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8 Attorneys for Plaintiff
 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 RESPONSE TO ROCKET
 LAWYER'S MEMORANDUM OF
 EVIDENTIARY OBJECTIONS**

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

Complaint Filed: November 20, 2012

28

1 Plaintiff LegalZoom.com, Inc. (“LegalZoom”) hereby responds to Defendant
2 Rocket Lawyer, Incorporated’s (“Rocket Lawyer”) Memorandum of Evidentiary
3 Objections in Support of Its Opposition to LegalZoom’s Motion for Summary
4 Judgment as follows:

5
6 Separate Statement Paragraph 7: Objection to Paragraph 5 of the Declaration of
7 Mary Ann T. Nguyen (“Nguyen Decl.”) (“Rocket Lawyer’s customers are required to
8 pay the state fees associated with incorporation and formation”) on the grounds that it
9 is misleading. To the extent this statement implies that Rocket Lawyer imposes the
10 fees, as opposed to the state, or that customers of LegalZoom or of any other
11 competitor are not required to pay the same fees, it is misleading. Fed. R. Evid. 403.

12 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 7:
13 The statement that consumers who incorporate a business are required to pay state
14 fees is a demonstrable and uncontrovertible fact. Here, it is admissible because it is
15 directly relevant to the central issue in this case—that is, whether the ads used by
16 Rocket Lawyer which state or imply that incorporation is “free”—violate the Lanham
17 Act and constitute unfair competition and false advertising under the California
18 Business and Professions Code. Given its direct relevance, the fact contested is
19 admissible under Federal Rule of Evidence 401. Rocket Lawyer’s attempt to invoke
20 the protections of Rule 403 as a basis to exclude this directly relevant and highly
21 probative evidence on the ground that it is misleading is unavailing. Indeed, Rocket
22 Lawyer has asserted no fact demonstrating, as would be required to do in order to
23 preclude the introduction of evidence with such high probative value, the misleading
24 nature of this statement. Contrary to Rocket Lawyer’s suggestion, the statement
25 implies nothing in connection with *who* imposes the state fees. Moreover, to the
26 extent that it is ambiguous as to whether Rocket Lawyer’s, but not other competitor’s,
27 customers need to pay the state-imposed fees, it highlights the misleading nature of
28 Rocket Lawyer’s own ads, which are silent on their face, as to whether a consumer

1 must pay state fees and which directly suggest that incorporation is entirely “free.” In
2 any event, there is nothing misleading about this statement, which reflects the idea
3 that consumers are required to pay fees to the state in order to incorporate.

4 Separate Statement Paragraph 8: Objection to Exhibit D to the Nguyen Decl.,
5 “Screen grabs of Rocket Lawyer’s ‘Interview’ for ‘Company Set-Up’ and ‘Company
6 Details,’” on the grounds that the evidence is incomplete and misleading. To the
7 extent that it is offered to show the only disclosure of state filing fees on Rocket
8 Lawyer.com, it is incomplete and misleading. Fed. R. Evid. 106, 403.

9 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 8:
10 The subject evidence, which includes certain pages of Rocket Lawyer’s website, is
11 relevant to a central issue in the case—whether Rocket Lawyer’s ads, which boast
12 “free” incorporation services are nonetheless false or misleading under the Lanham
13 Act and the California Business and Professions Code, particularly because the
14 disclosure that the subject services (i.e. incorporation) are not, in fact, free, are made
15 in places on the website far removed from the “free” advertisements. The evidence is
16 also probative of whether the disclosure that certain fees must be paid are sufficiently
17 conspicuous and clear as to not mislead consumers, a critical inquiry for purposes of
18 Rocket Lawyer’s violation of California Business and Professions Code section
19 17200. *See, e.g., In the Matter of Prodigy Servs. Corp.*, 125 F.T.C. 430, 434 (Mar. 16,
20 1998) (Prodigy liable for advertising “free” Internet service but failing to disclose at
21 the outset that customers would be charged if they did not cancel during the trial
22 period); 16 C.F.R. § 251.1 (1998).

23 Neither Federal Rule of Evidence 106 nor 403 operates to preclude the
24 admission of this evidence that is taken directly from Rocket Lawyer’s own website
25 featuring its ads—which Rocket Lawyer does not contest. To the extent that Rocket
26 Lawyer argues that the selected pages of the website are “incomplete,” Federal Rule
27 106 does not mandate outright exclusion of the subject evidence. In fact, Rocket
28 Lawyer has not clearly established why or how the subject screenshots are

1 incomplete. Nor has Rocket Lawyer made the requisite showing indicating that
2 “fairness” requires the introduction of additional material. *U.S. v. Branch*, 91 F.3d
3 699 (1996); *U.S. v. Boylan*, 898 F.2d 230 (1990), cert. denied, 111 S.Ct. 139 (noting
4 that there is no “per se rule requiring the admission of evidence in any case and that a
5 preliminary decision is required concerning what units contained in a document
6 collection constitutes a “fair and reasonably” complete unit of material). In any
7 event, to the extent that Rule 106 does apply, Rule 106 simply permits Rocket Lawyer
8 to offer evidence rendering the pages of the website (to the extent that they constitute
9 “writings” or “recorded statements” for purposes of the Rule) whose contents Rocket
10 Lawyer suggests are allegedly incomplete, complete. By now, Rocket Lawyer should
11 have proffered whatever evidence it believes is necessary to make this submission
12 complete, thus mooted this objection altogether. If not, it certainly had the
13 opportunity to do so.

14 Rocket Lawyer’s attempt to invoke the protections of Rule 403 as a basis to
15 exclude this directly relevant and highly probative evidence is also unavailing.
16 Rocket Lawyer has not established that the probative value of the evidence itself is
17 substantially outweighed by any potential confusion. Again, the evidence goes to a
18 central issue. Moreover, there is nothing confusing or misleading about the evidence
19 itself, particularly where, as here, Rocket Lawyer has had the opportunity to provide
20 contemporaneous corrective statements or evidence to controvert it.

21 Separate Statement Paragraph 9: Objection to the assertion that “Rocket
22 Lawyer subsequently changed the language of these advertisements after LegalZoom
23 filed its original Complaint” on the grounds that it is irrelevant, evidence of a
24 subsequent remedial measure, and misleading. Any Rocket Lawyer advertising not
25 complained of is irrelevant. Fed. R. Evid. 401, 402. To the extent it is offered as a
26 subsequent remedial measure demonstrating culpable conduct, it is inadmissible. Fed.
27 R. Evid. 407. To the extent it is offered to show an admission of guilt, it is misleading
28 as LegalZoom has offered no evidence and Rocket Lawyer has made no concession

1 that its new advertisements resulted from the original Complaint. Fed. R. Evid. 403.

2 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 9:

3 ***By Rocket Lawyer’s own admission***, evidence of its ads and policies—both as they
4 exist now and as they existed previously—are undoubtedly relevant. In its
5 opposition, Rocket Lawyer specifically invites this Court to view its current
6 advertisements on the website *today* as distinct from its prior advertisements evident
7 previously and to which LegalZoom has cited extensively. *See, e.g.*, Opposition at p.
8 2, lines 18-20 (“[i]f the Court were to visit Rocketlawyer.com today, it would look
9 substantially different from LegalZoom’s exhibits”). Advertisements of any nature at
10 any time are directly relevant to whether there has been a violation of the Lanham Act
11 or Business and Professions Code. *See, e.g., Skydrive Arizona, Inc. v. Quattrocchi*,
12 2009 WL 6597892, *25 (D. Ariz. Feb. 2, 2009) (liability for false advertising under
13 the Lanham Act may not be avoided by removing false statements from later
14 advertising). The evidence is additionally relevant to Rocket Lawyer’s intent,
15 including specifically Rocket Lawyer’s state of mind regarding whether it knew that
16 its ads were false or whether an alternative was feasible. *See, e.g., Pom Wonderful*
17 *LLC v. Coca Cola Co.*, 727 F. Supp. 2d 849, 869 (C.D. Cal. 2010) (aff’d in part,
18 vacated in part, remanded sub nom. *Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d
19 1170 (9th Cir. 2012)) (“if [the defendant has] intentionally misled consumers, [the
20 court will presume that] consumers were in fact deceived and [the defendant] would
21 have the burden of demonstrating otherwise”) Thus, under 401, the evidence should
22 be admitted.

23 Contrary to Rocket Lawyer’s position, Section 407 does not mandate exclusion
24 of this evidence. Indeed, it is questionable whether Section 407 even applies to this
25 case. To the extent that Rocket Lawyer contends that the changes that it has instituted
26 to its website are “subsequent remedial measures” (and Rocket Lawyer does not
27 appear to have made any such claim), 407 is inapplicable. Rule 407 only applies in
28 instances where the “subsequent remedial measure” has made the injury or harm that

1 was posed by the prior condition less likely to occur. *See, e.g.,* In re
2 HOMESTORE.COM, INC. Securities Litigation, 2011 WL 291176 (C.D. 2011)
3 (where act or repair not taken in order to improve the conditions that led to harm or
4 injury, the evidence does not constitute a subsequent remedial measure within the
5 realm of Rule 407); *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 42 (5th
6 Cir. 2006). Whatever changes Rocket Lawyer has made, it has not been established
7 and there is no evidence submitted in connection with these motions that its changes
8 “lessened” any confusion on the part of the consumer. Moreover, it is not being
9 offered for an impermissible purpose under section 407.

10 Insofar as Rocket Lawyer’s objection on the basis of section 403 is concerned,
11 there is no evidence that the probative value of this evidence (which Rocket Lawyer
12 admits) is substantially outweighed by the danger of misleading this Court. Indeed,
13 that Rocket Lawyer elected to change features of its website is already in evidence on
14 account of Rocket Lawyer’s own admissions. The Court is free to draw from this
15 evidence those inferences that are supported from the available evidence.

16 Separate Statement Paragraph 10: Objection to Exhibit E to the Nguyen Decl.,
17 “Screen grabs of Rocket Lawyer’s Advertisements,” on the grounds that the evidence
18 is misleading and irrelevant. Page 45 of Exhibit E purports to show that Rocket
19 Lawyer advertised “free legal review.” The evidence is taken from Rocket Lawyer’s
20 website and does not make clear when in the user experience this screen is
21 encountered. Thus, to the extent it is offered to show what Rocket Lawyer advertised
22 to non-customers, it is misleading and irrelevant to the fact asserted. Fed. R. Evid.
23 401, 402, 403.

24 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 10:
25 Rocket Lawyer objects to evidence from its own website evidencing the central
26 advertisements at issue in this lawsuit as “misleading and irrelevant.” It strains
27 credulity that Rocket Lawyer could claim that its own statements and advertising that
28 are the subject of this lawsuit are “irrelevant,” and that is true whether a consumer

1 ultimately was lured by the ads and became a customer or not. And, to the extent
2 that Rocket Lawyer claims that it is “misleading,” because it is unclear “when” in the
3 “user experience” this screen is encountered, it proves, at a minimum, that the ads
4 themselves, are misleading to the extent that they are read as stand-alone statements.
5 Rocket Lawyer’s invocation of Rule 403 as a grounds for exclusion is unavailing
6 where, as here, the evidence is relevant to a central issue in the case and the value is
7 not outweighed, let alone substantially outweighed, by any purported confusion
8 concerning the statements of Rocket Lawyer on its own website. Even to the extent
9 that the evidence is related to the impact of the ads on consumers who are not
10 currently customers of Rocket Lawyer, the evidence is not “misleading” for purposes
11 of section 403, but, in fact, the best evidence of what Rocket Lawyer advertises.

12 Objection to the supporting evidence of [http://www.Rocket Lawyer.com/on-](http://www.Rocket Lawyer.com/on-call-terms-of-service.rl)
13 [call-terms-of-service.rl](http://www.Rocket Lawyer.com/on-call-terms-of-service.rl) for assertion that “The paid-membership requirement for
14 access to the purported ‘free help from local attorneys’ and ‘free legal review’ was
15 not disclosed in close proximity to the advertisements on Rocket Lawyer’s website”
16 on the grounds that it is irrelevant and misleading. The evidence provided does not
17 demonstrate the disclosure’s proximity or lack thereof to Rocket Lawyer’s advertising
18 and is therefore irrelevant to the asserted fact. Fed. R. Evid. 401, 402. To the extent it
19 is used for such purpose, it is misleading. Fed. R. Evid. 403.

20 Response to Rocket Lawyer’s Objection: Evidence of the terms and conditions
21 attached to the receipt of the free services offered by Rocket Lawyer is undoubtedly
22 relevant. Notably, Rocket Lawyer does not dispute that its website contains
23 disclosures concerning the terms of the consumer’s purported free access. To the
24 extent that it is clear from looking at the terms of service that the advertisement is not
25 *on the same page*, it is further relevant and persuasive as to whether there has been a
26 violation of the law, *see, e.g.*, Cal. Bus. & Prof. Code § 17600 *et seq.*, California
27 Business and Professions Code § 17200; *In the Matter of Prodigy Servs. Corp.*, 125
28 F.T.C. 430, 434 (Mar. 16, 1998) (Prodigy liable for advertising “free” Internet service

1 but failing to disclose at the outset that customers would be charged if they did not
2 cancel during the trial period); 16 C.F.R. § 251.1 (1998), and therefore admissible
3 under section 401. Any attempted exclusion on the grounds of the catch-all of
4 Federal Rule of Evidence 403 is specious. The evidence makes clear that the
5 advertisement is not contained on the same page as the terms of service relating to the
6 conditions upon which access is given.

7 In any event, Rocket Lawyer’s invocation of Rule 403 as a grounds for
8 exclusion is unavailing where, as here, the evidence is relevant to a central issue in
9 the case and the value is not substantially outweighed by any purported confusion
10 concerning where these terms and conditions are encountered in relation to the ads at
11 issue in this litigation. Again, Rocket Lawyer has now had the opportunity to clear up
12 any confusion concerning these terms and conditions.

13 Separate Statement Paragraph 13: Objection to the supporting evidence of
14 <http://www.Rocket Lawyer.com/on-call-terms-of-service.rl> for assertion that “The
15 paid-membership requirement was only disclosed in Rocket Lawyer’s ‘On Call Terms
16 of Service,’ which was accessible to customers on a separate link found at
17 <http://www.Rocket Lawyer.com/on-call-terms-of -service.rl>.” The evidence provided
18 does not support the assertion that the Terms of Service are the only disclosure. To
19 extent that it is used for that purpose, it is misleading. Fed. R. Evid. 403.

20 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 13:
21 Evidence of the terms and conditions, and how readily accessible the terms and
22 conditions are, upon which the receipt of the free services advertised by Rocket
23 Lawyer are and were to the consumer is clearly relevant to the issue of whether there
24 is a violation of the Lanham Act and the California Business & Professions Code.
25 *see, e.g*, Cal. Bus. & Prof. Code § 17600 *et seq*. To the extent that Rocket Lawyer
26 here argues for exclusion on the grounds that *other* information exists on the website
27 also discloses these conditions, that is for Rocket Lawyer to argue and to present to
28 the Court. However, exclusion under 403 is not required in light of the highly

1 probative value of the subject evidence.

2 Separate Statement Paragraph 14: Objection to the supporting evidence of
3 Rocket Lawyer’s On Call Terms of Service dated November 2012 on the grounds that
4 it is irrelevant, misleading, and evidence of a subsequent remedial effort. Any Rocket
5 Lawyer terms of service not complained of are not relevant. Fed. R. Evid. 401, 402.
6 To the extent it is offered as a subsequent remedial measure demonstrating culpable
7 conduct, it is inadmissible. Fed. R. Evid. 407. To the extent it is offered to show an
8 admission of guilt or that the prior terms of service were insufficient as a disclosure, it
9 is misleading. Fed. R. Evid. 403.

10 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 14:
11 ***By Rocket Lawyer’s own admission***, evidence of Rocket Lawyer’s ads and policies
12 concerning receipt of the services that are the subject of those ads—both as they exist
13 now and as they existed previously—are undoubtedly relevant. See, *e.g.*, Opposition
14 at p. 2, lines 18-20. Rocket Lawyer, in fact, submits into evidence, virtually the
15 same—if not identical—Terms of Service in defense of its position opposing
16 summary judgment. See, *e.g.*, Exhibit 13 to the Declaration of Hong-An Vu
17 Submitted in Support of its Opposition to LegalZoom’s Motion for Summary
18 Judgment. It, thus, strains credulity that Rocket Lawyer could argue that the very
19 same document taken from its website within 6 days of the other could be argued as
20 relevant and straightforward when submitted by it, but irrelevant and misleading
21 when submitted by LegalZoom. In fact, it cannot be the case that an earlier version of
22 the terms and conditions under which consumers receive Rocket Lawyer’s services is
23 simply mooted or deemed inactionable upon the inclusion of later terms and
24 conditions. Indeed, liability for false advertising under the Lanham Act may not be
25 avoided by removing false statements from later advertising. *Skydrive Arizona, Inc.*
26 *v. Quattrocchi*, 2009 WL 6597892, 25 (D. Ariz. Feb. 2, 2009). The evidence is
27 additionally relevant to Rocket Lawyer’s intent, including specifically Rocket
28 Lawyer’s state of mind regarding whether it knew that its ads were false or whether

1 an alternative was feasible. *See, e.g., Pom Wonderful LLC v. Coca Cola Co.*, 727 F.
2 Supp. 2d 849, 869 (C.D. Cal. 2010) (aff'd in part, vacated in part, remanded sub nom.
3 *Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170 (9th Cir. 2012)) (“if [the
4 defendant has] intentionally misled consumers, [the court will presume that]
5 consumers were in fact deceived and [the defendant] would have the burden of
6 demonstrating otherwise”) Thus, under 401, the evidence should be admitted.

7 Neither Federal Rule of Evidence 403 nor 407 preclude its introduction into
8 evidence. First, contrary to Rocket Lawyer’s position, Section 407 does not mandate
9 exclusion of this evidence. Indeed, it is questionable whether section 407 even
10 applies to this case. To the extent that Rocket Lawyer contends that the changes that
11 it has instituted to its website are “subsequent remedial measures,” (and Rocket
12 Lawyer actually has not made any such claim), 407 is only applicable in instances
13 where the “subsequent remedial measure” has made the injury or harm that was posed
14 by the prior condition less likely to occur. *See, e.g., In re Homestore.com, Inc.*
15 *Securities Litigation*, 2011 WL 291176 (C.D. 2011) (where act or repair not taken in
16 order to improve the conditions that led to harm or injury, the evidence does not
17 constitute a subsequent remedial measure within the realm of Rule 407); *Brazos River*
18 *Authority v. GE Ionics, Inc.*, 469 F.3d 416, 42 (5th Cir. 2006). Whatever changes
19 Rocket Lawyer has made, it has not been established, and there is no evidence
20 submitted in connection with these motions to suggest, that its changes “lessened”
21 any confusion on the part of the consumer. Moreover, it is not being offered for an
22 impermissible purpose under section 407.

23 Insofar as Rocket Lawyer’s objection on the basis of section 403 is concerned,
24 there is no evidence that the probative value of this evidence (which Rocket Lawyer
25 admits) is substantially outweighed by the danger of misleading this Court. In
26 essence, Rocket Lawyer argues that evidence of its changed policies may be
27 misleading to this Court. However, having itself placed into evidence the content of
28 its prior policies, it may not now shun these policies when offered as evidence by

1 LegalZoom. The Court is entitled to make whatever inferences about the documents
2 to which the available evidence is susceptible.

3 Separate Statement Paragraph 15: Objection to the supporting evidence of
4 Rocket Lawyer’s On Call Terms of Service, dated July 2012, and Rocket Lawyer’s
5 On Call Terms of Service, dated November 2012, on the grounds that they are
6 misleading. Rocket Lawyer’s terms of service do not demonstrate what customers
7 actually had access to attorney review. To the extent they are offered for that purpose,
8 they are misleading. Fed. R. Evid. 403.

9 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 15:
10 Rocket Lawyer’s own Terms of Service clearly are relevant as they clearly set forth
11 (and are intended to set forth clearly to consumers) the conditions under which they
12 can receive the services that Rocket Lawyer provides, and ultimately, are probative as
13 to whether Rocket Lawyer provides anything for “free,” as it advertises. Rocket
14 Lawyer admits so—having placed in evidence the same document to serve its own
15 purposes. Federal Rule of Evidence 403 does not support the exclusion of this
16 highly-probative evidence as there is no clearly-articulated argument that
17 demonstrates that the probative value of this evidence is outweighed, let alone
18 substantially outweighed, by any purported confusion. In any event, there is nothing
19 inherently misleading about the document itself, another iteration of a document upon
20 which Rocket Lawyer relies itself and does not preclude its introduction. That Rocket
21 Lawyer does not agree that the document supports the proposition for which
22 LegalZoom offers the document is of no moment.

23 Separate Statement Paragraph 16: Objection to the supporting evidence of
24 Rocket Lawyer’s On Call Terms of Service, dated November 2012, on the grounds
25 that it is misleading. To the extent Rocket Lawyer’s terms of service are offered to
26 show that customers provided Rocket Lawyer with credit card information and were
27 billed, they are misleading. Fed. R. Evid. 403.

28 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 16:

1 Rocket Lawyer’s own Terms of Service clearly are relevant as they clearly set forth
2 (and are intended to set forth clearly to consumers) the conditions under which they
3 can receive the services that Rocket Lawyer provides, and ultimately, are probative as
4 to whether Rocket Lawyer provides anything for “free,” as it advertises. Rocket
5 Lawyer admits so—having placed in evidence the same document to serve its own
6 purposes. Federal Rule of Evidence 403 does not support the exclusion of this
7 highly-probative evidence as there is no clearly-articulated argument that
8 demonstrates that the probative value of this evidence is outweighed, let alone
9 substantially outweighed, by any purported confusion. In any event, there is nothing
10 inherently misleading about the document itself, another iteration of which Rocket
11 Lawyer relies on itself. That Rocket Lawyer does not agree that the document
12 supports the proposition for which LegalZoom offers the document is of no moment.

13 Separate Statement Paragraph 18: Objection to Paragraph 13 of the supporting
14 Nguyen Decl. (“[C]ustomers who sign up for a one-week free trial membership under
15 the ‘Basic Legal Plan’ or ‘Pro Legal Plan’ must first provide Rocket Lawyer with
16 their credit card information and enroll in Rocket Lawyer’s ‘negative option’ program
17 — i.e., a program in which customers are automatically enrolled and billed and must
18 contact Rocket Lawyer to opt out of.”) on the grounds that it is misleading and
19 improperly sets forth a legal conclusion. To the extent that it is offered to show that
20 Rocket Lawyer charges its customers for free trials, it is misleading. Fed. R. Evid.
21 403. It is also misleading as to the use of the word “first.” *Id.* To the extent that it
22 concludes Rocket Lawyer’s free trial is a negative option plan, it is an improper legal
23 conclusion. Fed. R. Civ. Proc. 56(c)(4); L.R. 7-7; see *Jones v. Corbis Corp.*, 815 F.
24 Supp. 2d 1108, 1112 (C.D. Cal. 2011) *aff’d*, 489 F. App’x 155 (9th Cir. 2012)
25 (agreeing with defendant that “while Plaintiff may testify to facts relevant to the legal
26 determination [at issue], she may not testify as to the legal determination itself.”).

27 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 18:
28 This statement, based upon Rocket Lawyer’s own Terms of Service clearly is

1 relevant. Indeed, the conditions under which consumers can actually receive the
2 services that Rocket Lawyer provides and advertises are probative as to whether
3 Rocket Lawyer provides anything for “free,” as it advertises. Rocket Lawyer admits
4 so—having placed in evidence the same document to serve its own purposes. Federal
5 Rule of Evidence 403 does not support the exclusion of this highly-probative
6 evidence as there is no clearly-articulated argument that demonstrates that the
7 probative value of this evidence is outweighed, let alone substantially outweighed, by
8 any purported confusion.

9 Separate Statement Paragraph 19: Objection to Exhibit I to the supporting
10 Nguyen Decl. on the grounds that it is incomplete, misleading, and an improper legal
11 conclusion. To the extent that it is offered to show that this is the only disclosure of
12 Rocket Lawyer’s free trial terms, it is incomplete, misleading, and offers an improper
13 legal conclusion. Fed. R. Evid. 106, 403; Fed. R. Civ. 6 Proc. 56(c)(4); L.R. 7-7. To
14 the extent it concludes that Rocket Lawyer’s free trial is a negative option plan, it is
15 an improper legal conclusion. Fed. R. Civ. Proc. 56(c)(4); L.R. 7-7. Furthermore, to
16 the extent it alleges a violation of the Negative Option law, it is irrelevant since
17 LegalZoom lacks a right of action under that law. *See Noll v. eBay Inc.*, 2013 WL
18 2384250 (N.D. Cal. May 30, 2013) (“The Legislature employed specific language in
19 Section 17602 limiting recovery under Section 17600 *et seq.* to California consumers.
20 The court will not contravene the Legislature’s clear intention.”) (emphasis added).

21 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 19:
22 Evidence of the terms and conditions upon which the receipt of “free” services
23 is offered to Rocket Lawyer consumers is undoubtedly relevant to this case. *See, e.g.*,
24 Cal. Bus. & Prof. Code § 17600 *et seq.* To the extent that Rocket Lawyer here argues
25 for exclusion on the grounds that *other* information exists on the website also
26 discloses these conditions, Federal Rule of Evidence 106 does not mandate outright
27 exclusion of the subject evidence. Rule 106 would simply permit Rocket Lawyer,
28 under such a circumstance and after it has lain the factual predicate for doing so, to

1 offer evidence rendering the purportedly incomplete “writing” or “recorded
2 statement” complete. Here, however, Rocket Lawyer has not clearly established why
3 or how the subject screenshots are incomplete. Nor has Rocket Lawyer made the
4 requisite showing indicating that “fairness” requires the introduction of additional
5 material. *U.S. v. Branch*, 91 F.3d 699 (1996); *U.S. v. Boylan*, 898 F.2d 230 (1990),
6 cert. denied, 111 S.Ct. 139 (noting that there is no “per se rule requiring the admission
7 of evidence in any case and that a preliminary decision is required concerning what
8 units contained in a document collection constitutes a “fair and reasonably” complete
9 unit of material). In any event, by now, Rocket Lawyer should have proffered
10 whatever evidence it believes is necessary to make this particular Exhibit complete.
11 If not, it certainly had the opportunity to do so.

12 Rocket Lawyer’s objection on the grounds of 403 is also unavailing. Indeed,
13 Rocket Lawyer has proffered no evidence demonstrating that there are other
14 disclosures of Rocket Lawyer’s free trial terms. The document is central to a critical
15 issue in this case and Rocket Lawyer has offered no reason as to why the probative
16 value of a document reflecting its own terms is substantially outweighed by the
17 danger of misleading this Court.

18 Exclusions under Federal Rule of Evidence 403 is also not required in light of
19 the highly probative value of the subject evidence. Finally, the evidence is relevant to
20 the issues in the instant lawsuit whether or not LegalZoom may pursue Rocket
21 Lawyer for remedies in connection with a violation of the Negative Option Law. In
22 fact, to the extent that Rocket Lawyer’s ads violate the Negative Option Law because
23 receipt of free services is conditioned upon the purchase of a paid membership, which
24 is not sufficiently disclosed in Rocket Lawyer’s ads, Rocket Lawyer violates
25 California Business and Professions Code § 17200. *See, e.g., In the Matter of Prodigy*
26 *Servs. Corp.*, 125 F.T.C. 430, 434 (Mar. 16, 1998) (Prodigy liable for advertising
27 “free” Internet service but failing to disclose at the outset that customers would be
28 charged if they did not cancel during the trial period); 16 C.F.R. § 251.1 (1998).

1 Therefore, it is abundantly relevant to the central issue in this case.

2 Separate Statement Paragraph 20: Objection to Paragraph 13 (“No further
3 acknowledgement regarding the negative option is provided.”) of and Exhibit I to the
4 supporting Nguyen Decl. on the grounds that it is incomplete, misleading, and an
5 improper legal conclusion. To the extent that it is offered to show that this is the only
6 disclosure of Rocket Lawyer’s free trial terms, it is incomplete and misleading. Fed.
7 R. Evid. 106, 403. To the extent it concludes that Rocket Lawyer’s free trial is a
8 negative option plan, it is an improper legal conclusion. Fed. R. Civ. Proc. 56(c)(4);
9 L.R. 7-7. Furthermore, to the extent it alleges a violation of the Negative Option law,
10 it is irrelevant since LegalZoom lacks a right of action under that law. *See Noll v.*
11 *eBay Inc.*, 2013 WL 2384250 (N.D. Cal. May 30, 2013) (“The Legislature employed
12 specific language in Section 17602 limiting recovery under Section 17600 *et seq.* to
13 California consumers. The court will not contravene the Legislature’s clear
14 intention.”) (emphasis added).

15 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 20:
16 Evidence of the terms and conditions upon which the receipt of “free” services is
17 offered to Rocket Lawyer consumers is undoubtedly relevant to this case. *See, e.g.*,
18 Cal. Bus. & Prof. Code § 17600 *et seq.* To the extent that Rocket Lawyer argues for
19 exclusion on the ground that *other* information exists on the website also discloses
20 these conditions, Federal Rule of Evidence 106 does not mandate outright exclusion
21 of the subject evidence. Rule 106 would simply permit Rocket Lawyer, under such a
22 circumstance and after it has lain the factual predicate for doing so, to offer evidence
23 rendering the purportedly incomplete “writing” or “recorded statement” complete.
24 Here, however, Rocket Lawyer has not clearly established why or how the subject
25 screenshots are incomplete. Nor has Rocket Lawyer made the requisite showing
26 indicating that “fairness” requires the introduction of additional material. *U.S. v.*
27 *Branch*, 91 F.3d 699 (1996); *U.S. v. Boylan*, 898 F.2d 230 cert. denied, 111 S.Ct. 139
28 (noting that there is no “per se rule requiring the admission of evidence in any case

1 and that a preliminary decision is required concerning what units contained in a
2 document collection constitutes a “fair and reasonably” complete unit of material). In
3 any event, by now, Rocket Lawyer should have proffered whatever evidence it
4 believes is necessary to make this particular Exhibit complete. If not, it certainly had
5 the opportunity to do so.

6 Exclusions under Federal Rule of Evidence 403 is also not required in light of
7 the highly probative value of the subject evidence. Finally, the evidence is relevant to
8 the issues in the instant lawsuit whether or not LegalZoom may pursue Rocket
9 Lawyer for remedies in connection with a violation of the Negative Option Law. In
10 fact, to the extent that Rocket Lawyer’s ads violate the Negative Option Law because
11 receipt of free services is conditioned upon the purchase of a paid membership, which
12 is not sufficiently disclosed in Rocket Lawyer’s ads, Rocket Lawyer violates
13 California Business and Professions Code § 17200. *See, e.g., In the Matter of Prodigy*
14 *Servs. Corp.*, 125 F.T.C. 430, 434 (Mar. 16, 1998) (Prodigy liable for advertising
15 “free” Internet service but failing to disclose at the outset that customers would be
16 charged if they did not cancel during the trial period); 16 C.F.R. § 251.1 (1998).
17 Therefore, it is abundantly relevant to the central issue in this case.

18 Separate Statement Paragraph 21: Objection to Exhibit J to the Nguyen Decl.
19 on the grounds that it is misleading, incomplete and contains irrelevant hearsay. To
20 the extent it is offered to show the exchange between Mssrs. Liu and Nye, it is
21 incomplete. Fed. R. Evid. 106. To the extent it is offered to show that LegalZoom’s
22 legal department raised these alleged issues, it is irrelevant hearsay, since the
23 initiation of the conversation is not at issue. Fed. R. Evid. 401, 402, 801, 802.
24 LegalZoom’s evidence shows no communication between mid-November 2011 and
25 November 2012, when Rocket Lawyer was served with papers for this dispute.
26 Therefore to the extent the evidence is offered to show that LegalZoom sought to
27 resolve this dispute out of court before filing this lawsuit, it is misleading. Fed. R.
28 Evid. 403.

1 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 21:

2 The exhibit to which Rocket Lawyer objects, which reflects communications between
3 Rocket Lawyer and LegalZoom principals, are relevant and admissible. The
4 communications are relevant to the extent they indicate Rocket Lawyer’s state of
5 mind concerning the nature of their advertisements and may suggest Rocket Lawyer’s
6 motive in changing critical aspects of their website—thus excepting them from the
7 rule against hearsay since they are not offered to prove the truth of the matter. Fed. R.
8 Evid. 801 (c)(2). To the extent that they involve statements of an opposing party,
9 they are not hearsay at all. Federal Rule of Evidence 801 (d)(2).

10 That there are or may be additional communications does not render these
11 communications irrelevant or preclude introduction on the grounds that they are
12 incomplete or misleading under Federal Rule of Evidence 106. Federal Rule 106
13 does not mandate outright exclusion of the subject evidence. Rule 106 simply permit
14 a responding party, in certain circumstances and where certain factual predicates have
15 been established, to offer evidence rendering a “writing” or “recorded statement”
16 whose contents were allegedly incomplete, to submit the entirety of the writing or that
17 portion in order to make the writing complete. Here, however, Rocket Lawyer has
18 not clearly established why or how the subject screenshots are incomplete. Moreover,
19 Rocket Lawyer has not made the requisite showing indicating that “fairness” requires
20 the introduction of additional material. *U.S. v. Branch*, 91 F.3d 699 (1996); *U.S. v.*
21 *Boylan*, 898 F.2d 230 (1990), cert. denied, 111 S.Ct. 139 (noting that there is no “per
22 se rule requiring the admission of evidence in any case and that a preliminary decision
23 is required concerning what units contained in a document collection constitutes a
24 “fair and reasonably” complete unit of material). Moreover, by now, Rocket Lawyer
25 should have proffered whatever evidence it believes is necessary to make this
26 submission complete. If not, it certainly had the opportunity to do so.

27 Finally, the fact that these communications took place nearly a year prior to the
28 filing of the lawsuit also does not preclude the introduction of this evidence under

1 Federal Rule of Evidence 403. First, there is nothing inherently misleading about the
2 communications. Second, their having taken place a year before the lawsuit is
3 insufficient, in light of the circumstances, to support a conclusion that the danger of
4 misleading this Court substantially outweighs the probative value of the
5 communications. Proximity in time is only one fact the Court weighs in balancing
6 whether the misleading nature of evidence outweighs the probative value of a piece of
7 evidence. Here, all other indicia point to the inclusion of the evidence, which goes to
8 a central issue in the case—evidence of Rocket Lawyer’s intent.

9 Separate Statement Paragraph 22: Objection to Exhibit J to the Nguyen Decl.
10 on the grounds that it is incomplete. To the extent it is offered to show the exchange
11 between Mssrs. Liu and Nye, it is incomplete. Fed. R. Evid. 106.

12 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 22:
13 The exhibit to which Rocket Lawyer objects, which reflects communications between
14 Rocket Lawyer and LegalZoom principals, are relevant and admissible. The
15 communications are relevant to the extent they indicate Rocket Lawyer’s state of
16 mind concerning the nature of their advertisements and may suggest Rocket Lawyer’s
17 motive in changing critical aspects of their website—thus excepting them from the
18 rule against hearsay since they are not offered to prove the truth of the matter. Fed. R.
19 Evid. 801 (c)(2). To the extent that they involve statements of an opposing party,
20 they are not hearsay at all. Federal Rule of Evidence 801 (d)(2).

21 That there are or may be additional communications does not render these
22 communications irrelevant or preclude introduction on the grounds that they are
23 incomplete or misleading under Federal Rule of Evidence 106. Federal Rule 106
24 does not mandate outright exclusion of the subject evidence. Rule 106 simply permit
25 a responding party, in certain circumstances and where certain factual predicates have
26 been established, to offer evidence rendering a “writing” or “recorded statement”
27 whose contents were allegedly incomplete, to submit the entirety of the writing or that
28 portion in order to make the writing complete. Here, however, Rocket Lawyer has

1 not clearly established why or how the subject screenshots are incomplete. Moreover,
2 Rocket Lawyer has not made the requisite showing indicating that “fairness” requires
3 the introduction of additional material. *U.S. v. Branch*, 91 F.3d 699 (1996); *U.S. v.*
4 *Boylan*, 898 F.2d 230 (1990), cert. denied, 111 S.Ct. 139 (noting that there is no “per
5 se rule requiring the admission of evidence in any case and that a preliminary decision
6 is required concerning what units contained in a document collection constitutes a
7 “fair and reasonably” complete unit of material). Moreover, by now, Rocket Lawyer
8 should have proffered whatever evidence it believes is necessary to make this
9 submission complete. If not, it certainly had the opportunity to do so.

10 Separate Statement Paragraph 23: Objection to Exhibit K to the Nguyen Decl.
11 on the grounds that it is irrelevant and contains irrelevant hearsay and an improper
12 legal conclusion. To the extent that it is offered to show that LegalZoom took issue
13 with Rocket Lawyer’s advertising, it is irrelevant hearsay since LegalZoom’s state of
14 mind is not at issue. Fed. R. 401, 402, 801, 802. To the extent it is offered to show
15 that state-imposed fees negate a free service, it is an improper legal conclusion. Fed.
16 R. Civ. Proc. 56(c)(4); L.R. 7-7.

17 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 23:
18 LegalZoom offers evidence of communications between principals of Legal Zoom
19 and Rocket Lawyer not for the truth of the matter—here, the content of the FTC’s
20 guidance in connection with advertisements—but to show that Rocket Lawyer
21 received communications questioning the ads. The receipt of such communications is
22 relevant to the state of mind of Rocket Lawyer and whether Rocket Lawyer was on
23 notice regarding the legality of its practices prior to the time of the filing of the
24 Complaint. To the extent that they involve statements of an opposing party, they are
25 not hearsay at all. Federal Rule of Evidence 801 (d)(2). Contrary to Rocket Lawyer’s
26 assertions, simply because the document may support LegalZoom’s position here
27 does not render the document itself a legal conclusion; it is simply a communication.

28 Separate Statement Paragraph 24: Objection to Exhibit K to the Nguyen Decl.

1 on the grounds that it is irrelevant, misleading, and contains irrelevant hearsay and an
2 improper legal conclusion. To the extent it is offered to show that Rocket Lawyer has
3 violated the Federal Trade Commission’s guidelines regarding the use of the word
4 free (“FTC Guide”), it is irrelevant, since compliance with the FTC Guide is not at
5 issue, hearsay, misleading, and an improper legal conclusion. Fed. R. Evid. 401, 402,
6 403, 801, 802; Fed. R. Civ. Proc. 56(c)(4); L.R. 7-7. Furthermore, to the extent it is
7 offered to show the requirements of the FTC Guide, it is not the best evidence, which
8 would be the Guide itself. Fed. R. Evid. 1001, 1002.

9 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 24:

10 LegalZoom offers evidence of communications between principals of Legal Zoom
11 and Rocket Lawyer, which are relevant to the extent that they show that Rocket
12 Lawyer received communications questioning the ads. Moreover, the receipt of such
13 communications is relevant to the state of mind of Rocket Lawyer and whether
14 Rocket Lawyer was on notice regarding the legality of its practices prior to the time
15 of the filing of the Complaint. As such, these communications do not represent
16 hearsay. *See, e.g., Drew v. Equifax Information Services, LLC*, 690 F.3d 1100, 1008
17 (9th Cir. 2012). To the extent that they involve statements of an opposing party, they
18 are not hearsay at all. Federal Rule of Evidence 801 (d)(2).

19 Finally, no other purported objection compels a conclusion that the evidence
20 should be excluded. Contrary to Rocket Lawyer’s representations, the evidence is not
21 being submitted to prove the contents of the FTC Guide. Federal Rule of Evidence
22 1002, is, therefore, not an issue here. Moreover, there is nothing inherently
23 misleading about these communications or anything that has been asserted by Rocket
24 Lawyer that would lay the foundation for exclusion of the evidence on the ground that
25 its probative value is substantially outweighed by the danger of confusing this Court.

26 Separate Statement Paragraph 25: Objection to Exhibit K to the Nguyen Decl.

27 on the grounds that it is misleading, prejudicial, hearsay, and an improper legal
28 conclusion. To the extent that it is offered to show that any of Rocket Lawyer’s

1 advertisements were misleading, the exhibit is misleading and prejudicial, hearsay,
2 and an improper legal conclusion. Fed. R. Evid. 403, 801, 802; Fed. R. Civ.
3 Proc.56(c)(4); L.R. 7-7.

4 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 25:

5 LegalZoom offers evidence of communications between principals of Legal
6 Zoom and Rocket Lawyer, which are relevant to the extent that they show that Rocket
7 Lawyer received communications questioning the ads. Moreover, the receipt of such
8 communications is relevant to the state of mind of Rocket Lawyer and whether
9 Rocket Lawyer was on notice regarding the legality of its practices prior to the time
10 of the filing of the Complaint. As such, these communications do not represent
11 hearsay. *See, e.g., Drew v. Equifax Information Services, LLC*, 690 F.3d 1100, 1008
12 (9th Cir. 2012). To the extent that they involve statements of an opposing party, they
13 are not hearsay at all. Federal Rule of Evidence 801 (d)(2).

14 Finally, no other purported objection compels a conclusion that the evidence
15 should be excluded. Contrary to Rocket Lawyer’s representations, the evidence is not
16 being submitted to prove the contents of the ads themselves, and both Rocket Lawyer
17 and LegalZoom have submitted original source documents for the ads themselves.
18 Federal Rule of Evidence 1002, is, therefore, not an issue here. Moreover, there is
19 nothing inherently misleading about these communications or anything that has been
20 asserted by Rocket Lawyer that would lay the foundation for exclusion of the
21 evidence on the ground that its probative value is substantially outweighed by the
22 danger of confusing this Court.

23 Separate Statement Paragraph 26: Objection to Exhibit L to the Nguyen Decl.

24 on the grounds that it is hearsay and not the best evidence. To the extent that it is
25 offered to show that Rocket Lawyer’s advertisements of free services had not been
26 changed or removed, it is hearsay and not the best evidence of that purported fact.
27 Fed. R. Evid. 801, 802, 1001, 1002.

28 Response to Rocket Lawyer’s Objection to Separate Statement Paragraph 26:

1 LegalZoom offers evidence of communications between principals of Legal Zoom
2 and Rocket Lawyer, which are relevant to the extent that they show that Rocket
3 Lawyer received communications questioning the ads. Moreover, the receipt of such
4 communications is relevant to the state of mind of Rocket Lawyer and whether
5 Rocket Lawyer was on notice regarding the legality of its practices prior to the time
6 of the filing of the Complaint. As such, these communications do not represent
7 hearsay. *See, e.g., Drew v. Equifax Information Services, LLC*, 690 F.3d 1100, 1008
8 (9th Cir. 2012). To the extent that they involve statements of an opposing party, they
9 are not hearsay at all. Federal Rule of Evidence 801 (d)(2).

10 Finally, no other purported objection compels a conclusion that the evidence
11 should be excluded. There is nothing inherently misleading about these
12 communications or anything that has been asserted by Rocket Lawyer that would lay
13 the foundation for exclusion of the evidence on the ground that its probative value is
14 substantially outweighed by the danger of confusing this Court.

15 Separate Statement Paragraph 27: Objection to Exhibit L to the Nguyen Decl.
16 on the grounds that it is hearsay, misleading and prejudicial, and an improper legal
17 conclusion. To the extent it is offered to show that Rocket Lawyer's conduct
18 constituted false advertising or unfair competition, it is misleading and prejudicial,
19 hearsay, and an improper legal conclusion. Fed. R. Evid. 403, 801, 802; Fed. R. Civ.
20 Proc. 56(c)(4); L.R. 7-7.

21 Response to Rocket Lawyer's Objection to Separate Statement Paragraph 27:
22 LegalZoom offers evidence of communications between principals of Legal Zoom
23 and Rocket Lawyer, which are relevant to the extent that they show that Rocket
24 Lawyer received communications questioning the ads. Moreover, the receipt of such
25 communications is relevant to the state of mind of Rocket Lawyer and whether
26 Rocket Lawyer was on notice regarding the legality of its practices prior to the time
27 of the filing of the Complaint. As such, these communications do not represent
28 hearsay. *See, e.g., Drew v. Equifax Information Services, LLC*, 690 F.3d 1100, 1008

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(9th Cir. 2012). To the extent that they involve statements of an opposing party, they are not hearsay at all. Federal Rule of Evidence 801 (d)(2).

Finally, no other purported objection compels a conclusion that the evidence should be excluded. There is nothing inherently misleading about these communications or anything that has been asserted by Rocket Lawyer that would lay the foundation for exclusion of the evidence on the ground that its probative value is substantially outweighed by the danger of confusing this Court.

DATED: October 7, 2013

Respectfully submitted,

GLASER WEIL FINK JACOBS
HOWARD AVCHEN & SHAPIRO LLP

By: /s/ Fred Heather
PATRICIA L. GLASER
FRED D. HEATHER
MARY ANN T. NGUYEN
Attorneys for Plaintiff
LegalZoom.com, Inc.

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 10250 Constellation Boulevard, 19th Floor, Los Angeles, California 90067.

On October 7, 2013, I electronically filed the following document(s) using the CM/ECF system.

**PLAINTIFF LEGALZOOM.COM, INC.’S RESPONSE TO ROCKET
LAWYER’S MEMORANDUM OF EVIDENTIARY OBJECTIONS**

Participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury that the above is true and correct.

Executed on October 7, 2013 at Los Angeles, California.

/s/ Fred Heather
Fred Heather

Glaser Weil Fink Jacobs
Howard Avchen & Shapiro LLP

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