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 26 **ROCKET LAWYER INCORPORATED**

27 **UNITED STATES DISTRICT COURT**
 28 **CENTRAL DISTRICT OF CALIFORNIA**
WESTERN DIVISION

19 LEGALZOOM.COM, INC., a Delaware
 20 corporation,
 21 Plaintiff,
 22 v.
 23 ROCKET LAWYER
 24 INCORPORATED, a Delaware
 25 corporation,
 26 Defendant.

Case No. 2:12-cv-09942-GAF-AGR

**ROCKET LAWYER
 INCORPORATED'S
 MEMORANDUM OF
 CONTENTIONS OF FACT AND
 LAW**

PTC: November 10, 2014
 1:30 p.m.
 Trial: December 9, 2014
 Judge: Judge Gary A. Feess
 Courtroom: 740
 255 East Temple Street
 Los Angeles, CA 90012
 Action Filed: November 20, 2012

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1 Pursuant to Local Rule 16-4, Rocket Lawyer Incorporated (“Rocket Lawyer”)
2 hereby submits its Memorandum of Contentions of Fact and Law.

3 **I. CLAIMS AND DEFENSES**

4 **A. Summary LegalZoom’s Claims**

5 Claim 1: Rocket Lawyer violated the Lanham Act, 15 U.S.C. § 1125(a).

6 Claim 2: Rocket Lawyer violated the California False Advertising Law
7 (“FAL”), Cal. Bus. & Prof. Code § 17500.

8 Claim 3: Rocket Lawyer violated the California Unfair Competition Law
9 (“UCL”), Cal. Bus. & Prof. Code § 17200 et seq.

10 **B. Elements of LegalZoom’s Claims**

11 **1. Elements Required to Establish LegalZoom’s Claim for**
12 **Violation of the Lanham Act**

13 (1) Rocket Lawyer made a false or misleading statement of fact about its
14 own product or another’s product in commercial advertising;

15 (2) the statement actually deceived or has the tendency to deceive a
16 substantial segment of its audience;

17 (3) the deception is material, in that it is likely to influence the purchasing
18 decision;

19 (4) Rocket Lawyer caused its false or misleading statement to enter
20 interstate commerce; and

21 (5) LegalZoom has been or is likely to be injured as a result of the false or
22 misleading statement, either by direct diversion of sales from itself to Rocket
23 Lawyer or by a lessening of the goodwill associated with its products.

24
25 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir.
26 1997); *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1054 (9th Cir.
27 2008); 15 U.S.C. § 1125(a)(1)(B).

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2. **Elements Required to Establish LegalZoom’s Claim for Violation of the FAL**

- (1) Rocket Lawyer made or disseminated a statement,
- (2) in connection with the sale or disposition of goods or services,
- (3) which was untrue or misleading,
- (4) and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.

See California Business and Professions Code § 17500.

3. **Elements Required to Establish LegalZoom’s Claim for Violation of the UCL**

LegalZoom’s UCL claim is predicated entirely on its Lanham Act and FAL claims. As such, the element of LegalZoom’s UCL claim is:

- (1) Rocket Lawyer violated the Lanham Act or the FAL.

See Rice v. Fox Broad. Co., 330 F.3d 1170, 1181-82 (9th Cir. 2003) (granting summary judgment to defendants on UCL claim based strictly on grant of summary judgment on Lanham Act false advertising claim).

C. **Rocket Lawyer’s Key Evidence in Opposition to LegalZoom’s Claims**

All of LegalZoom’s causes of actions are based on the same facts and advertisements, and as such, the evidence in opposition to each cause of action is the same. However, LegalZoom must prove each of the three causes of action with respect to each of the four advertisements at issue:

- Free Business Formation Ads: Advertising free business entity formation on search engines results (“Free incorporation” or “Free LLC”) with state fee disclosures made multiple times on RocketLawyer.com before the point of purchase;

- 1 • Free Trial Offers: Advertising a free trial on RocketLawyer.com without
- 2 adequately disclosing the terms of the free trial
- 3 • Free Help Ads: advertising “free help from local attorneys” on
- 4 RocketLawyer.com; and
- 5 • Free Legal Review Ads: advertising “free legal review” on
- 6 RocketLawyer.com (collectively, the “RLI Free Ads”).

7 As explained more fully below, Rocket Lawyer intends to rely on its
8 scientifically conducted survey testing Rocket Lawyer’s business formation and free
9 trial ads/offerings in the context of the consumer journey, the ads themselves,
10 screenshots of Rocket Lawyer’s website and advertisements, customer complaint
11 and call data, financial and conversion data, communications relating to the
12 performance of Rocket Lawyer’s free ads, testimony relating to working with
13 Google regarding its free advertisements, and facts already determined by the Court,
14 to demonstrate that LegalZoom cannot prove its claims.

15 **1. Key Evidence in Opposition to LegalZoom’s Claim for**
16 **Violation of the Lanham Act**

17 The evidence produced in this case and testimony from fact and expert
18 witnesses will show:

19 **a. Rocket Lawyer’s advertising statements are not false**
20 **or misleading**

21 This Court has already held that LegalZoom must prove that the RLI Free
22 Ads are literally false “in context [with reference to RocketLawyer.com] ... instead
23 [of] improperly focus[ing] on the word ‘free’ divorced from the advertisements and
24 services as a whole.” Order at 9. The Court further acknowledged that Rocket
25 Lawyer does not charge Pro Plan free trial members service fees for business
26 formation and discloses state fees on its website such that “when viewed in this
27 context, [Rocket Lawyer’s] advertisements are not false, but rather are a truthful
28 promotion of its free trial that could potentially distinguish its services from other
customers by allowing customers to incorporate without paying any processing and

1 filing fees.”

2 In discovery, LegalZoom has made no attempt to refute the Court’s factual
3 findings or analyze Rocket Lawyer’s advertisements in context. LegalZoom has
4 continued to ignore that Rocket Lawyer discloses state fees several times in the
5 consumer journey before consumers can make a purchasing decision. It ignores that
6 Rocket Lawyer discloses the terms and limitations on its free trial and On Call
7 services on the pages immediately before consumers must make a purchasing
8 decision. Indeed, LegalZoom conducted a survey where respondents were required
9 to respond to RL’s Free Ads without consideration of or reference to any context
10 and divorced from Rocket Lawyer’s services as a whole. Thus, LegalZoom cannot
11 meet its burden of demonstrating that the RL Free Ads are literally false in context.

12 In addition, the evidence demonstrates that Rocket Lawyer’s challenged
13 advertising is not misleading.

14 (1) **Free Business Formation Ads**

15 The Wind Survey demonstrates that consumers have not been misled. In the
16 Wind Survey, a test group of 104 actual and potential consumers of legal services
17 viewed a Free Business Formation Ad that disclosed state fees, and a control group
18 of 103 similar consumers viewed an ad that did not disclose state fees.

19 Control:

20 [Incorporate for Free | RocketLawyer.com](https://www.rocketlawyer.com)
www.rocketlawyer.com/CA-Incorporate
866-231-5787 - Pay No Fees (\$0) Simple California Incorporation!
408 people +1'd or follow Rocket Lawyer

22 Test:

23 [Incorporate for Free](https://www.rocketlawyer.com) 1 (866) 231 4452
www.rocketlawyer.com/CA-Incorporate ▼
Incorporate in CA in 5 Minutes. Only Pay California State Fees!
Rocket Lawyer has 613 followers on Google+
24 [Call our Specialists: 866-231-5787 - 5 Minute California LLC](https://www.rocketlawyer.com)

25 Each stimulus placed its respective ad in context. The test and control ads
26 were placed in the same place, in the same position among other ads that appear in a
27 real search for “incorporation.” Respondents then followed the typical path
28 consumers follow on RocketLawyer.com (the “consumer journey”). The Wind

1 Survey was designed to determine (i) whether more consumers in the control group
2 were drawn to Rocket Lawyer’s website than in the test group, and (ii) whether
3 consumers in the test group than those in the control group were more likely to
4 understand that they must pay state fees. The answer to both of these questions is
5 no.

6 After viewing the search engine results and ads, respondents were asked to
7 choose an advertised company to explore further. **Respondents in the control**
8 **group did not choose Rocket Lawyer more than in the test group:** the Wind
9 Survey established that there is no statistically significant difference between the
10 test and control groups with respect to choosing Rocket Lawyer or LegalZoom
11 among the many competitors in the market at the search engine stage. In fact,
12 slightly more respondents chose *LegalZoom* in the control group (where the Rocket
13 Lawyer advertisement *did not* disclose state fees in its text).¹

14 **Table 1:**
15 **The Impact of the Rocket Lawyer Search Ad on the Choice of Rocket Lawyer and Legal Zoom (Q2)**

| | <u>Incorporation Service</u> | |
|---------------|--|--|
| | <u>Test</u> (State Fee Disclosure in ad) % | <u>Control</u> (No State Fee Disclosure in ad) % |
| | (n=104) | (n=103) |
| Rocket Lawyer | 35.6 | 34.0 |
| Legal Zoom | 64.4 | 68.0 |

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19 In addition, **test respondents did not exhibit any better understanding that they**
20 **must pay state fees even if Rocket Lawyer’s services were free than in the**
21 **control group:** the test and control groups were equally likely to understand the
22 state fees issue at the decision-making point. Nearly 70% of all test subjects
23 understood that they were required to pay state fees regardless of whether they were
24 in the test or control group.

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27 ¹ Note that although the Wind Survey analyzed whether there was any difference
28 between the test and control groups in their decision to choose Rocket Lawyer or
LegalZoom, many respondents chose other competitors whose ads appeared on the
search engine results, as would occur in the real world.

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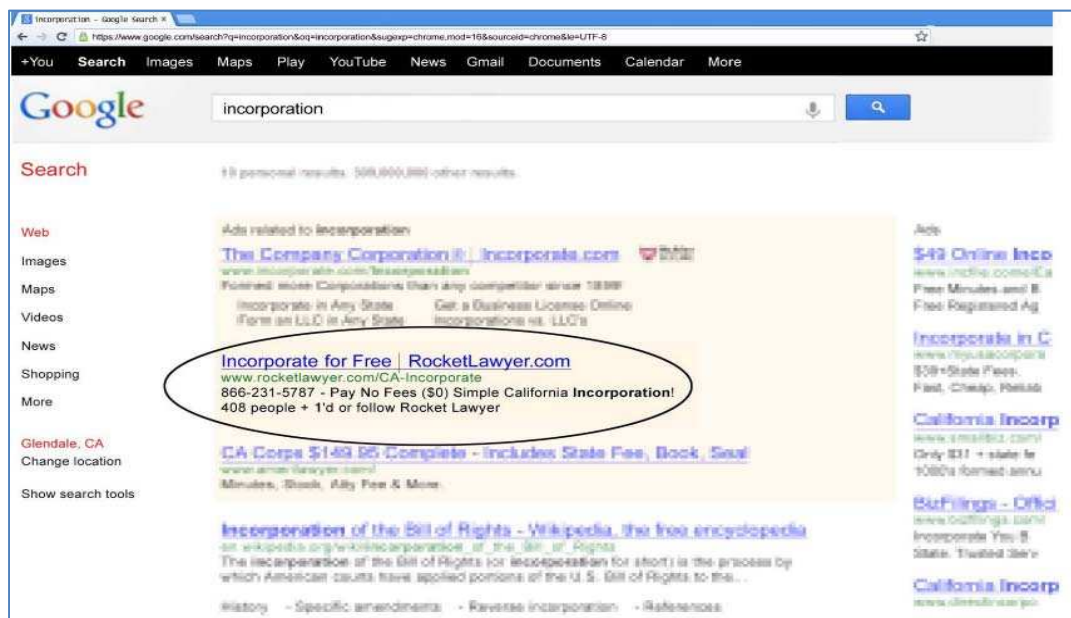
**Table 6:
Recall if Had to Pay State Fees to the State for Incorporation with the Free Offer (QB10a)**

| | Incorporation Service | |
|------------|--|--|
| | Test (State Fee Disclosure in ad) % | Control (No State Fee Disclosure in ad) % |
| | (n=104) | (n=103) |
| Yes | 70.2 | 68.9 |
| No | 13.5 | 14.6 |
| Don't Know | 16.3 | 16.5 |

Furthermore, there was no significant difference between the test and control respondents in deciding to do business with Rocket Lawyer. Thus, adding state fee disclosures to the ad copy itself would not affect consumers' selection of Rocket Lawyer. Moreover, respondents' in the Wind Survey also identified the advertisement as the least important factor in their decision making.

LegalZoom's survey, or the "Isaacson Survey," does not contradict the Wind Survey results because it tested the wrong issues:

- i. It did not test whether consumers were diverted from LegalZoom to Rocket Lawyer. Instead of allowing respondents choose Rocket Lawyer or LegalZoom in the context of a search engine result page, the Isaacson Survey's stimuli failed to replicate market conditions and merely focused respondents solely on an isolated Rocket Lawyer advertisement, blurring out all other ads and circling Rocket Lawyer's.



1 ii. It did not provide any context. As mentioned above, the Isaacson Survey did
2 not allow respondents to view the competitor ads that any real world
3 consumer would encounter. It also did not provide respondents with access to
4 the information and disclosures on RocketLawyer.com regarding state fees,
5 which every consumer must view before making a purchasing decision,
6 contrary to this Court’s instruction. *See* Order at 7-8.

7 iii. It did not test respondents’ understanding. The Isaacson survey was an open
8 book test where respondents had access to the advertisements at all times and
9 could merely copy the advertisements in response to open ended questions.
10 Thus, it was basically a reading test (*i.e.*, a basic parroting exercise) that did
11 not test consumers’ comprehension and perceptions of the advertisements.

12 iv. It did not test LegalZoom’s allegations in the FAC. The Isaacson Survey
13 stimuli entirely removed “free” from the control ad instead of testing “free”
14 with additional disclosure of state fees.

15 Thus, the Isaacson Survey provides LegalZoom with no evidence relevant to
16 the key issues in this litigation. Therefore, further disclosure of state fees in Rocket
17 Lawyer’s Free Business Formation Ads would not have affected consumer
18 understanding or decision to provide Rocket Lawyer with business, and would have
19 had no effect on LegalZoom.

20 In addition, Rocket Lawyer’s ad and business formation data confirm that
21 whether Rocket Lawyer disclosed state fees or not in its search engine ads, has no
22 effect on consumers’ decision to do business with Rocket Lawyer. Internal Rocket
23 Lawyer testing demonstrates that adding “plus state fees” or similar language
24 actually leads to better performance for the ad. This is supported by evidence that
25 Rocket Lawyer chose to disclose the state fees a vast majority of the time. In
26 addition, the number of businesses formed did not significantly change after Rocket
27 Lawyer began to disclose state fees in all of its free business formation ads.

28

1 (2) Free Trial Offers

2 LegalZoom only challenges the format of Rocket Lawyer's free trial
3 disclosures on its website and not their substance. FAC ¶¶ 14, 20. Thus, Rocket
4 Lawyer conducted a survey where one group received the disclosures as Rocket
5 Lawyer has disclosed them (control group) and a second group received the
6 disclosures as LegalZoom displays its own free trial information (test group), to
7 determine if either the test or control group better understood the nature of a free
8 trial.²

9 They did not. The Wind Survey results demonstrate that there is no significant
10 difference in consumer understanding of the free trial between the test and control
11 groups. Indeed, 66.3% of the control respondents knew that the free trial had a time
12 limit compared to 67.3% in the test group. 52 of 70 test respondents understood that
13 they would be charged after the free trial period ended compared to 54 of 67 control
14 respondents. There was also no significant difference in respondents' decision to do
15 business with Rocket Lawyer between the test and control groups (compare 41.7%
16 test with 38.3% control).

17 Revising Rocket Lawyer's free trial disclosure format, even to directly
18 conform with LegalZoom's own practices, would not affect consumer understanding
19 or decision making.

20 LegalZoom has no evidence sufficient to dispute this evidence because it did
21 not test the Free Trial Ads in the Isaacson Survey. Dr. Isaacson's expert report
22 disclosed on October 28, 2014, analyzing four reports of a former consultant of
23 Rocket Lawyer, cannot cure his failure to test Rocket Lawyer's free trial disclosures.
24 He relies on hearsay and conjecture, does not conduct any consumer research on his
25 own, and attempts to find support for his conclusions even though (i) the studies
26 tested different versions of Rocket Lawyer's website from what he tested; (iii) the

27 _____
28 ² The test stimuli mirrored LegalZoom's formatting for its free trial offer and disclosures on LegalZoom.com.

1 studies were not even designed to test the issues in this litigation; and (iii) Rocket
2 Lawyer has made many of the changes suggested by the studies. Rocket Lawyer
3 reserves the right to raise additional issues regarding this recently disclosed expert
4 report.

5 To the extent they are even admissible, as the studies reflect multiple layers of
6 hearsay (to which Dr. Isaacson’s report adds another), they reflect that consumers
7 understand the terms of Rocket Lawyer’s free offers. They may not like the offers,
8 but they are not deceived and in fact, many of the respondents would walk away,
9 demonstrating that they have not been harmed.

10 (3) Free Help and Free Legal Review Ads

11 Rocket Lawyer does not advertise “free help from local attorneys” or “free
12 legal review” on Google or Bing. Instead, consumers typically encounter
13 information relating to Free Legal Review at the end of the consumer journey that
14 results from searching for and completing a form. On the same screen as the Free
15 Trial Offer, Rocket Lawyer disclosed that free document review was available
16 immediately in the annual plan, after 90 days for the monthly plan, and not included
17 in the free trial.



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25 No additional disclosures were provided for “free help from local attorneys”
26 because all Rocket Lawyer registered users, whether on a free trial or a paid legal
27 plan, can contact an attorney for a free consultation at any time.

28 Despite knowledge that free help from local attorneys is available to all

1 registered users, the Isaacson Survey tested “limitations” on Free Help Ads instead
2 of Free Legal Review. LegalZoom designed the Isaacson Survey stimuli to test
3 whether consumers understood when they could get “free help from a local
4 attorney.” But the limitations that LegalZoom tested do not apply to help from local
5 attorneys, and thus, LegalZoom’s survey does not test Rocket Lawyer’s actual
6 practices. In addition, LegalZoom’s survey reveals that a high majority of both test
7 and control respondents understood that they were required to be on some kind of
8 Rocket Lawyer plan to receive free help from local attorneys.

9 Furthermore, LegalZoom chose not to test Free Legal Review Ads in the
10 Isaacson Survey, and therefore, has no evidence to suggest that Rocket Lawyer’s
11 disclosures are inadequate. Dr. Isaacson’s October 27, 2014 report continues to
12 ignore that free help from local attorneys was available to members on a free trial
13 plan, which does not require payment of any fees before receiving the service.

14 **b. Rocket Lawyer’s advertising statements have not**
15 **actually deceived and have no tendency to deceive a**
16 **substantial segment of its audience;**

17 The Wind Survey data demonstrates that no substantial portion of consumers
18 were misled or are likely to be misled by the Rocket Lawyer advertisements.
19 Consumers surveyed were equally likely to understand the state fee issues regardless
20 of whether they were shown a Free Business Formation Ad that disclosed state fees
21 or an ad that did not. Likewise, consumers surveyed regarding Rocket Lawyer’s free
22 trial terms demonstrated the same understanding of the terms whether they were
23 displayed using Rocket Lawyer’s formatting or LegalZoom’s. Thus, the population
24 of deceived consumers is zero.³

25 ³ For the Free Business Formation Ads, even if LegalZoom could demonstrate some
26 confusion, this confusion cannot meet the requirement that the confusion affect a
27 substantial portion of the target audience. Based on Rocket Lawyer’s conversion
28 data, even if all of all Free Business Formation ads did not disclose state fees were
misleading, no more than 3% of consumers who encountered these ads would have
been misled into providing Rocket Lawyer with business. Even in the best case
scenario for LegalZoom, the amount of confusion is not sufficient to support a
Lanham Act claim. *William H. Morris*, 66 F.3d at 258 (stating that less than 3% is

1 The fundamentally flawed Isaacson survey data cannot prove whether the RLI
2 Free Ads are misleading or deceptive. First, it tested the RL Free Ads out of context
3 without reference to the information on RocketLawyer.com. *See* Order at 9.

4 Second, LegalZoom’s survey allowed consumers access to the stimuli at all
5 times, which demonstrates that the experiment was a reading test that did not
6 accurately gauge consumers’ understanding of the ads.

7 Third, the Isaacson Survey failed to test the allegations at issue in this case
8 and is thus irrelevant.

- 9 • LegalZoom did not test Rocket Lawyer’s Free Trial Offers or disclosure and
10 has no evidence to support substantial confusion regarding this service.
- 11 • Regarding the Business Formation Ads, LegalZoom tested whether Rocket
12 Lawyer’s use of the word “free” had an impact on consumers by designing a
13 control ad that removed “free” entirely and replacing it with “No Service
14 Fees.” But the issue as alleged is whether Rocket Lawyer should have
15 disclosed state fees with its use of “free” in its advertisements; there is no
16 allegation that Rocket Lawyer should not have used the word “free” at all.
17 LegalZoom should have tested consumer reaction to ads that said “Free
18 Incorporation – Pay only state fees” or similar language instead of removing
19 the word “free” entirely.⁴
- 20 • Regarding the Free Help and Free Legal Review Ads, LegalZoom tested
21 limitations on the Free Help Ads that do not exist and did not test the Free
22 Legal Review Ads at all.

23 Because LegalZoom is unable to refute the Wind Survey evidence, it cannot
24

25 “[s]uch a small percentage” that it “does not constitute proof that a significant
26 portion of recipients were deceived”).

27 ⁴ LegalZoom’s failure to test the allegations at issue demonstrates how biased and
28 leading this survey is. By removing “free” entirely from the control stimuli,
LegalZoom made it far less likely that a consumer would actually type “free” when
answering an open ended question about what they saw from the ad, especially
where the ad was available at all times.

1 meet its burden on this issue.

2 Rocket Lawyers' complaint and call volume data also demonstrate that
3 consumer concerns about Rocket Lawyer's is a small portion of Rocket Lawyer's
4 business. The vast majority of Rocket Lawyer's customers have not paid anything to
5 Rocket Lawyer for services, understand the terms of the free offers, know how to
6 get their free documents, understand the free trial, and know how to cancel their
7 plans before the free trial is over.

8 c. **Any deception is not material, in that it is not likely to**
9 **influence any purchasing decision**

10 LegalZoom admits that its allegations do not relate to the "purchasing
11 process" – and thus, it admits the absence of materiality. LegalZoom's continued
12 disregard of the context of the advertisements is reflected in its survey. In the Free
13 Help experiment, LegalZoom merely showed respondents one or two pages of
14 RocketLawyer.com, where no purchasing decision could be made. LegalZoom
15 therefore did not test the effect of the RL Free Ads on consumers' purchasing
16 decision because neither stimuli brought respondents to the point where a
17 purchasing decision could be made. In fact, LegalZoom removed all decision
18 making from its survey respondents. Thus, LegalZoom has no reliable evidence
19 relating to whether the statements in Rocket Lawyer's advertisements were material
20 to consumers' decisions to provide business to Rocket Lawyer.

21 The Wind Survey, on the other hand, exposed respondents to stimuli from the
22 search engine result page where the ad first appears to the point where a purchasing
23 decision would be made in the typical consumer journey. The results demonstrate
24 that the purchasing decisions of consumers are not affected by either the fee
25 disclosure or the manner in which the trial terms are displayed. Consumer behavior
26 changed little as a result of LegalZoom's proposed revisions to the advertisements –
27 except that slightly more consumers chose to make purchases from Rocket Lawyer
28 when state fees *were disclosed* up front. Indeed, the Wind Survey found that there is

1 a portion of the relevant population that is skeptical about free offers and that such
2 ads decrease the likelihood that these consumers would chose to explore Rocket
3 Lawyer and/or actually provide business to Rocket Lawyer. Additionally, for both
4 experiments conducted in the Wind Survey, respondents identified the
5 advertisements as the least important factor in their decision to do business with
6 Rocket Lawyer. Rather, other customers' reviews and price of the service provider
7 were among the top factors affecting purchasing decisions in both experiments.

8 In the context of the information provided on RocketLawyer.com, statements
9 made in the RLI Free Ads are not material to consumers' purchasing decisions.
10 LegalZoom cannot dispute this fact.

11 **d. LegalZoom has not been and is not likely to be injured**

12 First, the Wind Survey demonstrates that disclosure of state fees in Rocket
13 Lawyer's Free Business Formation Ads would not affect consumers' choice to
14 explore Rocket Lawyer *or* LegalZoom at the search engine phase. In both the test
15 and control groups, respondents chose Rocket Lawyer approximately 35% of the
16 time among the numerous competitors in the market and chose LegalZoom
17 approximately 64% of the time among the same competitors. Thus, the Free
18 Business Formation Ads did not cause any diversion of consumers from
19 LegalZoom. LegalZoom cannot refute this evidence because, among other things, it
20 did not test diversion at all. Respondents in the Isaacson Survey were not given any
21 opportunity to choose which online legal services company to explore. Instead, they
22 were improperly directed to focus on Rocket Lawyer in the instructions and the way
23 the stimuli were designed.

24 Second, LegalZoom has no evidence that consumers of online legal services
25 would have purchased LegalZoom's services had Rocket Lawyer not published the
26 RLI Free Ads. LegalZoom conducted no testing on whether consumers would have
27 purchased services from LegalZoom had they not chosen to do business with Rocket
28 Lawyer. Thus, the undisputed facts show no causal link between Rocket Lawyer's

1 advertisements and LegalZoom's business.

2 Third, the Wind Survey demonstrates that there is no population of consumers
3 confused by the RLI Free Ads that would lead to harm to LegalZoom. In Rocket
4 Lawyer's survey, there is no significant difference between the test and control
5 groups with respect to those who: (i) chose Rocket Lawyer after seeing just the
6 search engine advertisements, (ii) recalled the free offer, (iii) perceived the free offer
7 as valuable (iv) exhibited or demonstrated some confusion as to the free offer, and
8 (v) accepted the free trial or bought other products from Rocket Lawyer. In fact,
9 there were *slightly more* confused respondents who would have given Rocket
10 Lawyer business in the *test groups* that viewed the ads as LegalZoom demands. In
11 the control groups—those who viewed Rocket Lawyer's ads as they were
12 published—less than 5% of respondents exhibited *some* confusion about Rocket
13 Lawyer's services. This demonstrates that of those who actually provided Rocket
14 Lawyer with business, a vast majority understood the limitations on Rocket
15 Lawyer's services as advertised, and there would have been no difference had
16 Rocket Lawyer changed its ads to address LegalZoom's allegations. The statements
17 in the RLI Free Ads had no effect on consumers or LegalZoom.

18 Fourth, the intrawebsite ads—its Free Trial Offer, Free Help From Local
19 Attorneys, and Free Legal Review—could not have caused any diversion of
20 business from LegalZoom. The allegations relevant here apply only to a consumer
21 who is already on RocketLawyer.com, because these ads only appear within the
22 Rocket Lawyer website—after a consumer has already chosen to explore
23 RocketLawyer.com. *See* FAC, Ex. C at 38.⁵ LegalZoom's lack of injury/damages is
24 reflected in the October 6, 2014 Goedde report, which only opines on damages
25 relating to search engine marketing, and the fact that LegalZoom has refused to
26 produce a witness to testify about damages.

27 ⁵ To the extent that some of these services were advertised on search engine
28 advertising, Rocket Lawyer has gained zero conversions from any search engine ads
for these services it has published on LegalZoom keywords, if any.

1 Fifth, LegalZoom cannot point to any evidence demonstrating a loss of
2 goodwill caused by the RLI Free Ads. The Wind Survey demonstrates that after
3 reviewing Rocket Lawyer’s advertisements and websites, most consumers continue
4 to search for other online legal services providers. There is no significant difference
5 between the test and control groups with respect to this decision. Thus, regardless of
6 how Rocket Lawyer advertises, after many consumers explore RocketLawyer.com,
7 LegalZoom and other competitors in the market have another opportunity to secure
8 the consumers’ business. Indeed, only about 5.5% of all respondents stated that they
9 were not going to buy online legal services at all – meaning that 94.5% of all
10 respondents were open to using online legal services after their experience with
11 RocketLawyer.com.

12 Finally, LegalZoom’s own evidence suggests that Rocket Lawyer and
13 LegalZoom cater to different markets. Their internal communications and
14 testimony from Dorian Quispe confirm that consumers who are looking for “free”
15 are not likely to visit LegalZoom, which does not offer many free services or
16 products. Consumers looking for free services were more likely to visit other free
17 websites. In fact, one of LegalZoom’s own freemium websites, Lightwavelaw, at
18 one point was more likely to get a visit from a Rocket Lawyer visitor.

19 There is no evidence that the RLI Free Ads caused LegalZoom to suffer any
20 harm. Therefore, LegalZoom cannot meet its burden on this issue.

21 **2. Key Evidence in Opposition to LegalZoom’s Claim for**
22 **Violation of the FAL**

23 The evidence produced in this case and testimony from fact and expert
24 witnesses will show:

25 **a. Rocket Lawyer Made No Advertising Statement That**
26 **Was Untrue or Misleading**

27 Rocket Lawyer’s advertising is not false or misleading. *See supra* § I.C.1.a.
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b. No Statement Could Reasonably Have Been Known to be Misleading

Consumers were not misled by Rocket Lawyer’s advertising. *See supra* § I.C.1.b. Accordingly, Rocket Lawyer could not reasonably have expected any of its ads to mislead customers.

3. Key Evidence in Opposition to LegalZoom’s Claim for Violation of the UCL

Rocket Lawyer has not violated the Lanham Act or the FAL. *See supra* §§ I.C.1-I.C.2.

D. Summary of Rocket Lawyer’s Counterclaims and Affirmative Defenses

1. Rocket Lawyer’s Counterclaims

Counterclaim 1: Rocket Lawyer has not violated the Lanham Act.

Counterclaim 2: Rocket Lawyer has not violated the FAL.

Counterclaim 3: Rocket Lawyer has not violated the UCL.

Counterclaim 4: LegalZoom has violated the Lanham Act, 15 U.S.C. § 1125(a).

Counterclaim 5: LegalZoom has violated the FAL, Cal. Bus. & Prof. Code § 17500.

Counterclaim 6: LegalZoom has violated the UCL, Cal. Bus. & Prof. Code § 17200 et seq.

2. Rocket Lawyer’s Affirmative Defenses

Affirmative Defense 1: LegalZoom’s claims are barred, in whole or in part, for want of equity or by the doctrine of unclean hands.

Affirmative Defense 2: LegalZoom’s claims are barred, in whole or in part, by laches, waiver, and/or estoppel.

Affirmative Defense 3: Any injury sustained by LegalZoom was caused in whole or in part by acts or omissions of persons over whom Rocket Lawyer neither

1 exercised nor had any right of control, for whom Rocket Lawyer is and was not
2 responsible, and whose conduct Rocket Lawyer had no duty or reason to anticipate
3 or control.

4 Affirmative Defense 4: Rocket Lawyer's practices have not caused any
5 likelihood of confusion; any likelihood of confusion is caused by LegalZoom.

6 **E. Elements of Rocket Lawyer's Counterclaims and Affirmative**
7 **Defenses**

8 **1. Elements Required to Establish Rocket Lawyer's**
9 **Counterclaim for Declaratory Relief that It Did Not Violate**
10 **the Lanham Act**

11 (1) Rocket Lawyer did not make a false or misleading statement of fact
12 about its own product or another's product in commercial advertising; OR

13 (2) the statement did not actually deceived and has no tendency to deceive
14 a substantial segment of its audience; OR

15 (3) any deception is not material, in that it is not likely to influence the
16 purchasing decision;

17 (4) Rocket Lawyer did not cause a false or misleading statement to enter
18 interstate commerce; OR

19 (5) LegalZoom has not been and is not likely to be injured as a result of
20 any false or misleading statement.

21 *See Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir.
22 1997); *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1054 (9th Cir.
23 2008); 15 U.S.C. § 1125(a)(1)(B).

24 **2. Elements Required to Establish Rocket Lawyer's**
25 **Counterclaim for Declaratory Relief that It Did Not Violate**
26 **the FAL**

27 Any statement made or disseminated by Rocket Lawyer was either:

28 (1) not made in connection with the sale or disposition of goods or

- 1 services,
2 (3) not untrue or misleading, or
3 (4) was neither known, nor by the exercise of reasonable care should have
4 been known, to be untrue or misleading.

5
6 *See* California Business and Professions Code § 17500.

7 **3. Elements Required to Establish Rocket Lawyer’s**
8 **Counterclaim for Declaratory Relief that It Did Not Violate**
9 **the UCL**

- 10 (1) Rocket Lawyer has not violated the Lanham Act or the FAL.

11 *See Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1181-82 (9th Cir. 2003) (granting
12 summary judgment to defendants on UCL claim based strictly on grant of summary
13 judgment on Lanham Act false advertising claim).

14 **4. Elements Required to Establish Rocket Lawyer’s**
15 **Counterclaim that LegalZoom Violated the Lanham Act**

- 16 (1) LegalZoom made a false or misleading statement of fact about its own
17 product or another’s product in commercial advertising;

- 18 (2) the statement actually deceived or has the tendency to deceive a
19 substantial segment of its audience;

- 20 (3) the deception is material, in that it is likely to influence the purchasing
21 decision;

- 22 (4) LegalZoom caused its false or misleading statement to enter interstate
23 commerce; and

- 24 (5) Rocket Lawyer has been or is likely to be injured as a result of the false
25 or misleading statement, either by direct diversion of sales from itself to LegalZoom
26 or by a lessening of the goodwill associated with its products.

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1 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir.
2 1997); *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1054 (9th Cir.
3 2008); 15 U.S.C. § 1125(a)(1)(B).

4 **5. Elements Required to Establish Rocket Lawyer’s**
5 **Counterclaim that LegalZoom Violated the FAL**

- 6 (1) LegalZoom made or disseminated a statement,
7 (2) in connection with the sale or disposition of goods or services,
8 (3) which was untrue or misleading,
9 (4) and which is known, or which by the exercise of reasonable care should
10 be known, to be untrue or misleading.

11
12 *See* California Business and Professions Code § 17500.

13 **6. Elements Required to Establish Rocket Lawyer’s**
14 **Counterclaim That LegalZoom Violated the UCL**

- 15 (1) LegalZoom’s conduct with respect to LegalSpring.com was:
16 a. unfair;
17 b. fraudulent; or
18 c. unlawful based on violation of the Lanham Act or FAL.

19
20 Cal. Bus. & Prof. Code § 17200 *et seq.*; *Kerr Corp. v. Tri Dental, Inc.*, No.
21 *SACV 12-0891 DOC (CWx)*, 2013 WL 990532, at *4 (C.D. Cal. Mar. 11, 2013)
22 (granting default judgment for UCL claim where liability under Lanham Act
23 shown).

24
25 **7. Elements Required to Establish Rocket Lawyer’s Affirmative**
26 **Defense 1 of Unclean Hands**

- 27 (1) LegalZoom engaged in inequitable conduct; and
28 (2) LegalZoom’s inequitable conduct related directly to the subject matter
of its claims against Rocket Lawyer.

1 BAJI § 10:3 Special Instruction 4; *Brother Records, Inc. v Jardine*, 318 F.3d
2 900, 909 (9th Cir. 2003); *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d
3 829, 841 (9th Cir. 2002); *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1097 (9th Cir.
4 1985); *Pfizer, Inc. v. Int'l Rectifier Corp.*, 685 F.2d 357, 359 (9th Cir. 1982)

5 **8. Elements Required to Establish Rocket Lawyer's Affirmative**
6 **Defense 2 of Laches, Waiver, and/or Estoppel**

7 **a. Laches:**

- 8 (1) LegalZoom unreasonably and inexcusably delayed in bringing suit, and
9 (2) Either:
10 (a) that the delay caused prejudice to Rocket Lawyer, or
11 (b) LegalZoom acquiesced in the conduct about which it complains.

12 *Johnson v. City of Loma Linda*, 24 Cal. 4th 61, 68 (2000) (affirming finding
13 that plaintiffs claim was barred by laches); *Conti v. Board of Civil Service Comm'rs*,
14 1 Cal. 3d 351, 359 (1969) ("The defense of laches requires unreasonable delay plus
15 either acquiescence in the act about which plaintiff complains or prejudice to the
16 defendant resulting from the delay.").

17 **b. Waiver**

- 18 (1) LegalZoom possessed the right to bring claims against Rocket Lawyer;
19 (2) LegalZoom possessed actual or constructive knowledge of this right;
20 and
21 (3) LegalZoom either
22 (a) expressly released and discharged the right to such claims, or
23 (b) engaged in conduct so inconsistent with any intent to bring such
24 claims as to induce Rocket Lawyer's reasonable belief that the right had been
25 relinquished.

26
27 *See Gaunt v. Prudential Ins. Co. of America*, 255 Cal. App. 2d 18, 23 (1967);
28 *In re Marriage of Paboojian*, 189 Cal. App. 3d 1434, 1437 (1987); *Rubin v. Los*

1 *Angeles Federal Saving & Loan Assn.*, 159 Cal. App. 3d 292, 298 (1984).

2 **c. Estoppel**

3 (1) LegalZoom knew the facts relevant to its claims;

4 (2) LegalZoom acted in such a way that Rocket Lawyer had a right to
5 believe LegalZoom would not bring those claims;

6 (3) Rocket Lawyer did not know that LegalZoom planned to bring its
7 claims; and

8 (4) Rocket Lawyer relied on LegalZoom's conduct to its detriment.

9
10 *See City of Long Beach v. Mansell*, 476 P.2d 423, 443 (Cal. 1970); *Driscoll v.*
11 *City of Los Angeles*, 431 P.2d 245, 250 (Cal. 1967).

12 **9. Elements Required to Establish Rocket Lawyer's Affirmative**
13 **Defense 3 of Lack of Harm**

14 (1) LegalZoom has failed to demonstrate any actual injury; or

15 (2) LegalZoom has failed to demonstrate that any injury suffered resulted
16 from Rocket Lawyer's advertisements.

17 *See Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.3d 197, 210 (9th Cir.
18 1989) ("in a suit for damages under section 43(a), however, actual evidence of some
19 injury resulting from the deception is an essential element of the plaintiff's case.");
20 *see also Southland*, 108 F.3d at 1146 (reversing summary judgment granted to
21 defendant for lack of causation and injury, allowing for possible jury finding of
22 actual injury and causation); *Hansen Beverage Co. v. Vital Pharmaceutical, Inc.*,
23 2010 WL 3069690, at *6-7 (S.D. Cal. Aug. 3, 2010) (*citing Harper House, Inc. v.*
24 *Thomas Nelson, Inc.*, 889 F.2d 197, 209 (9th Cir. 1989) ("when advertising does not
25 directly compare defendant's and plaintiff's products, when numerous competitors
26 participate in a market, or when the products are aimed at different market
27 segments, injury to a particular competitor may be a small fraction of the
28 defendant's sales, profits, or advertising expenses.").

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10. Elements Required to Establish Rocket Lawyer’s Affirmative Defense 4 of No Likelihood of Confusion

LegalZoom’s claims are barred, in whole or in part, because LegalZoom cannot demonstrate that (1) that any statement made by Rocket Lawyer in advertising actually deceived or has the tendency to deceive a substantial segment of its audience.

Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997); *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1054 (9th Cir. 2008); 15 U.S.C. § 1125(a)(1)(B).

F. Rocket Lawyer’s Key Evidence in Support of its Counterclaims and Affirmative Defenses

1. Key Evidence in Support of Rocket Lawyer’s Counterclaim for Nonviolation of the Lanham Act

See supra § I.C.1.

2. Key Evidence in Support of Rocket Lawyer’s Counterclaim for Nonviolation of the FAL

See supra § I.C.2.

3. Key Evidence in Support of Rocket Lawyer’s Counterclaim for Nonviolation of the UCL

See supra § I.C.3.

4. Key Evidence in Support of Rocket Lawyer’s Counterclaim for Violation of the Lanham Act

The evidence produced in this case and testimony from fact and expert witnesses will show:

a. LegalZoom Made a False or Misleading Statement of Fact About Its Product(s)

LegalZoom has falsified its reputation on LegalSpring.com by manipulating the balance of positive and negative reviews. The site contains more than mere

1 opinion and puffery. The consumer reviews as a whole represent an assertion about
2 consumer satisfaction with LegalZoom's products. These reviews also support
3 LegalZoom's four star rating on LegalSpring.com, a recognizable metric
4 corresponding with quality. This likewise has been falsified: the overall consumer
5 opinion of LegalZoom as represented on LegalSpring.com is untrue, and thus is
6 false. LegalZoom's removal of negative reviews and addition of positive reviews
7 affects caused its star rating to increase on LegalSpring.com. This rating was higher
8 than LegalZoom's rating on other review websites where it did not exercise the
9 same level of control. In addition, each consumer review contains a statement of
10 fact regarding the date and time it is posted. These have been directly altered,
11 specifically to push negative reviews further down and for the appearance of
12 realism. The dates listed for at least some of the consumer reviews on
13 LegalSpring.com are untrue, and thus are literally false. LegalZoom contends that it
14 received permission from its customers to use their exit interview comments for
15 marketing purposes. However, LegalZoom has not produced evidence to support
16 this contention. Furthermore, the star rating provided by LegalZoom consumers are
17 on a scale of 1-10, not 1-5 like displayed on LegalSpring, further demonstrating
18 falsity.

19 LegalZoom's operation of LegalSpring.com and its control over
20 LegalSpring.com's search engine marketing (its Google Ad words account) is also
21 false and misleading. LegalSpring.com was created by LegalZoom's then
22 employee, Travis Giggy, for the purpose of demonstrating to LegalZoom the
23 benefits of an affiliate program in driving traffic to LegalZoom. It held itself out as
24 a neutral review website for consumers to rely on. For years, no disclaimer with
25 respect to LegalZoom's relationship with LegalSpring.com was disclosed. In April
26 2012, LegalZoom requested that a disclaimer be placed on LegalSpring.com
27 disclosing that companies listed on the site are affiliated with LegalSpring.com and
28 that reviews may be added or removed by these companies. However, this

1 disclaimer is misleading because at that time, LegalZoom was controlling
2 LegalSpring.com’s advertising as a brand defense website and Mr. Giggy had not
3 been actively managing LegalSpring.com for years, except to comply with
4 LegalZoom’s requests for changes on the website.⁶

5 **b. LegalZoom’s False Statement Actually Deceived or**
6 **Has the Tendency to Deceive a Substantial Segment of**
7 **Its Audience**

8 **(1) LegalZoom Intended to Deceive Consumers**

9 LegalZoom’s instructions to manipulate its star rating and balance of positive
10 and negative customer reviews could only have been done with knowledge of their
11 falsity and intent to deceive.

- 12 • Travis Giggy, the creator and one-time operator of LegalSpring.com, while
13 still an employee of LegalZoom, expressly intended that consumers rely on
14 LegalSpring as a resource in deciding which online legal services company to
15 use.
- 16 • LegalSpring’s own FAQ states that LegalSpring was created to answer for
17 consumers, “who is the best incorporator.”
- 18 • And yet, the evidence demonstrates that LegalZoom had the ability to remove
19 negative reviews and monitor other competitors’ performance and conversion
20 rates using LegalSpring.com.
- 21 • In a January 2009 email chain that forwarded an article about the importance
22 of customer reviews to consumers, LegalZoom expressed its preference that
23 negative reviews about its products and services “disappear” and be replaced
24 with “good, descriptive reviews,” a preference that was subsequently put into
25 action. LegalZoom also referenced how bad reviews would negatively affect
26 the commissions LegalSpring would earn from LegalZoom.
- 27 • In October 2011, employees at LegalZoom recognized “the importance of

28 ⁶ Mr. Giggy testified that after the mid 2000s, he continued to respond to requests
for other companies, but that the requests for edits to the website were primarily
from LegalZoom.

1 correcting [LegalZoom's] reputation within review sites" which led
2 LegalZoom to direct Giggy to manipulate the number of positive and negative
3 reviews to ensure that LegalZoom would have a four star rating.

- 4 • LegalZoom also stated that it wanted to use LegalSpring in search engine
5 marketing to ensure that consumers searching for legal services would see
6 LegalSpring and potentially, the positive rating and reviews of LegalZoom.
- 7 • LegalZoom also discussed with Mr. Giggy leaving some negative reviews on
8 LegalSpring to maintain an image of impartiality/credibility, further
9 demonstrating intent that consumers would rely on and trust the reputation of
10 LegalZoom advertised on LegalSpring.com

11 These communications evidence LegalZoom's manipulation of its reviews
12 with full knowledge of the importance of customer reviews and review websites to
13 consumers and a company's ability to compete. Thus, LegalZoom's knowing
14 manipulation of the balance of positive and negative reviews on LegalSpring and
15 acting to place LegalSpring on search engine results demonstrates an intent to
16 deceive consumers.

17 In addition, there is no dispute that over the course of their relationship,
18 LegalZoom has paid LegalSpring commissions for the clicks to LegalZoom.com
19 from LegalSpring. More, LegalZoom controlled the likelihood that LegalSpring
20 would appear in search engine advertising to further promulgate it's false and/or
21 misleading rating and reputation on LegalSpring.com. Indeed, LegalZoom had
22 access to LegalSpring.com's Google Adwords account and paid for its search engine
23 advertising. Thus, like the governing cases, LegalZoom has expended funds to
24 publish false advertising in an effort to steer potential customers toward its website,
25 further warranting application of the presumption that consumers have been misled,
26 and by extension, Rocket Lawyer has been harmed.

27 (2) LegalZoom Actually Deceived Consumers

28 Although deception may be presumed if the Court finds that LegalZoom

1 intended to deceive consumers, the evidence also demonstrates that consumers have
2 relied on these misleading reviews. At LegalSpring.com, consumers viewing the
3 reviews can indicate whether they are “helpful” or not. The three reviews added at
4 LegalZoom’s instruction in January 2009 indicate that a majority of consumers who
5 responded found those reviews helpful. LegalSpring.com, as LegalZoom knows, is
6 “the highest review site in google and bing[.]” Most of the other reviews posted on
7 LegalSpring.com demonstrate that a majority of consumers who have read the
8 reviews found them to be helpful. In addition, LegalZoom has paid LegalSpring for
9 orders originating from LegalSpring.com, demonstrating that consumers have seen
10 LegalZoom’s reviews on LegalSpring.com and have decided to make a purchasing
11 decision in favor of LegalZoom.

12 **c. LegalZoom’s Deception is Material**

13 Consumers place a high value on reviews posted by other consumers. In
14 addition, there is no dispute that LegalZoom benefits from its reputation as it has
15 found that the number of negative reviews directly affects its conversion rates from
16 LegalSpring.com. Thus LegalZoom knew that consumers value review sites like
17 LegalSpring.com, and misled consumers about the timing and overall mix of
18 reviews posted by other consumers and its star rating to obtain more business. The
19 importance of other customers’ reviews of an online legal services provide is also
20 supported by the survey conducted by Rocket Lawyer’s expert, as customer reviews
21 were among the top factors affecting consumers’ decision to do business with a
22 company.

23 **d. Rocket Lawyer Has Been or is Likely to be Injured as a**
24 **Result of the False or Misleading Statement**

25 Rocket Lawyer’s Chief Financial Officer and fact witness on its damages on the
26 counterclaims testified that LegalZoom bidding on popular search terms/keywords
27 impacts Rocket Lawyer’s costs for search engine marketing. Based on the
28

1 testimony of LegalZoom’s witnesses for the periods of time in which LegalZoom
2 was bidding on keywords with multiple companies, including LegalSpring.com,
3 which had the manipulated reviews of LegalZoom, Rocket Lawyer’s expert will be
4 able to calculate how much such practice increased costs for Rocket Lawyer.

5 **5. Key Evidence in Support of Rocket Lawyer’s Counterclaim**
6 **for Violation of the FAL**

7 **a. LegalZoom Made or Disseminated an Untrue or**
8 **Misleading Statement in Connection with the Sale or**
9 **Disposition of its Services**

10 *See supra* § I.F.4.a.

11 **b. LegalZoom Should have Known by the Exercise of**
12 **Reasonable Care that its False Statement was Untrue**
13 **or Misleading**

14 *See supra* § I.F.4.b.

15 **6. Key Evidence in Support of Rocket Lawyer’s Counterclaim**
16 **for Violation of the UCL**

17 LegalZoom has violated the Lanham Act and the UCL. *See supra* §§ I.F.4-
18 I.F.5.

19 **7. Key Evidence in Support of Rocket Lawyer’s Affirmative**
20 **Defense of Unclean Hands**

21 **a. LegalZoom Engaged in Inequitable Conduct**

22 LegalZoom has also advertised the price of its business formation services
23 without disclosing that consumers would have to pay state fees. LegalZoom also
24 offers a free trial that automatically charges users’ credit cards that LegalZoom
25 requires be provided, and enrolls them in a paying plan, if such users do not cancel.
26 Indeed, LegalZoom requires that consumers make a prior purchase and provide their
27 credit cards to be charged before they have they have the opportunity to enroll in the
28 free trial.

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b. LegalZoom’s Inequitable Conduct Relates Directly to the Subject Matter of its Claims Against Rocket Lawyer.

The conduct identified in Section I.F.8.a is the same conduct complained of by LegalZoom. Although Rocket Lawyer maintains that such conduct is not inequitable, should the jury find otherwise, LegalZoom has engaged in the same conduct and cannot recover in this action. LegalZoom essentially complains that Rocket Lawyer has advertised in some of its ads the price of incorporation without disclosing state fees. LegalZoom has done the same.

LegalZoom also takes a credit card so that it can charge their free trial members at the end of the free trial if such members do not cancel. LegalZoom’s conduct is actually worse and squarely violates the definition of “free” as provided by the FTC. LegalZoom’s free trial offered is contingent upon a prior or contemporaneous purchase.

In addition, LegalZoom’s conduct in discovery relating to this unclean hands defense has been inequitable. LegalZoom has refused to search for documents relating relating to its own business formation and advertisements for free services. It has refused to produce such documents. LegalZoom also refused to provide an witnesses to testify on its business formation and free advertisements. Such conduct is inequitable in light of this defense and bars LegalZoom’s recovery even if it were to prevail.

8. Key Evidence in Support of Rocket Lawyer’s Affirmative Defense of Laches, Waiver, and/or Estoppel

a. Laches: LegalZoom Unreasonably and Inexcusably Delayed in Bringing Suit, Causing Prejudice to Rocket Lawyer

LegalZoom raised the issues relating to Rocket Lawyer’s free business formation ads in November to December 2011 with both Rocket Lawyer and Google. LegalZoom filed his lawsuit in November 2012 after not raising this issue

1 again with Rocket Lawyer, or based on what has been produced, with Google.
2 LegalZoom's silence conveyed to Rocket Lawyer that LegalZoom was no longer
3 interested in bringing suit, especially after Rocket Lawyer worked with Google
4 regarding a potential Google policy violation and was allowed to continue to publish
5 ads for free business formation without disclosing state fees. Rocket Lawyer
6 continued to publish some of its ads without referencing state fees because it
7 believed that LegalZoom no longer viewed the advertisements as false or
8 misleading. LegalZoom's silence has also led to its damages, if any.

9 In addition, internal LegalZoom communications demonstrate that during this
10 interim period, LegalZoom was increasing its expenses in advertising in preparation
11 for suing Rocket Lawyer months later.

12 Finally, LegalZoom also advertised business formation services without
13 disclosing state fees, further demonstrating that it no longer viewed such omission
14 as actionable.

15
16 **b. Waiver: LegalZoom Engaged in Conduct so
17 Inconsistent With Any Intent to Bring its Claims as to
18 Induce Rocket Lawyer's Reasonable Belief that the
19 Right had been Relinquished**

20 *See supra* Sec. I.F.8.a.

21 **c. Estoppel**
22 **(1) LegalZoom Knew the Facts Relevant to Its
23 Claims**

24 *See supra* Sec. I.F.8.a.

25 **(2) LegalZoom acted in such a way that Rocket
26 Lawyer had a right to believe LegalZoom would
27 not bring those claims**

28 *See supra* Sec. I.F.8.a.

**(3) Rocket Lawyer did not know that LegalZoom
planned to bring its claims; and**

See supra Sec. I.F.8.a.

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(4) **Rocket Lawyer relied on LegalZoom’s conduct to its detriment**

See supra Sec. I.F.8.a.

9. **Key Evidence in Support of Rocket Lawyer’s Affirmative Defense of Lack of Harm**

a. **LegalZoom has Failed to Demonstrate Any Actual Injury**

In discovery, LegalZoom referred Rocket Lawyer to its expert for evidence regarding injury. LegalZoom’s expert witness on damages has only provided an opinion regarding business formation and search engine ads placed on LegalZoom’s keywords, but on ads viewed on Rocket Lawyer’s website – free trial, free legal review, and free help from local attorneys. As such, regarding these three ads, LegalZoom has no damages. LegalZoom’s expert damages based on Rocket Lawyer bidding on search engine ads cannot lead to injury or damages because such conduct is legal. Even if LegalZoom could prove its claims regarding Rocket Lawyer’s business formation ads, its damages are speculative at best. The Wind survey demonstrates that Rocket Lawyer would have gained the same amount of business whether it disclosed state fees or not. In addition, LegalZoom’s expert has not properly identified the market and has relied on assumptions undermined by LegalZoom’s witnesses and Securities Exchange filings. Mr. Goedde removed from the market sole practitioners and LegalShield, even though LegalZoom’s S-1 filing identifies both as key competitors. LegalZoom does not have credible evidence of injury.

b. **LegalZoom has Failed to Demonstrate That Any Injury Suffered Results From Rocket Lawyer’s Advertisements**

See supra Sec. I.C.1.d. LegalZoom has no evidence that Rocket Lawyer diverted customers away from LegalZoom. In fact, LegalZoom’s witness, Dorian Quispe, and its documents demonstrate that customers looking for free products or

1 services are different from those willing to pay for a service. In essence, Rocket
2 Lawyer and LegalZoom target different markets. Based on metrics tracked by
3 LegalZoom, consumers who have chosen to explore Rocket Lawyer are not likely to
4 visit LegalZoom. Instead, these customers are more likely to visit other websites
5 with free offerings. In addition, LegalZoom did not test diversion in its consumer
6 survey, choosing instead, to direct respondents to Rocket Lawyer’s ads. Rocket
7 Lawyer’s expert, Professor Wind, tested whether consumers were drawn more often
8 to Rocket Lawyer’s search engine ad for business formation when state fees were
9 not disclosed. The results demonstrate that there is no difference Regarding Rocket
10 Lawyer’s intrawebsite ads – free trial, free legal review, free help from local
11 attorneys – LegalZoom has no evidence that individuals who saw these ads because
12 they already chose Rocket Lawyer would have given business to LegalZoom.

13 Furthermore, there are many competitors in this market. LegalZoom’s harm,
14 if any, was caused by any number of other competitors, many of whom also
15 advertise free services in the manner that LegalZoom claims is misleading. These
16 competitors, especially sole practitioners and prepaid legal companies like
17 LegalShield, are responsible for any loss of business suffered by LegalZoom.
18 Finally, LegalZoom’s documents demonstrate that it engaged in practices that would
19 increase its costs. Thus, losses suffered by LegalZoom were its fault, and not
20 Rocket Lawyer’s.

21 **10. Key Evidence in Support of Rocket Lawyer’s Affirmative**
22 **Defense of No Likelihood of Confusion**

23 As this Court has already held, LegalZoom must prove that the RLI Free Ads
24 are literally false “in context [with reference to RocketLawyer.com] ... instead [of]
25 improperly focus[ing] on the word ‘free’ divorced from the advertisements and
26 services as a whole.” Order at 9. The Court further acknowledged that Rocket
27 Lawyer does not charge Pro Plan free trial members service fees for business
28 formation and discloses state fees on its website such that “when viewed in this

1 context, [Rocket Lawyer’s] advertisements are not false, but rather are a truthful
2 promotion of its free trial that could potentially distinguish its services from other
3 customers by allowing customers to incorporate without paying any processing and
4 filing fees.”

5 In discovery, LegalZoom has made no attempt to refute the Court’s findings
6 or analyze Rocket Lawyer’s advertisements in context. LegalZoom has continued to
7 ignore that Rocket Lawyer discloses state fees several times in the consumer journey
8 before consumers can make a purchasing decision. It ignores that Rocket Lawyer
9 discloses the terms and limitations on its free trial and On Call services on the pages
10 immediately before consumers must make a purchasing decision. Indeed,
11 LegalZoom conducted a survey where respondents were required to respond to RL’s
12 Free Ads without consideration of or reference to any context and divorced from
13 Rocket Lawyer’s services as a whole. Thus, LegalZoom cannot meet its burden of
14 demonstrating that the RL Free Ads are literally false in context.

15 The Wind Survey of over 400 members of the target audience demonstrates
16 that if Rocket Lawyer changed its advertising to address LegalZoom’s allegations,
17 there would not have been a statistically significant difference in (i) consumers
18 decision to explore Rocket Lawyer or LegalZoom; (ii) consumer’s perception and
19 understanding of Rocket Lawyer’s ads; or (iii) services or in their decision to do
20 business with Rocket Lawyer.

21 **G. Anticipated Evidentiary Issues**

22 Rocket Lawyer anticipates filing the following motions in limine:

- 23 • Motion to exclude LegalZooms’ experts under Daubert
- 24 • Motion to exclude evidence based on LegalZoom’s discovery abuses
- 25 • Motion to limit LegalZoom’s damages evidence to the extent its damages
26 expert testimony is admissible
- 27 • Motion to exclude usability studies

28 Rocket Lawyer has also lodged objections to certain exhibits proposed by

1 LegalZoom in the Joint Exhibit List.

2 **H. Anticipated Issues of Law**

3 There are no other issues of law other than what has been provided in this
4 memorandum.

5 **II. BIFURCATION OF ISSUES**

6 Rocket Lawyer does not believe that bifurcation is necessary.

7 **III. JURY TRIAL**

8 All issues other than resolution of the equitable claims and defenses and
9 application of equitable remedies are for the jury to decide. As such, the nonjury
10 issues are: each parties' Business and Professions Code section 17200 claims and
11 each parties' request for restitution and injunctive relief. Rocket Lawyer and
12 LegalZoom have each timely requested jury trials in their pleadings, and in the Rule
13 26 Case Management Report.

14 **IV. ATTORNEYS' FEES**

15 Rocket Lawyer has requested attorneys' fees under the Lanham Act. The
16 Court has discretion to award reasonable attorneys' fees and costs to the prevailing
17 party in exceptional cases. 15 U.S.C. § 1117(a). The Court may award Rocket
18 Lawyer attorneys' fees whether it successfully defeats LegalZoom's claims or
19 succeeds on its counterclaims. *See Gracie v. Gracie*, 217 F.3d 1060 (9th Cir. 2000)
20 (stating that the same standard of "exceptional circumstances" will be applied to
21 both prevailing defendants and prevailing plaintiffs); *Cairns v. Franklin Mint Co.*,
22 115 F. Supp. 2d 1185 (C.D. Cal. 2000) *aff'd* 292 F.3d 1139 (9th Cir. 2002).

23 LegalZoom's conduct in this lawsuit, especially in discovery, warrants an
24 award of attorneys' fees to Rocket Lawyer should it prevail in defending itself
25 against LegalZoom's claims:

- 26 • LegalZoom's 30(b)(6) witness on document retention could not recall
27 whether LegalZoom had issued a litigation hold.
- 28 • LegalZoom has produced only about 2,100 documents over the life of this

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case.

- LegalZoom has refused to produce documents relied upon by its experts.
- LegalZoom refused to produce documents responsive to Rocket Lawyer’s requests that were identified by LegalZoom’s witnesses.
- LegalZoom refused to produce documents relating to Rocket Lawyer’s unclean hands defense by refusing to produce documents or a witness on LegalZoom’s business formation ads or ads containing the word “free.”
- LegalZoom withheld documents if they did not consider to be “relevant and responsive” to Rocket Lawyer’s requests for production, even though Rule 26 allows Rocket Lawyer to receive documents reasonably calculated to lead to admissible evidence.
- LegalZoom conducted a consumer survey that ignored the court’s instruction to test the ads at issue in context, causing Rocket Lawyer to have to respond to this expert opinion

LegalZoom’s conduct in advertising and in this lawsuit, especially in discovery, warrants an award of attorneys’ fees to Rocket Lawyer should it prevail on the counterclaims. LegalZoom misrepresented that it did not have control over content on LegalSpring.com and only withdrew these misrepresentations after Rocket Lawyer had to oppose its motion for summary judgment and serve a Rule 11 Motion. In actuality, LegalZoom exercised significant control over LegalSpring.com by, for example, requesting that its moderate remove negative reviews and add positive reviews so that LegalZoom’s star rating and overall reputation would be more positive than it is on other review websites and LegalZoom controlled LegalSpring’s search engine marketing. LegalZoom’s manipulation of its reputation on LegalSpring.com was done with knowledge that consumers rely on review websites in making purchasing decisions.

Rocket Lawyer also seeks attorneys’ fees for its FAL and UCL claims under California Code of Civil Procedure section 1021.5, which allows the Court to award

1 attorneys' fees in an action to enforce "an important right affecting the public
2 interest." Rocket Lawyer's action to get an injunction against LegalZoom's false
3 and/or misleading advertising through LegalSpring would confer a benefit to the
4 public, especially in light of recent activity from government entities and agencies to
5 sanction the publishing of false and/or misleading customer reviews.

6 **V. ABANDONMENT OF ISSUES**

7 Rocket Lawyer has abandoned its affirmative defenses relating to
8 LegalZoom's inability to state a claim and inability to prove punitive damages, no
9 damages for UCL claim, and lack of standing. The parties have stipulated that
10 neither party shall be able to claim punitive damages and that LegalZoom is no
11 longer pursuing damages for its UCL claim. Failure to state a claim and lack of
12 standing are not applicable at this stage.

13
14 Dated: October 28, 2014

Respectfully submitted,

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16 By: /s/ Michael T. Jones

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