

1 Forrest A. Hainline III (SBN 64166)
fhainline@goodwinprocter.com
2 Hong-An Vu (SBN 266268)
hvu@goodwinprocter.com
3 **GOODWIN PROCTER LLP**
Three Embarcadero Center
4 24th Floor
San Francisco, California 94111
5 Tel.: 415.733.6000
Fax.: 415.677.9041

6 Michael T. Jones (SBN 290660)
mjones@goodwinprocter.com
7 **GOODWIN PROCTER LLP**
135 Commonwealth Drive
8 Menlo Park, California 94025-1105
9 Tel.: 650.752.3100
Fax.: 650.853.1038

10 Brian W. Cook (*Pro Hac Vice*)
bcook@goodwinprocter.com
11 **GOODWIN PROCTER LLP**
53 State Street
12 Boston, MA 02109-2802
13 Tel.: 617.570.1000
Fax.: 617.523.1231

14 *Attorneys for Defendant*
15 **ROCKET LAWYER INCORPORATED**

16
17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**
19 **WESTERN DIVISION**
20

21 LEGALZOOM.COM, INC., a Delaware
corporation,

22 Plaintiff,

23 v.

24 **ROCKET LAWYER**
25 **INCORPORATED**, a Delaware
corporation,

26 Defendant.
27
28

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

**REPLY OF ROCKET LAWYER
INCORPORATED IN SUPPORT OF
ITS MOTION FOR SUMMARY
JUDGMENT AND/OR
ADJUDICATION**

Date: August 18, 2014
Time: 9:30 a.m.
Judge: Judge Gary A. Feess
Courtroom: 740
Action Filed: November 20, 2012

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

TABLE OF AUTHORITIESii

I. INTRODUCTION 1

II. LEGALZOOM ADMITS THE ALLEGED MISREPRESENTATIONS ARE NOT MATERIAL 2

III. THE DEFINED SCOPE OF LEGALZOOM’S CLAIMS..... 3

IV. THE COURT MAY DETERMINE THE ABSENCE OF LITERAL FALSITY ON SUMMARY JUDGMENT 5

V. LEGALZOOM’S FAILURE TO TEST ADS IN CONTEXT PURSUANT TO THE COURT’S ORDER AND OTHER APPLICABLE LAW TO DETERMINE WHETHER ADS ARE MISLEADING 6

VI. ROCKET LAWYER’S SURVEY TESTED ADS IN CONTEXT, FINDING CONFUSION UNLIKELY 7

VII. LEGALZOOM’S FAILURE TO CONDUCT RELIABLE SURVEY TESTING ADS IN CONTEXT 11

VIII. LEGALZOOM ADMITS LACK OF CAUSATION 13

IX. LEGALZOOM’S IMPROPER ASSERTIONS 15

 A. LegalZoom Has No Sufficient Evidence of Intent to Mislead 15

 B. Evidence of Remedial Action Is Not Admissible to Prove Culpable Conduct..... 17

X. LEGALZOOM CAUSED ANY DELAY IN DISCOVERY 18

XI. LEGALZOOM’S FAL AND UCL CLAIMS FAIL FOR THE SAME REASONS AS ITS LANHAM ACT CLAIMS 19

XII. CONCLUSION 20

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

CASES

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986)..... 1

Castagnola v. Hewlett-Packard Co.,
No. C11-05772 JSW, 2012 WL 2159385 (N.D. Cal. June 13, 2012)..... 7

Celotex Corp. v. Catrett,
477 U.S. 317 (1986)..... 3

Cleary v. News Corp.,
30 F.3d 1255 (9th Cir. 1994)..... 19

Clicks Billiards, Inc. v. Sixshooters, Inc.,
251 F.3d 1252 (9th Cir. 2001)..... 12

Codonics, Inc. v. Datcard Sys., Inc.,
No. 1:08CV1885, 2009 WL 5454582 (N.D. Ohio Nov. 9, 2009) 9

Cont’l Lab. Prods., Inc. v. Medax Int’l., Inc.,
114 F. Supp. 2d 992 (S.D. Cal. 2000) 15

CytoSport, Inc. v. Vital Pharm., Inc.,
894 F. Supp. 2d 1285 (E.D. Cal. 2012)..... 2

Doe v. Benicia Unified Sch. Dist.,
206 F. Supp. 2d 1048 (E.D. Cal. 2002)..... 14, 19

Freeman v. Time, Inc.,
68 F.3d 285 (9th Cir. 1995)..... 7

Galen v. Mobil Oil Corp.,
922 F. Supp. 318 (C.D. Cal. 1996)..... 4

Kournikova v. Gen. Media Commc’ns, Inc.,
278 F. Supp. 2d 1111 (C.D. Cal. 2003)..... 13

Kwan Software Eng’g, Inc. v. Foray Techs., LLC,
No. C 12-03762 SI,
2014 U.S. Dist. LEXIS 17376, (N.D. Cal. Feb. 11, 2014)..... 13

Kwan Software Eng’g v. Foray Techs., LLC,
No. C 12-03762 SI, 2013 U.S. Dist. LEXIS 14708 (N.D. Cal. Jan. 22,
2013)..... 2

Kwikset Corp. v. Super. Ct.,
51 Cal. 4th 310 (2011)..... 13

Mission Power Eng’g Co. v. Cont’l Cas. Co.,
883 F. Supp. 488 (C.D. Cal. 1995)..... 18

1	<i>Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.,</i>	
2	290 F.3d 578 (3d Cir. 2002).....	6
3	<i>One Indus., LLC v. Jim O’Neal Dist., Inc.,</i>	
4	578 F.3d 1154 (9th Cir. 2009).....	15, 17
5	<i>Premier Nutrition, Inc. v. Organic Food Bar, Inc.,</i>	
6	No. SACV 06-0827.....	13
7	<i>Res. Developers, Inc. v. Statue of Liberty –Ellis Island Found., Inc.,</i>	
8	926 F.2d 134,140-41 (2nd Cir. 2009).....	17
9	<i>Rice v. Fox Broad. Co.,</i>	
10	330 F.3d 1170 (9th Cir. 2003).....	2
11	<i>Sidense Corp. v. Kilopass Tech. Inc.,</i>	
12	No. C 11-04112 SI, 2012 WL 3545289 (N.D. Cal. Aug. 16, 2012).....	2
13	<i>Southland Sod Farms v. Stover Seed Co.,</i>	
14	108 F.3d 1134 (9th Cir. 1997).....	2, 5, 13
15	<i>Time Warner Cable, Inc. v. DIRECTV, Inc.,</i>	
16	497 F.3d 144 (2d Cir. 2007).....	5
17	STATUTES	
18	15 U.S.C.	
19	§ 1125(a)(1)(B).....	2, 13
20	Cal. Bus. & Prof. Code	
21	§ 17200	19
22	§ 17500	2, 13, 19
23	Fed. R. Evid.	
24	Rule 407	17
25	Fed. R. Civ. Proc.	
26	Rule 56(d)	18
27		
28		

1 **I. INTRODUCTION**

2 While LegalZoom’s Opposition to Rocket Lawyer’s Motion for Summary
3 Judgment (the “Motion”) is an attempt at misdirection, several things are clear:

4 First, by admitting that its allegations do not relate to the “purchasing
5 process,” LegalZoom has conceded that the alleged misrepresentations in Rocket
6 Lawyer’s ads are not material as required in a false advertising claim. This
7 admission alone is sufficient to show that Rocket Lawyer has met its burden on
8 summary judgment by undermining at least one necessary element of LegalZoom’s
9 claims.

10 Second, LegalZoom failed to conduct a reliable survey testing Rocket
11 Lawyer’s ads in context as required to prove its claims, which has been determined
12 by the Court as the additional information available to consumers on Rocket
13 Lawyer’s website. Instead, LegalZoom contends that it somehow analyzed and
14 tested Rocket Lawyer’s ads in context by removing their context.

15 Finally, LegalZoom has proffered no evidence to create a dispute of fact.
16 Instead, LegalZoom claims that it has evidence that it may be able to present at trial
17 in support of its case—but that it cannot provide such evidence at this time.
18 LegalZoom’s failure to adduce facts at the summary judgment stage is fatal. *See*
19 *e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (“The mere
20 existence of a scintilla of evidence in support of the plaintiff’s position will be
21 insufficient; *there must be evidence* on which the jury could reasonably find for the
22 plaintiff”) (emphasis added).

23 For these reasons, the Court should grant summary judgment in favor of
24 Rocket Lawyer. The Court is permitted under applicable law to find the absence of
25 literal falsity based on the ads and their context. The evidence presented by Rocket
26 Lawyer demonstrates that there can be no genuine issue that Rocket Lawyer’s ads
27 are not misleading and did not cause LegalZoom harm. Thus, summary judgment in
28 favor of Rocket Lawyer is warranted. In the alternative, the Court should grant

1 summary adjudication on all issues and claims about which there is no genuine
2 dispute.

3 **II. LEGALZOOM ADMITS THE ALLEGED MISREPRESENTATIONS**
4 **ARE NOT MATERIAL**

5 Materiality is a necessary element of all of LegalZoom’s causes of action.
6 *See* 15 U.S.C. § 1125(a)(1)(B); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d
7 1134, 1139 (9th Cir. 1997) (Lanham Act elements); (elements of California False
8 Advertising under Cal. Bus. & Prof. Code § 17500); *CytoSport, Inc. v. Vital Pharm.,*
9 *Inc.*, 894 F. Supp. 2d 1285, 1295 (E.D. Cal. 2012) (In the Ninth Circuit, claims of
10 unfair competition and false advertising under [the FAL and UCL] are substantially
11 congruent to claims made under the Lanham Act); *Walker & Zanger, Inc. v.*
12 *Paragon Indus., Inc.*, 549 F. Supp. 2d 1168, 1182 (N.D. Cal. 2007); *see also Kwan*
13 *Software Eng’g v. Foray Techs., LLC*, No. C 12-03762 SI, 2013 U.S. Dist. LEXIS
14 14708, at *7 n.2 (N.D. Cal. Jan. 22, 2013).

15 Factors “likely to influence the *purchasing decision . . .*” are material.
16 *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1180, (9th Cir. 2003) (emphasis added)
17 (reversing denial of summary judgment because false statements could not influence
18 the purchasing decision); *Appliance Recycling Ctr. Of Am., Inc. v. JACO Env’tl.,*
19 *Inc.*, 378 Fed. App. 652, 655 (9th Cir. 2010) (affirming summary judgment in part
20 “because the references to the patent and claims to have pioneered the system are
21 not material, no reasonable jury could find that they or any similar statements were
22 likely to cause future injury.”); *Sidense Corp. v. Kilopass Tech. Inc.*, No. C 11–
23 04112 SI, 2012 WL 3545289, at *11 (N.D. Cal. Aug. 16, 2012) (granting summary
24 judgment where no evidence that deception was likely to influence purchasing
25 decision). LegalZoom, contorting to undermine the survey conducted by Rocket
26 Lawyer’s expert, Professor Jerry Wind, states in its Opposition, “Moreover,
27 **LegalZoom’s claims are not related to the purchase process.**” ECF 74 at 7
28 (emphasis added). LegalZoom continues, “The claims address consumer

1 impressions formed at the point of reviewing an advertisement, **before the point of**
2 **purchase.**” *Id* (emphasis added).

3 LegalZoom thus admits the absence of the element of materiality because it
4 deems the purchasing process and reaching the point of purchase—necessary
5 elements of any false advertising claim—irrelevant to their claims and allegations.
6 These admissions are fatal. The Court is justified in granting summary judgment in
7 favor of Rocket Lawyer without further analysis. *See Celotex Corp. v. Catrett*, 477
8 U.S. 317, 322-23 (1986) (Where defendant is the moving party, it need not disprove
9 each element of plaintiff’s case, but rather has met its burden if it can negate at least
10 one of plaintiff’s necessary elements).¹

11 **III. THE DEFINED SCOPE OF LEGALZOOM’S CLAIMS**

12 LegalZoom’s attempts to expand the scope of its claims fail. Based on the
13 allegation in the Amended Complaint and LegalZoom’s arguments in its First
14 Motion for Summary Judgment, the Court has already determined that this case
15 hinges on the adequacy of Rocket Lawyer’s disclosures relating to its free services.
16 The Court identified the relevant ads at issue:

- 17 1) “Incorporate for Free . . . Pay No Fees (\$0);” 2) “Free. . .LLCs;” 3)
18 “Free help from local attorneys” and “Free legal review;” 4) “Zoom
19 Charges \$99. Rocket Lawyer is Fast, Easy, & Free. Incorporate Your
20 Business Today;” and 5) “Free” trials of Defendant’s “Basic Legal
Plan” and “Pro Legal Plan.”

21 SJ Order at 2. “Each advertisement either contains a link to Defendant’s website or
22 is published directly on Defendant’s website,” where additional disclosures are
23 made. *See id*. The Court further explained that, “Plaintiff adamantly disputes the
24 adequacy and conspicuousness of these disclosures.” *Id*. at 3.

25
26
27 ¹ The Court is further justified in granting summary judgment because as Professor
28 Wind found, “advertising” is one of the least important factors to consumers in
making purchasing decisions. SSUF at 37.

1 The remainder of the Court’s first summary judgment opinion focused on
2 whether the ads, when viewed in the context of Rocket Lawyer’s *disclosures* on its
3 website, are false and/or misleading:

- 4 • “Upon visiting Defendant’s website, a consumer is presented with details of
5 its services and disclosures about the terms of the free trial and the fact that
6 state incorporation fees must be paid even though Defendant’s processing and
7 filing incorporation services are free” (*Id.* at 7);
- 8 • “A reasonable jury could conclude that, when viewed in the context of
9 Defendant’s website included in the advertisements, the details of the
10 advertised free services and the terms of the free trial are sufficiently
11 disclosed to consumers and thus not literally false” (*Id.* at 7-8);
- 12 • “Moreover, Plaintiff also fails to provide evidence that certain fees are
13 ‘buried’ in Defendant’s website or revealed only after the ‘deception is
14 complete.’ In fact, Defendant discloses the state fees and the terms of the trial
15 period well before a purchase is complete” (*Id.* at 9).

16 LegalZoom cannot reinvent its claims in its Opposition in an effort to sidestep
17 unfavorable factual findings the Court has already made. *See Galen v. Mobil Oil*
18 *Corp.*, 922 F. Supp. 318, 320 (C.D. Cal. 1996) (“Previous findings of fact and
19 conclusions of law in this case govern the evaluation” of remaining claims). It
20 certainly cannot do so by ignoring the relevant law.

21 Furthermore, as LegalZoom has demonstrated by completely failing to test
22 the free trial disclosures, and carelessly testing the wrong allegations relating to
23 Rocket Lawyer’s attorney services, this case boils down to whether the inclusion of
24 four simple words in incorporation ads has an effect on consumers: “Pay only state
25 fees.”

1 **IV. THE COURT MAY DETERMINE THE ABSENCE OF LITERAL**
2 **FALSITY ON SUMMARY JUDGMENT**

3 The Court is able to grant summary judgment and/or summary adjudication
4 based on the ads and evidence presented. Regarding literal falsity, it is true that
5 proving literally falsity at summary judgment places a high burden on a plaintiff.
6 However, courts may and routinely do find the *absence* of literal falsity by
7 determining that no reasonable jury could find the ads literally false when viewed in
8 context. *See Walker*, 549 F. Supp. 2d at 1182 (finding at the summary judgment
9 stage that the advertisements at issue were not literally false); *Appliance Recycling*,
10 378 Fed. App. at 654 (affirming summary judgment in part because no reasonable
11 jury could find statement false); *see also Southland Sod*, 108 F. 3d at 1139 (literal
12 falsity may be determined on the face of the ad when viewed in context).

13 The Court has already found that LegalZoom cannot prove that Rocket
14 Lawyer’s ads are literally false on summary judgment. However, by viewing the
15 ads in the context of the disclosures on Rocketlawyer.com, the Court can now find
16 that the advertisements are *not* literally false.

17 As noted by the Court, “Upon visiting Defendant’s website, a consumer is
18 presented with details of its services and disclosures about the terms of the free trial
19 and the fact that state incorporation fees must be paid even though Defendant’s
20 processing and filing incorporation services are free.” SJ Order at 7.² The Court
21 can and should find that the ads for free incorporation/LLC are not literally false
22 because Rocket Lawyer does not charge for its services when a consumer is enrolled
23 in a free trial of the Pro Legal Plan. Furthermore, it is well-established that even if
24 an ad were ambiguous, it cannot be literally false. *Time Warner Cable, Inc. v.*

25 _____
26 ² The Court’s prior findings further demonstrate that LegalZoom’s “bait and switch”
27 cases are inapposite. When viewed in context, Rocket Lawyer discloses the state
28 fees, which it passes on entirely to the state, in multiple locations on its websites and
in places where consumers would be certain to see the state fees if they were
forming a business, and then provides consumers an option whereby they can get
processing from Rocket Lawyer for free. *See SSUF* at 10, 11, 13.

1 *DIRECTV, Inc.*, 497 F.3d 144, 158 (2d Cir. 2007) (“[O]nly an *unambiguous*
2 message can be literally false.”) (quoting *Novartis Consumer Health, Inc. v.*
3 *Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 587 (3d Cir.
4 2002)) (emphasis added).

5 Regarding the free trial, the Court can and should find that no literal falsity
6 exists because, “The fact that a customer will be charged if she fails to cancel her
7 membership after seven days does not negate the fact that the trial period itself is
8 unconditionally free.” SJ Order at 8. Any other conclusion would render every
9 similar free trial in the internet marketplace – *and there are many*³ – literally false.

10 Finally, the Court can and should find that Rocket Lawyer’s intrawebsite free
11 help from local attorneys and free legal review ads are not literally false because
12 Rocket Lawyer offers free consultations to its users, including free trial members,
13 and discloses the limitations on attorney review on Rocket Lawyer.com immediately
14 before consumers make a purchasing decision. SSUF at 76.

15 **V. LEGALZOOM’S FAILURE TO TEST ADS IN CONTEXT PURSUANT**
16 **TO THE COURT’S ORDER AND OTHER APPLICABLE LAW TO**
17 **DETERMINE WHETHER ADS ARE MISLEADING**

18 Because the Court could not find in favor of LegalZoom regarding literal
19 falsity, the Court instructed LegalZoom to provide market research or consumer
20 surveys:

21 “[U]nless an advertisement is literally false, a party seeking relief under
22 § 43(a) of the Lanham Act bears the ultimate burden of proving actual
23 deception by using reliable consumer surveys or market research. *See*
24 *Walker & Zanger, Inc. v. Paragon Indus., Inc.*, 549 F. Supp. 2d 1168,
25 1182 (N.D. Cal. 2007) (‘But if an advertisement is not false on its face .
26 . . . plaintiff must produce evidence, usually in the form of market
27 research or consumer surveys, showing exactly what message ordinary
28 consumers perceived.’).”

³ See SSUF at ¶ 142 (dozens of types of free trials encountered by respondents in Wind Survey; examples of free trials offered by Microsoft, Amazon, Turbo Tax, Netflix, Sirius XM).

1 SJ Order at 10. In addition, the Court had criticized LegalZoom for viewing Rocket
2 Lawyer’s advertisements in isolation. *Id.* at 9. After analyzing law requiring that
3 ads be viewed in context, which was determined to include information available on
4 RocketLawyer.com⁴, the Court found that “Plaintiff’s arguments in support of its
5 false advertising claim fail to consider Defendant’s advertisements in context and
6 instead improperly focus on the word ‘free’ divorced from the advertisements and
7 services as a whole.” *Id.* 9.

8 Thus, taking the Order in its entirety, the Court’s guidance was clear:
9 produce survey evidence demonstrating how consumers perceive the ads within the
10 full context available to them, including the information provided on
11 RocketLawyer.com.

12 **VI. ROCKET LAWYER’S SURVEY TESTED ADS IN CONTEXT,**
13 **FINDING CONFUSION UNLIKELY**

14 Rocket Lawyer complied with the Court’s instruction by conducting a survey
15 that tested the advertisements in context with reference to both the ads and
16 information on RocketLawyer.com. The stimuli were designed to take respondents
17 through what Rocket Lawyer considers to be the typical consumer journey based on
18 their experience and tracking of conversions. Paul Hollerbach, Rocket Lawyer’s
19 Chief Financial Officer, explained in detail in his declaration how consumers
20 typically encounter the free trial offer and the terms of Rocket Lawyer’s attorney
21 services. *See* SSUF at 78. Professor Wind testified that he reviewed the Hollerbach
22 declaration and communicated with Rocket Lawyer in designing his stimuli. SSUF
23 at 143. Included in the Wind Appendices was also the Declaration of David Baga,
24 which explained how in the typical consumer journey, Rocket Lawyer has always

25 _____
26 ⁴ *Citing to Southland Sod*, 108 F.3d 1134,1139 (9th Cir. 1997); *Freeman v. Time,*
27 *Inc.*, 68 F.3d 285, 289 (9th Cir. 1995); *Castagnola v. Hewlett-Packard Co.*, No.
28 C11-05772 JSW, 2012 WL 2159385, at *9-10 (N.D. Cal. June 13, 2012) (in false
advertising case, district court concluded that statements on the webpage should not
be viewed in isolation and that references to “offer details” were sufficient to give
notice of nature and terms of the program at issue).

1 disclosed state fees multiple times and that this journey has not changed
 2 substantively since it was first offered. *See id.* at 13, *id.* at 164. Indeed, on
 3 RocketLawyer.com, in order to incorporate, consumers must complete the current
 4 incorporation pages used in Professor Wind’s survey. *See id.* at 150. Any argument
 5 that Professor Wind did not have support for his consumer journey is unfounded.

6 As explained by Professor Wind, the survey was designed to see if there was
 7 any difference in the perceptions of individuals who viewed the control stimuli
 8 (Rocket Lawyer’s actual ads) versus those who viewed the test stimuli (modified as
 9 LegalZoom would prefer). SSUF at 144; *see also* SSUF 31. If there is a significant
 10 difference in perception between the test and control groups, and the test group had
 11 a better understanding of Rocket Lawyer’s services, then Rocket Lawyer’s
 12 advertisements may have been misleading. *See id.* In the end the survey results
 13 across multiple questions were clear:

- 14 • Whether Rocket Lawyer adds language about state fees in the search engine
 15 ad or not, the number of consumers who chose Rocket Lawyer and those who
 16 chose LegalZoom is the same. SSUF at 29.

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

	Incorporation Service	
	Test (State Fee Disclosure In ad)	Control (No State Fee Disclosure in ad)
	%	%
	(n=104)	(n=103)
Rocket Lawyer	35.6	34.0
Legal Zoom	64.4	68.0

- 22 • The vast majority of respondents (approximately 70%) were aware of the
 23 need to pay state fees in forming a business on Rocket Lawyer. SSUF at 33.
- 24 • Whether or not Rocket Lawyer includes “Pay only state fees” in its search
 25 engine ads for business formation, has no effect on consumer perception and
 26 understanding of Rocket Lawyer’s offer, as there was **no significant**
 27 **difference** between the test and control groups. SSUF at 34; *see also* SSUF
 28 at 33, 34 (70.2% test; 68.9% control).

- 1 • In the experiment focusing on the free trial, a majority of consumers
2 understood the nature of Rocket Lawyer’s free offer—that there was a time
3 limit (66.3% in control group and 67.3% in test group) and a subsequent
4 charge/enrollment in a paying plan unless the respondent cancelled (52/70 in
5 test group and 54/67 in control group). SSUF at 66-68.⁵
- 6 • Whether Rocket Lawyer modifies its free trial disclosures to match
7 LegalZoom’s formatting has no effect on consumer understanding of the free
8 trial as there was **no significant difference** between the test and control
9 groups. *Id.*

10 Thus, even independent of the decision trees which LegalZoom focuses on, the
11 survey results demonstrate the absence of deception and diversion of consumers
12 away from LegalZoom.

13 LegalZoom’s remaining criticisms of the Wind Survey are unavailing. Its
14 criticisms of the decision trees’ sample sizes as too small are unfounded because the
15 original sample analyzed was comprised of over 100 consumers per test and control
16 group—sufficiently large for a survey and consistent with the sample sizes in
17 surveys conducted by LegalZoom’s own expert.⁶

18 LegalZoom further demonstrates its lack of understanding of the decision
19 trees by claiming that Professor Wind did not explain how consumers who did not
20 choose Rocket Lawyer have not been misled. First, the tree is designed to identify
21 any potentially harmed population; consumers who did not choose Rocket Lawyer

22
23 ⁵ LegalZoom states, *without a fact citation*, that “one way” to view the Wind Survey
24 results is that 60% of test respondents and 80% of control respondents
25 misunderstood the ad in some fashion. Opp. at 15. This would be the wrong way of
26 viewing the results. SSUF at 67-68.

25 ⁶ *See Codonics, Inc. v. Datcard Sys., Inc.*, No. 1:08CV1885, 2009 WL 5454582, at ¶
26 14 (N.D. Ohio Nov. 9, 2009) (“After passing screening questions, 233 survey
27 respondents were asked to read a brochure for the PacsCube Express 100X and
28 200X. For 103 respondents, the brochure was the actual brochure found on the
DatCard website. For the other 130 respondents, page 4 of the brochure was
modified to remove references to UL in the product specification section found on
that page.”)

1 could not have been harmed by any allegedly misleading ads. Second, as explained
2 by Professor Wind, the absence of deception and diversion of consumers is
3 demonstrated by the fact that there is no difference between the test and control
4 groups—i.e., **whether Rocket Lawyer disclosed state fees in the search engine**
5 **ads had no effect on consumers’ choice of Rocket Lawyer, LegalZoom, or other**
6 **competitors**. SSUF at 145; *see also id.* at 45, 47. Thus, there is no potentially
7 harmed population. *Id.*

8 LegalZoom’s criticism of Professor Wind’s inclusion of individuals who
9 “may or may not” look for legal services in the near future ignores there is a
10 likelihood that many of these individuals will indeed look for and purchase online
11 legal services. SSUF at 146. Thus, they were properly included in the survey.
12 Furthermore, Professor Wind analyzed this group separately and found that for key
13 tables—understanding of state fees and the free trial—there was *still* no difference
14 between the test and control groups. If Professor Wind had excluded this group, the
15 survey results would have been the same. *Id.*

16 Finally, LegalZoom’s contention that Professor Wind was not sufficiently
17 involved in the survey is unsupported. LegalZoom cites to no case that states that an
18 expert may not oversee a team in conducting a survey. Professor Wind has
19 submitted bills relating to over 130 hours he has personally spent on the survey and
20 reports. SSUF at 151. At his deposition, he was able to substantively answer the
21 questions posed by counsel, even though counsel refused to provide Professor Wind
22 with his complete report. *Id.* at 147. Professor Wind also testified about how he
23 oversaw and was involved in each aspect of the survey. *Id.* at 148.

24 The evidence demonstrates that consumers have not been misled by Rocket
25 Lawyer’s ads and that summary judgment is proper.

1 **VII. LEGALZOOM’S FAILURE TO CONDUCT RELIABLE SURVEY**
2 **TESTING ADS IN CONTEXT**

3 Disregarding the Court’s guidance, LegalZoom conducted a survey that
4 analyzes Rocket Lawyer’s ads in isolation. To hide its error, LegalZoom states that
5 the context is only the ad itself.

6 LegalZoom contends, “Dr. Isaacson focused the consumer on the entire ad to
7 ensure that the respondent actually understood the message of the ad being
8 conveyed.” Opp. at 11. As demonstrated in the Motion, Dr. Isaacson did so by
9 blurring out the ads of other competitors that consumers may choose over Rocket
10 Lawyer and circled only the Rocket Lawyer ad. In short, LegalZoom pretends that
11 an ad’s context is limited to the ad itself. These actions and statements demonstrate
12 that **LegalZoom tested the ads in context by removing their context.** *See id.*⁷

13 This is the very conduct the Court already found improper. *See* SJ Order at 9.
14 (“Plaintiff’s arguments in support of its false advertising claim fail to consider
15 Defendant’s advertisements in context and instead improperly focus on the word
16 ‘free’ divorced from the advertisements and services as a whole.”). Indeed, in
17 Professor Wind’s over 40 years of experience as a marketing professor and
18 marketing expert for legal matters, he has never seen the competitive landscape
19 entirely removed as Dr. Isaacson did here. SSUF at 149. This erroneous conduct
20 alone warrants granting summary judgment in Rocket Lawyer’s favor.

21 LegalZoom did not address the other flaws in Dr. Isaacson’s survey:

- 22 • Dr. Isaacson did not test the free trial allegations;
23 • Dr. Isaacson did not test the limitations on free legal review;

24
25 _____
26 ⁷ LegalZoom’s assertion that “Dr. Isaacson appropriately considered the ‘entire
27 advertisement’ in context , in the way in which a consumer would have viewed it
28 and sought to understand it” is false. Opp. at 11. No Rocket Lawyer search engine
ad ever appears completely in isolation apart from the ads of other competitors on
search engine results, and an ad is never circled such that consumers would only
focus on that ad.

- 1 • Dr. Isaacson tested a limitation on free help from local attorneys that does not
2 exist because free consultations are available to all users;
- 3 • Dr. Isaacson’s removal of free entirely from the control stimuli is contrary to
4 how LegalZoom alleged its claims and how the Court has defined this case;⁸
5 and
- 6 • Dr. Isaacson decided not to analyze over 60% of the responses he received
7 merely because they were not helpful to LegalZoom’s position.

8 Mot. at 7-8; 12, 16-17; SSUF at 152 (Wind Rebuttal showing Isaacson’s removal of
9 respondents from his analysis). Finally, Dr. Isaacson did not even test whether
10 having to pay state fees is material to consumers. Instead, he found that “price” is
11 material to consumers. Opp. at 13. This finding supports Rocket Lawyer’s position
12 that consumers chose Rocket Lawyer because it is ultimately cheaper than
13 LegalZoom when consumers incorporate while on a free trial plan. SJ Order at 8
14 (“It is true that a customer can save the \$99 charged by Plaintiff for its processing
15 and filing fee by enrolling in the free trial offered by Defendant”).

16 These flaws are fatal to LegalZoom’s position. Contrary to LegalZoom’s
17 assertion, the flaws in the Isaacson Survey are also issues of admissibility: the
18 survey is not relevant as it does not test the correct allegations and has not been
19 conducted according to accepted principles. SSUF at 39, 44, 71; *Clicks Billiards,*
20 *Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1263 (9th Cir. 2001) (“First, is the survey
21 admissible? That is, is there a proper foundation for admissibility, and is it relevant
22 and conducted according to accepted principles? This threshold question may be
23

24 ⁸ As stated in Rocket Lawyer’s motion, this design issue is further exacerbated by
25 the fact that consumers had access to the artificial stimuli at all times, which resulted
26 in a substantial number of respondents merely parroting back the language that was
27 in the ad that they viewed. *See* SSUF at 43. If Professor Wind had allowed the
28 stimuli to remain available to respondents, it is likely that the number of individuals
who were aware of the state fees would have been even higher given that Rocket
Lawyer discloses the state fees at least three times in the consumer journey,
including in the payment summary on the very last page of the stimuli. *See id.* at ¶13,
Ex. B, App. E (Incorporation Stimuli).

1 determined by the judge.”). Nevertheless, on summary judgment, courts have given
2 flawed surveys so little weight that the surveys could not create a dispute of fact to
3 defeat summary judgment. *Kwan Software Eng’g, Inc. v. Foray Techs., LLC*, No. C
4 12-03762 SI, 2014 U.S. Dist. LEXIS 17376, at *13-15 (N.D. Cal. Feb. 11, 2014)
5 (granting summary judgment because unreliable survey could not create a dispute of
6 fact), *Kournikova v. Gen. Media Commc’ns, Inc.*, 278 F. Supp. 2d 1111, 1125-26
7 (C.D. Cal. 2003) (granting summary judgment where “even though the Court
8 elected not to strike Plaintiff[’s] seriously flawed survey, it carries insufficient
9 weight to establish a genuine issue of material fact for trial.”); *Premier Nutrition,*
10 *Inc. v. Organic Food Bar, Inc.*, No. SACV 06-0827 AG (RNBx), 2008 U.S. Dist.
11 LEXIS 78353, at *28-29 (C.D. Cal. Mar. 27, 2008) (granting summary judgment
12 where a flawed survey failed to “support[], in any meaningful way, [the party’s]
13 argument” that a fact dispute existed).

14 Based on the foregoing, the Court should either disregard LegalZoom’s
15 survey entirely as inadmissible or, in the alternative, find that the survey’s flaws
16 warrant so little weight that it cannot create a genuine dispute of fact.

17 **VIII. LEGALZOOM ADMITS LACK OF CAUSATION**

18 Causation is also a key element of all of the causes of action. *See* 15 U.S.C. §
19 1125(a)(1)(B); *Southland Sod*, 108 F.3d at 1139 (harm must be “as a result of” the
20 offending ad); *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 326, (2011)
21 (“[California law] requires that a plaintiff’s economic injury come ‘as a result of’
22 the unfair competition [UCL] or a violation of the false advertising law [Section
23 17500].”). Rocket Lawyer argued in its Motion that LegalZoom cannot point to any
24 facts to demonstrate that Rocket Lawyer customers would have provided
25 LegalZoom with business but for the RLI Free Ads. Mot. at 21-22. Rocket Lawyer
26 further emphasized that there is no evidence at all that consumers who were already
27 on RocketLawyer.com and viewing intrawebsite ads would have provided
28 LegalZoom with business. *Id.*

1 LegalZoom fails to even address causation in its Opposition. The lone
2 statement addressing causation in LegalZoom’s Opposition is a bare assertion that
3 Rocket Lawyer caused LegalZoom harm, with a citation to the First Amended
4 Complaint and no other supporting evidence. *See* Opp at 4-5 and SSUF at 103.⁹
5 This is not sufficient on summary judgment. LegalZoom points to no evidence
6 because it cannot. LegalZoom did not test whether consumers would choose
7 LegalZoom over Rocket Lawyer. Thus, LegalZoom’s failure to address Rocket
8 Lawyer’s arguments regarding causation is tantamount to admitting that summary
9 judgment is proper. *Foster*, 392 F. Supp. 2d at 1147 n. 7 (“[F]ailure of a party to
10 address a claim in an opposition to a motion for summary judgment may constitute a
11 waiver of that claim.”); *Doe v. Benicia Unified Sch. Dist.*, 206 F. Supp. 2d 1048,
12 1050 n.1 (E.D. Cal. 2002) (finding “[P]laintiff abandons [its] theory in [its]
13 opposition to defendants’ motion for summary judgment by not mentioning it or
14 citing any” supporting cases).¹⁰

15 The lack of evidence for causation is supported by data relating to the online
16 legal services industry. Based on a comprehensive report on online legal services in
17 the U.S., there are 16,692 businesses in this market that could take business away
18 from LegalZoom. SSUF at 153. Of the online legal services market, LegalZoom’s
19 market share is only 5.8%, further demonstrating that even if consumers did not
20 choose Rocket Lawyer, there is no guarantee that they would have chosen
21 LegalZoom. *Id.*

23 ⁹ LegalZoom argues that a conversion rate of 1.33% for 1.2 million ads compared to
24 a conversion rate of 1.74% on 1,380 LegalZoom triggered ads demonstrates
25 diversion. However, LegalZoom has performed no statistical analysis on these
26 numbers and has not taken into account the significant difference in the sample sizes
of the two ad segments. Merely demonstrating a minute difference in the
conversion rate without more is not sufficient evidence for summary judgment.

27 ¹⁰ LegalZoom comments in a footnote that a showing of injury is not necessary
28 where a consumer seeks an injunction based on future injury. Opp., ECF No. 74, at
19. This argument does not address Rocket Lawyer’s argument regarding causation.
Furthermore, LegalZoom ignores that it also seeks damages. *See* FAC at 14.

1 In addition, LegalZoom’s own documents admit the absence of causation.
2 According to LegalZoom’s tracking conventions, “affinity” is a numeric score
3 assigned to websites that appear on searches for specific keywords. SSUF at ¶ 154.
4 The affinity score shows the relationship between two websites by seeing how many
5 more times the audiences of the two websites are going to choose the other for
6 specific keywords. *Id.* at 155. In comparing Rocket Lawyer and LegalZoom,
7 LegalZoom has found that for the target audience for LegalZoom, Rocket Lawyer is
8 ranked #6, which means that more often, those searching LegalZoom are interested
9 in companies other than Rocket Lawyer to also explore. *Id.* at 156. This same
10 document demonstrates that LegalZoom is not even in the top 10 of sites visited
11 from a search related to Rocket Lawyer. *Id.* at 157. Thus, it appears that Rocket
12 Lawyer and LegalZoom may not truly be competitors as at least some portion of
13 respective their target audiences differ— those searching for free products or
14 services are not interested in LegalZoom. LegalZoom’s Senior Director, Online
15 Media & Marketing, admits this difference by stating “it will be difficult to sway
16 users looking for ‘free’ toward a quality product that has a price tag.” SSUF at 158.

17 **IX. LEGALZOOM’S IMPROPER ASSERTIONS**

18 **A. LegalZoom Has No Sufficient Evidence of Intent to Mislead**

19 LegalZoom contends that it has evidence that it can produce at trial— but not
20 now— that Rocket Lawyer intended to deceive consumers, thus entitling it to a
21 presumption of deception. *See Opp.* at 17. This is insufficient on summary
22 judgment. Courts have consistently denied application of this presumption where
23 there is no evidence to support a mere assertion of intent. *See e.g., One Indus., LLC*
24 *v. Jim O’Neal Dist., Inc.*, 578 F.3d 1154, 1164 (9th Cir. 2009) (affirming lower
25 court grant of summary judgment where there was a “lack of evidence” of intent to
26 deceive); *Cont’l Lab. Prods., Inc. v. Medax Int’l., Inc.*, 114 F. Supp. 2d 992, 1011
27 (S.D. Cal. 2000) (refusing to apply presumption where no evidence of intent to
28 deceive).

1 To the extent that LegalZoom purports to use the “evidence” listed at page 19
2 of LegalZoom’s Opposition as evidence of intent, such evidence is insufficient as
3 LegalZoom’s contentions are either irrelevant or merely conjecture.

- 4 • The fact that Rocket Lawyer monitored LegalZoom, its competitor, is not
5 relevant evidence, especially where LegalZoom has also monitored Rocket
6 Lawyer and other competitors. *See e.g.*, SSUF at 154-56.
- 7 • The fact that Rocket Lawyer has used the term “free” in its advertisements as
8 a way to stay competitive is not evidence of intent to mislead, especially
9 where Rocket Lawyer provides many free documents and services. SSUF at
10 52; *see also*, SJ Order at 9.
- 11 • Rocket Lawyer’s tracking of the performance of its ads is not only common
12 industry practice, but also a practice engaged in by LegalZoom. *See* SSUF at
13 154-58.
- 14 • A handful of customer complaints are not evidence of intent to mislead. This
15 is especially so where LegalZoom’s key evidence, a spreadsheet relating to
16 customer service calls, demonstrates that 1,781/638,816 service calls involved
17 “questions” or “complaints” about “free” (less than 1%). SSUF at 159. Thus,
18 the evidence submitted by LegalZoom does not demonstrate that even a
19 significant portion of Rocket Lawyer’s customer service efforts is related to
20 its free services. Furthermore, all businesses, including LegalZoom, have
21 customer complaints. In fact, LegalZoom has relatively far more complaints
22 than Rocket Lawyer, but it continues to operate under the same business
23 model. *See* SSUF at 160 (LegalZoom: 133 complaints on the BBB in 1 year
24 and 4 months—8.3 complaints/month, compared to Rocket Lawyer 181
25 complaints over 3 years—5 complaints/month).
- 26 • In addition, the Court has already found that “a handful of customer
27 statements on one online review site is not sufficient to demonstrate that a
28

1 'significant portion' of customers were deceived and is not necessarily a
2 reliable consumer survey or market research." SJ Order at 10.

- 3 • Rocket Lawyer's disagreement over LegalZoom's interpretation of Rocket
4 Lawyer's advertisements does not demonstrate intent to deceive, especially
5 where the Wind Survey demonstrates that Rocket Lawyer's ads are not
6 misleading. *See e.g.*, SSUF at 28, 34, 36, 46.¹¹

7 If this is all of the evidence LegalZoom currently has, the Court should find
8 the evidence insufficient to create a dispute as to Rocket Lawyer's intent. *Res.*
9 *Developers, Inc. v. Statue of Liberty –Ellis Island Found., Inc.*, 926 F.2d 134,140-41
10 (2nd Cir. 2009) (refusing to apply presumption where evidence of intent was merely
11 "speculation and conjecture . . . [t]he summary judgment rule would be rendered
12 sterile ... if the mere incantation of intent or state of mind would operate as a
13 talisman to defeat an otherwise valid motion.") (internal citations omitted).

14 **B. Evidence of Remedial Action Is Not Admissible to Prove Culpable**
15 **Conduct**

16 The Court should reject out of hand LegalZoom's argument that a dispute of
17 fact exists as to *one* of the allegedly offending ads—free legal review—because
18 Rocket Lawyer subsequently changed its terms and conditions. *Opp.* at 16-17.
19 Evidence of subsequent remedial actions are not admissible to prove culpable
20 conduct. Fed. R. Evid. 407. In addition, LegalZoom completely ignores that
21 Rocket Lawyer disclosed the limitations on free legal review immediately before
22 consumers enroll in a free trial, monthly, or annual plan even before it changed its
23

24 ¹¹ Contrast LegalZoom's "evidence" with the evidence presented by Rocket Lawyer
25 in its opposition to LegalZoom's motion for partial summary judgment (ECF No.
26 82). There, Rocket Lawyer has adduced actual evidence that LegalZoom knew of
27 the importance of customer reviews, but still sought to delete negative reviews and
28 post positive reviews to manipulate its rating on LegalSpring.com, falsify time
stamps on reviews so that reviews it adds appear to be from real consumers, and
direct its employees to post reviews from home instead of at work to avoid rejection
by review websites for "biased location[s]." *See* ECF No. 82. *This* is evidence of
culpable intent.

1 terms and conditions. SSUF at 79. Indeed, LegalZoom does not have competent
2 evidence relating to consumer perceptions of “free legal review” because it did not
3 test this ad and inexplicably tested limitations on free help from local attorneys that
4 do not exist.

5 **X. LEGALZOOM CAUSED ANY DELAY IN DISCOVERY**

6 LegalZoom contends that summary judgment is not warranted because
7 discovery is ongoing. This position is untenable for the following reasons.

8 First, Federal Rule of Civil Procedure 56(d) provides a means for relief if a
9 party is unable to dispute an assertion of fact because of incomplete discovery.
10 LegalZoom has made no motion under this rule and therefore seeks no actual relief
11 pursuant to it.

12 Second, even if LegalZoom had filed a Rule 56(d) motion, relief is only
13 granted “for specified reasons.” LegalZoom has not specified any reasons that
14 would warrant delaying judgment. Rocket Lawyer has completed its productions,¹²
15 totaling over 85,000 pages of documents (excluding native electronic files and data
16 pulls produced in native format) in response to LegalZoom’s broad discovery
17 requests. SSUF at 161. Despite prompting by Rocket Lawyer, LegalZoom has been
18 inactive in discovery. LegalZoom has produced fewer than 10,000 pages between
19 itself and nonparty, Travis Giggy, who is represented by the same counsel as
20 LegalZoom. SSUF at 162. LegalZoom chose not to notice depositions for 19
21 months since they filed this action and 10 months since the discovery stay was
22 lifted. *Id.* at 163. LegalZoom has caused any delay in its own discovery and cannot
23 now be permitted to benefit from its own lack of diligence. *See Mission Power*
24 *Eng’g Co. v. Cont’l Cas. Co.*, 883 F. Supp. 488, 493 (C.D. Cal. 1995) (relief relating
25 to failure to obtain discovery usually granted only where party can show it was
26

27 _____
28 ¹² The only subsequent productions Rocket Lawyer anticipates may occur is if it
declassifies documents marked as privileged.

1 “without fault in creating” its crisis and that “it used the entire discovery period
2 efficiently”).

3 **XI. LEGALZOOM’S FAL AND UCL CLAIMS FAIL FOR THE SAME**
4 **REASONS AS ITS LANHAM ACT CLAIMS**

5 LegalZoom does not address Rocket Lawyer’s argument that the evidence
6 does not support LegalZoom’s false advertising claim under California Business and
7 Professions Code section 17500. Thus, LegalZoom has conceded Rocket Lawyer’s
8 argument and admits that this claim, too, fails and warrants summary adjudication.
9 *See e.g., Foster*, 392 F. Supp. 2d at 1147 n. 7; *Doe*, 206 F. Supp. 2d at 1050 n.1.

10 Regarding the UCL claim under California Business and Professions Code section
11 17200, the Court has already found that “[i]n the Ninth Circuit, claims of unfair
12 competition and false advertising under state statutory and common law are
13 “substantially congruent” to claims made under the Lanham Act” and that
14 LegalZoom’s state law claims should be treated in the same manner as the Lanham
15 Act claim. SJ Order at 11 (citing to *Cleary v. News Corp.*, 30 F.3d 1255, 1262-63
16 (9th Cir. 1994). As the Court has previously found, LegalZoom’s FAL and UCL
17 claims rise and fall with its Lanham Act claim. SJ Order at 11. Thus, the Court
18 should grant judgment in favor of Rocket Lawyer on these claims as well.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

XII. CONCLUSION

For the foregoing reasons, the Court should grant Rocket Lawyer’s Motion for Summary Judgment. In the alternative, the Court should grant summary adjudication as to any issues where no genuine dispute exists.

Dated: August 4, 2014

Respectfully submitted,

By: /s/Michael T. Jones
Forrest A. Hainline III
fhainline@goodwinprocter.com
Michael T. Jones (SBN 290660)
mjones@goodwinprocter.com
Hong-An Vu (SBN 266268)
hvu@goodwinprocter.com
Brian W. Cook (*Pro Hac Vice*)
bcook@goodwinprocter.com
GOODWIN PROCTER LLP

Attorneys for Defendant
ROCKET LAWYER INCORPORATED