Entrepreneur Media Inc v. Eygn Limited Ernst & Young LLP et al Doc. 52

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ENTREPRENEUR MEDIA, INC.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ENTREPRENEUR MEDIA, INC.,

Plaintiff,

v.

EYGN LIMITED; ERNST & YOUNG LLP;and ERNST & YOUNG ADVISORY INC.,

Defendants.

EYGN Limited and ERNST & YOUNG LLP

Counterclaimants,

v.

ENTREPRENEUR MEDIA, INC.

Counterdefendant.

No. SACV08-0608 DOC

MEMORANDUM OF POINTS AND AUTHORITIES OF ENTREPRENEUR MEDIA, INC. IN OPPOSITION TO MOTION OF ERNST AND YOUNG LLP FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, TO TRANSFER

Date: December 22, 2008
Time: 8:30 a.m.
Courtroom: 9D
Judge: Honorable David O. Carter

Dockets.Justia.com

Plaintiff Entrepreneur Media, Inc. ("Plaintiff") respectfully submits this memorandum in opposition to the motion (the "Motion") of Defendant Ernst & Young LLP ("Defendant" or "Defendant Ernst & Young") for Judgment on the Pleadings or, in the Alternative, to Transfer.

I. **Introduction**.

Defendant Ernst & Young erroneously contends, *through judgment on the pleadings,* that this Court lacks jurisdiction over it because, purportedly, this Court lacks personal jurisdiction over Defendant EYGN (who is a necessary party to this action). However, as argued in detail in opposition to Defendant EYGN's motion for judgment on the pleadings, Defendant EYGN is not entitled to dismissal for lack of personal jurisdiction – certainly not based on its motion for judgment on the pleadings – and this Court does in fact have jurisdiction over Defendant EYGN.

The Complaint expressly alleges that the **defendants** have had sufficient contacts with California generally, and in connection with this matter particularly, so as to give rise to personal jurisdiction over each defendant (including Defendant EYGN). Complaint, ¶ 7. Accepting this allegation as true, as is mandated by Ninth Circuit law, requires denial of the motion for judgment on the pleadings. Moreover, even if this Court were to require greater specificity in pleading jurisdictional allegations than the short and plain statement included in the Complaint, Plaintiff is entitled to leave to amend to provide it.

Defendants have submitted a variety of declarations attesting to a lack of jurisdiction over Defendant EYGN, but those declarations cannot be considered in the context of a judgment on the pleadings. To the extent the Court considers the declarations, it must treat the motion as one for summary judgment – in which case Plaintiff is entitled to a continuance to allow it to conduct discovery on the issue of jurisdiction. FRCP 56(f). Based on the

information known to date and the information Plaintiff believes it can gather during discovery, Plaintiff contends that this Court does have jurisdiction over Defendant EYGN.

In short, Defendant Ernst & Young LLP is not at this time entitled to dismissal for lack of personal jurisdiction (nor is it entitled to dismissal for lack of personal jurisdiction at all). Indeed, it is doubtful that Defendant Ernst & Young LLP is even entitled to bring the instant motion because, even though it has approximately at least 12 offices in California, it is not currently registered with the California Secretary of State as being qualified to do business in California. Defendant Ernst & Young's motion must be denied or, at the very least, continued to allow Plaintiff a full and fair opportunity to conduct jurisdictional discovery.

II. Argument.

Defendant Ernst & Young LLP's Motion should be denied because Defendant Ernst & Young LLP is a foreign corporation transacting intrastate business within California without having registered with the California Secretary of State. Ernst & Young has approximately twelve offices in California. Declaration of Michael R. Adele, Exh. A. In California, "[a] foreign limited liability partnership transacting intrastate business in this state shall not maintain any action, suit, or proceeding in any court of this state until it has registered in this state pursuant to this section." Cal. Corp. Code § 16959. Accordingly, Ernst & Young LLP does not have standing to bring this Motion unless and until it registers to do business with the California Secretary of State. Accord Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd., 12 Cal.App.4th 74, 86-87 (1993) (time to bring motion was tolled when Court delayed hearing to give defendant/movant time to cure lack of registration with the California Secretary of State).

A. **EYGN Limited Is a Properly Joined Party Over Which This Court Has Jurisdiction**

Plaintiff agrees that EYGN is an indispensible party to this action. However, as argued in opposition to Defendant EYGN's motion to dismiss, this Court has personal jurisdiction over EYGN.

Defendant Ernst & Young LLP erroneously claims that *Rheodyne, Inc. v. Ramin'*, 201 U.S.P.Q. 667, 670 (N.D.Cal. 1978) is "on point." In *Rheodyne*, the court dismissed patent owners for lack of personal jurisdiction in a declaratory relief regarding alleged patent infringement, then dismissed the remainder of the action against the licensees because the dismissed owners were necessary and indispensible parties. In essence, Defendant Ernst & Young LLP has adopted, in the very different context of a trademark license, the strategy employed by the Defendant in *Rheodyne.* However, *Rheodyne* is not "on point" with regard to the present action because it involved a patent license, not a trademark license, and there was no indication that the terms of the license required licensor enforcement, granted licensee authorization for trademark enforcement actions, required co-operation of the licensor and licensee in such actions and obligated the licensor to lending its name to infringement suits. *Compare Rheodyne*, 201 U.S.P.Q. 667 (which does not delve into any of the terms of the license agreement) *with* Cochrane Decl., Exh. C (which provides for extensive co-operation, oversight and involvement in policing the licensed trademarks, including a provision requiring the licensor to "lend its name" to any legal proceedings). As argued in opposition to Defendant EYGN's motion for judgment on the pleadings, these additional oversight and enforcement obligations establish specific jurisdiction against Defendant EYGN here.

In short, Plaintiff Entrepreneur Media Inc. agrees that Defendant EYGN is a necessary party to this action, but contends that *Rheodyne* is not on point.

1 For the reasons set forth in greater detail in opposition to Defendant EYGN's
2 motion for judgment on the pleadings, this Court has jurisdiction over EYGN.
3 Plaintiff incorporates those arguments by reference as if set forth herein in full.

4 B. **The Court Should Not Decline to Exercise Declaratory**
5 **Relief Jurisdiction**

6 Defendant Ernst & Young LLP claims that the Court should decline to
7 exercise Declaratory Relief Jurisdiction because the Court lacks jurisdiction
8 over Defendant EYGN Limited. However, as argued above and in detail in
9 Plaintiff's opposition to Defendant EYGN's motion for judgment on the
10 pleadings, Defendant EYGN Limited is a proper party to this action over which
11 this Court has personal jurisdiction. Because Defendant Ernst & Young's
12 argument for this Court declining declaratory relief jurisdiction is based
13 exclusively upon the erroneous assertion that this Court lacks personal
14 jurisdiction over Defendant EYGN Limited, the Court should reject the
15 argument and should retain jurisdiction over this action.

16 **C. This Action Should Not Be Transferred to New York**

17 Defendant Ernst & Young makes two arguments in support of
18 transferring this matter to New York: (1) the interests of justice (purportedly)
19 favor transfer; and (2) Plaintiff's choice of forum in this first-filed action do not
20 weigh against transfer. These arguments lack merit.

21 **1. The Interests of Justice Do Not Favor Transfer**

22 The interests of justice do not favor transfer. Defendants are seeking to
23 prevent Plaintiff from holding an entrepreneur of the year awards ceremony by
24 preventing Plaintiff from using the phrase "Entrepreneur of the Year." It is
25 difficult to imagine how one can hold an entrepreneur of the year awards
26 ceremony if once cannot call the ceremony what it is. As such, preventing use
27 of the phrase effectively prevents the ability to hold such a ceremony, and
28 gives Defendants an monopoly over the ability to hold entrepreneur of the year

ceremonies. A ruling in favor of Defendants in this action will not only affect Plaintiff, which is a California resident, but all other California residents who wish to hold entrepreneur of the year awards ceremonies, including without limitation:

- The University of Southern California, located in Los Angeles, which has been holding entrepreneur of the year awards since 1977;
- Hispanic Business Magazine, published by Hispanic Business Inc. located in Santa Barbara, which has been holding entrepreneur of the year awards since 2002;
- Loyola Marymount University, located in Los Angeles, which has been holding entrepreneur of the year awards since 2003; and
- The San Diego Chamber of Commerce, which as been holding entrepreneur of the year awards since at least 2007.

A ruling barring Plaintiff's use of the phrase Entrepreneur of the Year could effectively bar, or at least chill, the above-entities' use of the phrase and ability to continue holding their awards ceremonies. Given the potential affect of this action on Plaintiff and other California residents, the interests of justice favor deciding this case in California. Moreover, each of the foregoing entities will likely be deponents and potential trial witnesses who cannot be compelled to appear for trial in New York. With regard to the parties' own documents and witnesses, it is just as easy to compel appearance and/or production in California as in New York, and there is no evidence that there are likely to be more party affiliated documents and/or witnesses in New York than in California. In short, the interests of justice do <u>not</u> favor transfer.

Defendant Ernst & Young LLP argues that the interests of justice (purportedly) do favor transfer because: (a) Defendant EYGN Limited is a necessary party over which this Court lacks jurisdiction; (b) the existence of a

jurisdictional dispute here makes it easier to simply proceed in New York (where jurisdiction is not disputed); and (c) the New York court's familiarity with New York law will make it easier to resolve claims asserted herein that are based on New York law. These arguments lack merit and/or do not outweigh the interests of justice served by resolving the issue here.

(a) Defendant EYGN Limited Is a Party over which this Court Has Jurisdiction

As argued above, this Court has personal jurisdiction over EYGN Limited. Thus, the present action contains all of the parties necessary for resolving this dispute.

(b) This Court Is Quite Capable of Determining a Jurisdictional Dispute

The jurisdictional dispute here raises important issues regarding a trademark owner's ability to avoid jurisdiction by delegating use of the mark in a territory to a licensee (even when it oversees and controls use of the mark in that territory), and the ability of a trademark owner to avoid jurisdiction by transferring its mark to an offshore holding company. Inasmuch as important rights of California state residents are involved, the Court should not transfer the present case merely to avoid deciding a jurisdictional dispute.

(c) This Court Is Quite Capable of Determining Unfair Competition Claims under New York State Law

This Court interprets foreign states' laws all the time sitting in diversity. Deciding issues of New York state law on unfair competition is well within this Court's abilities

2. Plaintiff's Choice of Forum in this First-Filed Action Weigh Against Transfer

Defendant Ernst & Young LLP argues that the first-to-file rule should not apply because the "threshold factors" of "same parties" and "same claims" are not met here because of the purported lack of jurisdiction over Defendant EYGN. However, the threshold factors are met here because this Court does have jurisdiction over Defendant EYGN and, therefore, the parties to the New York Action and the claims in that action are the same as the parties and claims raised here.

A. Judgment on the Pleadings Must Be Denied Based on the Jurisdictional Allegations in the Complaint.

“A judgment on the pleadings is a decision on the merits,” that the Ninth Circuit reviews de novo. *General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989), *cert. denied*, 493 U.S. 1079 (1990). A motion for judgment on the pleadings is proper “when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.,* 896 F.2d 1542, 1550 (9TH Cir. 1990). “All allegations of fact by the party opposing the motion are accepted as true, and are construed in the light most favorable to that party.” *General Conference, 887 F.2d* at 230.

Here, the Complaint expressly alleges that "Defendants have sufficient contacts with this jurisdiction generally and, in particular, with the events alleged herein, that each defendant is subject to the exercise of jurisdiction of this court over its person." Complaint, ¶ 7. This allegation of fact must be taken as true in the context of a motion for judgment on the pleadings.

General Conference, 887 F.2d at 230. Moreover, the allegation conforms with the requirement that Plaintiff need only provide "a short and plain statement of the grounds for this court's jurisdiction . . . " FRCP, 8(a)(1). Accordingly, the motion for judgment on the pleadings for lack of personal jurisdiction must be denied.[1]

B. If Judgment on the Pleadings Is Granted, Leave to Amend Must Also Be Granted Here.

To the extent the Court requires greater specificity and is inclined to grant judgment on the pleadings, Plaintiff requests (and is entitled to) leave to amend the complaint to provide that specificity.

> It is said that a motion for judgment on the pleadings is not favored by the courts, and this is true, if the motion is permitted to cut off the right to amend, thus preventing a hearing on the merits. But if the motion for judgment is treated as a demurrer to the defective pleading with leave to amend in a proper case, as was done here, the practice is sanctioned by usage and free from objection.

David v. Robert Dollar Co., 2 F.2d 803, 806 (9th Cir. 1925). In determining whether to grant leave to amend, "a court must be guided by the underlying purpose of [Federal] Rule [of Civil Procedure] 15-to facilitate decision on the merits, rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981), quoted in *Roth v. Garcia*, 942 F2d 617, 628 (9th Cir. 1991); *see also In re Rogstad*, 126 F.3d 1224, 1228 (9th Cir. 1997).

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[1] *See also WebZero, LLC v. ClicVU, Inc.*, 2008 WL 1734702, 4 (C.D.Cal. 2008) (without having conducted discovery, [plaintiff] need only make a prima facie showing that [defendant] is subject to personal jurisdiction in California, *citing Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir.1977) (stating that Plaintiff need only "demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss") (citations omitted)).

Here, Plaintiff can (and will) amend the Complaint to allege greater jurisdictional specificity if need be. Trademark licensors, such as Defendant EYGN, are required to oversee and control the quality and the use of its trademark. In fact, Defendant EYGN's license agreement provides for such control. *See* Declaration of Victoria Cochrane, Exhibit C section 5 (Defendant EYGN's quality control rights); *see also Miller v. Glenn Miller Productions, Inc.*, 454 F.3d 975, 992 (9th Cir. 2006) ("It is well established that when the owner of a trademark licenses the mark to others, he retains a "duty to exercise control and supervision over the licensee's use of the mark"). As such, Defendant EYGN is not a "mere" licensor, and the patent cases it cites regarding "mere" licensors are unavailing.

Defendant EYGN's oversight activities (and those of its agent/designated controller, EYGS) in assuring Ernst & Young's proper use of the mark in California and in policing the mark's use in California provide jurisdiction. So too, the acts of Ernst & Young LLP in using the Entrepreneur of the Year mark under Defendant EYGN's supervisory control are attributable to Defendant EYGN. *See e.g., Akro Corp v. Luker,* 45 F.3d 1541, 1548-49 (Fed. Cir. 1995) (licensor subject to personal jurisdiction due to sale of licensed product in state pursuant to license that granted licensee power to litigate infringement actions and that required licensor to defend and pursue infringements against the patent); *Genetic Implant Systems v. Core-Vent Corp.,* 123 F.3d 1455 (Fed. Cir. 1997) (licensor's obligations under an exclusive license agreement may subject it to personal jurisdiction in the forum state even if the licensee is not incorporated or headquarted in the forum state, so long as the exclusive licensee conducts business there).[2]

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[2] *Viam Corp. v. Iowa Export-Import Trading Co.*, 84 F.3d 424 (Fed.Cir. 1996) (sending cease and desist letters, plus placing patented product into commerce through distributor and purposefully exploiting the California market through advertising suffices for personal jurisdiction because the "forum state does not exceed its powers under the

The case of *Breckenridge Pharmaceutical, Inc. v. Metabolite Laboratories, Inc.*, 444 F.3d 1356 (Fed. Cir. 2006) establishes that a licensor may subject itself to personal jurisdiction where it goes beyond a "mere" license in exchange for royalties, retains control over licensee's activities and grants licensee (and retains for licensor) the right to litigate infringement actions. For instance, in *Breckenridge*, the court held:

> Here, in addition to sending letters into the forum state, which we presume qualify as “cease and desist” letters, Metabolite has entered into an exclusive license with PamLab, a company that, while not headquartered or incorporated in Florida, conducts business in Florida. As part of the license agreement, Metabolite granted PamLab the right to sue for patent infringement with Metabolite's written consent, and the parties agreed to “discuss in good faith the appropriate action, if any, with respect to third party infringers of the Licensed Patents, and to cooperate reasonably in any enforcement actions”. Metabolite granted PamLab “full control of the prosecution or maintenance” of any patent or application that Metabolite abandons or permits to lapse and agreed to provide PamLab with an executed power of attorney for that purpose. Metabolite further agreed to “provide consultation to PamLab in the science, medicine and marketing of vitamins and related products, from time to time”.
>
> That this exclusive license agreement not only *contemplated* an ongoing relationship between PamLab and Metabolite beyond royalty payments but has *actually resulted* in such a relationship is obvious from the facts of this case. Metabolite coordinates with PamLab in sending cease and desist letters and in litigating infringement claims in Florida and elsewhere and, as is the case here, licensor and licensee are often represented jointly by counsel. As such, we hold that, through its relationship with PamLab, which sells products in Florida, Metabolite has purposefully availed itself to the privilege of conducting activities within Florida.

Id. at 1366-67.

The facts stated above are closely analogous to the facts presented here. As in *Breckenridge*, licensor EYGN has retained for itself and granted to licensee Ernst & Young LLP the right to sue third parties for infringement, and

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Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State”).

has obligated itself to protect the licensed interests and pay for lawsuits instituted by Ernst & Young LLP. Cochrane Decl., Exh. C ¶¶ 4.2 and 4.3. So too, as in *Breckenridge,* Defendant EYGN's license requires that Ernst & Young LLP abide by various quality control provisions. Cochrane Decl., Exh. C ¶¶ 5.1-5.4. Just as in *Breckenridge,* this license resulted in the co-ordination of the cease and desist letters sent by their *joint* counsel to Plaintiff and Plaintiff's counsel (Complaint, Exhs. A and B), and has resulted in their joint representation in both the present action and in the New York Action. As in *Breckenridge*, the relationship between licensor EYGN and its licensee, Ernst & Young LLP gives rise to this Court's jurisdiction over Defendant EYGN.[3]

Indeed, jurisdiction is particularly appropriate where, as here, Ernst & Young LLP owned the mark originally, then sold it to Defendant EYGN and took a license back from Defendant EYGN. Notwithstanding the corporate shell game, the relationship between Defendant EYGN Limited and Defendant Ernst & Young LLP is either an alter ego and/or agency relationship, such that Ernst & Young's conduct in connection therewith give rise to this Court's jurisdiction over Defendant Ernst & Young LLP and Defendant EYGN Limited. *Dainippon Screen Mfg. Co., Ltd. v. CFMT, Inc.*, 142 F.3d 1266, 1270 –1271 (Fed. Cir. 1998) ("Stripped to its essentials, CFM contends that a parent

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[3] In the Federal Circuit, as in the Ninth Circuit, simply sending a cease and desist letter will not create jurisdiction. *See e.g, Campbell Pet Co. v. Miale*, 542 F.3d 879, 885 (Fed. Cir. 2008) ("the sending of an infringement letter, without more, is insufficient to satisfy the requirements of due process when exercising jurisdiction over an out-of-state patentee"); *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1089 (9th Cir. 2000) ("a cease-and-desist letter sent by a trademark holder to a putative infringer is not, by itself, a sufficient basis for personal jurisdiction in the putative infringer's home state."). However, the type of relationship at issue here, which goes beyond a mere license in exchange for royalty payments, *will* suffice to give rise to personal jurisdiction. *Breckenridge Pharmaceutical, Inc. v. Metabolite Laboratories, Inc.*, 444 F.3d 1356 (Fed. Cir. 2006); *Dainippon Screen Mfg. Co., Ltd. v. CFMT, Inc.*, 142 F.3d 1266, 1270 -1271 (Fed. Cir. 1998).

company can incorporate a holding company in another state, transfer its patents to the holding company, arrange to have those patents licensed back to itself by virtue of its complete control over the holding company, and threaten its competitors with infringement without fear of being a declaratory judgment defendant, save perhaps in the state of incorporation of the holding company. This argument qualifies for one of our “chutzpah” awards. ").

Plaintiff can and would make the foregoing allegations if the Court were inclined to grant Defendant EYGN's motion for judgment on the pleadings, and if leave to amend were also granted. Declaration of Peter Shea, ¶ _. Consequently, if the Court grants the Motion, Plaintiff must also be granted leave to amend the Complaint. *Swartz v. KPMG LLP*, 476 F.3d 756, 760 (9th Cir. 2007) (Ninth Circuit reaffirmed that a court should not dismiss a complaint for jurisdictional defects unless “it is clear ... that the complaint could not be saved by any amendment”); *See also David v. Robert Dollar Co*., 2 F.2d at 806; *Roth v. Garcia*, 942 F2d at 628.

C. If the Court Looks Beyond the Pleadings and Considers Testimony and Other Extrinsic Evidence, Plaintiff Is Entitled Summary Judgment in Its Favor or, in the Alternative, to a Continuance to Conduct Discovery.

Counterclaimant's motion for judgment on the pleadings is not based upon the four corners of the pleadings, but rather based on extrinsic evidence from various declarants. As such, to the extent such evidence is considered and not excluded, the motion is not a motion for judgment on the pleadings, but a *de facto* summary judgment motion. *See* FRCP 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to

present all the material that is pertinent to the motion"). Because Defendant EYGN chose to bring a motion for judgment on the pleadings and not a summary judgment motion, the declarations proffered by Defendant EYGN should be excluded and the Motion should be denied (or at most, granted with leave to amend).

If, however, the Court decides to consider the declarations and treat this Motion as one for summary judgment, then Plaintiff should prevail based on the limited evidence currently available and proffered by Defendant EYGN. As the discussion above regarding *Breckenridge* establishes, Defendant EYGN's license agreement with Defendant Ernst & Young LLP, which allows both licensor EYGN Limited and licensee Ernst & Young LLP to litigate infringement actions (at Defendant EYGN's expense), which requires Defendant EYGN to protect the licensed trademarks, which affords Defendant EYGN quality control oversight over the use of the trademarks in California (and elsewhere), and which resulted in the co-ordinated cease and desist letters from counsel for Defendant EYGN and Defendant Ernst & Young LLP being sent into California and directed at a California resident establish personal jurisdiction over Defendant EYGN.

Alternatively, if the limited evidence currently proffered in connection with this motion (principally by Defendant EYGN) does not establish jurisdiction over EYGN, Plaintiff is entitled to a continuance of the hearing on this motion to allow discovery. *See Portland Retail Druggists Ass'n v. Kaiser Foundation Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981) ("Before summary judgment may be entered against a party, that party must be afforded both notice that the motion is pending and an adequate opportunity to respond. Implicit in the "opportunity to respond" is the requirement that sufficient time be afforded for discovery necessary to develop "facts essential to justify (a party's) opposition" to the motion. "); *See America West Airlines, Inc. v. GPA*

Group, Ltd., 877 F.2d 793, 801 (9th Cir. 1989) ("where pertinent facts bearing on the question of jurisdiction are in dispute, discovery should be allowed").[4]

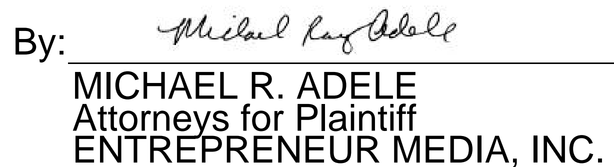
Although this matter has been pending since June 2008, it has only recently been at issue, the parties only recently met and conferred pursuant to Rule 26, and discovery is not slated to commence with the initial disclosure of witnesses and documents on January 30, 2008 – *after the currently scheduled hearing on this motion.* This schedule was established on the understanding that Plaintiff's motion for an injunction and Defendants' motions to dismiss, stay or transfer would be based on the undisputed facts that relate to the first-to-file and "anticipatory filing" doctrines. Inasmuch as Defendants have taken a much broader, fact based, approach to have this case dismissed, stayed or transferred, to the extent this Motion is not denied outright given the limited facts proffered by Defendant EYGN, Plaintiff is entitled to conduct jurisdictional discovery.

III. **Conclusion.**

This Court should deny Defendant EYGN's motion. Alternatively, to the extent the Court grants judgment on the pleadings, leave to amend must also be granted. So too, to the extent that the Court is inclined to treat this Motion as a summary judgment motion and is not inclined to deny the Motion outright based on the limited evidence presented, Plaintiff is entitled to a continuance to allow it a full and fair opportunity to conduct jurisdictional discovery.

Dated: December 8, 2008

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

By: 

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[4] *See also* FRCP 56(f) (providing for continuances to allow for discovery relevant to summary judgment motions); *see also* FRCP 12(d) (If treated as a summary judgment motion, "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion")

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