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 LegalZoom.com, Inc.

9 UNITED STATES DISTRICT COURT
 10 CENTRAL DISTRICT OF CALIFORNIA
 11 WESTERN DIVISION

Glaser Weil Fink Jacobs
 Howard Avchen & Shapiro LLP

12 LEGALZOOM.COM, INC., a Delaware
 13 corporation,

14 Plaintiff,

15 v.

16 ROCKET LAWYER INCORPORATED,
 a Delaware corporation,

17 Defendants.

CASE NO.: CV 12-9942-GAF (AGR_x)

Hon. Gary A. Feess
 Courtroom: 740

**PLAINTIFF LEGALZOOM.COM,
 INC.'S REPLY IN SUPPORT OF
 ITS MOTION FOR SUMMARY
 JUDGMENT**

Date: October 21, 2013
 Time: 9:30 a.m.
 Courtroom: 740
 255 East Temple Street
 Los Angeles, CA 90012

Complaint Filed: November 20, 2012

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1 **I. INTRODUCTION**

2 It is undisputed that Defendant Rocket Lawyer Incorporated (“Rocket
3 Lawyer”) has engaged in false advertising and unfair competition in violation of the
4 Lanham Act and California Professions and Business Code, that LegalZoom has
5 standing to bring its claims, and that Plaintiff LegalZoom.com, Inc. (“Plaintiff”) is not
6 barred from obtaining relief by the doctrine of “unclean hands.” Rocket Lawyer’s
7 attempts to cloud the issue by arguing that Rocket Lawyer’s “free” advertisements
8 (despite the undisputed fees and conditions) are somehow “true,” that LegalZoom has
9 not suffered any injury as a result of Rocket Lawyer’s false advertising and unfair
10 competition, and that LegalZoom’s advertisements are like Rocket Lawyer’s
11 advertisements, are nonsense. Rocket Lawyer fails to present any evidence that could
12 create a triable issue as to Rocket Lawyer’s liability for false advertising and unfair
13 competition, as to LegalZoom’s standing, or as to LegalZoom’s “clean hands.” To
14 the contrary, Rocket Lawyer’s Opposition and failure to file a statement of genuine
15 issues confirm that LegalZoom’s Motion should be granted.¹

16 **II. ARGUMENT**

17 **A. As A Matter Of Law, By Failing To File A Statement Of Genuine**
18 **Issues, Rocket Lawyer Admits Without Controversy That**
19 **LegalZoom’s Material Facts Are Undisputed**

20 Local Rule 56-2 states that “[a]ny party who opposes [a motion for summary
21 judgment] *shall* serve and file with the opposing papers a separate document
22 containing a concise ‘Statement of Genuine Issues’ setting forth all material facts as
23 to which it is contended there exists a genuine issue necessary to be litigated.” Local
24 Rule 56-3 states the Court *will* assume that the material facts claimed and adequately
25 supported by the moving party *are admitted to exist without controversy* unless the
26 facts are contained in the “Statement of Genuine Issues” *and* controverted by

27 _____
28 ¹ So as to refrain from burdening this Court with unnecessary pleading practice,
LegalZoom will ignore as irrelevant and immaterial Rocket Lawyer’s absurd attempt
to paint LegalZoom’s business or technology as behind the times.

1 admissible evidence. Where an opposing party fails to comply with such rules,
2 summary judgment is appropriate on the basis of uncontroverted assertions in the
3 moving party's separate statement. *See, e.g.*, F.R.C.P. 56(e)(2); C.D. Cal. L.R. 56-3;
4 *Beard v. Banks*, 548 U.S. 521, 527 (2006); *see also* Note to Amended Fed. R. Civ. P.
5 56(e)(2); C.D. Cal. L.R. 56-3; *see Microprocessor Enhancement Corp. v. Tex.*
6 *Instruments, Inc.*, 520 F.3d 1367, 1372 n.4 (Fed. Cir. 2008) (“When deciding the
7 motions for summary judgment the court assumes that the facts contained in the
8 proposed statements are “admitted without controversy” unless they are included in
9 the “Statement of Genuine Issues” (required of the nonmoving party pursuant to C.D.
10 Cal Local Rule 56-2) and controverted by declaration or written evidence.”); *see also*
11 *Chubb Group of Insurance Companies v. H.A. Transportation Systems, Inc.*, 243 F.
12 Supp. 1064, 1066 at n.1 (C.D. Cal. 2002) (“where the Court finds that [Plaintiff] has
13 met its initial burden and where [Defendant’s] version of events is... unsupported
14 because of its failure to file a [Statement of Genuine Issues], the Court will find that
15 there is no genuine issue.”).

16 Rocket Lawyer did not file a “Statement of Genuine Issues” as required by
17 Local Rule 56-2. Given Rocket Lawyer’s failure to comply with the Court’s rules,
18 the Court can and should deem all of LegalZoom’s undisputed material facts as
19 admitted by Rocket Lawyer for the purpose of the instant Motion. Accordingly, as a
20 matter of law, LegalZoom’s undisputed material facts are deemed admitted without
21 controversy, demonstrating that LegalZoom is entitled to summary judgment as
22 explained below.

23 **B. LegalZoom Has Proven By Undisputable Facts The Elements Of**
24 **Each Cause Of Action**

25 **1. Rocket Lawyer has Violated the Lanham Act**

26 LegalZoom has shown by undisputed facts that Rocket Lawyer has engaged in
27 each element of a Lanham Act false advertising claim, and therefore is entitled to
28 summary judgment on this claim, as a matter of law.

1 **a. Rocket Lawyer’s Advertisements Are Literally False**

2 LegalZoom has shown by undisputed facts that Rocket Lawyer’s
3 advertisements are literally false. Whether a statement is literally false is a
4 determination to be made as a matter of law. *See Allsup, Inc. v. Advantage 2000*
5 *Consultants Inc.*, 428 F.3d 1135, 1138 (8th Cir. 2005) (“[a] literally false statement
6 can be determined as a matter of law”); *see also CKE Rest. v. Jack in the Box, Inc.*,
7 494 F. Supp. 2d 1139 (C.D. Cal. 2007); *Mut. Pharm. Co. v. Ivax Pharms., Inc.*, 459 F.
8 Supp. 2d 925, 933 (C.D. Cal. 2006) (“a court may find on its own that a statement is
9 literally false”) (citation omitted). Therefore this determination *is* appropriate for
10 summary judgment.

11 In its Opposition, Rocket Lawyer argues that each of Rocket Lawyer’s subject
12 advertisements (“Zoom Charges \$99. Rocket Lawyer is Fast, Easy, & Free.
13 Incorporate Your Business Today,” “incorporate for free... pay no fees (\$0),” “form
14 your LLC free at Rocket Lawyer,” “free help from local attorneys,” “free legal
15 review,” and “free” trials of Rocket Lawyer’s “Basic Legal Plan” and “Pro Legal
16 Plan”) is true because Rocket Lawyer’s “free” advertisements, when “analyzed in
17 [their] entirety,” are true. (Opposition, 12: 5-14.) However, as stated in LegalZoom’s
18 Motion and repeated here, Rocket Lawyer customers cannot incorporate, form an
19 LLC, get help from local attorneys, get legal review or get trials of Rocket Lawyer’s
20 plans for “free.” Rather, Rocket Lawyer customers seeking to incorporate or form an
21 LLC for “free” through Rocket Lawyer’s services are required to pay the state fees
22 associated with incorporation or formation. Moreover, prior to Rocket Lawyer’s
23 modification of its On Call Terms of Services (and prior to LegalZoom’s filing of its
24 complaint), customers could not access the “free help from local attorneys” and the
25 “free legal review” unless they were “Eligible Members” who had either (a)
26 purchased three consecutive months of Rocket Lawyer’s monthly Legal Plan, or (b)
27 purchased a Rocket Lawyer annual Legal Plan.² (See Declaration of Mary Ann T.
28

² Rocket Lawyer subsequently changed the language of its “On Call Terms of
PLAINTIFF LEGALZOOM.COM, INC.’S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

1 Nguyen In Support of LegalZoom’s Motion, ¶¶ 11, Ex. F.) Indeed, as stated in
2 Rocket Lawyer’s “On Call Terms of Service,” dated July 2012, “The term ‘Eligible
3 Member’ includes any individual who either (a) purchases three consecutive months
4 of a Rocket Lawyer monthly legal plan, or (b) purchases a Rocket Lawyer annual
5 Legal Plan.” (*Id.*) Finally, customers who signed up for a one-week free trial
6 membership under Rocket Lawyer’s “Basic Legal Plan” or “Pro Legal Plan” are
7 required to enroll in Rocket Lawyer’s “negative option” program. (Motion, 8:26-
8 9:8); *see Spiegel, Inc. v. Fed. Trade Comm’n*, 494 F.2d 59 (7th Cir. 1974) (“free trial”
9 offers conditioned on customer’s meeting retailer’s credit criteria were not truly free).
10 Accordingly, because Rocket Lawyer’s advertisements are untrue (they are not
11 “free”), they are literally false as a matter of law. *See Castrol Inc. v. Pennzoil Co.*,
12 987 F.2d 939, 944 (3d Cir. 1993) (“if a defendant’s claim is untrue, it must be deemed
13 literally false”); *see also* 16 C.F.R. § 251.1 (2009) (“FTC Guide Concerning The Use
14 of the Word ‘Free’ And Similar Representations”) (false advertising occurs where the
15 “free” offer is not accompanied by a sufficient disclaimer making clear that the offer
16 is not actually free).

17 In addition, Rocket Lawyer argues that interpreting “free” to mean “free” is to
18 imply an “irrational consumer standard.” (Opposition, 13:15-16.) In an attempt to
19 support such a conclusion, Rocket Lawyer states that to suggest that Rocket Lawyer’s
20 “free” advertisements meant “free” is to suggest that consumers using Turbo Tax’s
21 “FREE *Tax Filing*” to complete tax forms would mean that they “would not have to
22 pay any taxes.” (Opposition, 13:21-24.) Such a comparison is absurd. Turbo Tax’s
23 advertisement states “FREE *Tax Filing*,” which expressly limits “free” to Turbo
24 Tax’s tax filing. (Supplemental Declaration of Mary Ann T. Nguyen (“Supp. Nguyen
25 Decl.”), ¶ 2, Ex. A.) Turbo Tax’s “FREE *Tax Filing*” advertisement would not

26
27 Service,” to provide that “Customers who enter into a one week (seven (7) calendar
28 days) free trial are eligible to receive one (1) free legal matter consultation...” after
LegalZoom filed its original Complaint. (Nguyen Decl., ¶ 10, **Exhibit G**.) This
access during a “free trial” was not available before LegalZoom’s filing of the
original Complaint. (Nguyen Decl., ¶ 10, **Exhibits F and G**.)

1 suggest that users would not have to pay any taxes. No rational consumer would
2 suggest that they would not have to pay any taxes if they were to use Turbo Tax’s
3 “FREE *Tax Filing*.” Rocket Lawyer’s “free” advertisements, on the other hand, state
4 only that “Zoom Charges \$99. Rocket Lawyer is Fast, Easy, & Free. Incorporate
5 Your Business Today,” “incorporate for free... pay no fees (\$0),” “form your LLC
6 free at Rocket Lawyer,” “free help from local attorneys,” “free legal review,” and
7 “free” trials of Rocket Lawyer’s “Basic Legal Plan” and “Pro Legal Plan.” These
8 statements do not in any way expressly limit the word “free.” A rational consumer
9 would infer that they would “pay no fees (\$0)” and would be able to “incorporate for
10 free,” form their “LLC free at Rocket Lawyer,” get “free help from local attorneys,
11 get “free legal review” and get “free” trials of the “Basic Legal Plan” and “Pro Legal
12 Plan” from Rocket Lawyer, as explicitly stated in the Rocket Lawyer “free”
13 advertisements. Rocket Lawyer’s argument irrationally assumes that all consumers
14 are readily aware that they must pay state filing fees, even after reading “pay no fees
15 (\$0),” and ignores that Rocket Lawyer’s “free” advertisements can lure unsuspecting
16 customers to Rocket Lawyer on the promise of “free” incorporation.

17 Rocket Lawyer further argues that Rocket Lawyer’s “free” advertisements,
18 when considered “in context,” dispel any notion that Rocket Lawyer’s “free”
19 advertisements are false. (Opposition, 13:25-26.) Rocket Lawyer states that each
20 Rocket Lawyer “free” advertisement contains a link to Rocketlawyer.com or is
21 published on Rocketlawyer.com, where consumers can navigate through the
22 Rocketlawyer.com website’s numerous pages to find additional information and
23 qualifying language relating to Rocket Lawyer’s “free” advertisements. (Opposition,
24 14:1-7.) Although it is true that advertisements must be read “in context,” the cases
25 relied upon by Rocket Lawyer for this proposition, *Freeman v. Time, Inc.*, 68 F.3d
26 285, 289 (9th Cir. 1995) and *Castagnola v. Hewlett-Packard Co.*, 2012 WL 2159385,
27 at *9 (N.D. Cal. Jun. 13, 2012), are inapposite. (See Opposition, 7:27-8:11.) In both
28 *Freeman* and *Castagnola*, the qualifying language appeared *immediately next to the*

1 *representations or on the same page* as the representations they qualified. *See*
2 *Freeman*, 68 F.3d at 289 (“the qualifying language appears immediately next to the
3 representations it qualifies and no reasonable reader could ignore it”); *Castagnola*,
4 2012 WL at *10 (“the screenshot shows that the Offer Details are on the same page
5 and in close proximity to these statements.”) This is not the case with Rocket
6 Lawyer’s disclosures and qualifying language. “In context” does not require this
7 court to consider Rocket Lawyer’s “free” advertisements along with the separately
8 linked pages to the Rocketlawyer.com website and its numerous pages. Disclosures
9 and qualifying language buried in the Rocket Lawyer website, which consumers must
10 navigate through to find, do not “dispel” the notion that Rocket Lawyer’s “free”
11 advertisements are false. *See Williams v. Gerber Products Co.*, 552 F.3d 934, 940
12 (9th Cir. 2008) (improper for court to conclude “that reasonable consumers should be
13 expected to look beyond misleading representations on the front of the box to
14 discover the truth from the ingredient list in small print on the side of the box”); *see*
15 *also In re iPhone 4S Consumer Litig.*, 2013 WL 3829653 (N.D. Cal. July 23, 2013
16 (“Some of the pages on the website, but not all, do disclose that Siri is in beta... [and]
17 although Apple did sometimes put an orange label with the word next to Siri on the
18 website, frequently the disclosure that Siri is in beta is at the bottom of the page in
19 much small font, separated from the primary discussion of Siri’s features. This is not
20 ‘immediately next to the representations it qualifies,’ as in the *Freeman* case.”)
21 While disclaimers can help qualify a statement, it does not follow that a company can
22 freely advertise that something is “free” in one location and then disclaim that the
23 product is not actually “free” in another location. This is the heart of the problem.
24 Rocket Lawyer uses “free” in its advertisements to lure unsuspecting customers to its
25 website and away from its competitors, and only once the deception is complete are
26 customers provided with the possibility of learning about the filing fees, buried in the
27 pages of Rocket Lawyer’s website. Thus, Rocket Lawyer’s “free” advertisements,
28 when considered “in context,” **do not** dispel the notion that its “free” advertisements

1 are false. Thus, LegalZoom is entitled to summary judgment on this element.

2 **b. Rocket Lawyer’s “Free” Advertisements Are Deceptive.**

3 If an advertisement is literally false, or if a defendant intentionally misleads
4 customers, a presumption arises that customers were in fact deceived and the burden
5 shifts to the defendant to prove otherwise. *Pom Wonderful LLC v. Coca Cola Co.*,
6 727 F. Supp. 2d 849, 869 (C.D. Cal. 2010) (*aff’d* in part, vacated in part, remanded
7 sub nom. *Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170 (9th Cir. 2012)) (“if
8 [the defendant has] intentionally misled consumers, [the court will presume that]
9 consumers were in fact deceived and [the defendant] would have the burden of
10 demonstrating otherwise”); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d at
11 1146; see also *The William H. Morris Co. v. Group W, Inc.*, 66 F.3d 255, 258 (9th
12 Cir.1995); *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998)
13 (“If a plaintiff proves that a challenged claim is literally false, a court may grant relief
14 without considering whether the buying public was actually misled; actual consumer
15 confusion need not be proved”); *Western States Wholesale, Inc. v. Synthetic Inds.,*
16 *Inc.*, 206 F.R. D. 271, 275 (C.D. Cal. 2002) (“When a plaintiff shows that the
17 defendant's false advertising was intentional, the plaintiff is entitled to a presumption
18 that customers were deceived.”).

19 Rocket Lawyer argues that “the presumption arises only in the case of
20 *deliberately false comparative* claims.” (Opposition, 14:23-27.) Rocket Lawyer is
21 wrong.³ Indeed the presumption has been applied in the absence of comparative ads.
22 *See Del Webb Communities, Inc. v. Partington*, 2009 WL 3053709, *13 (D. Nev.
23 Sept. 18, 2009) (“where a defendant intentionally misled consumers or the
24 advertisement is literally false, a presumption arises that consumers were in fact
25 deceived and the burden shifts to the defendant to prove otherwise”); *Soaring Helmet*
26

27 ³ In any event, some of the Rocket Lawyer “free” advertisements, – “Zoom Charges
28 \$99. Rocket Lawyer is Fast, Easy, & Free. Incorporate Your Business Today” – are
undisputably false (as discussed above) and are comparative (as reference to “Zoom”
is undisputably a reference to LegalZoom),⁷

1 *Corp. v. Nanal, Inc.*, 2011 WL 39058, *6 (W.D. Wash. Jan. 3, 2011) (“a finding that
2 the advertisement was literally or facially false leads to a presumption of consumer
3 deception and materiality in a false advertisement case.”). Even more, as provided in
4 *Healthport Corporation v. Tanita Corporation of America*, 563 F. Supp. 2d 1169,
5 1179-80 (D. OR. 2008), *aff’d* 324 F. App’x 921 (Fed. Cir. 2009), “Courts may
6 presume consumer deception and reliance if the defendant made an intentionally false
7 statement regarding the defendants' product, even if the statement entailed “little overt
8 reference to plaintiff or plaintiff's product... ‘[T]here need not be a direct comparison
9 to a competitor for a statement to be actionable under the Lanham Act.’” (*Citing*
10 *Harper House Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 209 (9th Cir.1989) and
11 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997).

12 It is undisputed that Rocket Lawyer intentionally used its false “free”
13 advertisements. Rocket Lawyer was made aware of the literal falsity of its
14 advertisements, but nonetheless *intentionally* continued to use such false
15 advertisements to confuse and deceive customers into believing that its products and
16 services were somehow “free.” Thus, it is presumed that customers were in fact
17 deceived. Given such legal presumption in LegalZoom’s favor, LegalZoom is
18 entitled to summary judgment on this element.

19 **c. Rocket Lawyer’s “Free” Advertisements are Material.**

20 Contrary to Rocket Lawyer’s arguments, numerous courts have presumed
21 literally false advertising claims to be material. *See e.g. POM Wonderful LLC v.*
22 *Purely Juice, Inc.*, 2008 WL 4222045, *11 (C.D. Cal. July 17, 2008) *aff’d*, 362 F.
23 App’x 577 (9th Cir. 2009) (actually false claims are presumed material); *Pizza Hut,*
24 *Inc. v. Papa John’s Int’l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000) (“With respect to
25 materiality, when the statements of fact at issue are shown to be literally false, the
26 plaintiff need not introduce evidence on the issue of the impact the statements had on
27 consumers.” (*citing Avila v. Rubin*, 84 F.3d 222, 227 (7th Cir. 1996); *Castrol, Inc. v.*
28 *Quaker State Corp.*, 977 F.2d 57, 62 (2d. Cir. 1992)); *PPX Enters., Inc. v.*

1 *Audiofidelity Enters., Inc.*, 818 F.2d 266, 272 (“If a statement is actually false, relief
2 can be granted on the court’s own findings *without reference to the reaction of the*
3 *buyer or consumer of the product*”) (emphasis added) (internal quotations and
4 citations omitted)); *ALPO Petfoods v. Ralston Purina Co.*, 720 F. Supp. 194, 214
5 (D.D.C. 1989), *reversed in part on other grounds*, 913 F.2d 958 (D.C. Cir. 1990)
6 (“Since this court has found that Ralston’s CHD claims are actually false, their
7 materiality thus may be presumed”); *see also Am. Home Prods. Corp. v. Johnson &*
8 *Johnson*, 577 F.2d 160, 165 (2d Cir. 1978); *SmithKline Beecham Consumer*
9 *Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 906 F. Supp.
10 178, 181 (S.D.N.Y. 1995), *aff’d*, 100 F.3d 943 (2d Cir. 1996)); *Am. Brands, inc. v.*
11 *R.J. Reynolds Tobacco Co.*, 413 F. Supp. 1352, 1356 (S.D.N.Y. 1976).

12 Consequently, because Rocket Lawyer’s “free” advertisements are literally false,
13 LegalZoom is entitled to the legal presumption that the advertisements are material
14 and LegalZoom is entitled to summary judgment on this element.

15 In any event, assuming, *arguendo*, that the presumption does not apply,
16 LegalZoom *has* established materiality. A false statement is material if “it is likely to
17 influence purchasing decision.” *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1181 (9th
18 Cir.2003). “A plaintiff may establish this materiality requirement by proving that the
19 defendants misrepresented an inherent quality or characteristic of the product.” *POM*
20 *Wonderful LLC v. Purely Juice, Inc.*, 2008 WL 4222045, at *11 (C.D. Cal. July 17,
21 2008), *aff’d*, 362 F. App’x 577 (9th Cir.2009) (quoting *Johnson & Johnson Vision*
22 *Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242 (11th Cir.2002)) (internal quotation
23 marks omitted). In *POM Wonderful LLC*, the defendant falsely advertised its juice as
24 “100% pomegranate juice.” 2008 WL 4222045, at *3. The court held that because
25 the false advertising concerns the very nature of the product, the false statement was
26 material. *Id.* Here, Rocket Lawyer’s false advertisements concern the cost of Rocket
27 Lawyer’s products and services. Cost concerns the nature of a product or service and
28 influences the purchasing decisions of consumers. Thus, Rocket Lawyer’s false

1 “free” advertisements are material.

2 **d. Rocket Lawyer’s False Advertising Caused Actual**
3 **Injury to LegalZoom.**

4 The Lanham Act creates a cause of action for a person who “is or is *likely to be*
5 *damaged*” by false advertising. 15 U.S.C. § 1125(a)(1)(B) (emphasis added).

6 Rocket Lawyer’s reliance on the Ninth Circuit’s *Harper House* decision for the
7 position that actual evidence of resulting injury is required is misplaced. (Opposition,
8 17:10-13.) As several subsequent Ninth Circuit decisions (as well as other Circuit
9 decisions) have explained in more detail, “[al]though the Ninth Circuit in *Harper*
10 *House* stated that “actual evidence of some injury resulting from the deception is an
11 essential element” in a suit for damages..., *id.* (emphasis omitted), a more recent
12 decision holds that “an inability to show actual damages does not alone preclude a
13 recovery....” *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1411(9th Cir. 1993)
14 (quoting *Bandag, Inc. v. Bolser's Tire Stores*, 750 F.2d 903, 919 (Fed. Cir. 1984)); *see*
15 *also American Council for Certified Podiatric Physicians & Surgeons v. American*
16 *Bd. Of Podiatric Surgery, Inc.*, 185 F.3d 606, 614 (6th Cir. 1999); *PPX Enter., Inc. v.*
17 *Audiofidelity Enter., Inc.*, 818 F.2d 266, 272 (2d Cir. 1987). Under *Lindy Pen*, the
18 preferred approach allows the district court in its discretion to fashion relief, including
19 monetary relief, based on the totality of the circumstances. *Id.*; *see also Badger*
20 *Meter, Inc. v. Grinnell Corp.*, 13 F.3d 1145, 1157 (7th Cir. 1994) (stating that, even if
21 a plaintiff is unable to demonstrate damages resulting from the defendant's Lanham
22 Act violation, § 1117 allows the district court to award the plaintiff any just monetary
23 award so long as it constitutes “compensation” for the plaintiffs losses or the
24 defendant's unjust enrichment and is not simply a “penalty” for the defendant's
25 conduct).

26 Still more, there is a line of authority, which equates literally false advertising
27 with a presumed related injury. *See, e.g., U-Haul Intern, Inc. v. Jartran, Inc.*, 793
28 F.2d 1034, 1041 (9th Cir. 1986) (presumption exists that literal false advertising

1 causes injury; [h]e who has attempted to deceive should not complaint when required
2 to bear the burden of presumption that he succeeded”); *Porous Media Corp. v. Pall*
3 *Corp.*, 110 F.3d 1329, 1336 (9th Cir. 1997) (“A predicate finding of intentional
4 deception... encompasses sufficient harm to justify a... presumption of causation and
5 injury in fact”). Because LegalZoom has shown that Rocket Lawyer’s “free”
6 advertisements are literally false and Rocket Lawyer intended to use such literally
7 false “free” advertisements, injury is presumed.⁴

8 **2. Rocket Lawyer’s Advertisements Constitute False Advertising**
9 **Under Cal. Bus. & Prof. Code § 17500**

10 California’s false advertising law, Cal. Bus. & Prof. Code § 17500 *et seq.*,
11 makes advertising products or services by “untrue or misleading” statements
12 unlawful. *See Brockey v. Moore*, 107 Cal. App. 4th 86, 98 (2003), *citing* Cal. Bus. &
13 Prof. Code § 17500. “Section 17500 has been broadly construed to proscribe ‘not
14 only advertising which is false, but also advertising which[,] although true, is either
15 actually misleading or which has a capacity, likelihood or tendency to deceive or
16 confuse the public.’” *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663,
17 679 (2006), *quoting Kasky v. Nike, Inc.*, 27 Cal.4th 939, 951 (2002).

18 **a. Rocket Lawyer’s “Free” Advertisements Are False.**

19 The falsity of advertisements is assessed under the California false advertising
20 law in the same manner as under the Lanham Act false advertising claim. *See*
21 *Cytosport, Inc. v. Vital Pharms., Inc.*, 894 F. Supp. 2d 1285, 1295 (E.D. Cal. 2012)
22 (“In the Ninth Circuit, claims of unfair competition and false advertising under [the
23 California Business & Professions Code] are substantially congruent to claims made
24 under the Lanham Act[.]”). As stated above, Rocket Lawyer’s “free” advertisements
25 are false because customers seeking to “incorporate for free” or form an LLC for

26
27 ⁴ LegalZoom requests that this Court presume injury at least for its determination of
28 liability as to Rocket Lawyer’s false advertising and unfair competition. As provided
in LegalZoom’s Motion, LegalZoom seeks summary judgment on the liability
element of its false advertising and unfair competition claims, but leaves the
computation of damages to be determined at trial. (Motion, 18:5-8.)

1 “free” through Rocket Lawyer’s services are nonetheless required to pay the state fees
2 associated with incorporation or formation, customers can access Rocket Lawyer’s
3 “free help from local attorneys” and the “free legal review” only if they are **paid**
4 members of Rocket Lawyer’s “Basic Legal Plan” or “Pro Legal Plan,” and customers
5 who sign up for a one-week free trial membership under Rocket Lawyer’s “Basic
6 Legal Plan” or “Pro Legal Plan” must nonetheless enroll in Rocket Lawyer’s negative
7 option program. Just as cell phone companies must not advertise “free” phones where
8 sales taxes are charged without conspicuously disclosing that customers must pay
9 such sales taxes, the Court should find that Rocket Lawyer’s “free” advertisements
10 are false. *See AT&T Mobility LLC v. Conception*, 131 S. Ct. 1740, 1744 (2011).

11 **b. Rocket Lawyer’s “Free” Advertisements Have Deceived**
12 **Reasonable Consumers.**

13 In its Opposition, Rocket Lawyer argues that the only way Rocket Lawyer’s
14 “free” advertisements could be deemed to deceive customers is if an *irrational*
15 consumer standard is applied. (Opposition 21:10-11.) Specifically, Rocket Lawyer’s
16 argues that only an irrational consumer would interpret Rocket Lawyer’s “free”
17 advertisements – “Zoom Charges \$99. Rocket Lawyer is Fast, Easy, & Free.
18 Incorporate Your Business Today,” “incorporate for free... pay no fees (\$0),” “form
19 your LLC free at Rocket Lawyer,” “free help from local attorneys,” “free legal
20 review,” and “free” trials of Rocket Lawyer’s “Basic Legal Plan” and “Pro Legal
21 Plan” – to mean exactly what these advertisements state – that Rocket Lawyer’s
22 customers would be able to “incorporate for free... pay no fees (\$0),” “form your
23 LLC free at Rocket Lawyer,” get “free help from local attorneys,” get “free legal
24 review,” and get “free” trials of Rocket Lawyer’s “Basic Legal Plan” and “Pro Legal
25 Plan.” However, contrary to Rocket Lawyer’s baseless argument, some customers
26 have found Rocket Lawyer’s practices to be deceiving. (Supp. Nguyen Decl., ¶ 3, Ex.
27 B.)

28 Rocket Lawyer further argues that Rocket Lawyer’s terms of services

1 sufficiently dispels any potential deception. (Opposition, 21:1-2.) However, Rocket
2 Lawyer’s terms of services are not found anywhere near the advertisements
3 themselves. Indeed, Rocket Lawyer admits that the terms are provided only after
4 consumers have connected to the Rocket Lawyer website, have clicked through
5 Rocket Lawyer’s various pages on its website and/or clicked on the terms of services
6 link and read through 3,681 words in the terms of services. (Opposition, 14:1-2
7 (“Each Rocket Lawyer advertisement at issue contains a link to Rocketlawyer.com...
8 Rocket Lawyer discloses the state fees on the incorporation and entity formation page
9 of its website... All of the details of Rocket Lawyer’s free trial plan are also disclosed
10 on Rocketlawyer.com”); Supp. Nguyen Decl., ¶5.) Consumers do not and should not
11 be expected to review every single page and every single word of an advertiser’s
12 website to dispel deception from false advertisements.

13 **c. Rocket Lawyer’s “Free” Advertisements Violate Section**
14 **17509 and the Negative Option Rule.**

15 California Business and Professions Code Section 17509 provide that
16 advertisements soliciting the purchase of a product or service that requires, as a
17 condition of sale, the purchase or lease of a different product or service, to
18 conspicuously disclose in the advertisement the price of all those products or
19 services.” California’s Negative Option Law (the “California Negative Option
20 Rule”), Cal. Bus. & Prof. Code § 17600 *et seq.*, provides that an offer which includes
21 an automatic renewal provision must include a **clear and conspicuous** disclosure
22 that: (1) the subscription will continue until the customer terminates the contract; (2)
23 the cancellation policy of the offer; (3) the amount of the recurring charges that the
24 customer’s credit card will be charged, and if the amount will change, and if so, the
25 amount that the charge will be changed by, if known; (4) the duration of the automatic
26 renewal term or that the subscription is continuous; and (5) if there is any minimum
27 purchase requirement. The statute spells out the requirements of “clear and
28 conspicuous” and provides that to qualify as “clear and conspicuous, a disclosure

1 must be in larger type than the surrounding text, or in contrasting type, font or color to
2 the surrounding text of the same size, or set off from the surrounding text of the same
3 size by symbols or other marks, in a manner that clearly calls attention to the
4 language.” In addition, the statute requires that the customer be provided with an
5 acknowledgement that includes the automatic renewal or continuous service offer
6 terms, cancellation policy and information regarding how to cancel in a manner that is
7 capable of being retained by the customer. As shown in LegalZoom’s Motion,
8 Rocket Lawyer’s negative option disclosure appears in standard font only upon the
9 customer being directed to enroll in the “free trial.” (Motion, 17-9-12.) Accordingly,
10 the disclosure is not clearly and conspicuously disclosed as required by the law and
11 violates Section 17509 and the Negative Option Rule.

12 In its Opposition, Rocket Lawyer argues that LegalZoom’s failure to prove
13 “bad faith” is “fatal” to LegalZoom’s Negative Option Rule claim. (Opposition, 22:8-
14 11.) However, Rocket Lawyer is wrong. Nowhere in the statute does it state that
15 LegalZoom must prove “bad faith” to support its Negative Option Rule claim.
16 Instead, the statute provides only that where “a business complies with the provisions
17 of this article in good faith, it shall not be subject to civil remedies.” *See* Cal. Bus. &
18 Proc. Code § 17604. In any event, as shown in LegalZoom’s Motion, Rocket Lawyer
19 was made fully aware of the falsity of its “free” advertisements, but nonetheless
20 intentionally continued to use such false “free” advertisements. (Motion, 5:4-6:3.)
21 Such intentional use of its false “free” advertisements sufficiently proves Rocket
22 Lawyer’s bad faith.

23 **3. Rocket Lawyer’s False Advertising Constitutes Unfair**
24 **Competition Under Cal. Bus. & Prof. Code § 17200**

1 **a. Rocket Lawyer’s Violation of the Lanham Act and**
2 **California False Advertising Law Constitute Unfair**
3 **Competition under Cal. Bus. & Prof. Code § 17200.**

4 As stated in LegalZoom’s Motion, California’s unfair competition law
5 prohibits “any unlawful, unfair or fraudulent business practice and unfair, deceptive,
6 untrue or misleading advertising. Cal. Bus. & Prof. § 17200. “An unlawful business
7 practice within the meaning of [California’s unfair competition law] is one that is
8 forbidden by law, whether civil or criminal, federal, state, or municipal, statutory,
9 regulatory, or court-made.” *People v. Servantes*, 86 Cal.App.4th 1081, 1087 (2001).
10 As provided in the Motion and discussed in further detail above, Rocket Lawyer’s
11 “free” advertising violates the Lanham Act and the California false advertising law
12 and, thus, constitutes “unlawful” conduct under California’s unfair competition law.

13 **b. Although the FTC Guide Alone Does Not Support an**
14 **Unfair Competition Claim, It Provides Guidance as to**
15 **the Deceptiveness and Falsity Rocket Lawyer’s “Free”**
16 **Advertisements.**

17 Although the FTC Guide alone does not support a claim under California
18 Business & Professions Code Section 17200, the FTC Guide suggests a procedure
19 that will prevent the use of the term “free” from being false and misleading when
20 there are terms and conditions that must be fulfilled before a consumer can receive the
21 “free” product or service. *See Waul v. Circuit City Stores, Inc.*, WL 1535825, *7
22 (Cal. App. July 9, 2004). Thus, it provides guidance as to the deceptiveness and
23 falsity of Rocket Lawyer’s “free” advertisements.

24 In any event, Rocket Lawyer’s assertion in its Opposition that “LegalZoom
25 alleges only a violation of the guide, not an underlying statute... and therefore cannot
26 justify its UCL claim” *is not true*. (Opposition, 23:18-19.) As alleged by LegalZoom
27 and shown above, Rocket Lawyer’s “free” advertising also violates the Lanham Act
28 and the California false advertising law, which supports a violation under California’s

1 unfair competition law.

2 **C. LegalZoom Has Standing To Pursue Its Claims**

3 **1. LegalZoom Has Standing To Pursue Its False Advertising**
4 **Claim under the Lanham Act.**

5 LegalZoom has standing to proceed with its false advertising claim under the
6 Lanham Act because it is undisputedly in direct competition with Rocket lawyer as an
7 online provider of legal products and because LegalZoom has properly alleged a
8 discernably competitive injury stemming from Rocket Lawyer’s false “free”
9 advertisements. *Barrus v. Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995) (for standing
10 purposes, the alleged injury must be “competitive, i.e., harmful to the plaintiff’s
11 ability to compete with defendant”) (inner quotation and citation omitted); *Waits v.*
12 *Frito-Lay, Inc.*, 978 F.2d 1093, 1109 (9th Cir. 1991) (“a discernably competitive
13 injury must be alleged;” emphasizing the importance of a “discernably competitive
14 interest;” standing exists where false advertisements “theoretically draw. . .
15 [customers] away from” competitor). Concerning the issue of competition between
16 the parties, it is undisputed that LegalZoom and Rocket Lawyer are both providers of
17 online legal products and compete with one another in the online legal products
18 industry. (Motion, 1:18-24.) Concerning the issue of alleged discernably competitive
19 injury, in using its false “free” advertisements, LegalZoom has alleged that such
20 literally false “free” advertisements either have diverted or are likely to divert
21 business away from LegalZoom (with the precise amount of damages to be
22 determined at trial). Such is sufficient to meet the “competitive injury” requirement
23 for standing in false advertising cases. *See Coastal Abstract Serv. Inc. v. First Am.*
24 *Title Ins. Co.*, 173 F.3d 725, 734 (9th Cir. 1999) (standing exists where advertisement
25 had potential of diverting business away from competitor); *Waits*, 978 F.2d at 1109
26 (standing exists where false advertisements, “theoretically draws [customers] away
27 from” the plaintiff).

28 The *Waits* case is instructive on this point. In *Waits*, the Ninth Circuit

1 reconciled conflicting jurisprudence concerning standing requirements under the
2 Lanham Act and, in doing so, set forth the requirements applicable to a false
3 advertising claim. *Waits*, 978 F.2d at 1109. The Ninth Circuit provided a helpful
4 illustration: If a defendant wrongfully misrepresents a quality of the defendant’s
5 product, a competitor plaintiff *would have standing*: the misrepresentation
6 *theoretically draws* customers away from the plaintiff competitor's products because
7 of the misrepresentation concerning the desirability (i.e. cost) of the defendant’s
8 product. *Id.*

9 Here, as in *Waits*, Rocket Lawyer has wrongfully misrepresented the quality of
10 its products – namely, that its products are “free” when they are *not* “free.” Applying
11 *Waits*, this theoretically draws consumers of online legal products away from
12 LegalZoom. That consumers of online legal products would likely be drawn away
13 from LegalZoom due to Rocket Lawyer’s false “free” advertisements makes sense
14 given that LegalZoom and Rocket Lawyer are both providers of online legal products
15 and compete with one another in the online legal products industry. In addition, the
16 charged “free” language in Rocket Lawyer’s advertisements is likely to be influential
17 in the purchasing decisions of consumers of online legal products. *See In re Samuel*
18 *Stores*, 27 F.T.C. 882 (1938) (offers of free goods and services are “recognized as
19 powerful psychological magnets to draw trade and undoubtedly the merchant expects
20 to benefit thereby, either through an immediate direct profit on some other article
21 which must be purchased or indirectly through increased good will and future
22 patronage.”).

23 **2. LegalZoom Has Standing To Pursue Its False Advertising and**
24 **Unfair Competition Claims under the California Business &**
25 **Professions Code.**

26 Under the California Business & Professions Code, “a person who has suffered
27 injury in fact and has lost money or property as a result of... unfair competition” may
28 seek relief for false advertising and unfair competition. Cal. Bus. & Prof. Code §§

1 17204, 17535. LegalZoom has injuries that are economic in nature and recognized by
2 the United States Supreme Court as injuries in fact sufficient for standing.
3 Established case law recognizes that organizations have standing when they divert
4 resources to identify and counteract illegal activity. *See S. Cal. Hous. Rights Ctr. v.*
5 *Los Feliz Towers Homeowners Ass'n Bd. of Dirs.*, 426 F. Supp. 2d 1061, 1069 (C.D.
6 Cal. 2005) (the plaintiffs investigation and the subsequent diversion of staff time
7 away from other issues amounted to “evidence of actual [economic] injury” caused by
8 the defendant’s practices and was therefore sufficient to show standing under the
9 UCL.), citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *see also*
10 *People ex rel. Mosk v. Nat’l Research Co. of Cal.*, 201 Cal.App.2d 765, 770 (1962)
11 (bearing in mind that the UCL was originally conceived to protect business
12 competitors); *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1147-
13 1148 (2003) (deterrence of unfair competition is an important goal of the UCL).

14 In *Havens*, the Supreme Court held that organizations suffer injury in fact when
15 they divert financial resources and staff time to identify and counteract unlawful
16 activity. *Id.* The plaintiff in that case was a housing rights association that operated a
17 housing counseling service. *Id.* at 368. The Court observed that “injury to the
18 organization’s activities – with the consequent drain on the organization’s resources –
19 constitutes far more than simply a setback to the organization’s... interests.” *Id.* at
20 379.

21 In reaching out to Rocket Lawyer to alert Rocket Lawyer of the falsity of
22 Rocket Lawyer’s “free” advertisements (Motion, 5:5-6:3) and instituting the instant
23 litigation, LegalZoom diverted its resources to identify and counteract Rocket
24 Lawyer’s unlawful activities. LegalZoom’s efforts to alert and deter Rocket Lawyer
25 from continuing its false “free” advertisements amount to a loss because LegalZoom
26 would have otherwise used its resources for other projects to further its interests.
27 These losses are economic because LegalZoom has expended monies to pursue the
28 instant litigation. The loss was caused by Rocket Lawyer, as these losses would not

1 be necessary but for the unlawful actions of Rocket Lawyer. Thus, LegalZoom has
2 satisfied standing requirement under the California Business & Professions Code as
3 provided in *Southern California Housing Rights Center*. See 426 F. Supp. 2d at 1069.

4 **D. LegalZoom Does Not Have “Unclean Hands” Because LegalZoom’s**
5 **Incorporation Advertisement Is Not Like Rocket Lawyer’s**
6 **Incorporation Advertisements And LegalZoom’s Advertisement**
7 **That It Has An “A Rating” With The Better Business Bureau Is Not**
8 **False**

9 In its Opposition, Rocket Lawyer argues that summary judgment is
10 inappropriate under the doctrine of “unclean hands” because LegalZoom’s
11 advertisements are somehow the “same” as Rocket Lawyer’s advertisements.
12 (Opposition, 8:27-28.) In particular, Rocket Lawyer argues that LegalZoom’s
13 advertisement for its incorporation services (“Incorporation Services... Sign in to our
14 secure server to start your incorporation... Economy \$99”) is the “same” as Rocket
15 Lawyer’s advertisement for its incorporation services (“Incorporate your business for
16 Free – Rocket Lawyer... Free Incorporation. Get a Free Incorporation in any State.
17 How to Incorporate in Any State For Free”) simply because neither advertisement
18 references state fees. (Opposition 8:27-9:9.) However, LegalZoom’s advertisement
19 for its incorporation services specifically refers to LegalZoom’s “Incorporation
20 **Services,**” not the full incorporation, and does not allege that it offers anything for
21 “free.” (Emphasis added.) Rocket Lawyer’s advertisements, on the other hand, state
22 that customers can “***Incorporate* your business for ***Free... Free Incorporation***. Get a
23 ***Free Incorporation* in any State,” “incorporate for free... pay no fees (\$0),” “form**
24 **your LLC free at Rocket Lawyer,” “free help from local attorneys,” “free legal**
25 **review,” and “free” trials of Rocket Lawyer’s “Basic Legal Plan” and “Pro Legal**
26 **Plan.”** (See Opposition, 9:4-7 (emphasis added); Motion, 21:23-22:1.) Free is an
27 especially powerful tool in marketing. Rocket Lawyer’s advertisements do not limit
28 the term “free” to Rocket Lawyer’s “services.” As a result of the state fees, which are**

1 unavoidably associated with incorporation, Rocket Lawyer’s advertisements are false
2 because Rocket Lawyer’s customers cannot “Incorporate [their] business for Free,”
3 get “Free Incorporation,” “Get a Free Incorporation in any State,” “Incorporate in
4 Any State For Free” or “pay no fees (\$0)” through Rocket Lawyer’s services, despite
5 the express language in Rocket Lawyer’s advertisements. Thus, Rocket Lawyer’s
6 contention that there is evidence, on the basis of this advertisement, that LegalZoom
7 has acted with “unclean hands” is unsupportable.

8 Rocket Lawyer also argues that summary judgment is inappropriate under the
9 doctrine of “unclean hands” because LegalZoom’s advertisement that it has an “A
10 rating” with the Better Business Bureau (“BBB”) is somehow false. (Opposition,
11 10:7-11.) However, Rocket Lawyer’s allegation of falsity is premised on the mere
12 fact that LegalZoom’s BBB rating is currently *unavailable* on the BBB website due to
13 the BBB’s updating of its files on all businesses in the Greater Los Angeles area in
14 which LegalZoom is located. (See Opposition, 10:12-17 (providing that “BBB is
15 currently updating its files on all businesses in the Greater Los Angeles area and
16 pending that review, a BBB rating is unavailable. However, this business is
17 Accredited by BBB, which means that the business has committed to meeting our
18 standards.”).) The mere fact that LegalZoom’s BBB rating is *unavailable* pending the
19 BBB’s updating of its files does not make LegalZoom’s advertisement that it has an
20 “A rating” with the BBB false. Indeed, the BBB has confirm that LegalZoom is still
21 able to display the “A rating” while the BBB worked to update its files. (Declaration
22 of Patty Chikamagalur, ¶ 2.) Thus, LegalZoom does not have “unclean hands.”

23 In any event, as provided in *Republic Molding Corp. v. B. W. Photo Utilities*,
24 319 F.2d 347, 350 (9th Cir. 1963) (a Lanham Act and unfair competition case),
25 “Unclean hands... does not stand as a defense that may be properly considered
26 independent of the merits of the plaintiff’s claim... Its assertion does not eliminate the
27 need for the court to ascertain the soundness of the plaintiff’s claim. In the interests of
28 right and justice the court should not automatically condone the defendant’s

1 infractions because the plaintiff is also blameworthy, thereby leaving two wrongs
2 unremedied and increasing the injury to the public.” Thus, Rocket Lawyer’s
3 unsupported assertion of the doctrine should not eliminate the need for the court to
4 ascertain on summary judgment Rocket Lawyer’s liability for false advertising and
5 unfair competition under the Lanham Act and the California Business & Professions
6 Code.

7 **III. CONCLUSION**

8 For the forgoing reasons, Rocket Lawyer’s false advertising constitutes false
9 advertising under the Lanham Act and false advertising and unfair competition under
10 California law. Therefore, LegalZoom respectfully requests that this Court grant
11 LegalZoom summary judgment on the liability element of its false advertising and
12 unfair competition claims, leaving only computation of damages to be determined at
13 trial.

14
15 DATED: October 7, 2013

Respectfully submitted,

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