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 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 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

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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 misconduct on  
8 the part of all of the Defendants in the action, including Defendant EYAI.  
9 Moreover, the cease and desist letter from Defendant EYGN's counsel noted  
10 that the ENTREPRENEUR OF THE YEAR mark is licensed to "member firms  
11 of the Ernst & Young global organization" (of which Ernst & Young Advisory  
12 Inc. is one). Complaint, Exh. A. The cease and desist letter also purported to  
13 reserve the rights of "all of the Ernst & Young affiliated firms" (of which Ernst &  
14 Young Advisory Inc. is one). *Id.* Defendant EYAI is the ONLY Ernst & Young  
15 entity that has registered with the California Secretary of State to do business  
16 in California.<sup>1</sup> Inasmuch as Defendants are currently (and have in past years)  
17 been holding regional "entrepreneur of the year" contests in California, it is a  
18 fair and reasonable inference from the pleadings that Defendant EYAI – the  
19 only Ernst and Young entity qualified to do business in California – was in  
20 whole or part responsible for the contests. This Court is required to make all  
21 reasonable inferences in favor of Plaintiff. "All allegations of fact by the party  
22 opposing the motion are accepted as true, and are construed in the light most  
23 favorable to that party." *General Conference Corp. of Seventh-Day Adventists*  
24 *v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9<sup>th</sup> Cir.

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28 <sup>1</sup> 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. A and B.

1 1989), *cert. denied*, 493 U.S. 1079 (1990). Accordingly, the judgment on the  
2 pleadings should be 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 (9<sup>th</sup> 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 F2d 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's<sup>2</sup> "entrepreneur of the year" contest, 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 <sup>2</sup> 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 (9<sup>th</sup> 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").<sup>3</sup>

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 <sup>3</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")

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