

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.)

24)
25 EYGN Limited and ERNST &)
26 YOUNG LLP)
27 Counterclaimants,)

28)
29 v.)
30)
31)
32 ENTREPRENEUR MEDIA, INC.)
33)
34 Counterdefendant.)

No. SACV08-0608 DOC

**MEMORANDUM OF POINTS
AND AUTHORITIES OF
ENTREPRENEUR MEDIA, INC. IN
OPPOSITION TO MOTION OF ERNST
& YOUNG ADVISORY, INC.
JUDGMENT ON THE PLEADINGS
FOR LACK OF SUBJECT MATTER
JURISDICTION**

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

1 Plaintiff Entrepreneur Media, Inc. ("Plaintiff") respectfully submits this
2 memorandum in opposition to the motion (the "Motion") of Defendant Ernst &
3 Young Advisory Inc. ("Defendant" or "Defendant EYAI") for Judgment on the
4 Pleadings for Lack of Subject Matter Jurisdiction.

5 Defendant EYAI erroneously contends, through its motion *for judgment*
6 *on the pleadings*, that this Court lacks subject matter jurisdiction over
7 Defendant EYAI. However, the Complaint expressly alleges the defendants'
8 (plural) misconduct. Moreover, the cease and desist letter from Defendant
9 EYGN's counsel noted that the ENTREPRENEUR OF THE YEAR mark is
10 licensed to "member firms of the Ernst & Young global organization" (of which
11 Ernst & Young Advisory Inc. is one). Complaint, Exh. A. The cease and
12 desist letter also purported to reserve the rights of "all of the Ernst & Young
13 affiliated firms" (of which Ernst & Young Advisory Inc. is one). *Id.* Defendant
14 EYAI is the ONLY Ernst & Young entity that has registered with the California
15 Secretary of State to do business in California.¹ Inasmuch as Defendants are
16 currently (and have in past years) been holding regional entrepreneur of the
17 year contests in California, it is a fair and reasonable inference from the
18 pleadings that Defendant EYAI – the only Ernst and Young entity qualified to
19 do business in California – was in whole or part responsible for the contests.
20 This Court is required to make all reasonable inferences in favor of Plaintiff.

21 "All allegations of fact by the party opposing the motion are accepted as true,
22 and are construed in the light most favorable to that party." *General*
23 *Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist*
24 *Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989), *cert. denied*, 493
25

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27
28 ¹ Despite approximately 12 offices throughout California, Defendant Ernst & Young LLP does not
appear to be registered with the California Secretary of State to do business in California. See
Adele Decl., Exhs. ___ and ___.

1 U.S. 1079 (1990). Accordingly, the judgment on the pleadings should be
2 denied.

3 At the very least, if the Court is inclined to grant the motion for judgment
4 on the pleadings, Plaintiff is entitled (and in such case requests) leave to
5 amend so that it can remedy any perceived defect.

6
7 It is said that a motion for judgment on the pleadings is not
8 favored by the courts, and this is true, if the motion is permitted
9 to cut off the right to amend, thus preventing a hearing on the
10 merits. But if the motion for judgment is treated as a demurrer
11 to the defective pleading with leave to amend in a proper case,
12 as was done here, the practice is sanctioned by usage and free
13 from objection.

14 *David v. Robert Dollar Co.*, 2 F.2d 803, 806 (9th Cir. 1925). In determining
15 whether to grant leave to amend, “a court must be guided by the underlying
16 purpose of [Federal] Rule [of Civil Procedure] 15-to facilitate decision on the
17 merits, rather than on the pleadings or technicalities.” *United States v. Webb*,
18 655 F.2d 977, 979 (9th Cir. 1981), quoted in *Roth v. Garcia*, 942 F.2d 617, 628
19 (9th Cir. 1991); see also *In re Rogstad*, 126 F.3d 1224, 1228 (9th Cir. 1997).
20 Plaintiff is prepared to amend the Complaint to allege Defendant EYAI's
21 involvement in the Ernst & Young's² Entrepreneur of the Year program, based
22 on information and belief, given the information stated above.

23 Defendant EYAI's motion for judgment on the pleadings is not based
24 upon the four corners of the pleadings, but rather based on extrinsic evidence
25 from various declarants. As such, to the extent such evidence is considered
26 and not excluded, the motion is not a motion for judgment on the pleadings,
27 but a *de facto* summary judgment motion. See FRCP 12(d) ("If, on a motion

28 ² Ernst & Young's website is exceptionally cagey about which Ernst & Young affiliated entity is
responsible for various acts.

1 under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to
2 and not excluded by the court, the motion must be treated as one for summary
3 judgment under Rule 56. All parties must be given a reasonable opportunity to
4 present all the material that is pertinent to the motion"). Because Defendant
5 EYAI chose to bring a motion for judgment on the pleadings and not a
6 summary judgment motion, the declarations proffered by Defendant EYAI
7 should be excluded and the Motion should be denied (or at most, granted with
8 leave to amend).

9 Alternatively, if the limited evidence currently proffered in connection
10 with this Motion is considered and the Motion is treated as a summary
11 judgment motion, Plaintiff is entitled to a continuance of the hearing on this
12 motion to allow discovery. *See Portland Retail Druggists Ass'n v. Kaiser*
13 *Foundation Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981) ("Before summary
14 judgment may be entered against a party, that party must be afforded both
15 notice that the motion is pending and an adequate opportunity to respond.
16 Implicit in the "opportunity to respond" is the requirement that sufficient time be
17 afforded for discovery necessary to develop "facts essential to justify (a
18 party's) opposition" to the motion. "); *see America West Airlines, Inc. v. GPA*
19 *Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989) ("where pertinent facts bearing
20 on the question of jurisdiction are in dispute, discovery should be allowed").³

21 For instance, discovery regarding the following issues would further
22 illuminate the propriety of this Court exercising personal jurisdiction over
23 Defendant EYGN:

- 24 • The use by Defendant EYAI in California of the ENTREPRENEUR
25 OF THE YEAR trademark;
- 26 • The relationship between EYAI and the other defendants in this
27 action;

28 ³ *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")

- Whether the Defendant's Entrepreneur of the Year trademark was used in California, in whole or in part, through the rights granted by the California Secretary of State allowing Defendant EYAI (and not either of the other two defendants) to do business in California; and
- Depositions of the Defendants' declarants who offered declarations in support of this Motion.

Although this case has been pending since June 2008, it has only recently become "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 avoiding jurisdiction, to the extent this Motion is treated as a summary judgment motion, Plaintiff is entitled to conduct jurisdictional discovery so that the Court can make its decision regarding jurisdiction based on a full and complete set of facts (and arguments based thereon).

III. Conclusion.

This Court can and should deny Defendant EYAI's motion outright. Alternatively, to the extent the Court grants judgment on the pleadings, leave to amend 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, Plaintiff is entitled to a continuance to allow it a full and fair opportunity to conduct jurisdictional discovery. In any event,

1 Defendant EYAI is not entitled to dismissal for lack of personal jurisdiction at
2 this juncture (or ever).

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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