

there has not been a discovery schedule ordered by the Court providing Plaintiff the opportunity to commence discovery demands. As noted in *Crystalline H2O, Inc. v. Orminiski*, “there is a critical distinction . . . between cases where a litigant opposing a motion for summary judgment requests a stay of that motion to conduct additional discovery and cases where that same litigant opposes a motion for summary judgment on the ground that it is entitled to an opportunity to commence discovery with respect to [the non-movant's] claims . . . .” 105 F.Supp.2d 3, 6-7 (N.D.N.Y. 2000). The instant matter is not a case in which Plaintiffs, as non-movants, have been dilatory in conducting discovery, seek to conduct additional discovery late in the day, or request discovery on matters extraneous to their complaint. Instead, Plaintiffs simply request a continuance under Rule 56(f) so that they may discover facts that will establish the existence of genuine issues of material fact.

Accordingly, Plaintiffs herein must be afforded an opportunity to depose the publisher and/or other executives of Defendant magazine that had first-hand involvement in analyzing and compiling the Hot 100 list so that Plaintiffs may establish that Defendant was, *inter alia*, reckless and entertained serious doubts as to the truth of the Agape publication. Additionally, Plaintiffs must have an opportunity to review documentation and correspondence maintained by Defendant pertaining to its involvement with Agape prior to the publication of the Hot 100 feature.

Plaintiffs expect that discovery will allow them to, at minimum, demonstrate that: 1) Defendant failed to take appropriate action before publication; 2) Defendant profited financially as a direct result of including Agape in its Hot 100 list; 3) Defendant was aware prior to publication of the Hot 100 article that Agape had numerous outstanding/pending complaints against it; 4) Defendant was aware prior to publication of the Hot 100 article of Agape’s weak financial stature, but chose to ignore and otherwise disregard this knowledge; and 5) Defendant

had serious doubts as to the truth and veracity of the information provided by Agape. These avenues of discovery will assist Plaintiffs in demonstrating that Defendant acted with reckless disregard for the rights of others.

Plaintiffs are cognizant of and appreciate the practical utility of summary judgment—namely to assist in securing “the just, speedy and inexpensive determination of every action.” Fed.R.Civ.P. 1. However, at this juncture such a procedural device is premature in this action, for “only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery.” *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000). There appears to be little to no apparent prejudice to Defendant in allowing Plaintiffs an opportunity to conduct discovery prior to being called upon to oppose a summary judgment motion. Instead, any potential judicial efficiency and economy that may result from an accelerated determination is greatly outweighed by the resulting prejudice and harm to Plaintiffs.<sup>1</sup>

### CONCLUSION

In light of the foregoing, Plaintiffs respectfully request that Defendant’s Motion to Dismiss all counts of Plaintiffs’ complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) be denied in all respects. Plaintiffs further respectfully request that the Court grant Plaintiffs a continuance under Federal Rule of Civil Procedure 56(f) so that they may conduct discovery in this matter and present facts essential to justify their opposition.

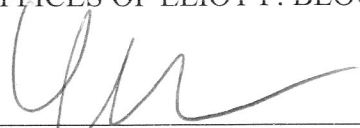
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<sup>1</sup> *Cf. Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 627 (6th Cir. 2002) (“If the non-movant makes a proper and timely showing of a need for discovery, the district court's entry of summary judgment without permitting him to conduct any discovery at all will constitute an abuse of discretion.”).

Dated: Mineola, New York  
July 28, 2009

Yours, etc.

LAW OFFICES OF ELIOT F. BLOOM, P.C.



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By: Eliot F. Bloom, Esq. (9423)  
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Mineola, New York 11501  
(516) 739-5300

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X Index No.: 09-2096

ILAN ABRAHAM, ET AL.

Plaintiffs,

District Judge  
Joanna Seybert

-against-

ENTREPRENEUR MEDIA, INC.,

**AFFIDAVIT OF SERVICE**

Defendant.

-----X

STATE OF NEW YORK     )  
  ) ss.:  
COUNTY OF NASSAU     )

MICHAEL WERNER, being duly sworn, deposes and says:

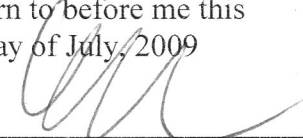
1. I am not a party to this action, am over eighteen years of age and reside in Suffolk County, New York.

2. On July 28, 2009, Deponent served the within Affidavit in Opposition to Defendant's Motion to Dismiss and Request for Continuance Under Rule 56(f) on the below named party by CM/ECF, which will send electronic notification of such filing to all registered participants, as well as via overnight courier:

TO: Steven B. Pokotilow, Esq.  
STROOCK & STROOCK & LAVAN, LLP  
180 Maiden Lane  
New York, New York 10038

  
\_\_\_\_\_  
MICHAEL WERNER

Sworn to before me this  
28 day of July, 2009

  
\_\_\_\_\_  
Notary Public

ELIOT F. BLOOM  
Notary Public, State of New York  
No. 02BL5087341  
Qualified in Suffolk County  
Commission Expires Nov. 3rd, 2007

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X Index No.: 09-2096  
ILAN ABRAHAM, ET AL.

Plaintiffs,

District Judge  
Joanna Seybert

-against-

ENTREPRENEUR MEDIA, INC.,

Magistrate Judge  
Michael Orenstein

Defendant.

-----X

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**AFFIRMATION IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND  
REQUEST FOR CONTINUANCE UNDER RULE 56(f)**

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ELIOT F. BLOOM, ESQ.  
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114 Old Country Road, Ste. 308  
Mineola, New York 11501  
(516) 739-5300  
(516) 739-3202 (Fax)

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**NOTICE OF ENTRY**

Sir: Please take notice that the within is a (certified) true copy of an  
duly entered in the office of the Clerk of the within named Court on  
Dated: Mineola, New York

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**NOTICE OF SETTLEMENT**

Sir: Please take notice that a judgment of which the within is a true copy will be  
presented for settlement to the Hon. of the  
within named Court, at on the day of , 2009  
Dated: Mineola, New York

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Service of a Copy of the within  
is hereby admitted.

Dated: \_\_\_\_\_