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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
 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

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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 LLP ("Defendant" or "Defendant Ernst & Young") for Judgment on the
4 Pleadings or, in the Alternative, to Transfer.

5 **I. Introduction.**

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

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

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

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

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

13 **II. Argument.**

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

28

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

3 Plaintiff agrees that EYGN is an indispensable party to this action.

4 However, as argued in opposition to Defendant EYGN's motion to dismiss, this
5 Court has personal jurisdiction over EYGN.

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

27 In short, Plaintiff Entrepreneur Media Inc. agrees that Defendant EYGN
28 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 one 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 a monopoly over the ability to hold entrepreneur of the year

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

- 5 • The University of Southern California, located in Los Angeles,
6 which has been holding entrepreneur of the year awards since
7 1977;
- 8 • Hispanic Business Magazine, published by Hispanic Business Inc.
9 located in Santa Barbara, which has been holding entrepreneur of
10 the year awards since 2002;
- 11 • Loyola Marymount University, located in Los Angeles, which has
12 been holding entrepreneur of the year awards since 2003; and
- 13 • The San Diego Chamber of Commerce, which as been holding
14 entrepreneur of the year awards since at least 2007.

15 A ruling barring Plaintiff's use of the phrase "entrepreneur of the year" could
16 effectively bar, or at least chill, the above-entities' use of the phrase and ability
17 to continue holding their awards ceremonies. Given the potential effect of this
18 action on Plaintiff and other California residents, the interests of justice favor
19 deciding this case in California. Moreover, representatives of each of the
20 foregoing entities will likely be deponents and potential trial witnesses who
21 cannot be compelled to appear for trial in New York. With regard to the
22 parties' own documents and witnesses, it is just as easy to compel
23 appearance and/or production in California as in New York, and there is no
24 evidence that there are likely to be more party affiliated documents and/or
25 witnesses in New York than in California. In short, the interests of justice do
26 not favor transfer.

27 Defendant Ernst & Young LLP argues that the interests of justice
28 (purportedly) do favor transfer because: (a) Defendant EYGN Limited is a

1 necessary party over which this Court lacks jurisdiction; (b) the existence of a
2 jurisdictional dispute here makes it easier to simply proceed in New York
3 (where jurisdiction is not disputed); and (c) the New York court's familiarity
4 with New York law will make it easier to resolve claims asserted herein that
5 are based on New York law. These arguments lack merit and/or do not
6 outweigh the interests of justice served by resolving the issue here.

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

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

12
13 **(b) This Court Is Quite Capable of Determining a**
14 **Jurisdictional Dispute**

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

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

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

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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

1 the requirement that Plaintiff need only provide "a short and plain statement of
2 the grounds for this court's jurisdiction . . . " FRCP, 8(a)(1). Accordingly, the
3 motion for judgment on the pleadings for lack of personal jurisdiction must be
4 denied.¹

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

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

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

18 *David v. Robert Dollar Co.*, 2 F.2d 803, 806 (9th Cir. 1925). In determining
19 whether to grant leave to amend, "a court must be guided by the underlying
20 purpose of [Federal] Rule [of Civil Procedure] 15-to facilitate decision on the
21 merits, rather than on the pleadings or technicalities." *United States v. Webb*,
22 655 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).

23 Here, Plaintiff can (and will) amend the Complaint to allege greater
24 jurisdictional specificity if need be. Trademark licensors, such as Defendant

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26 ¹ 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 EYGN, are required to oversee and control the quality and the use of its
2 trademark. In fact, Defendant EYGN's license agreement provides for such
3 control. See Declaration of Victoria Cochrane, Exhibit C section 5 (Defendant
4 EYGN's quality control rights); see also *Miller v. Glenn Miller Productions, Inc.*,
5 454 F.3d 975, 992 (9th Cir. 2006) ("It is well established that when the owner
6 of a trademark licenses the mark to others, he retains a "duty to exercise
7 control and supervision over the licensee's use of the mark").

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

22 The case of *Breckenridge Pharmaceutical, Inc. v. Metabolite*
23 *Laboratories, Inc.*, 444 F.3d 1356 (Fed. Cir. 2006) establishes that a licensor
24

25 ² *Viam Corp. v. Iowa Export-Import Trading Co.*, 84 F.3d 424 (Fed.Cir. 1996) (sending
26 cease and desist letters, plus placing patented product into commerce through
27 distributor and purposefully exploiting the California market through advertising suffices
28 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 subjects itself to personal jurisdiction where it retains control over licensee's
2 activities and grants licensee (and retains for licensor) the right to litigate
3 infringement actions. For instance, in *Breckenridge*, the court held:

4 Here, in addition to sending letters into the forum state, which we
5 presume qualify as “cease and desist” letters, Metabolite has
6 entered into an exclusive license with PamLab, a company that,
7 while not headquartered or incorporated in Florida, conducts
8 business in Florida. As part of the license agreement, Metabolite
9 granted PamLab the right to sue for patent infringement with
10 Metabolite's written consent, and the parties agreed to “discuss
11 in good faith the appropriate action, if any, with respect to third
12 party infringers of the Licensed Patents, and to cooperate
13 reasonably in any enforcement actions”. Metabolite granted
14 PamLab “full control of the prosecution or maintenance” of any
15 patent or application that Metabolite abandons or permits to
16 lapse and agreed to provide PamLab with an executed power of
17 attorney for that purpose. Metabolite further agreed to “provide
18 consultation to PamLab in the science, medicine and marketing
19 of vitamins and related products, from time to time”.

20 That this exclusive license agreement not only *contemplated* an
21 ongoing relationship between PamLab and Metabolite beyond
22 royalty payments but has *actually resulted* in such a relationship
23 is obvious from the facts of this case. Metabolite coordinates
24 with PamLab in sending cease and desist letters and in litigating
25 infringement claims in Florida and elsewhere and, as is the case
26 here, licensor and licensee are often represented jointly by
27 counsel. As such, we hold that, through its relationship with
28 PamLab, which sells products in Florida, Metabolite has
purposefully availed itself to the privilege of conducting activities
within Florida.

19 *Id.* at 1366-67.

20 The facts stated above are closely analogous to the facts presented
21 here. As in *Breckenridge*, EYGN both retains and grants to licensee Ernst &
22 Young LLP the right to sue third parties for infringement, and has obligated
23 itself to protect the licensed interests and pay for lawsuits instituted by Ernst &
24 Young LLP. Cochrane Decl., Exh. C ¶¶ 4.2 and 4.3. So too, as in
25 *Breckenridge*, Defendant EYGN's license requires that Ernst & Young LLP
26 abide by various quality control provisions. Cochrane Decl., Exh. C ¶¶ 5.1-
27 5.4. Just as in *Breckenridge*, this license resulted in the co-ordination of the
28 cease and desist letters sent by their *joint* counsel to Plaintiff and Plaintiff's

1 counsel (Complaint, Exhs. A and B), and has resulted in their joint
2 representation in both the present action and in the New York Action. As in
3 *Breckenridge*, the relationship between licensor EYGN and its licensee, Ernst
4 & Young LLP gives rise to this Court's jurisdiction over Defendant EYGN.³

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

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21
22 ³ In the Federal Circuit, as in the Ninth Circuit, simply sending a cease and desist letter will
23 not create jurisdiction. See e.g., *Campbell Pet Co. v. Miale*, 542 F.3d 879, 885 (Fed. Cir.
24 2008) ("the sending of an infringement letter, without more, is insufficient to satisfy the
25 requirements of due process when exercising jurisdiction over an out-of-state patentee");
26 *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1089 (9th Cir. 2000) ("a
27 cease-and-desist letter sent by a trademark holder to a putative infringer is not, by itself, a
28 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).

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

9 **C. If the Court Looks Beyond the Pleadings and Considers**
10 **Testimony and Other Extrinsic Evidence, Plaintiff Is**
11 **Entitled Summary Judgment in Its Favor or, in the**
12 **Alternative, to a Continuance to Conduct Discovery.**
13

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

27 If, however, the Court decides to consider the declarations and treat this
28 Motion as one for summary judgment, then Plaintiff should prevail based on

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

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

24 Although this matter has been pending since June 2008, it has only
25 recently been at issue, the parties only recently met and conferred pursuant to

26 _____

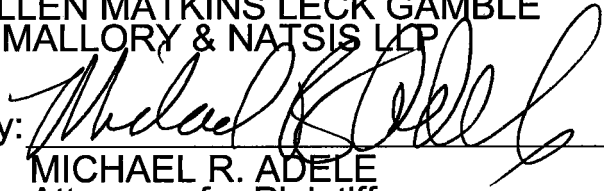
27 ⁴ See also FRCP 56(f) (providing for continuances to allow for discovery relevant to summary judgment
28 motions); see also FRCP 12(d) (If treated as a summary judgment motion, "[a]ll parties must be given a
reasonable opportunity to present all the material that is pertinent to the motion")

1 Rule 26, and discovery is not slated to commence with the initial disclosure of
2 witnesses and documents on January 30, 2008 – *after the currently scheduled*
3 *hearing on this motion*. This schedule was established on the understanding
4 that Plaintiff's motion for an injunction and Defendants' motions to dismiss,
5 stay or transfer would be based on the undisputed facts that relate to the first-
6 to-file and "anticipatory filing" doctrines. Inasmuch as Defendants have taken
7 a much broader, fact based, approach to have this case dismissed, stayed or
8 transferred, to the extent this Motion is not denied outright given the limited
9 facts proffered by Defendant EYGN, Plaintiff is entitled to conduct jurisdictional
10 discovery.

11 **III. Conclusion.**

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

18 Dated: December 8, 2008

19 ALLEN MATKINS LECK GAMBLE
20 MALLORY & NATSIS LLP
21 By: 
22 MICHAEL R. ADELE
23 Attorneys for Plaintiff
24 ENTREPRENEUR MEDIA, INC.
25
26
27
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