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13 UNITED STATES DISTRICT COURT
 14 CENTRAL DISTRICT OF CALIFORNIA
 15 WESTERN DIVISION

16 LEGALZOOM.COM, INC., a Delaware
 17 corporation,

18 Plaintiff,

19 v.

20 ROCKET LAWYER INCORPORATED,
 21 a Delaware corporation,

22 Defendant.

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

Hon. Gary A. Feess
 Courtroom: 740

**MEMORANDUM OF POINTS AND
 AUTHORITIES OF PLAINTIFF
 LEGALZOOM.COM, INC. IN
 OPPOSITION TO ROCKET
 LAWYER INCORPORATED'S
 MOTION FOR SUMMARY
 JUDGMENT AND/OR
 ADJUDICATION;**

Date: August 18, 2014
 Time: 9:30 a.m.
 Courtroom: 740

[Statement of Genuine Disputes;
 Declaration of Patricia J. Winograd,
 Declaration of Alan Goedde,
 Declaration Dr. Bruce Isaacson and
 Notice of Lodging, filed concurrently
 herewith]

Complaint Filed: November 20, 2012

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1 **I. INTRODUCTION**

2 In connection with LegalZoom’s motion for summary judgment which was
3 decided last October, Rocket Lawyer argued, and this Court repeatedly held, that
4 whether advertising is considered actionable as false or misleading under the Lanham
5 Act, or as unfair competition under state law, presents issues of fact which must be
6 resolved by a jury. For example, this Court ruled that “literal falsity is a question of
7 fact, and summary judgment should not be granted where a reasonable jury could
8 conclude a statement is not false.” ECF No. 44, p. 7. Similarly, this Court ruled that
9 “[w]hether customers are ‘lured’ to Defendant’s website by its ‘free’ advertisements
10 and whether Defendant provides adequate disclosures are questions of fact that cannot
11 be resolved at the summary judgment stage.” *Id.* at p. 9. Rocket Lawyer’s motion
12 flies in the face of those rulings. It presents and fails to resolve numerous factual
13 issues.

14 First, to succeed on summary judgment, Rocket Lawyer would have to disprove
15 *both* literal falsity and the likelihood of misleading or confusing consumers. Either
16 basis provides an independent ground for LegalZoom to prevail, but Rocket Lawyer
17 has failed to establish either issue as a matter of law. On the issue of literal falsity,
18 this Court has already recognized that a jury will necessarily have to evaluate that
19 question. Moreover, Rocket Lawyer’s marketing expert has admitted in deposition
20 that his survey does not address that question. As to the issue of whether Rocket
21 Lawyer’s advertisements likely mislead or confuse consumers, this case presents a
22 classic “battle of experts” with competing opinions from both sides. The survey
23 evidence relied upon by Rocket Lawyer is fatally flawed and inconclusive on whether
24 use of the term “free” in the ads causes consumers to be either confused or misled, as
25 alleged by LegalZoom. Rocket Lawyer’s argument that LegalZoom’s survey is
26 technically flawed, at most, concerns the *weight* and not the admissibility of the
27 survey, and does not suffice to establish an absence of triable issues of fact. The very
28 presence of dueling surveys necessarily create issues of fact, which must be weighed

1 by the trier of fact. *LG Electronics USA Inc. v. Whirlpool Corp.*, 661 F.Supp.2d 940,
2 956 (N.D. Ill. 2009) (the question of how much weight to attribute the survey is for
3 the trier of fact to decide).

4 Second, Rocket Lawyer's motion misstates LegalZoom's allegations and
5 misapplies the law to those allegations.

6 Third, discovery in this case is not yet complete. No percipient witness
7 depositions have been taken, and documents are still being produced. It would be
8 fundamentally unfair to resolve the case on a summary judgment motion that was filed
9 before Rocket Lawyer completed its promised document production and before
10 Rocket Lawyer produced a single percipient witness for deposition.

11 Fourth, significant evidence suggests that Rocket Lawyer acted willfully in its
12 desire to mislead the public by its ads which argument, if accepted at trial, would
13 entitle LegalZoom to a presumption which Rocket Lawyer would have the burden to
14 rebut at trial and which it has not done as a matter of law.

15 Fifth and finally, Rocket Lawyer's motion fails to address all of LegalZoom's
16 claims in this case, including its unfair competition claims.

17 For each of the above reasons, summary judgment should be denied, and the
18 matter should proceed to trial as to LegalZoom's claims.

19 **II. SUMMARY JUDGMENT BURDENS AND STANDARDS**

20 A moving party without the ultimate burden of persuasion at trial has both the
21 initial burden of production and the ultimate burden of persuasion on a motion for
22 summary judgment. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d
23 1099, 1102 (9th Cir. 2000). The moving party may support its motion for summary
24 judgment by disproving an essential element of the opposing party's claim or showing
25 that the opposing party lacks sufficient evidence to carry its ultimate burden of
26 persuasion at trial. *Id.* In opposing summary judgment, the non-moving party "must
27 show that evidence in the record could lead a rational trier of fact to find in its favor."
28 Order. at 4. On summary judgment, the court draws all reasonable factual inferences

1 in favor of the non-movant. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255, 106
2 S.Ct. 2505, 91 L.Ed.2d 202 (1986)

3 **III. THIS COURT'S PRIOR RULING ON SUMMARY JUDGMENT**

4 On October 17, 2013, this Court denied LegalZoom's motion for summary
5 judgment. In so doing, this Court recognized that summary judgment was an
6 "extraordinarily high hurdle to clear at this stage of the proceedings." ECF No. 44, p.
7 6. As to the literal falsity determination, the Court ruled that in the Ninth Circuit such
8 a determination "is a question of fact." *Id.* at 7. Accordingly, the Court found that the
9 issue of literal falsity was one to be decided by the jury, and not the Court.
10 Defendants have provided no evidence to alter the basis for the Court's conclusion.
11 *Id.* at 7-8. As to allegations that consumers are misled, the Court ruled that "[w]hether
12 customers are 'lured' to Defendant's website by its 'free' advertisements and whether
13 Defendant provides adequate disclosures are questions of fact that cannot be resolved
14 at the summary judgment stage." *Id.* at p. 9. As to allegations that consumers were
15 deceived, this Court cited *Johnson & Johnson * Merck Consumer Pharmaceuticals*
16 *Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 297 (2d Cir. 1992) for the
17 proposition that "It is not for the judge to determine, based solely upon his or her
18 intuitive reaction, whether the advertisement is deceptive." Based on the Court's prior
19 rulings, Rocket Lawyer cannot possibly meet its burden to establish the absence of
20 triable issues of fact in connection with LegalZoom's claims.

21 **IV. ROCKET LAWYER MISSTATES AND FAILS TO ADDRESS**
22 **LEGALZOOM'S ALLEGATIONS**

23 The gravamen of LegalZoom's suit is that Rocket Lawyer's advertisements
24 surrounding its business formation and other products are literally false and
25 misleading because the ads boast that consumers can incorporate for "free" and
26 receive other services allegedly for "free." Statement of Genuine Disputes ("SGD") at
27 96. LegalZoom alleges these ads are false and misleading because use of the word
28 "free" in the advertisement is belied by the fact that consumers are ultimately required

1 to pay a state filing fee and/or fees to Rocket Lawyer itself in order to avail
2 themselves of the purportedly “free” services. SGD at 97. Costs and conditions are
3 therefore attached to the receipt of the allegedly “free” services, which costs and
4 conditions are not contained in the text of any of Rocket Lawyer’s business formation
5 ads or in close proximity to statements on its website that its services are free. SGD at
6 98. For example, Rocket Lawyer purports to offer “free help from local attorneys”
7 and “free legal review.” SGD at 99. However, the terms and conditions upon which
8 receipt of these allegedly “free” services are conditioned and available are revealed on
9 Rocket Lawyer’s website at a location other than the page on which the offer is
10 conveyed. SGD at 100, 101. LegalZoom complains, thus, that Rocket Lawyer is
11 misleading consumers as to the true nature of the services that Rocket Lawyer offers,
12 so as to lure unsuspecting consumers by its false advertising.¹

13 In addition to the false and misleading nature of the advertisements, LegalZoom
14 contends that Rocket Lawyer’s advertisements violate directives of the Federal Trade
15 Commission governing the use of the word “free” and the California unfair
16 competition statutes and, thus, constitute unfair competition. SGD at 102.
17 LegalZoom’s complaint further asserts that Rocket Lawyer’s use of advertising
18 containing the word “free,” has not only misled the public to LegalZoom’s detriment
19

20 ¹ In this way, Rocket Lawyer’s conduct is tantamount to a “bait and switch” tactic,
21 commonly referred to in the trademark context as “initial interest confusion,” by
22 which advertisers attempt to capitalize on and exploit the goodwill of its competitors.
23 *General Steel Domestic Sales, LLC v. Chumley*, No. 10-cv-01398-PAB-KLM, 2013
24 WL 1900562, at *9 (D. Colo. 2013) (“Initial interest confusion is a ‘bait and switch’
25 tactic that permits a competitor to lure consumers away from a service provider by
26 passing off services as those of the provider, notwithstanding that the confusion is
27 dispelled by the time of sale.”); *Vail Associates, Inc. v. Vend-Tel-Co., Ltd.* 516 F.3d
28 853, 872 (10th Cir. 2008) (“Initial interest confusion is a ‘bait and switch’ tactic that
permits a competitor to lure consumers away from a service provider by passing off
services as those of the provider, notwithstanding that the confusion is dispelled by the
time of sale.) Just as this tactic is not permitted in the trademark context, it should not
be the case that Rocket Lawyer could lie to or mislead a consumer in its
advertisements as long as it corrects the falsity or deceptiveness of the ad by including
information about the true nature, terms and conditions of the goods and services on
its website before the consumer buys its products.

1 but has allowed Rocket Lawyer to compete unfairly and has caused LegalZoom other
2 harm, including the potential decline in sales and market share, loss of goodwill and
3 additional losses and damages. SGD at 103. For these violations, LegalZoom seeks
4 injunctive relief. SGD at 104.

5 Rocket Lawyer largely ignores these allegations, and instead focuses the
6 Court's attention on whether consumers who are led through a "typical consumer
7 journey from the advertisement to the point of purchase" are misled into buying
8 Rocket Lawyer's products based on a belief that no fees are associated with
9 incorporating or starting a free trial. SGD at 105. This is not what LegalZoom
10 alleges, and this is not the applicable standard for determining whether Rocket Lawyer
11 is guilty of false advertising or unfair competition. Under the Lanham Act, the
12 elements of a false advertising claim include whether "the statement actually deceived
13 *or* has the tendency to deceive a substantial segment of its audience" and whether the
14 statement is "material, in that it is likely *to influence* the purchasing decision."
15 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997)
16 (emphasis added). Accordingly, LegalZoom should prevail upon its Lanham Act
17 claim as long as it can show that, for example, customers were lured to defendant's
18 website by their "free" business formation ads – and LegalZoom is not required to
19 show that the statement actually led to purchases of Rocket Lawyer products under
20 false pretenses. *Id.* In addition, Rocket Lawyer has no basis for establishing that
21 there is any "typical consumer journey" associated with how consumers view and are
22 impacted by Rocket Lawyer advertisements. A jury will have to decide these
23 questions – not the Court.

24 **V. ROCKET LAWYER'S SURVEY EVIDENCE IS FATALY FLAWED**
25 **AND INCONCLUSIVE**

26 The survey evidence prepared by Rocket Lawyer's expert, Dr. Wind, is not only
27 inadmissible hearsay, it is also unreliable, based on several intractable problems.
28

1 **A. Dr. Wind Fails to Measure How The Term “Free” Affects Consumer**
2 **Behavior**

3 Notwithstanding that LegalZoom’s complaint is focused squarely upon Rocket
4 Lawyer’s use of the term “free” in the subject advertising, and notwithstanding that
5 LegalZoom has provided three expert opinions which describe the misleading and
6 unfair impact of the word “free” in that advertising, Rocket Lawyer has made an
7 astonishing tactical choice to ignore the word “free” in developing its market research
8 and in presenting its market survey evidence. SGD at 106, 107. Thus, if the Court
9 looks carefully at the survey evidence prepared by Rocket Lawyer’s expert, Dr. Wind,
10 the Court will find that Dr. Wind’s survey is based on a “control” advertisement which
11 is the original Rocket Lawyer ad containing the phrase “Incorporate for free,” together
12 with a “test” advertisement (the modified ad) which also contains the phrase
13 “Incorporate for free.” SGD at 108. Only by comparing the consumer responses to
14 these separate ad stimuli does Dr. Wind purport to offer opinions that there is no
15 significant difference in response to the original Rocket Lawyer ad (the control ad) and
16 the ad which was modified to supposedly address LegalZoom’s allegations (the test
17 ad).² SGD at 109. In any event, Dr. Wind’s placement of the Rocket Lawyer test and
18 control ads, on a busy page with complex other content, makes the differences in the
19 ads very hard to notice, and minimizes the potential for respondents to be affected
20 differently by the ads. These significant flaws in Dr. Wind’s study renders it
21 completely useless to establish a defense to LegalZoom’s claims.

22 ² Across the 13 screens of information presented to respondents in Dr. Wind’s survey,
23 there are only minor differences between the test (modified ad content) and control
24 (original ad content), and only on the pages concerning the Rocket Lawyer search
25 engine ads. The test ad provides additional text which reads “Only Pay California
26 State Fees!” and removes “RocketLawyer.com” and “Pay No Fees” from the headline.
27 Another difference between test and control in the free trial survey is that 3 lines of
28 text on Image 8 are highlighted in red on the test cell, but not in the control cell. These
29 changes between test and control are difficult to observe on their own, and even more
30 difficult to notice when they are presented with 20 additional ads and 8 suggested
31 searches, followed by a long series of Rocket Lawyer website pages. This survey
32 design makes it almost impossible for respondents to notice the details of a test
33 stimulus or control stimulus. Dr. Wind’s survey, therefore, unfairly concludes there is
34 no effect associated with the Rocket Lawyer ads and website pages disputed in this
35 matter.

1
2 **B. Dr. Wind Measures Consumer Behavior Based on a “Consumer Journey” For Which There is No Basis**

3 Dr. Wind purports to have designed a survey in which it took respondents
4 through the “typical consumer journey” from the advertisement to the point of
5 purchase,” but there is no basis for Dr. Wind to believe that the journey taken was
6 “typical” in any sense, and Dr. Wind admitted as such in his deposition. SGD at 110.
7 Indeed, there is no “typical” way a consumer can be said to move through the 13 or 14
8 web pages that Dr. Wind takes the survey respondents through before he asks them
9 questions. SGD at 111. Moreover, LegalZoom’s claims are not related to the
10 purchase process. SGD at 112. The claims address consumer impressions formed at
11 the point of reviewing an advertisement, before the point of purchase, not after the
12 consumer has already been misled into embarking on the purchase journey. SGD at
13 113. The majority of Dr. Wind’s complicated stimuli do not even involve information
14 on the website that a consumer allegedly sees before making the purchasing decision.
15 SGD at 114. Of the 12 pages of stimuli shown to respondents, only two pertain to
16 information that relate to price, terms or conditions. SGD at 115. The majority of the
17 pages of the website shown to respondents are pages that a consumer would only see
18 *after* making a purchasing decision. SGD at 116. As such, Dr. Wind’s survey cannot
19 speak to the issue raised by LegalZoom’s complaint – whether Rocket Lawyer’s
20 advertisements improperly lure unsuspecting consumers to its website to LegalZoom’s
21 detriment.

22
23 **C. Dr. Wind’s Survey Results Are Based on an Inadequate Pool of Respondents**

24 Dr. Wind’s survey is based on a decision tree which includes five separate
25 levels. SGD at 117. At each level, survey respondents are eliminated from
26 consideration by Dr. Wind because they are deemed not to be candidates for potential
27 deception by Rocket Lawyer ads. SGD at 118. By the time Dr. Wind reaches the
28 bottom level of the decision tree, in which he purports to test whether the ads actually

1 have an impact in causing confused or misled respondents to choose Rocket Lawyer
2 products for purchase, there are only 15 respondents in the test group as compared
3 against 13 in the control group. SGD at 119. This tiny pool of respondents cannot
4 possibly be relied upon to establish consumer behavior in the online marketplace. Dr.
5 Wind's reading of 46.7% at the bottom of Figure 1 of his Original Report is based on
6 15 interviews. SGD at 120. At the 95% level of confidence, this number has a margin
7 of error of +/- 25%, meaning that the true number could be as low as 21.5%, or as high
8 as 71.9%. SGD at 121. The range is so wide as to make this number meaningless
9 from a statistical standpoint.

10
11 **D. Dr. Wind's Survey Fails to Establish Any Connection Between a
Lack of Interest in Exploring Rocket Lawyer and Deception**

12 Dr. Wind fails to articulate any connection between a lack of interest in
13 exploring Rocket Lawyer's website, and deception. In other words, at step 1 of his
14 decision tree, he eliminates respondents based on them answering that they are not
15 interested in Rocket Lawyer or in exploring Rocket Lawyer's website. SGD at 122.
16 Wind says that he disqualifies them from the survey because they are not within a
17 group that has a potential to be deceived (i.e., tricked into buying a Rocket Lawyer
18 product). SGD at 123. But there is no guarantee that such respondents were not
19 deceived (i.e., misled) by the ad, but still decided not to explore Rocket Lawyer for
20 other reasons.

21
22 **E. Dr. Wind's Survey Includes Respondents Who Were Not Properly
Qualified**

23 Dr. Wind also failed to properly qualify respondents as past and/or prospective
24 purchasers of online legal products. Dr. Wind qualifies respondents by asking if they
25 "looked for" online legal products. SGD at 124. But this does not necessarily capture
26 "potential purchasers," which is the group that even Dr. Wind believes is appropriate
27 to test. Moreover, he fails to ever ask whether respondents are really "consumers" of
28 online legal products, in the sense that they have used or would use such products.

1 SGD at 125. Moreover, Dr. Wind has no basis for his conclusions (and his chart) that
2 respondents who “may or may not” purchase online legal products are more likely than
3 not going to purchase such products, and, therefore, no basis for including such
4 respondents into the survey experiment. Ultimately, a failure to properly qualify
5 respondents in an effort to ensure that the proper universe of individuals is surveyed
6 provides an additional, independent reason to disregard Dr. Wind’s survey. It is
7 fundamental that a false advertising survey consist of the proper universe. A survey
8 conducted of the wrong universe of respondents may be irrelevant.³ “The proper
9 universe for a consumer perception survey usually consists of potential purchasers (or
10 both past and potential purchasers) of the advertised product or service.” Deborah Jay,
11 Ten Truths of False Advertising Surveys, 103 Trademark Rep. 1116, 1121 (2013).
12 Because Dr. Wind includes in his survey results a variety of people who “may or may
13 not” be looking for online legal products, at least ¼ of the respondent pool should have
14 been excluded.

15 **F. Dr. Wind Had an Unacceptable Lack of Involvement in The Survey.**

16 Dr. Wind’s survey is flawed in other material respects, including that Dr. Wind
17 had an unacceptable lack of involvement in pre-testing, data review, coding, and
18 analysis in connection with his survey.

19 **VI. LEGALZOOM’S SURVEY EVIDENCE DEMONSTRATES**
20 **CONSUMERS WERE MISLED BY ROCKET LAWYER’S**
21 **ADVERTISEMENTS**

22 Responsive to the Court’s prior summary judgment ruling, LegalZoom has
23 developed market survey evidence from which a reasonable juror could conclude that
24 Rocket Lawyer’s ads are misleading. A jury should be entitled to consider that
25 evidence and weigh it against the survey evidence relied upon by Rocket Lawyer, and
26

27 ³ 32:159, “Relevant ‘universe’ surveyed – Defining the universe,” in *McCarthy on*
28 *Trademarks and Unfair Competition*, By J. Thomas McCarthy, Fourth Edition,
database updated March 2009.

1 Rocket Lawyer therefore cannot prove, as a matter of law, that its ads are not
2 misleading. “As a general rule, summary judgment is inappropriate where an expert’s
3 testimony supports the nonmoving party’s case.” *Southland Sod*, 108 F.3d at 1144.
4 *See also, Morningware v. Hearthware Home Products*, No. 09 C 4348, 2012 WL
5 3721350, at *12 (N.D. Ill. 2012) (“[i]t is simply not the Court’s province to weigh
6 expert testimony at the summary judgment stage.”); *LG Electronics USA Inc. v.*
7 *Whirlpool Corp.*, (“the question of how much weight to attribute the survey is for the
8 trier of fact to decide”).

9 A survey conducted by LegalZoom’s expert, Dr. Bruce Isaacson, determined
10 that 41% of respondents shown the subject business formation ads believed that they
11 could incorporate or form an LLC for free—that is, without paying any fees to any
12 entity or organization (including a state or Rocket Lawyer)—as opposed to 0.3% of
13 consumers in the control group, who were shown an advertisement that removed the
14 word “free” and otherwise made it clear that state fees would need to be paid for the
15 incorporation. SGD at 126. Dr. Isaacson similarly found that an overwhelming
16 majority of respondents indicated that the amount of fees paid would influence their
17 decision regarding which service provider to select—thereby establishing materiality.
18 SGD at 127. In one case, more than 82% of respondents indicated that the cost would
19 affect their purchase decision; in the other, 88.9% so indicated. SGD at 128.

20 **A. Rocket Lawyer’s Arguments Do Not Undermine Dr. Isaacson’s**
21 **Survey and Only Go to the Weight of LegalZoom’s Evidence, not its**
22 **Admissibility**

23 Although Rocket Lawyer seeks to discredit Dr. Isaacson’s survey as flawed and
24 irrelevant, Rocket Lawyer’s criticisms are without merit and, in any event, cannot
25 serve to eliminate triable issues of fact. Rocket Lawyer, for example, complains that
26 Dr. Isaacson failed to replicate market conditions by failing to show respondents the
27 ads without information appearing elsewhere on the Rocket Lawyer website. Rocket
28 Lawyer also admonished Dr. Isaacson for “allow[ing]. . . consumers to access stimuli
or the challenged ads at all times during the survey”—otherwise referred to as giving

respondents a “reading test.” However, Dr. Isaacson’s survey methodology is consistent with accepted practices.

1. **Dr. Isaacson ensured that respondents were poised to actually understand the subject ads.**

First, Dr. Isaacson properly focused respondents on the entire offending advertisements to ensure that respondents could render an opinion concerning the message of the ad being conveyed. Where, as here, the purpose of the study is to understand the “ordinary message the consumer received,” Dr. Isaacson appropriately considered the “entire advertisement” in context, in the way in which a consumer would have viewed it and sought to understand it.⁴ See, e.g., *Muchkin, Inc. v. Playtex Products, LLC*, No. CV 11-00503 AHM (RZx), 2011 WL 2174383, at *12 (C.D. Cal. 2011) (courts are required to analyze a statement “in the context of the advertisement as a whole”); *Williams v. Gerber Products Co.*, 552 F.3d 934, 939 n. 3 (9th Cir. 2008) (dismissing argument that word “nutritious,” as used on packaging constituted puffery when viewed in the context of the packaging as a whole); *Summit Technology, Inc. v. High-Line Medical Instruments, Co.*, 933 F. Supp. 918, 931 (C.D. Cal. 1996) (“In the context of the entire advertisement, the phrase ‘perfectly reliable’ is not couched in terms that would indicate independent verifiability”); *Koehler v. Litehouse, Inc.*, 2012 WL 6217635, at *3 (N.D. Cal. 2012) (“To determine whether a reasonable consumer is likely to be deceived, the statement must be read in context of the entire advertisement.”) Dr. Isaacson focused the consumer on the entire ad to ensure that the respondent actually understood the message of the ad being conveyed.

The only cases cited by Rocket Lawyer for the proposition that Dr. Isaacson tested the ads “out of context” do not undermine Dr. Isaacson’s methodology or the manner in which Dr. Isaacson presented the ad content to respondents of the survey.

⁴ In stating that LegalZoom was required to provide survey evidence in connection with the question of whether the ads were misleading, the Court did not hold that that survey evidence must include a review of the entire Rocket Lawyer website.

1 *Scotts Co. v. United Indus. Corp.*, 315 F.2d 264 (4th Cir. 2002) involved a dispute
2 over an illustration that appears on the bag of a lawn care product designed to prevent
3 the growth of crabgrass. The plaintiff alleged that the illustration gave the impression
4 that the product prevented crabgrass even after it had reached a certain level of
5 growth/maturity, and that impression was deceptive because in fact the product only
6 prevented crabgrass pre-growth and up to a certain short timeframe (4 weeks) post-
7 growth. The survey in *Scotts* involved showing participants an empty bag of the
8 product, which had been folded in such a way that only the illustration was visible,
9 and not any wording that clarified that the product only worked pre-growth and post-
10 growth up to 4 weeks. In criticizing that survey, the court found that the allegedly
11 deceptive illustration should have been tested “in context,” meaning that the survey
12 participants should have been shown the entire bag, not just the illustration on one
13 quadrant of the bag. In *Sears, Roebuck & Co. v. Menard, Inc.*, Sears, 2003 WL
14 168642 (N.D. Ill. Jan. 24, 2003), cited by Rocket Lawyer, survey participants were
15 presented with only clips of the ads and portions of the commercial ads at issue.
16 There can be no argument made here that Dr. Isaacson failed to show respondents the
17 entirety of the ad, or showed merely portions of, the ad. Rocket Lawyer, therefore,
18 has no argument that Dr. Isaacson failed to appropriately test whether Rocket
19 Lawyer’s ads, in context, mislead or tend to mislead.

20
21 **2. Dr. Isaacson’s use of a reading test was appropriate under the
circumstances and in keeping with acceptable practices**

22 Second, contrary to Dr. Wind’s criticism, Dr. Isaacson’s use of a reading test
23 (which keeps the ad content in view while questions are asked) is more appropriate
24 than Dr. Wind’s memory test (which removes the content before the question is asked)
25 because it is more consistent with how consumers buy “high involvement” goods and
26 services where consumers think and deliberate before buying. (cite Isaacson). Courts
27 have routinely upheld reading tests and criticized memory test formats. For example,
28 *Novartis Consumer Health v. Johnson & Johnson-Merck Consumer Pharmaceuticals*

1 Co., (U.S.D.C., D. NJ) 129 F.Supp 2d 351 (2000). "... the Court finds that leaving the
2 products for the respondents to examine rather than taking the products away
3 replicates market conditions." See also *In Starter Corp, v. Converse, Inc.* 170 F.3d
4 286, 297 (2d Cir, 1999), a survey where products were covered with a cloth after
5 viewing was described as "little more than a memory test" that tested respondents'
6 ability to remember what they had been shown, but did not measure marketplace
7 confusion. In *Barre-Nat'l Inc. v. Barr Labs., Inc.*, 773 F.Supp 735, 745 n. 20 (D.N.J.
8 1991) the court criticized a survey of pharmacists that removed information that would
9 have been in front of the pharmacists during purchase decisions.⁵ As such, nothing
10 about Dr. Isaacson's methodology undermines the reliability of Dr. Isaacson's survey.

11 In any event, Rocket Lawyer's criticisms only attack the methodology and
12 design of Dr. Isaacson's survey. Issues concerning a survey's technical "unreliability"
13 (aside from their admissibility) go to the weight of the evidence and must be
14 considered by the trier of fact. *Southland Sod*, 108 F.3d at 1143 n. 8 ("a jury should be
15 able to determine whether asserted technical deficiencies undermine a survey's
16 probative value"); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1292 (9th
17 Cir.1992) ("Technical unreliability goes to the weight accorded a survey, not its
18

19 ⁵ Dr. Isaacson's survey also tested materiality using generally accepted principles.
20 Dr. Isaacson asked survey respondents whether information about the price (in the case
21 of the business formation ads) and information about the paid membership
22 requirement would affect their decision to purchase. SGD at 127. Asking respondents
23 a question concerning whether the information being manipulated in the control would
24 likely influence a purchasing decision is commonplace as a measure of materiality.
25 See, e.g., *Jones v. ConAgra Foods*, No. C 12-01633 CRB, 2014 WL 2702726, at *16
26 (N.D. Cal. 2014) (plaintiffs did NOT show materiality where their expert did NOT
27 survey customers as to whether the challenged statements affected their purchase
28 decisions); *Aviva Sports v. Fingerhut Direct Marketing*, 829 F.Supp.2d 802, 823 (D.
Minn. 2011) (affirming expert's methods as reliable because, among other things, the
expert included questions in the survey about what influenced the consumers'
purchasing decisions); *Bracco Diagnostics Inc v. Amersham Health Inc*, 627
F.Supp.2d 384, 446-448 (D. N.J. 2009) (court is critical of a survey in which the
expert did not ask questions about the consumers' purchasing decisions); *Millenium
Import Co v. Sidney Frank Importing Co*, No. Civ.03-5145 JRT/FLN, 2004 WL
1447915, at *8-*10 (D. Minn 2004) (sufficient to use survey responses that a
particular part of an advertisement affected purchasing decisions).

1 admissibility.”) (emphasis added); *CytoSport, Inc. v. Vital Pharmaceuticals, Inc.*, 894
2 F.Supp.2d 1285, 1292 (E.D. Cal. 2012) (an argument that a survey failed to replicate
3 market conditions concerns a survey’s “technical reliability arguments are meritorious,
4 but they go to the issue of weight rather than admissibility.”) (emphasis added).

5
6 **B. Rocket Lawyer’s Criticism of Dr. Isaacson Removing the Word
“Free” From His Control Ad is Without Merit**

7 Rocket Lawyer’s critique of Dr. Isaacson’s survey as not testing LegalZoom’s
8 allegations stems from Rocket Lawyer’s fundamental misconception of LegalZoom’s
9 case. Rocket Lawyer seeks to twist LegalZoom’s allegations as simply requiring more
10 disclosure, while it is plain from the operable complaint that LegalZoom is basing this
11 lawsuit on Rocket Lawyer’s use of the word “free” as a misleading term in the
12 advertisements.⁶ In the face LegalZoom’s actual allegations, Dr. Isaacson
13 appropriately tests the impressions a consumer has in viewing the ads complained of,
14 which include the term “free,” as compared to a modified ad which removes that term.
15 SGD at 129. Contrary to Rocket Lawyer’s suggestion, it was appropriate, and, in fact,
16 necessary that Dr. Isaacson remove the word in attempting to measure the impact of
17 Rocket Lawyer’s ads.

18 **VII. Triable Issues of Fact Preclude Summary Judgment**

19 **A. Whether the Ads are Literally False**

20 In denying LegalZoom’s motion for summary judgment premised on literal
21 falsity, the Court reminded the parties in quoting the Ninth Circuit, “literal falsity is a
22 question of fact, and summary judgment should not be granted where a reasonable jury
23 could conclude that a statement is not false.” *Southland Sod.*, 108 F.3d at 1144-45.
24 Moreover, Rocket Lawyer’s expert, Dr. Wind, admitted in deposition that his survey
25

26
27 ⁶ LegalZoom complains that the specific uses to which Rocket Lawyer has employed
28 the term “free” in its ads violates the Lanham Act and the California unfair
competition statutes. LegalZoom does not allege that the use of the term “free” could
never be lawfully included in advertisements.

1 was not designed to test literal falsity. SGD at 130. For that reason, Rocket Lawyer
2 has no evidence which establishes, as a matter of law, that its ad content using the term
3 “free” is not literally false. A jury must decide this question. On this basis alone, the
4 Court should deny Rocket Lawyer’s motion.

5 **B. Whether the Ads are Misleading/Confusing**

6 For the reasons set forth above, the survey evidence relied upon by Rocket
7 Lawyer on the subject of whether the ad content is misleading or confusing is fatally
8 flawed and unreliable; but, at a minimum, there is a triable issue of fact concerning the
9 differing conclusions reached by the competing experts. *Morningware v. Hearthware*
10 *Home Products*, 2012 WL 3721350, at *12 (“[i]t is simply not the Court’s province to
11 weigh expert testimony at the summary judgment stage.”). Moreover, one way to
12 view Dr. Wind’s survey results is that 60% of the test respondents and 80% of the
13 control respondents, in each case more than half, either misunderstand, or were in
14 some fashion, confused by or misunderstood the Rocket Lawyer ad content.

15 **1. Direct Evidence of Actual Consumer Confusion Exists That**
16 **Will be Preferred at Trial**

17 But even if this Court were to somehow reach the conclusion that Rocket
18 Lawyer’s survey evidence is more persuasive on the issue of whether its ads mislead,
19 additional evidence other than survey evidence can be produced and relied upon by
20 LegalZoom at trial. Survey evidence is not the only method by which one can show
21 that an ad is deceptive and misleading. Other, direct evidence may be admissible to
22 prove a Lanham Act violation. *Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105,
23 1110-1111 (9th Cir. 2012) (nothing in the Lanham Act, nor under our precedents,
24 requires a plaintiff to use . . . surveys) (citing *Southland Sod*, 108 F.3d at 1140); *U-*
25 *Haul Int’l, Inc. v. Jartran, Inc.*, 601 F. Supp. 1140, 1149 (D. Ariz.1984), (“Consumer
26 reliance as an element of a claim for damages under Section 43(a) of the Lanham Act,
27 can be shown by direct evidence such as testimony from individual members of the
28 buying public, or by circumstantial evidence, such as surveys of the buying public.”);

1 *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000),
2 (“Plaintiffs attempting to prove actual deception have to produce evidence of actual
3 consumer reaction to the challenged advertising or surveys showing that a substantial
4 number of consumers were actually misled by the advertisements.”); *PPX Enters., Inc.*
5 *v. Audiofidelity Enters., Inc.*, 818 F.2d 266, 271 (2d Cir. 1987) (“Actual consumer
6 confusion often is demonstrated through the use of direct evidence, e.g., testimony
7 from members of the buying public, as well as through circumstantial evidence, e.g.,
8 consumer surveys or consumer reaction tests.”)⁷

9 At trial, LegalZoom intends to produce direct evidence, in addition to its survey
10 evidence, demonstrating actual customer confusion. Indeed, Rocket Lawyer has
11 produced evidence and made material admissions, including in connection with the
12 two motions for summary judgment now brought to the Court’s attention, relating to
13 changes it has made to its website and advertisements since the filing of this lawsuit.
14 Rocket Lawyer has admitted that it changed its “free” business formation ads to
15 include a reference to filing fees. SGD at 131. The fact that Rocket Lawyer modified
16 its ads to provide a reference to filing fees demonstrates and is admissible evidence

17 _____
18 ⁷ Rocket Lawyer argues that a substantial segment of consumers could not have been
19 misled by its “free” ads, because the conversion rate of consumers who viewed such
20 ads is low. However, this representation is misleading: the fact is that Rocket
21 Lawyer’s own data shows that there is a substantially higher conversion rate among
22 those consumers who viewed Rocket Lawyers’ “free” ads without a disclosure of state
23 fees, compared with those consumers who viewed such ads with the disclosure of state
24 fees. SGD at 134. In other words, the use of Rocket Lawyer’s “free” ads that do **not**
25 contain information relating to state fees, allows Rocket Lawyer to capture, and thus,
26 convert consumers more often than the ads it has used that do contain information
27 relating to state fees. *Id.* The Free Business Formation ads that did not disclose state
28 fees have a conversion rate of 1.41% while the Free Business Formation ads that did
disclose state fees have a conversion rate of 0.63%. Therefore, by failing to disclose
state fees, Rocket Lawyer increased its conversion rate, and, hence, effectiveness, of
Free Business Formation ads by 124% $((1.41-0.63)/0.63 = 124\%)$. *Id.* Similarly,
Rocket Lawyer’s own information shows that when the Free Business Formation ads
are placed on LegalZoom keywords, (“Free LZ Triggered Business Formation ads”)
the ads have a conversion rate of 1.74%. The conversion rate of all 1.2 million ads is
1.33%. Therefore the presence of “legal” and “zoom” in a consumer search is 31%
 $((1.74-1.33)/1.33 = 31\%)$ more effective in generating conversions compared to the
average conversion rate of all 1.2 million Free Business Formation ads. *Id.*

1 showing that the prior ads were misleading. *See, e.g., Leatherman v Tool Group, Inc.*
2 *v. Coast Cutlery Co.* 823 F.Supp.2d 1150 (D.Or., 2011) (noting that the corrective
3 actions of an advertiser was an indirect admission supporting falsity). Rocket Lawyer
4 has also admitted that it has changed the terms and conditions, which set forth the
5 conditions under which members can receive access to its on call attorney service.
6 SGD at 132. Once again, these changes constitute evidence that the prior terms and
7 conditions were misleading.⁸

8 2. **LegalZoom May Be Entitled to a Presumption Concerning** 9 **Deception**

10 Finally, even if LegalZoom’s survey fails to establish consumers were actually
11 deceived by Rocket Lawyer’s advertising, evidence establishing willful misconduct by
12 Rocket Lawyer would entitle LegalZoom to a presumption that consumers have been
13 deceived. The “failure to establish that a significant number of consumers [are]
14 actually deceived is not necessarily fatal to [a plaintiff’s] case. If [the defendant has]
15 intentionally misled consumers, [the court will presume that] consumers were in fact
16 deceived and [the defendant] would have the burden of demonstrating otherwise.” *The*
17 *William H. Morris Co. v. Group W, Inc.*, 66 F.3d 255, 258 (9th Cir. 1995); *see Del*
18 *Webb Cmtys., Inc. v. Partington*, No. 2:08-cv-00571-RCJ-GW0046, 2009 WL
19 3053709, at *13 (D. Nev. 2009); *see also Novartis Consumer Health, Inc. v. Johnson*

20 ⁸ In addition, there is other direct evidence in the form of actual customer complaints
21 and testimonials that establishes actual confusion, that LegalZoom will proffer at trial.
22 Rocket Lawyer has, in fact, received direct complaints from consumers informing
23 Rocket Lawyer of their belief that they were deceived by Rocket Lawyer’s ads and the
24 content of Rocket Lawyer’s website. As a result of these complaints, Rocket Lawyer
25 was not just on notice that its use of the term “free” was confusing to its consumers,
26 but dedicated time—to the tune of hundreds of hours—and attention to answering its
27 customers’ complaints. SGD at 138. Other consumers complained directly to the
28 Better Business Bureau. These individuals should be allowed to testify. The
testimonials of Rocket Lawyer’s own consumers attesting to their own confusion and
their belief, based upon their individual experiences, that the subject ads and Rocket
Lawyer’s website content were misleading, at a minimum, establishes that Rocket
Lawyer has been aware that consumers found the ads and website to be misleading. In
the face of such evidence, which a jury should be entitled to consider, Rocket Lawyer
is not entitled to summary judgment.

1 & *Johnson-Merck Consumer Pharmaceuticals Co.*, 290 F.3d 578, 594 (3d Cir. 2002).
2 Indeed, where a defendant “intentionally misl[eads]” consumers, by “deliberate
3 conduct of egregious nature,” courts may presume that consumers have been
4 deceived. *William H. Morris Co.*, 66 F. 3d at 258; *see also Gonzalez v. Allstate Ins.*
5 *Co.*, No. CV 04-1548 FMC (PJWx), 2005 WL 5891935, *10 (C.D. Cal. 2005).

6 **C. Whether the Subject Ad Content is “Material”**

7 As discussed above, Rocket Lawyer’s test for materiality of the ad content is
8 artificial, and not related either to the allegations in LegalZoom’s complaint or to the
9 governing legal standard. It does not matter whether consumers actually chose Rocket
10 Lawyer’s products based on the ad content. It is sufficient for LegalZoom to establish
11 that consumers were “influenced” to further explore Rocket Lawyer’s website as a
12 result of a misleading ad, even if those consumers did not ultimately buy the product.
13 Damage to LegalZoom is still present in the form of, among other things, a potential
14 decline in market share and loss of good will. LegalZoom will be relying at trial upon
15 additional expert testimony from Dr. Alan Goedde and Dr. Larry Chiagouris on this
16 subject.

17 **D. Whether There Are Genuine Issues of Fact as to “Diversion”**

18 Relying substantially on its flawed survey evidence, Rocket Lawyer argues that
19 there is no evidence of “diversion” of consumers who otherwise might have purchased
20 LegalZoom products. For the reasons set forth in detail above, however, Dr. Wind’s
21 survey cannot be cited as establishing any evidence concerning diversion. To the
22 contrary, LegalZoom has produced evidence from which a reasonable juror could
23 conclude that there has been such diversion. Notably, data produced by Rocket
24 Lawyer makes clear that when the Free Business Formation ads are placed on
25 LegalZoom keywords, (“Free LZ Triggered Business Formation ads”) the ads have a
26 conversion rate of 1.74%. The conversion rate of all 1.2 million ads is 1.33%.
27 Therefore the presence of “legal” and “zoom” in a consumer search is 31% ((1.74-
28 1.33)/1.33 = 31%) more effective in generating conversions compared to the average

1 conversion rate of all 1.2 million Free Business Formation ads.. SGD at 134. That
2 evidence, itself, clearly shows there is a triable issue of fact concerning the degree of
3 diversion caused by Rocket Lawyer's ads.⁹

4 **E. Discovery Remains Ongoing**

5 As of the date of Rocket Lawyer's motion, significant document discovery
6 remains ongoing and no depositions have been taken. Winograd Decl., ¶ 13. Since
7 that date, a deposition of Dr. Wind was taken, but other depositions are only now
8 being noticed for early August. *Id.* Accordingly, significant discovery remains, and
9 considerable evidence is expected to be developed from which a trier of fact could find
10 that Rocket Lawyer's ads mislead and that Rocket Lawyer acted willfully in
11 publishing its misleading ads.

12 Based on evidence already developed in the case, LegalZoom expects to
13 demonstrate the following at trial:

- 14 • Rocket Lawyer watched LegalZoom like a hawk to try to find ways of
15 undercutting them competitively and to attempt to lure its customers to them
(SGD at 135);
- 16 • Rocket Lawyer intended to exploit the use of the word "free" in its
17 advertising, in part, as a way of distinguishing itself from LegalZoom (SGD
18 136);
- 19 • Rocket Lawyer did intend to "convert" customers and tracked its
20 "conversions" (SGD at 137);
- 21 • Rocket Lawyer was on notice that its use of the term "free" was confusing to
22 its consumers and dedicated time—to the tune of hundreds of hours—and
23 attention to answering its customers' complaints (SGD at 138);
- 24 • Rocket Lawyer continued to use its misleading advertising even after receipt
25 of these complaints (SGD at 139);
- 26 • Rocket Lawyer continued its use of its misleading advertising even after
27 LegalZoom warned that it believed it violative of the law (SGD at 140);

28 ⁹ A competitor need not prove injury when suing to enjoin conduct that violates
section 43(a), *Southland Sod Farms v. Stover See Co.*, 108 F.3d 1134, 1145 (9th Cir.
1997) ("[B]ecause of the possibility that a competitor may suffer future injury, as well
as the additional rationale underlying section 43(a)—consumer protection—a
competitor need not prove injury when suing to enjoin.")

- Rocket Lawyer has changed not only its advertisements but its website, too (SGD at 141).

VIII. ROCKET LAWYER'S MOTION FAILS TO ADDRESS ALL CLAIMS

California Business and Professions Code Section 17200 defines “unfair competition” to mean “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising” Cal. Bus. & Prof. Code §17200 (emphasis added). Accordingly, “any unlawful, unfair or fraudulent business act or practice” may form the basis for a UCL claim; a plaintiff need not predicate a UCL claim on false advertising. *Id.*

Even if the only bases for LegalZoom’s UCL claim were allegations of false advertising (and they are not), the only piece of evidence Rocket Lawyer has attacked in its summary judgment motion is LegalZoom’s survey; and both California state and federal courts have confirmed in recent case law that survey evidence is not required in order to effectively state a UCL claim based on false advertising. *See Silicon Image, Inc. v. Analogix Semiconductor, Inc.*, 642 F.Supp.2d 957, 969 (N.D. Cal. 2008) (“The Court rejects *Analogix*’s reliance [on] the federal cases that have held that false advertising claims under California law require extrinsic evidence that customers are likely to be deceived.”); *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663, 681-682 (Cal. Ct. App. 2006) (“As the court said in *Echostar*, supra, at page 1362, 8 Cal.Rptr.3d 22, ‘we reject defendants’ view that a plaintiff must produce a consumer survey or similar extrinsic evidence to prevail on a claim that the public is likely to be misled by a representation.’”); and *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal.App.4th 1351, 1362 (Cal. Ct. App. 2003) (“In so holding, we reject defendants’ view that a plaintiff must produce a consumer survey or similar extrinsic evidence to prevail on a claim that the public is likely to be misled by a representation.”). Rather, “[t]he falsity of ... advertising claims may be established by testing, scientific literature, or anecdotal evidence.” *Id.* (citing *National Council*

1 *Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.*, 107 Cal.App.4th 1336,
2 1348 (2003)). In fact, “with regard to the showing of deception, ‘the primary
3 evidence in a false advertising case is the advertising itself.’” *Colgan, supra*, 135
4 Cal.App.4th at 682 (citation omitted). Moreover, such evidence “need only show that
5 members of the public are likely to be deceived.” *Id.* It need not show that there has
6 been actual deception, let alone that a significant portion of those who viewed the
7 advertisements in question were deceived. *Silicon Image, supra*, 642 F.Supp.2d at
8 969. In fact, the *Rice* case cited by Rocket Lawyer in its summary judgment motion
9 has been criticized for misconstruing California law on this very point. *Id.* What
10 constitutes the nature and sufficiency of evidence for unfair competition claims is
11 simply different than that required for a Lanham Act claim. Therefore,

12 In essence, neither survey evidence nor similar extrinsic evidence is necessary
13 to prevail here given, among other things, that “***the primary evidence for a false***
14 ***advertising case under California law is the advertising itself.***” Therefore, even if
15 the Court were to accept Rocket Lawyer’s criticism of LegalZoom’s survey evidence,
16 LegalZoom would still have presented sufficient evidence that there is at least a triable
17 issue of fact as to whether Rocket Lawyer’s advertisements are likely to deceive.¹⁰
18

19 ¹⁰ Rocket Lawyer’s assertion that LegalZoom’s UCL claim is based entirely on the
20 same grounds as its Lanham Act and FAL claims is without merit. While the Court
21 previously ruled that there were triable issues of fact in regard to LegalZoom’s FAL
22 and UCL claims (*see* ECF No. 44 at p. 11), Rocket Lawyer has done nothing in its
23 motion to disprove those claims or to address LegalZoom’s actual allegations.
24 Moreover, LegalZoom has alleged and evidence that LegalZoom has adduced in this
25 case will show that: even if Rocket Lawyer’s advertisements are found not to be
26 deceptive, (and they were), Rocket Lawyer’s ad campaigns and its “free” offers (1)
27 violated California Business and Professions Code Sections 17602(a)(1), which
28 requires clear and conspicuous presentation of the terms of automatic renewals of
subscriptions for goods or services, such as Rocket Lawyer’s “free trial” membership;
(2) required LegalZoom to increase its expenditures on advertising in order to
compete, in a fair manner, with Rocket Lawyer, and (3) caused LegalZoom to sustain
damages to its goodwill. Accordingly, Rocket Lawyer’s reliance upon the cases of
Prachasaisoradej, *Steinhebel*, and *Rice*, where UCL claims were entirely derivative of
the Lanham Act claims, is misplaced. Here, LegalZoom’s UCL claim is not entirely
derivative of its Lanham Act and FAL claims.

1 **IX. CONCLUSION**

2 The Court should deny Rocket Lawyer's motion for summary judgment.

3
4 DATED: July 21, 2014

Respectfully submitted,

5
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7
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