

1 Jeffrey R. Patterson, Esq. (State Bar No. 126148)  
2 Michael R. Adele, Esq. (State Bar No. 138339)  
3 Michael J. Holmes, Esq. (State Bar No. 199311)

4 ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP  
5 12348 High Bluff Drive, Suite 210  
6 San Diego, CA 92130  
7 Telephone: (858) 481-5055  
8 Facsimile: (858) 481-5028

9 Attorneys for Plaintiff/Counter-Defendant  
10 ENTREPRENEUR MEDIA, INC.

11 **UNITED STATES DISTRICT COURT**  
12 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

13 ENTREPRENEUR MEDIA, INC., )  
14 )  
15 Plaintiff, )  
16 )  
17 v. )  
18 )  
19 EYGN LIMITED; ERNST & YOUNG )  
20 LLP;and ERNST & YOUNG )  
21 ADVISORY INC., )  
22 )  
23 Defendants. )

No. SACV08-0608 DOC

**MEMORANDUM OF POINTS  
AND AUTHORITIES OF  
ENTREPRENEUR MEDIA, INC. IN  
OPPOSITION TO MOTION OF EYGN  
LIMITED FOR JUDGMENT ON THE  
PLEADINGS FOR LACK OF  
PERSONAL JURISDICTION**

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

24 EYGN Limited and ERNST & )  
25 YOUNG LLP )  
26 Counterclaimants, )  
27 )  
28 v. )  
29 )  
30 ENTREPRENEUR MEDIA, INC. )  
31 )  
32 Counterdefendant.)

1 Plaintiff Entrepreneur Media, Inc. ("Plaintiff") respectfully submits this  
2 memorandum in opposition to the motion (the "Motion") of Defendant EYGN  
3 Limited ("Defendant" or "Defendant EYGN") for Judgment on the Pleadings for  
4 Lack of Personal Jurisdiction.

5 **I. Introduction.**

6 Defendant EYGN erroneously contends, through its motion for *judgment*  
7 *on the pleadings*, that this Court lacks personal jurisdiction over Defendant  
8 EYGN. However, the Complaint expressly alleges that the defendants have  
9 had sufficient contacts with California generally, and in connection with this  
10 matter particularly, so as to give rise to personal jurisdiction over each  
11 defendant (including Defendant EYGN). Complaint, ¶ 7. Accepting this  
12 allegation as true, as is mandated by Ninth Circuit law, requires denial of the  
13 motion for judgment on the pleadings. Regardless, even if this Court were to  
14 require greater specificity in pleading jurisdictional allegations than the short  
15 and plain statement included in the Complaint, Plaintiff is entitled to leave to  
16 amend its complaint so that it can provide any greater specificity the Court  
17 requires.

18 Defendants have submitted a variety of declarations attesting to a lack of  
19 jurisdiction over Defendant EYGN, but those declarations cannot be  
20 considered in the context of a judgment on the pleadings. To the extent the  
21 Court considers the declarations, the license agreement attached as Exhibit C  
22 to the declaration of Victoria Cochraine evidences that Defendant EYGN and  
23 Defendant Ernst & Young have a relationship relative to the trademarks at  
24 issue here that establishes jurisdiction over Defendant EYGN. Indeed, under  
25 the parties' license agreement (and federal law), Defendant EYGN was  
26 obligated to oversee and control the quality of any use of the mark in California  
27 (and elsewhere), Defendant EYGN and Defendant Ernst & Young were both  
28 entitled to commence litigation in California (and elsewhere), and both

1 Defendants used the same counsel to send their cease and desist letter and  
2 e-mail into California and to defend the litigation commenced by Plaintiff. If the  
3 Court considers such evidence, it must treat the Motion as a summary  
4 judgment motion and should deny it outright; however, to the extent the Court  
5 is not inclined to deny the Motion outright based on the evidence submitted by  
6 Defendants, Plaintiff is entitled to a continuance to allow it to conduct  
7 discovery on the issue of jurisdiction. Discovery has not as yet commenced in  
8 this matter, and is set to commence with the exchange of initial disclosures on  
9 January 30, 2008. Plaintiff is entitled, at a minimum, to a full and fair  
10 opportunity to conduct jurisdictional discovery so that it can fairly defend a  
11 summary judgment motion based on a purported lack of jurisdiction.

12 In short, Defendant EYGN is not entitled to dismissal for lack of personal  
13 jurisdiction. Given the motion as framed and the evidence submitted, EYGN's  
14 motion should be denied outright. If judgment on the pleadings is granted,  
15 however, Plaintiff is entitled to leave to amend. Moreover, if the matter is  
16 treated as a summary judgment motion and not denied outright, Plaintiff is  
17 entitled to a continuance to allow Plaintiff a full and fair opportunity to conduct  
18 jurisdictional discovery before the motion is resolved. Regardless, Defendant  
19 EYGN should not be dismissed for lack of personal jurisdiction.

## 20 **II. Argument.**

### 21 22 **A. Judgment on the Pleadings Must Be Denied Based on** 23 **the Jurisdictional Allegations in the Complaint.**

24 "A judgment on the pleadings is a decision on the merits," that the Ninth  
25 Circuit reviews de novo. *General Conference Corp. of Seventh-Day*  
26 *Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228,  
27 230 (9<sup>th</sup> Cir. 1989), *cert. denied*, 493 U.S. 1079 (1990). A motion for judgment  
28 on the pleadings is proper "when the moving party clearly establishes on the

1 face of the pleadings that no material issue of fact remains to be resolved and  
2 that it is entitled to judgment as a matter of law.” *Hal Roach Studios, Inc. v.*  
3 *Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9<sup>TH</sup> Cir. 1990). “All allegations of  
4 fact by the party opposing the motion are accepted as true, and are construed  
5 in the light most favorable to that party.” *General Conference*, 887 F.2d at  
6 230.

7 Here, the Complaint expressly alleges that "Defendants have sufficient  
8 contacts with this jurisdiction generally and, in particular, with the events  
9 alleged herein, that each defendant is subject to the exercise of jurisdiction of  
10 this court over its person." Complaint, ¶ 7. This allegation conforms with the  
11 requirement that Plaintiff need only provide "a short and plain statement of the  
12 grounds for this court's jurisdiction . . ." FRCP, 8(a)(1). Moreover, the  
13 allegation must be taken as true in the context of a motion for judgment on the  
14 pleadings. *General Conference*, 887 F.2d at 230. Accordingly, the motion for  
15 judgment on the pleadings for lack of personal jurisdiction must be denied.<sup>1</sup>

16 **B. If Judgment on the Pleadings Is Granted (and It Should**  
17 **Not Be), Leave to Amend Must Be Granted Too.**

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

21  
22 It is said that a motion for judgment on the pleadings is not  
23 favored by the courts, and this is true, if the motion is permitted  
24 to cut off the right to amend, thus preventing a hearing on the  
25 merits. But if the motion for judgment is treated as a demurrer

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26 <sup>1</sup> See also *WebZero, LLC v. ClicVU, Inc.*, 2008 WL 1734702, 4 (C.D.Cal. 2008) (without  
27 having conducted discovery, [plaintiff] need only make a prima facie showing that  
28 [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)).

1 to the defective pleading with leave to amend in a proper case,  
2 as was done here, the practice is sanctioned by usage and free  
3 from objection.

4 *David v. Robert Dollar Co.*, 2 F.2d 803, 806 (9<sup>th</sup> Cir. 1925). In determining  
5 whether to grant leave to amend, “a court must be guided by the underlying  
6 purpose of [Federal] Rule [of Civil Procedure] 15-to facilitate decision on the  
7 merits, rather than on the pleadings or technicalities.” *United States v. Webb*,  
8 655 F.2d 977, 979 (9th Cir. 1981), quoted in *Roth v. Garcia*, 942 F2d 617, 628  
9 (9th Cir. 1991); see also *In re Rogstad*, 126 F.3d 1224, 1228 (9th Cir. 1997).

10 Here, if need be, Plaintiff can (and will) amend the Complaint to allege  
11 greater jurisdictional specificity. Trademark licensors, such as Defendant  
12 EYGN, are required to oversee and control the quality and the use of their  
13 trademarks. In fact, Defendant EYGN's license agreement provides for such  
14 control. See Declaration of Victoria Cochrane, Exhibit C section 5 (Defendant  
15 EYGN's quality control rights); see also *Miller v. Glenn Miller Productions, Inc.*,  
16 454 F.3d 975, 992 (9th Cir. 2006) (“It is well established that when the owner  
17 of a trademark licenses the mark to others, he retains a “duty to exercise  
18 control and supervision over the licensee's use of the mark”). As such,  
19 Defendant EYGN is not a “mere” licensor, and its oversight and control over  
20 the use and quality of the mark in California (including its joint effort with  
21 Defendant Ernst & Young to enforce its rights in California) creates specific  
22 jurisdiction over Defendant EYGN in this matter.

23 Defendant EYGN's oversight activities (and those of its agent/designated  
24 controller, EYGS) in assuring Ernst & Young's proper use of the mark in  
25 California and in policing the mark's use in California provide jurisdiction. So  
26 too, the acts of Ernst & Young LLP in using the Entrepreneur of the Year mark  
27 under Defendant EYGN's supervisory control are attributable to Defendant  
28

1 EYGN. See e.g., *Akro Corp v. Luker*, 45 F.3d 1541, 1548-49 (Fed. Cir. 1995)  
2 (licensor subject to personal jurisdiction due to sale of licensed product in state  
3 pursuant to license that granted licensee power to litigate infringement actions  
4 and that required licensor to defend and pursue infringements against the  
5 patent); *Genetic Implant Systems v. Core-Vent Corp.*, 123 F.3d 1455 (Fed.  
6 Cir. 1997) (licensor's obligations under an exclusive license agreement may  
7 subject it to personal jurisdiction in the forum state even if the licensee is not  
8 incorporated or headquartered in the forum state, so long as the exclusive  
9 licensee conducts business there).<sup>2</sup>

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

16 Here, in addition to sending letters into the forum state, which we  
17 presume qualify as "cease and desist" letters, Metabolite has  
18 entered into an exclusive license with PamLab, a company that,  
19 while not headquartered or incorporated in Florida, conducts  
20 business in Florida. As part of the license agreement, Metabolite  
21 granted PamLab the right to sue for patent infringement with  
22 Metabolite's written consent, and the parties agreed to "discuss  
23 in good faith the appropriate action, if any, with respect to third  
24 party infringers of the Licensed Patents, and to cooperate  
25 reasonably in any enforcement actions". Metabolite granted  
26 PamLab "full control of the prosecution or maintenance" of any  
27 patent or application that Metabolite abandons or permits to  
28 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".

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2 <sup>2</sup> *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  
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").

1 That this exclusive license agreement not only *contemplated* an  
2 ongoing relationship between PamLab and Metabolite beyond  
3 royalty payments but has *actually resulted* in such a relationship  
4 is obvious from the facts of this case. Metabolite coordinates  
5 with PamLab in sending cease and desist letters and in litigating  
6 infringement claims in Florida and elsewhere and, as is the case  
7 here, licensor and licensee are often represented jointly by  
8 counsel. As such, we hold that, through its relationship with  
9 PamLab, which sells products in Florida, Metabolite has  
10 purposefully availed itself to the privilege of conducting activities  
11 within Florida.

12 *Id.* at 1366-67.

13 The facts stated above are closely analogous to the facts presented  
14 here. As in *Breckenridge*, licensor EYGN has retained for itself and granted to  
15 licensee Ernst & Young LLP the right to sue third parties for infringement, and  
16 has obligated itself to protect the licensed interests and pay for lawsuits  
17 instituted by Ernst & Young LLP. Cochrane Decl., Exh. C ¶¶ 4.2 and 4.3. So  
18 too, as in *Breckenridge*, Defendant EYGN's license requires that Ernst &  
19 Young LLP abide by various quality control provisions. Cochrane Decl., Exh.  
20 C ¶¶ 5.1-5.4. Just as in *Breckenridge*, this license resulted in the co-  
21 ordination of the cease and desist letters sent by their *joint* counsel to Plaintiff  
22 and Plaintiff's counsel (Complaint, Exhs. A and B), and has resulted in their  
23 joint representation in the present California based action. As in *Breckenridge*,  
24 the relationship between licensor EYGN and its licensee, which creates  
25 continuing obligations to police the mark in California (and elsewhere) –  
26 obligations that Defendants EYGN and Ernst & Young LLP were discharging  
27 by having their counsel contact Plaintiff and Plaintiff's counsel in California –  
28 gives rise to this Court's jurisdiction over Defendant EYGN.<sup>3</sup>

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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") (emphasis added); *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1089 (9<sup>th</sup> Cir. 2000) ("a cease-and-desist letter sent by a trademark holder to a putative infringer is

1           Indeed, jurisdiction is particularly appropriate where, as here, Ernst &  
2 Young LLP owned the mark originally (and has used it consistently in  
3 California for years), then sold it to Defendant EYGN and took a license back  
4 from Defendant EYGN. See Declaration of Michael R. Adele filed concurrently  
5 herewith ("Adele Decl."). Notwithstanding the corporate shell game, the  
6 relationship between Defendant EYGN Limited and Defendant Ernst & Young  
7 LLP is either an alter ego and/or agency relationship, such that Ernst &  
8 Young's conduct in connection therewith give rise to this Court's jurisdiction  
9 over Defendant Ernst & Young LLP and Defendant EYGN Limited. Indeed, in  
10 similar circumstances, attempts by the defendant to avoid jurisdiction have  
11 been met by at least one court with incredulity and the observation that the  
12 defendant had "chutzpah" for even making the argument. *Dainippon Screen*  
13 *Mfg. Co., Ltd. v. CFMT, Inc.*, 142 F.3d 1266, 1270 –1271 (Fed. Cir. 1998)  
14 ("Stripped to its essentials, CFM contends that a parent company can  
15 incorporate a holding company in another state, transfer its patents to the  
16 holding company, arrange to have those patents licensed back to itself by  
17 virtue of its complete control over the holding company, and threaten its  
18 competitors with infringement without fear of being a declaratory judgment  
19 defendant, save perhaps in the state of incorporation of the holding company.  
20 This argument qualifies for one of our "chutzpah" awards. ").

21           Plaintiff can and would make the foregoing specific factual allegations if  
22 the Court were inclined to grant Defendant EYGN's motion for judgment on the  
23 pleadings. See Adele Decl. Thus, if the Court grants judgment on the  
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25 not, by itself, a sufficient basis for personal jurisdiction in the putative infringer's home  
26 state."). However, the type of relationship at issue here, which goes beyond a mere  
27 license in exchange for royalty payments, will suffice to give rise to personal jurisdiction.  
28 *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).



1 pleadings (which it should not), leave to amend the Complaint in this action  
2 must also be granted. *Id.* Consequently, if the Court grants the Motion,  
3 Plaintiff must also be granted leave to amend the Complaint. *Swartz v. KPMG*  
4 *LLP*, 476 F.3d 756, 760 (9th Cir. 2007) (Ninth Circuit reaffirmed that a court  
5 should not dismiss a complaint for jurisdictional defects unless “it is clear ...  
6 that the complaint could not be saved by any amendment”); *See also David v.*  
7 *Robert Dollar Co.*, 2 F.2d at 806; *Roth v. Garcia*, 942 F2d at 628.

8 **C. If the Court Looks Beyond the Pleadings and Considers**  
9 **Testimony and Other Extrinsic Evidence, Plaintiff Is**  
10 **Entitled Summary Judgment in Its Favor or, in the**  
11 **Alternative, to a Continuance to Conduct Discovery.**  
12

13 Defendant EYGN's motion for judgment on the pleadings is not based  
14 upon the four corners of the pleadings, but rather based on extrinsic evidence  
15 from various declarants. As such, to the extent such evidence is considered  
16 and not excluded, the motion is not a motion for judgment on the pleadings,  
17 but a *de facto* summary judgment motion. See FRCP 12(d) ("If, on a motion  
18 under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to  
19 and not excluded by the court, the motion must be treated as one for summary  
20 judgment under Rule 56. All parties must be given a reasonable opportunity to  
21 present all the material that is pertinent to the motion"). Because Defendant  
22 EYGN chose to bring a motion for judgment on the pleadings and not a  
23 summary judgment motion, the declarations proffered by Defendant EYGN  
24 should be excluded and the Motion should be denied (or at most, granted with  
25 leave to amend as a judgment on the pleadings).

26 If, however, the Court decides to consider the declarations and treat this  
27 Motion as one for summary judgment, then Plaintiff should prevail based on  
28 the limited evidence currently available and proffered by Defendant EYGN. As

1 the discussion above regarding *Breckenridge* establishes, Defendant EYGN's  
2 license agreement with Defendant Ernst & Young LLP, which allows both  
3 licensor EYGN Limited and licensee Ernst & Young LLP to litigate infringement  
4 actions (at Defendant EYGN's expense), which requires Defendant EYGN to  
5 protect licensed ENTREPRENEUR OF THE YEAR trademark in California  
6 (and elsewhere), which affords Defendant EYGN quality control oversight over  
7 the use of the trademarks in California (and elsewhere), and which resulted in  
8 the co-ordinated cease and desist letters from counsel for Defendant EYGN  
9 and Defendant Ernst & Young LLP being sent into California and directed at a  
10 California resident, establishes personal jurisdiction over Defendant EYGN.  
11 See Cochrane Declaration, Exh. C.

12         Indeed, the license agreement between Defendant EYGN and  
13 Defendant Ernst & Young not only allows Defendant Ernst & Young LLP to  
14 commence legal action if Defendant EYGN does not, it states that ". . . EYGN  
15 shall act in good faith to protect the interests of [Ernst & Young LLP]. . . .  
16 EYGN shall give [Ernst & Young LLP] all reasonable assistance in any such  
17 action [*i.e.*, instituting legal proceedings], *including lending its name to any*  
18 *legal proceedings*. EYGN shall bear the reasonable costs of any such  
19 actions." See Cochrane Declaration, Exh. C ¶ 4.3. Where, as here, EYGN  
20 agreed to lend its name to trademark litigation Ernst & Young LLP may choose  
21 to institute in California (and elsewhere), EYGN can and should be held to  
22 have consented to personal jurisdiction anywhere (including California) where  
23 Ernst & Young can sue or be sued for trademark infringement involving the  
24 licensed EYGN trademarks (such as the ENTREPRENEUR OF THE YEAR  
25 trademark at issue here). Defendant EYGN cannot grant Ernst & Young LLP  
26 the right to commence trademark actions in California to protect EYGN  
27  
28

1 trademarks and contractually agree to participate as a party in such actions,<sup>4</sup>  
2 and then claim (only when it suits EYGN) that California courts lack jurisdiction  
3 over it in connection with those trademarks. See *Breckenridge*, 444 F.3d  
4 1356; *Viam Corp.*, 84 F.3d 424.

5 Viewed from another angle, if the present dispute had been an  
6 infringement action by Ernst & Young LLP against Entrepreneur Media Inc. for  
7 infringement of the licensed trademark, and Entrepreneur Media Inc. objected  
8 and sought dismissal for failure to join EYGN Limited as the owner of the  
9 trademark – the license agreement between EYGN Limited and Ernst & Young  
10 LLP would allow Ernst & Young LLP to be brought into the action as an  
11 interested party who contractually agreed to lend its name to any legal  
12 proceedings. Cochrane Decl., Exh. C, ¶ 4.3. EYGN could not claim a lack of  
13 personal jurisdiction, because it waived any such objection by virtue of the  
14 license provision requiring it to lend its name to *any* legal proceedings.

15 Indeed, even as this action is currently configured, if Ernst & Young LLP  
16 had sought to keep EYGN in the present action in California, the license  
17 agreement would constitute consent to personal jurisdiction and waiver by  
18 EYGN of any claim to lack of personal jurisdiction over it. Because the license  
19 agreement constitutes a waiver of personal jurisdiction allowing Ernst & Young  
20 LLP to keep EYGN in this action (or to bring it into the action through joinder if  
21 EYGN was not a party), this Court must have personal jurisdiction over EYGN  
22  
23  
24

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25 <sup>4</sup> In the context of legal action taken by a licensee in commencing lawsuits against  
26 third party infringers, an obligation of the licensor to give "all reasonable assistance in any  
27 such action, including lending its name to any legal proceedings," must mean consenting to  
28 being brought into the action as a party. *Accord Lion Petroleum of Missouri, Inc. v.*  
*Millennium Super Stop, LLC*, 467 F.Supp.2d 953, 956(E.D.Mo. 2006) ("Generally, in suits  
for patent and trademark infringement, the owner of the patent or trademark is a necessary  
party).

1 – and it does not matter whether or not it is Defendant Ernst & Young LLP or  
2 Plaintiff Entrepreneur Media Inc. asserting the existence of such jurisdiction.

3 Alternatively, if the limited evidence currently proffered in connection  
4 with this motion (principally by Defendant EYGN) does not establish  
5 jurisdiction over EYGN, Plaintiff is entitled to a continuance of the hearing on  
6 this motion to allow discovery. *See Portland Retail Druggists Ass'n v. Kaiser*  
7 *Foundation Health Plan*, 662 F.2d 641, 645 (9<sup>th</sup> Cir. 1981) ("Before summary  
8 judgment may be entered against a party, that party must be afforded both  
9 notice that the motion is pending and an adequate opportunity to respond.  
10 Implicit in the "opportunity to respond" is the requirement that sufficient time be  
11 afforded for discovery necessary to develop "facts essential to justify (a  
12 party's) opposition" to the motion. "); *See America West Airlines, Inc. v. GPA*  
13 *Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989) ("where pertinent facts bearing  
14 on the question of jurisdiction are in dispute, discovery should be allowed").<sup>5</sup>

15 For instance, discovery regarding the following issues would further  
16 illuminate the propriety of this Court exercising personal jurisdiction over  
17 Defendant EYGN:

- 18 • The use by Ernst & Young LLP in California of the  
19 ENTREPRENEUR OF THE YEAR trademark;
- 20 • The terms and conditions of Ernst & Young LLP's transfer of the  
21 ENTREPRENEUR OF THE YEAR trademark to EYGN Limited;
- 22 • Knowledge by EYGN Limited of Ernst & Young LLP's use of the  
23 trademark in California both before and after transfer of the  
24 trademark to EYGN Limited;
- 25 • The actions taken by EYGN Limited (and/or its control designate)  
26 in enforcing ENTREPRENEUR OF THE YEAR trademark rights  
27 against third parties in California;
- 28 • The actions taken by EYGN Limited (and/or its control designate)  
in overseeing and mandating quality control with regard to Ernst &

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<sup>5</sup> 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")

1 Young LLP's use of the ENTREPRENEUR OF THE YEAR  
2 trademark in California;

- 3 • The terms and conditions of the Joining Agreement referenced in ¶  
4 1.1 and license agreements (including the "master agreement")  
5 referenced in ¶ 2.2 of the License of Name Rights (see Cochrane  
6 Decl., Exh. C);
- 7 • All documents that evidence or refer to the meaning of the phrase  
8 "EYGN shall give [Ernst & Young LLP] all reasonable assistance in  
9 any such action, including lending its name to any legal  
10 proceedings," in ¶ 4.3 of the License of Naming Rights agreement.  
11 See Cochrane Decl., Exh. C ¶ 4.3.

12 Although this case has been pending since June 2008, it has only  
13 recently become "at-issue," the parties only recently met and conferred  
14 pursuant to Rule 26, and discovery is not slated to commence with the initial  
15 disclosure of witnesses and documents on January 30, 2008 – *after the*  
16 *currently scheduled hearing on this motion*. This schedule was established on  
17 the understanding that Plaintiff's motion for an injunction and Defendants'  
18 motions to dismiss, stay or transfer would be based on the undisputed facts  
19 that relate to the first-to-file and "anticipatory filing" doctrines. Inasmuch as  
20 Defendants have taken a much broader, fact-based, approach to avoiding  
21 jurisdiction, to the extent this Motion is not denied outright given the limited  
22 facts proffered by Defendant EYGN, Plaintiff is entitled to conduct jurisdictional  
23 discovery so that the Court can make its decision regarding jurisdiction based  
24 on a full and complete set of facts (and arguments based thereon).

### 25 **III. Conclusion.**

26 This Court can and should deny Defendant EYGN's Motion.  
27 Alternatively, if the Court grants judgment on the pleadings, leave to amend  
28 must be granted so that Plaintiff has an opportunity to provide additional  
jurisdictional allegations to rectify any perceived deficiency. Similarly, 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

1 fair opportunity to conduct jurisdictional discovery. In any event, Defendant  
2 EYGN is not entitled to dismissal for lack of personal jurisdiction.

3 Dated: December 8, 2008

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

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5 By: *Michael R. Adele*

6 MICHAEL R. ADELE  
7 Attorneys for Plaintiff  
8 ENTREPRENEUR MEDIA, INC.  
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