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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 v.)
17 EYGN LIMITED; ERNST & YOUNG)
18 LLP;and ERNST & YOUNG)
19 ADVISORY INC.,)
20 Defendants.)

No. SACV08-0608 DOC
**REPLY MEMORANDUM OF POINTS
AND AUTHORITIES OF
ENTREPRENEUR MEDIA, INC. TO
ENJOIN PROSECUTION OF SECOND
FILED ACTION**

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

21 EYGN Limited and ERNST &)
22 YOUNG LLP)
23 Counterclaimants,)
24 v.)
25 ENTREPRENEUR MEDIA, INC.)
26 Counterdefendant.)
27)

1 Plaintiff Entrepreneur Media, Inc. ("Plaintiff") respectfully submits this
2 reply memorandum in support of its motion (the "Motion") to enjoin
3 Counterclaimants EYGN Limited and Ernst & Young LLP
4 ("Counterclaimants") from prosecuting an action that they subsequently filed
5 against Plaintiff in a New York District Court months after Plaintiff
6 commenced this action.

7 Counterclaimants base the entirety of their argument in opposition to
8 the injunction on the grounds that the Court (purportedly) lacks personal
9 jurisdiction over Defendant EYGN Limited. However, Defendant EYGN is not
10 entitled at this time (or ever) to dismissal for lack of personal jurisdiction.

11 Defendant EYGN erroneously contends, through its motion *for*
12 *judgment on the pleadings*, that this Court lacks personal jurisdiction over it.
13 However, the Complaint expressly alleges that the defendants have had
14 sufficient contacts with California generally, and in connection with this matter
15 particularly, so as to give rise to personal jurisdiction over each defendant
16 (including Defendant EYGN). Complaint, ¶ 7. Accepting this allegation as
17 true, as is mandated by Ninth Circuit law,¹ requires denial of the motion for
18 judgment on the pleadings. Regardless, even if this Court were to require
19 greater specificity in pleading jurisdictional allegations than the short and
20 plain statement included in the Complaint, Plaintiff is entitled to leave to
21 amend its complaint so that it can provide any greater specificity the Court
22 requires. *Swartz v. KPMG LLP*, 476 F.3d 756, 760 (9th Cir. 2007) (Ninth
23 Circuit reaffirmed that a court should not dismiss a complaint for jurisdictional
24 defects unless "it is clear ... that the complaint could not be saved by any
25 amendment").

26
27 ¹ *General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist*
28 *Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989), *cert. denied*, 493 U.S. 1079
(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").

1 Counterclaimants have submitted a variety of declarations attesting to a
2 lack of jurisdiction over Defendant EYGN, but those declarations cannot be
3 considered in the context of a judgment on the pleadings. To the extent the
4 Court considers the declarations, the license agreement attached as Exhibit
5 C to the declaration of Victoria Cochraine evidences that Defendant EYGN
6 and Defendant Ernst & Young have a relationship relative to the trademarks
7 at issue here that establishes jurisdiction over Defendant EYGN. See e.g.,
8 *Breckenridge Pharmaceutical, Inc. v. Metabolite Laboratories, Inc.*, 444 F.3d
9 1356 (Fed. Cir. 2006) (licensor who retains quality control obligations and
10 grants licensee right to litigate has established continuing obligations
11 sufficient to give rise to specific jurisdiction where license is used in state and
12 coordinated cease and desist letter sent into state).

13 Indeed, under the parties' license agreement (and federal law),
14 Defendant EYGN was obligated to oversee and control the quality of any use
15 of the mark in California (and elsewhere), Defendant EYGN and Defendant
16 Ernst & Young were both entitled to commence litigation in California (and
17 elsewhere), and both Defendants used the same counsel to send their cease
18 and desist letter and e-mail into California and to defend the litigation
19 commenced by Plaintiff. If the Court considers such evidence, it must treat
20 the Motion as a summary judgment motion and should deny it outright based
21 on the facts presented by Defendant EYGN. See *Breckenridge*, 444 F.3d
22 1356; see also *Viam Corp. v. Iowa Export-Import Trading Co.*, 84 F.3d 424
23 (Fed.Cir. 1996) (sending cease and desist letters, plus placing patented
24 product into commerce through distributor and purposefully exploiting the
25 California market through advertising suffices for personal jurisdiction
26 because the "forum state does not exceed its powers under the Due Process
27 Clause if it asserts personal jurisdiction over a corporation that delivers its
28

1 products into the stream of commerce with the expectation that they will be
2 purchased by consumers in the forum State”).

3 However, to the extent the Court is not inclined to deny the Motion
4 outright based on the evidence submitted by Defendants, Plaintiff is entitled
5 to a continuance to allow it to conduct discovery on the issue of jurisdiction.
6 Discovery has not as yet commenced in this matter, and is set to commence
7 with the exchange of initial disclosures on January 30, 2008. Plaintiff is
8 entitled, at a minimum, to a full and fair opportunity to conduct jurisdictional
9 discovery so that it can fairly defend a summary judgment motion based on a
10 purported lack of jurisdiction. *See Portland Retail Druggists Ass'n v. Kaiser*
11 *Foundation Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981) ("Before summary
12 judgment may be entered against a party, that party must be afforded both
13 notice that the motion is pending and an adequate opportunity to respond.
14 Implicit in the "opportunity to respond" is the requirement that sufficient time
15 be afforded for discovery necessary to develop "facts essential to justify (a
16 party's) opposition" to the motion. "); *See America West Airlines, Inc. v. GPA*
17 *Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989) ("where pertinent facts bearing
18 on the question of jurisdiction are in dispute, discovery should be allowed”).

19 In short, Defendant EYGN is not entitled to dismissal for lack of
20 personal jurisdiction at this time (or ever). Currently, the New York action is
21 stayed by agreement of the parties. This Court can and should preserve the
22 *status quo* and preliminarily enjoin Counterclaimants from prosecuting the
23 New York action.

24 Dated: December 8, 2008

ALLEN MATKINS LECK GAMBLE
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26 By: 

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ENTREPRENEUR MEDIA, INC.

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