Joseph G. Pia (9945)
Nathan S. Dorius (8977)
PIA ANDERSON DORIUS REYNARD & MOSS
222 South Main Street, Suite 1800
Salt Lake City, Utah 84101
Telephone: (801) 350-9000
Facsimile: (801) 950-9010
E-mail: joe.pia@padrm.com
nathan@padrm.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

INCENTIVE CAPITAL, LLC, a Utah Limited Liability Company, Plaintiff, v. CAMELOT ENTERTAINMENT GROUP, INC., a Delaware Corporation; CAMELOT FILM GROUP, INC., a Nevada Corporation; CAMELOT DISTRIBUTION GROUP, INC., a Nevada Corporation, ROBERT P. ATWELL, an individual; JAMIE R. THOMPSON, an individual; STEVEN ISTOCK, an individual; TED BAER, an individual; PETER JAROWEY, an individual, Defendants.	**MEMORANDUM IN SUPPORT OF MOTION FOR WRIT OF ATTACHMENT** Civil No. 2:11-cv-00288 Judge Clark Waddoups

Plaintiff Incentive Capital, LLC ("Plaintiff" or "Incentive"), by and through its counsel, respectfully submits the following Memorandum in Support of its Application for Writ of Attachment/Sequestration pursuant to Rule 64 of the Federal Rules of Civil Procedure, and Rules 64 and 64C of the Utah Rules of Civil Procedure.

INTRODUCTION

This dispute and the claims alleged against Defendants arise out of certain loans (collectively the "Loan" or "Loan Transaction") that Plaintiff Incentive made to Camelot Entertainment Group, Inc. ("CEG"); Camelot Film Group, Inc. ("CFG"); and Camelot Distribution Group, Inc. ("CDG" and collectively with CEG and CFG, "Camelot") to finance Camelot's acquisition and subsequent licensing and distribution of a film and television library containing hundreds of media titles (collectively referred to as the "Liberation Assets"). *See* Plaintiff's Amended Complaint at ¶1. In addition to the repayment of the Promissory Note (the "Note") memorializing the Loan in the principal amount of $650,000.00, Camelot agreed under a Profit Participation Agreement to pay Incentive on a monthly basis, ten percent (10%) of all gross revenues received by Camelot (within 14 days of receipt of such receipt) from any third party in connection with Camelot's exploitation of the Liberation Assets "in all media, worldwide, from all sources" (the "Profit Participation Payments").

After making the Loan to Camelot to purchase the Liberation Library, Camelot defaulted on the Loan by failing to fulfill its repayment obligations under the Note and by failing to pay the Profit Participation Payments it owed to Incentive. Consequently, on June 11, 2010, the parties entered into a Loan Modification Agreement pursuant to which Camelot, in addition to the payments it already owed to Incentive under the Note and Profit Participation Agreement, agreed to hit a minimum sales target of $2,284,500 by no later than April 27, 2011, and pay Incentive 10% of this target. If Camelot failed to pay the full amount of such sales target by that deadline, then it agreed to pay Incentive 1.5% interest on the deficiency amount (the difference between of the $2,284,500 and what Camelot actually generated) per month until the entire amount of the sales target was paid (the "Loan Modification Payments").

Camelot failed to pay the monthly profit participation payments and then failed to pay the balloon payment on January 31, 2011. This fact is indisputable. The only counter-argument made by Camelot is that approximately 1½ months after default, it tendered Camelot shares that it had internally valued at an amount sufficient to cover the balloon payment. However, in consulting with a broker recommended by Camelot, Incentive discovered that the shares were nearly worthless and difficult if not impossible to sell on the open market. More to the point, Incentive was not required under any agreement to accept the late issuance of shares as payment or a cure, and did not. The shares were sent back to Camelot. Since that time, Camelot has not made any payments of any kind, and remains in breach.

The loan documents have specific default interest and penalty provisions that trigger upon a breach. As described in the Statement of Facts section, the present contractual amount due is **$1,151,890.23** ("Due Amount"). A breakdown of how this figure was determined is found in the Statement of Facts section below.

It is likely that Camelot cannot and will never be able to pay the Due Amount. Public records indicate that Camelot is nearly insolvent, with the value of its shares at 0.02 of a penny. These shares are presently trading at about 5,000 per day for a trading value of approximately $100.00/day. The revenue Camelot generates from the Liberation Library and the Distribution Assets paid to it by third parties from Camelot's exploitation of the Library is the primary (if not only) means by which Camelot will ever be able to pay a judgment in this case.

The loan was secured by a continuing first priority security interest in the Liberation Assets and certain other 13 film titles ("Distribution Assets") and all products and proceeds thereof, including all "monies derived from the disposition or other exploitation" in all media, from all sources, worldwide (the Liberation Assets and Distribution Assets are collectively

referred to as the "Library"). The Library and monies generated therefrom are the primary collateral by which Incentive was secured, in addition to a personal guarantee from Defendant Atwell and CEG and CDG.

Because of the precarious financial condition of Camelot, Plaintiff requests through its present Motion that the Court issue a writ of attachment to attach/sequester and hold in the Court's possession revenues generated by Camelot from exploitation of Library up to an amount necessary to:

(1) Repay the principal amount, penalties, and interest due under the Note;

(2) Bring Camelot current on the Profit Participation Payments and Loan Modification Payments presently owed to Incentive under the Loan Transaction; and

(3) Keep Camelot current on such payments during the pendency of this dispute for purposes of preserving the monies owed to Incentive, preserving the Library from dissipation, and ensuring the post-judgment availability of such funds to satisfy Incentive's claim against Camelot in this case.

For the reasons set forth below, the Court should grant Incentive's Motion and order the issuance of a writ of attachment over the revenues of Liberation Library and sequestration over the Library itself.

STATEMENT OF FACTS

1. In March of 2010, Camelot approached Incentive for a loan of funds (the "Loan" or "Loan Transaction") in the principal amount of $650,000 (the "Loan Amount") to secure acquisition of a large media library, known as the "Liberation Assets," which is comprised of approximately 880 motion pictures, television programs, and other media. For definitional purposes the term "Liberation Library" or "Library" means collectively both the Liberation Assets and the "Distribution Assets" as those two terms appear in the documents executed by the

parties in connection with the Loan Transaction. [*See* Exhibit 1 to Plaintiff's Memorandum in Support of its Second Motion for Temporary Restraining Order and Motion for Preliminary Injunction ("2nd TRO Memo"), Declaration of James Mecham, Manager of Plaintiff Incentive Capital, LLC in Support of 2nd TRO Memo ("First Mecham Declaration") at ¶8.]

2. On or about April 27, 2011, the Loan Transaction closed when Incentive and CFG entered into, among other things, a "Promissory Note Term Loan" (the "Note") for the Loan Amount of $650,000. [*See* First Mecham Declaration at ¶9, Exhibit "A" thereto, the Note.]

3. Incentive funded the Note in two stages. First, it provided $500,000 upon execution of the Note, on or about April 27, 2011. Second, it provided another $150,000 ("Operational Advance") in accordance with Camelot's representation that it had met certain obligations set forth in paragraph 1 of the Note, and the "Modification Agreement" (defined below). [*See* First Mecham Declaration at ¶10, Exhibit "A" thereto, the Note, at p. 1, First Paragraph.]

4. The Note provides that interest shall accrue at a rate of 1.5% per month, with a minimum interest period of six (6) months. The interest was payable on a monthly basis. [*See* First Mecham Declaration at ¶11, Exhibit "A" thereto, the Note, at p. 1, Second Paragraph.]

5. The Note is secured by collateral described in two security agreements. [*See* First Mecham Declaration at ¶19.]

6. Under the first of these security agreements executed between Incentive and CDG (the "CDG Security Agreement"), a series of thirteen (13) films being distributed by CDG described as the "Distribution Assets" is pledged as security. [*See* First Mecham Declaration at ¶20, Exhibit "E" thereto, CDG Security Agreement at p. 1, Section B, ¶1.]

7. Under the second separate security agreement, titled Security and Participation Agreement, which was executed between Incentive and CFG (the "CFG Security Agreement" or "Profit Participation Agreement"), the Note is further secured by collateral described as the "Liberation Assets" (i.e. the Liberation Library consisting of 880 motion pictures and television series episodes—the Liberation Assets and the Distribution Assets are collectively referred to as the "Liberation Library") as follows:

> 1. Grant of Security Interest. Debtor [CFG] hereby grants to the Secured Party [Incentive] ***a continuing first priority security interest*** in all property identified on Schedule 1 attached hereto and by this reference incorporated herein, and all products and proceeds thereof, including (a) the Liberation Assets; (b) all accounts, negotiable instruments, chattel paper and electronic chattel paper, general intangibles, ***proceeds, and monies derived from the disposition or other exploitation of the Liberation Assets*** in all media, from all sources, worldwide during the term hereof; and (c) other assets of the Debtor as set forth on said Schedule 1 (collectively, the "Collateral")." . . .

[*See* First Mecham Declaration at ¶28, Exhibit "F" thereto, CFG Security Agreement at p. 1, ¶ 1 (emphasis added).]

8. The CFG Security Agreement (*i.e.* Profit Participation Agreement) also provides that beginning on the date of the CFG Security Agreement of April 27, 2010, "the Debtor [CFG] shall pay to the Secured Party [Incentive] ten percent (10%) of one hundred percent (100%) of all gross revenues actually received thereafter by Debtor [CFG] ***within 14 days of receiving any such revenue***, CMGR or their respective subsidiaries, successors and assigns (collectively 'Camelot'), from any third party paying Camelot revenues in connection with Camelot's exploitation of the Liberation Assets in all media, worldwide, from all sources (the 'Camelot Revenue'), for an initial period of five years ('Initial Period') from the date of this Security Agreement ('Secured Party Initial Revenue Participation')." [*See* First Mecham Declaration at ¶33, Exhibit "F" thereto, the CFG Security Agreement/Profit Participation Agreement, at p. 2, ¶

2(a).] After the Initial Period, Camelot shall pay the Secured Party two and one half (2.5%) of all such revenues (the "Final Secured Party Revenue Participation"), "it being understood that the Secured Party shall receive the Final Secured Party Revenue Participation for so long as Camelot receives Camelot receives Camelot Revenue from exploiting the Liberation Assets." [*See id.*]

8. The Note also references the requirement that Camelot pay 10% of all gross proceeds derived from the Liberation Assets, as more fully described in the Profit Participation Agreement. [*See* First Mecham Declaration at ¶13.]

9. In connection with the Profit Participation Agreement (i.e. the CFG Security Agreement), Camelot further agreed to meet minimum benchmark guarantees of profit generation. [*See* First Mecham Declaration at ¶37.]

10. After Incentive funded the Loan, Incentive discovered that Camelot and its representatives had misrepresented, among other things, that Camelot's assets had "a significantly higher value than the amount of the proposed loan and the interest thereon." [*See* Plaintiff's Amended Complaint at ¶80; **Exhibit "A"** hereto, Second Declaration of James Mecham ("Second Mecham Declaration") at ¶6.] Incentive also discovered that in order to induce Incentive to make the Loan, Camelot's and its representatives had misrepresented Camelot's financial stability, its ability to undertake and pay back loans, and its track record and abilities as a distributor of films and in generating revenues from the exploitation of the Liberation Library, and grossly overstated the value of the Liberation Library itself. [*See* Plaintiff's Amended Complaint at ¶¶ 2, 75; **Exhibit "A"** hereto, Second Mecham Declaration at ¶6.]

11. For example, in an email to Baer dated April 1, 2010, counsel for Incentive stated, among other things, that "[a]s for the guarantors [of the Loan], the lender [i.e. Incentive] requires that Bob Atwell, Ted Baer, and Peter Jarowey personally guaranty payment of the Note." [*See* **Exhibit "A"** hereto, Second Mecham Declaration at ¶7, Exhibit 1 thereto, Email from Dorius to Baer dated 4/1/2010.] Incentive wanted Baer and Jarowey to guarantee the Loan, despite neither of them being an owner or director of Camelot at the time, to ensure that they communicated correct and accurate information to Incentive regarding Camelot's assets, its business, and the value of the Liberation Assets and stood behind the representations. [*See* **Exhibit "A"** hereto, Second Mecham Declaration at ¶7.]

12. In response to Incentive's request that each of Atwell, Baer and Jarowey execute personal guarantees to guarantee Camelot's repayment of the Loan, Baer sent an email to Incentive's counsel also dated April 1, 2010, in which Baer makes the following representation:

> Also, of particular note, I should point out that the parent company, Camelot Entertainment Group, Inc. [CEG], is a public company, and, as such, has substantial value that is far more secure than personal guarantees. For example, the company would consider placing into escrow $650,000 in convertible preferred stock in the public-traded entity in order to give your lender additional comfort of a substantial guarantee. The escrow would only be released upon satisfaction of the loan.

[*See* **Exhibit "A"** hereto, Second Mecham Declaration at ¶8, Exhibit 2 thereto, Email from Baer to Dorius dated 4/1/2010.]

13. Ultimately, acting in reliance on Baer's representation that a placing of CEG's shares equal in value to the Loan Amount of $650,000 would have "substantial value that is far more secure than [the] personal guarantees" of Atwell, Baer and Jarowey (which Incentive had requested), the parties entered into the Escrow Agreement at the Closing of the Loan, which requires that a share certificate valued at the Principal amount of $650,000 (*i.e.* the Loan

Amount) worth of CEG Class F Convertible Preferred shares (i.e. the Pledged Shares) shall be delivered to an unnamed escrow agent as additional security. [*See* First Mecham Declaration at ¶35, Exhibit "H" thereto, Escrow Agreement, at p. 1, ¶ 1(a).].

14. However, despite Camelot's and its representatives' representations to Incentive that Camelot's stock had "substantial value" which was "far more secure" than the personal guarantees of Atwell, Jarowey and Baer requested by Incentive, Camelot's stock quote [OTC: CMGR. PK] shows its current stock value to be $0.02 per share, with a daily volume of $4,999. [http://finance.yahoo.com/q?s=CMGR.PK&ql=0 (last visited 9/1/110]. This means that Camelot has a daily trading value of $99.98. [*See* Plaintiff's Amended Complaint at ¶ 63; **Exhibit "A"** hereto, Second Mecham Declaration at ¶10.] Indeed, Camelot's stock appears to be unable to trade more than a few thousand dollars per day. [*See id.*] Moreover, investigation into Camelot's financials indicates that there is no discernable market for Camelot's stock nor can it be readily liquidated. [*See id*.]

15. In a file attached to Baer's 4/1/2010 email to Dorius ("File #1"), the following revenue projections from the Liberation Library are provided:

a. Estimated Total Value (low): $22,845,000

b. Short Term Sales Potential (10%) [payable to Incentive]: $2,284,500

c. Estimated Total Value (med): $41,536,500

d. Short Term Sales Potential (10%) (med) [payable to Incentive]: $4,153,650.

[*See* **Exhibit "A"** hereto, Second Mecham Declaration at ¶11, Exhibit 2 thereto, Email from Baer to Dorius dated 4/1/2010 at attached File #1.]

16. File #1 was also included as an exhibit and attached to the Note (as "Exhibit A") and was initialed by Camelot's CEO, Robert Atwell ("Atwell"), as representing the gross

proceeds to be generated from the Liberation Library ("Gross Revenue Representations"). [*See* First Mecham Declaration at ¶14; Exhibit "A" thereto, the Note at its Exhibit A.]

17. Based on the Gross Revenue Representations made by Atwell and Baer, which were included as File #1 to Baer's April 1, 2010 email and in Exhibit A attached to the Note (along with the Warranties contained in the Note itself), it was Camelot's agreement that "the international sales projections previously provided by borrower… shall not vary by more than 25% less than that represented therein, i.e., Incentive would not receive less than 25% of $2,284,500 to $4,153,650 in gross participation from the Library. [*See* Plaintiff's Amended Complaint at ¶16; First Mecham Declaration at ¶16.]

18. Additionally, also included in Exhibit A to the Note (and likewise provided as attachments to Baer's 4/1/2010 email to Dorius) were certain sales projections related to the Liberation Library. According to the representations made by Camelot and its representatives relating to these sales projections, Incentive would receive 10% of the Existing Sales Revenue generated from the Liberation Library (or at least $15,000 monthly), and 10% of the Exploitation Revenues (or at least $190,375 monthly), for a total of not less than $205,375 each month (the "Payment Benchmark"). [*See* Plaintiff's Amended Complaint at ¶89; **Exhibit "A"** hereto, Second Mecham Declaration at ¶14.]

19. Furthermore, on March 24, 2010, Camelot's representative and Boston-based financial advisor, Defendant Peter Jarowey ("Jarowey"), sent an e-mail to Plaintiff's counsel, in response to a request for specific revenue figures for Camelot. In this email, Jarowey represents that his estimate of monthly gross revenue for the Liberation Assets was and would continue to be "around $200,000 per month net of the overhead reductions, maybe more [c]ould be as much as $300,000 per month." [*See* First Mecham Declaration at ¶44, Exhibit "K" thereto, Email from

Jarowey to Pia dated 3/30/10.]

20. It was only a matter of months after Incentive had made the Loan to Camelot (and before Incentive had discovered the above described misrepresentations) that Camelot began seriously underperforming on its agreed-to benchmarks pursuant to the Gross Revenue Representations set forth in Exhibit A to the Note for distributing the Liberation Library. [*See* Plaintiff's Amended Complaint at ¶ 38; **Exhibit "A"** hereto, Second Mecham Declaration at ¶16.]

21. Consequently, on Wednesday, June 2, 2010, Incentive's legal counsel sent a letter to Camelot entitled "Notice and No Waiver." [*See* First Mecham Declaration at ¶39, Exhibit "I" thereto, Notice and No Waiver Letter dated 6/2/2010.] The June 2, 2010 letter states, among other things, that:

> It was represented to Incentive Capital that the film library was currently generating $150,000 of gross revenues each month. . .
>
> Thus, it continues to be Incentive Capital's express understanding of the parties' agreements that in addition to your representations that $150,000 was being generated by the film library ***at the time it was acquired***, that the 'Short Term Sales Potential" payments to Incentive Capital of 10% of gross are $2,284,500. This representation has been relied upon by Incentive Capital.
>
> If the forgoing constitute accurate and truthful representations by Camelot, then during the month of May 2010 the lender should have received no less than $15,000 in participation payments. However, to date the lender has only received a participation payment of $1,012.22 on May 26, 2010 and on May 21, 2010 a payment of $4,400. The total participation payments to-date equal $5,412.22, which constitutes 10% of $54,122. The lender has also received $6,750 in interest payments. . . .
>
> Based upon the participation payments received to date, lender is concerned that one of two things is happening: (a) borrower is not generating monthly gross revenues as it represented in order to induce lender to make this loan, or (b) borrower is not making the full participation payments as required under the loan documents. . . .

[*See id.* (emphasis added).]

22. Camelot eventually disclosed that it had financial problems and was unable to perform in accordance with its representations. After many futile attempts to work out the issues, Camelot defaulted. [*See* Plaintiff's Amended Complaint at ¶ 46; First Mecham Declaration at ¶46.]

23. In light of Camelot's breaches and shortfall on its represented Gross Revenue Projections, on or about June 11, 2010, Incentive agreed to enter into a loan modification agreement with Camelot and Atwell (the "Loan Modification Agreement"), whereby Camelot agreed to meet certain sales and payment benchmarks in addition to their obligations under the Note. [*See* First Mecham Declaration at ¶47, Exhibit "L" thereto, Loan Modification Agreement.] In exchange for Camelot executing the Loan Modification Agreement, Incentive agreed to continue its monetary advances to CFG and to refrain from instituting legal action against Camelot and Atwell. [*See* id., Exhibit "L" thereto, Loan Modification Agreement, at p. 1, Last Paragraph.]

24. The Loan Modification Agreement states, among other things, the following:

> . . . By no later than April 27, 2011 (the "*Deadline*"), Borrower shall use its best efforts to generate sales from the exploitation of the "Liberation Assets" (as defined in the Loan Documents) in an amount not less than $2,284,500 (the "***Minimum Sales Target***"). In the event Borrower fails to meet the Minimum Sales Target by the Deadline, then interest shall accrue on the "Deficiency Amount" (defined as the difference between Borrower's actual gross sales revenue and the Minimum Sales Target) at the rate of 1.50% per month (the "***Shortfall Interest***"), commencing as of the Deadline. Borrower shall make monthly payments of all accrued but unpaid Shortfall Interest on the last day of each such month thereafter where there is accrued but unpaid Shortfall Interest, ...

[*See* First Mecham Declaration at ¶___, Exhibit "K" thereto, Loan Modification Agreement, at p. 1, "Recitals" Section, ¶ C; p. 2, "Agreement" Section, ¶¶ 2(A) and 2(B) (emphasis in original).]

25. The Loan Modification Agreement is signed by Incentive and each of, CFG, CDG, CEG, and Atwell. [*See* First Mecham Declaration at ¶49, Exhibit "K" thereto, Loan Modification Agreement, at p. 4.]

26. Camelot and Atwell failed to meet the Minimum Sales Target set forth in the Loan Modification Agreement. [*See* First Mecham Declaration at ¶50.]

27. Thereafter, Camelot failed to make the Balloon Payment due pursuant to the terms of the Note on January 31, 2011 of $682,500 and thereby defaulted under the Note. [*See* First Mecham Declaration at ¶52.]

28. Since failing to make the Balloon Payment due under the Note on January 31, 2011, Camelot has failed to make any payments owed to Incentive under the Profit Participation Agreement, the Loan Modification Agreement and/or the Note. [*See* **Exhibit "A"** hereto, Second Mecham Declaration at ¶19.]

29. Camelot has also breached several other provisions of the Note, including the representations and warranties sections, as discussed above. [*See* **Exhibit "A"** hereto, Second Mecham Declaration at ¶20.]

30. Incentive has calculated what amounts are due per the contract terms. This calculation does not include any damages that may have resulted from the breach:

AMOUNT	**JUSTIFICATION**
$650,000.00	**Principal amount**. ". . . the principal amount of Six Hundred Fifty Thousand and No/100 Dollars ($650,000) plus interest from this date [April 27, 2010] until paid. The principal amount together with accrued interest thereon shall be due and payable on January 31, 2011 ("Maturity")" (Note, at 1).
$32,500.00	**Origination and closing fee**. "As additional consideration for the extension of credit by Lender evidenced by this Note, Borrower shall pay Lender (a) a closing fee, and (b) an origination fee, each in the amount of Sixteen Thousand Two Hundred Fifty Dollars ($16,250.00), for a total of Thirty Two Thousand Five Hundred Dollars ($32,500.00),

	on or before the date of Maturity (Note, at 2).
$182,862.32	**3.5% Default Monthly Interest Rate.** "At Lender's election, without notice or demand, Borrower shall pay interest at the rate of three and one-half percent (3.50%) per month ("Default Rate") on the outstanding balance of this Note during the period that any Event of Default exists, on past due interest on this Note, on all other amounts payable to Lender by Borrower in connection with this Note, and on any unsatisfied judgment on this Note" (Note, at 2). 1. February: 3.5% * [$650,000 + $32,500 + $16,084.87] = **$24,450.47** 2. March: 3.5% * [$650,000 + $32,500 + $16,084.87] = **$24,450.47** 3. April: 3.5% * [$650,000 + $32,500 + $16,084.87] = **$24,450.47** 4. May: 3.5% * [$650,000 + $32,500 + $16,084.87 + $33,455.67] = **$25,621.38** 5. June: 3.5% * [$650,000 + $32,500 + $16,084.87 + $33,455.67 + $33,455.67] = **$26,792.34** 6. July: 3.5% * [$650,000 + $32,500 + $16,084.87 + $33,455.67 + $33,455.67 + $33,455.67] = **$27,963.32** 7. August: 3.5% * [$650,000 + $32,500 + $16,084.87 + $33,455.67 + $33,455.67 + $33,455.67 + $33,455.67] = **$29,134.26**
$16,084.87	**Profit Payments**. "Commencing on the date of this Security Agreement [April 27, 2010], the Debtor shall pay to the Secured Party ten percent (10%) of one hundred percent (100%) of all gross revenues actually received thereafter by Debtor within 14 days of receiving any such revenue . . . from any third party paying Camelot revenues in connection with Camelot's exploitation of the Liberation Assets in all media, worldwide, from all sources" (Security and Participation Agreement, at 2). "The Distribution Payment must actually be derived from 10% of the gross revenue generated from the exploitation of the Library" (Note, at 1.). "[T]o date the lender has only received a participation payment of $1,012.22 on May 26, 2010 and on May 21, 2010 a payment of $4,400. The total participation payments to-date equal $5,412.22, which constitutes 10% of $54,122" (6/2/2010 Letter "Notice and No Waiver"). Total Gross Sales from August 2010 = $160,848.77 ("New Sales") (Camelot Draft Sales Report as of June 24, 2011). "New Sales" = $160,848.77 * 10% = **$16,084.87**.
$33,455.67	**Deficiency payment for period ending May 27, 2011**. "In the event Borrower fails to meet the Minimum Sales Target [$2,284,500] by the Deadline [April 27, 2011], then interest shall accrue on the "Deficiency Amount" (defined as the difference between Borrower's actual Liberation Assets gross sales and the Minimum Sales Target) at the rate of 1.50% per month (the "Shortfall Interest"), commencing as of the Deadline. Borrower shall make monthly payments of all accrued but unpaid Shortfall Interest on the last day of each such month thereafter where there is accrued but unpaid Shortfall Interest" (Loan Modification Agreement, at 2). Camelot has previously acknowledged only $54,122 in sales, and only paid 10% Profit Payments on that amount. Camelot is now acknowledging $160,848.77 in gross sales; however, it is has not paid Profit

	Payments on that amount. Thus, for calculating the Deficiency Amount, the following equation is being employed: $2,284,500 – $54,122 = **$2,230,378 = Deficiency Amount**. 1.5% of $2,230,378 = **$33,455.67**.
$33,455.67	**Deficiency payment for period ending June 27, 2011**.
$33,455.67	**Deficiency payment for period ending July 27, 2011**
$33,455.67	**Deficiency payment for period ending August 27, 2011**
$41,620.36	**5% late fee on all unpaid balances**. "For any payment due under this Note not made within ten (10) Business Days after its due date, Borrower shall pay a late fee equal to the greater of five percent (5%) of the amount of the payment not made or $50.00" (Note, at 1). 8. Balloon payment 5% penalty: 5% * $650,000 = **$32,500.00** 9. Origination and closing fee: 5% * $32,500 = **$1,625.00** 10. Profit payment 5% penalty: 5% * $16,084.87 = **$804.24** 11. May 27, 2011 Deficiency Amount: 5% * $33,455.67 = **$1,672.78** 12. June 27, 2011 Deficiency Amount: 5% * $33,455.67 = **$1,672.78** 13. July 27, 2011 Deficiency Amount: 5% * $33,455.67 = **$1,672.78** 14. August 27, 2011 Deficiency Amount: 5% * $33,455.67 = **$1,672.78** Total = **$41,620.36**
$95,000	**Attorneys' fees (at least)**. "Borrower agrees to pay on demand all costs and expenses of Lender, including but not limited to (a) administration, travel and out-of-pocket expenses, including but not limited to reasonable attorneys' fees and expenses, of Lender in connection with the preparation, negotiation and closing of the Loan Documents and the administration of the Loan Documents, the collection and disbursement of all funds hereunder and the other instruments and documents to be delivered hereunder, (b) extraordinary expenses of Lender in connection with the administration of this Note and the other Loan Documents, (c) the reasonable fees and out-of-pocket expenses of special counsel for Lender, if any, with respect to the foregoing, and of local counsel, if any, who may be retained by said special counsel with respect thereto, (d) all fees due in any of the Loan Documents, and (e) all costs and expenses, including reasonable attorneys' fees, in connection with the determination of Lender's lien priority in any collateral securing this Note, or the restructuring or enforcement of this Note or any Loan Document" (Note, at 6).
$1,151,890.23	**TOTAL**

31. After many unsuccessful attempts to settle the matter, Incentive began steps to foreclose on the collateral set forth in the Security and Guaranty Agreements. [*See* **Exhibit "A"** hereto, Second Mecham Declaration at ¶22.]

32. On February 21, 2011 at 9:00 A.M., Incentive held a creditor's sale ("Foreclosure Sale") to foreclose on the collateral set forth in the Security Agreements, namely the Liberation Assets and the Distribution Assets, which have been collectively defined as the Liberation Library. [*See* Exhibit "A" Plaintiff's Amended Complaint at ¶ 58; First Mecham Declaration at ¶58.] Also on February 21, 2011, Incentive issued a Transfer Statement to Debtors. [*See id.* at ¶59.]

33. As of that date of the Foreclosure Sale Incentive became the legal title holder to the Liberation Library. [*See* First Mecham Declaration at ¶60.]

34. Since the date of the Foreclosure Sale, Camelot has informed Incentive that it is continuing to exploit the Liberation Library by entering into license and sale agreements similar to the Distribution Agreements, and is intending to transfer titles in the Liberation Library. [*See* **Exhibit "A"** hereto, Second Mecham Declaration at ¶24.]

35. Camelot and the other Defendants refuse to acknowledge the ownership interests of Incentive, continue to hold themselves out to the world as the owners of the Liberation Library, and are improperly maintaining control over the funds, physical property, and intellectual property, including contracts and payment rights in contravention of Incentive's ownership rights. [*See* **Exhibit "A"** hereto, Second Mecham Declaration at ¶25.]

36. By refusing to make the payments owed to Incentive under the Note, the Profit Participation Agreement and the Loan Modification Agreement, Camelot and the other Defendants are diverting and converting revenue that is being generated from the Liberation Library that rightfully belongs to Incentive. [*See* **Exhibit "A"** hereto, Second Mecham Declaration at ¶26.]

ARGUMENT

I. INCENTIVE CAN ESTABLISH EACH OF THE ELEMENTS REQUIRED FOR THE ISSUANCE OF A PREJUDGMENT WRIT OF ATTACHMENT.

Through its present Motion, Incentive requests that this Court issue a prejudgment writ of attachment over the revenues generated by Camelot from exploitation of the Liberation Library and the Distribution Assets to hold such revenues in the registry of the Court until the rights of the parties are determined. This request is being made in this case to preserve the property from dissipation and to ensure the postjudgment availability of the Liberation Library and Distribution Assets to satisfy Incentive's claim against Camelot for, among other things, breach of the Note.

A. Fed.R.Civ.P. 64 Mandates that a Request for the Remedy of a Prejudgment Writ of Attachment be Made in Accordance with Utah State Law.

Rule 64 of the Federal Rules of Civil Procedure governs seizure of a person's property in a federal diversity action.[1] Under Rule 64, the law of the state in which a district court sits on prejudgment attachment procedures should be applied by the Court under the same circumstances and in the same manner as in that state's own courts, unless an existing federal statute governs. In this case, there is no existing statute of the United States which is applicable.

[1] Rule 64 provides:

> (a) Remedies Under State Law — In General. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.
>
> (b) Specific Kinds of Remedies. The remedies available under this rule include the following — however designated and regardless of whether state procedure requires an independent action: arrest; attachment; garnishment; replevin; sequestration; and other corresponding or equivalent remedies.

Fed.R.Civ.P. 64

Accordingly, Incentive's request for the remedy of prejudgment attachment is made in accordance with Utah state law. *See* Fed. R. Civ. P. 64.

As more fully described below, Utah's rules give its courts the authority to issue an attachment at the commencement of the action or while it is pending against any property or credits belonging to the debtor upon application of the plaintiff.

B. Overview of Remedy of Prejudgment Writ of Attachment under Utah Law.

Under Utah law, an "attachment is a provisional remedy granted to the plaintiff in an action, which enables him to have property of the defendant seized by an officer and held in the custody of the law as security for the satisfaction of any judgment that he may recover." *In re McNeely*, 51 B.R. 816, 818 (Bankr. D. Utah 1985), citing *Bristol v. Brent,* 103 P. 1076, 1079 (Utah 1909). In other words, "[t]he property attached constitutes security for payment of the debt, if the debt is found to exist." *Id.* "When the court determines that the plaintiff is entitled to judgment, 'then, and only then, can the property that has been seized be applied to payment of the judgment.'" *Id.*, quoting *Bristol,* 103 P. at 1079. Accordingly, the fact that Defendants' property has been deposited into the registry of the court does not deprive Defendants of ownership of such property, since the Court merely holds the property as trustee for the rightful owner. *See, e.g., Baxter v. United Forest Products Co.,* 406 F.2d 1120, 1125 (8th Cir. 1969).

Rule 64C of the Utah Rules of Civil Procedure ("U.R.C.P.") governs the issuance of prejudgment writs of attachment under Utah law. Rule 64C provides that "[a] writ of attachment is available to seize property in the possession or under the control of the defendant." U.R.C.P., Rule 64C(a). The ground for a writ of attachment under Utah law are set forth in Rule 64C(b) as follows: "(i) that the defendant is indebted to the plaintiff; (ii) that the action is upon a contract or is against a defendant who is not a resident of this state or is against a foreign corporation not

qualified to do business in this state or the writ is authorized by statute; and (iii) that payment of the claim has not been secured by a lien upon property in this state." U.R.C.P., Rule 64C(b).

Rule 64A, which governs the issuance of prejudgment writs in Utah, provides that a writ of attachment "is available after the claim has been filed and before judgment only upon written order of the court." U.R.C.P., Rule 64A(a). Under Rule 64A, "[t]o obtain a writ of replevin, attachment or garnishment before judgment, plaintiff shall file a motion, security as ordered by the court and an affidavit stating facts showing the grounds for relief and other information required by these rules." U.R.C.P., Rule 64A(b). In addition to the specific ground required for the issuance of a writ of attachment set forth in Rule 64C, Rule 64A also requires that (i) each of the following requirements be established by the plaintiff: "(1) that the property is not earnings and not exempt from execution; (2) that the writ is not sought to hinder, delay or defraud a creditor of the defendant; and (3) a substantial likelihood that the plaintiff will prevail on the merits of the underlying claim," U.R.C.P., Rule 64A(c)(1) through –(3); and (ii) "***at least one***" of the following requirements also be established: (4) that the defendant is avoiding service of process; (5) that the defendant has assigned, disposed of or concealed, or is about to assign, dispose of or conceal, the property with intent to defraud creditors; (6) that the defendant has left or is about to leave the state with intent to defraud creditors; (7) ***that the defendant has fraudulently incurred the obligation that is the subject of the action***; (8) that the property will materially decline in value; (9) ***that the plaintiff has an ownership or special interest in the property***; or (10) ***probable cause of losing the remedy unless the court issues the writ***." U.R.C.P., Rule 64A(c)(4) through –(10) (emphasis added).

Rule 64A provides that "[t]he burden is on the plaintiff to prove the facts necessary to support the writ." U.R.C.P., Rule 64A(h). As demonstrated below, Incentive can meet its

burden of establishing each of the requirements for the issuance of a prejudgment writ. Therefore, the Court should grant Incentive's Motion.

C. Incentive Can Establish Each Requirement for a Prejudgment Writ of Attachment Under Utah Law.

As demonstrated by the allegations set forth in the Statement of Facts section of this Memorandum above, Incentive demonstrates each of the grounds required for the issuance of a prejudgment writ of attachment under Utah, as set forth in U.R.C.P., Rules 64A and 64C. Regarding the grounds for an attachment contained in Rule 64C, Incentive has established that under the Loan, Camelot "is indebted to [Incentive]" in an amount exceeding the principal Loan Amount of $650,000, as evidenced by the Note and other Loan Documents. *See* U.R.C.P., Rule 64C(b)(1). Camelot has failed to repay the Loan and is in default of the Note as a result of its failure to make the Balloon Payment due pursuant to the terms of the Note on January 31, 2011 of $682,500 failure to pay participation payments, and failure to make deficiency and interest payments. In addition, this action is both "upon a contract" (i.e. the Note and other Loan Documents) and "is against a defendant who is not a resident of this state." *See* U.R.C.P., Rule 64C(b)(2)(i). Lastly, the payment of the claim (i.e. the Loan) "has not been secured by a lien upon property ***in this state***." *See* U.R.C.P., Rule 64C(b)(3) (emphasis added). Accordingly, Incentive can establish each of the grounds for an attachment contained in Rule 64C.

Regarding the remaining grounds for an attachment contained in Rule 64A, Incentive can establish each of those as well. First, the property of Camelot which Incentive requests be attached by the Court, the ***revenue*** derived from the Library "is not earning and not exempt from

execution."[2] *See* U.R.C.P., 64A(c)(1). Second, because Incentive has a legitimate first position security interest in the Library pursuant to the terms of the Security Agreements (and, is arguably the owner of the Library as a result of the Foreclosure Sale), Incentive has established that "the writ is not sought to hinder, delay or defraud a creditor of the defendant." *See* U.R.C.P., 64A(c)(1).

Third, Incentive can establish "a substantial likelihood that [it] will prevail on the merits of the underlying claim." Specifically, Incentive has made a *prima facie* showing of the likelihood it will succeed on several of its claims asserted against Camelot in this case, particularly breach of contract. For example, Incentive has produced indisputable evidence that Camelot breached the parties' agreements by: (1) failing to repay Incentive the $650,000.00 in principal plus interest, fees and costs as required under the Loan Documents, and in particular the Note; (2) failing to generate income in accordance with their agreed-to benchmarks; (3) failing to make interest and revenue payments as required under the terms of the Loan Documents; and (4) diverting and converting funds and assets, including the Liberation Library, belonging to Incentive. These are indisputable breaches of contract. Thus, Incentive has established the "likelihood of success" requirement for the issuance of an attachment.

In addition, as the Statement of Facts section of the Memorandum shows, although Incentive is required to only establish one of the following, it has established: (i) "that [Camelot] has assigned, disposed of or concealed, or is about to assign, dispose of or conceal, the [Liberation Library] with intent to defraud creditors," U.R.C.P., 64A(c)(5); (ii) "that [Camelot] has fraudulently incurred the obligation that is the subject of the action," U.R.C.P., 64A(c)(7);

[2] Incentive is not asking for sequestration of the Liberation Library and Distribution assets themselves, rather the revenue derived therefrom.

(iii) that [Incentive] has an ownership or special interest in the property," U.R.C.P., 64A(c)(9) and (iv) "probable cause of losing the remedy unless the court issues the writ." U.R.C.P., Rule 64A(c)(10).

Because Incentive can meet its burden of establishing each of the requirements for the issuance of a prejudgment writ of attachment under Utah law, the Court should grant Incentive's present Motion.

D. Utah Courts Have Consistently Permitted the Attachment of Property that Represents the Debt or Security for the Debt Owed by the Defendant to the Plaintiff.

The fact that Incentive requests that the revenues generated from Camelot's exploitation of the Library be attached to secure payment by Camelot of the debt it owes Incentive under the Loan is appropriate under Utah law. Utah courts consistently permit the attachment of property which represents security for a debt or even the debt itself owed by the defendant to the plaintiff. Indeed, given that the Library was pledged by Camelot as security for its payment obligations under the Loan and that Camelot promised to pay Incentive monthly Profit Participation Payments and Loan Modification Payments in connection with its obligation to repay the Loan, the revenues generated by Camelot from the Library represents the most appropriate property of Camelot to be attached in this case. In addition, because the value of Camelot's stock is virtually zero, these revenues from the Liberation Library represents the only property of value that Camelot possesses and the thus essentially the only property that could be attached to secure Incentive's receipt of the payments it is owed under the Loan.

The following cases are examples in which the Utah court permitted the attachment of property representing the debt itself or security for the debt: *Meyer v. Gen. Am. Corp.*, 569 P.2d 1094, 1095 (Utah 1977) (upholding validity of writ of attachment issued on caterpillar tractor for

loan of $12,000 given for purpose of purchasing the tractor where the defendant "executed promissory notes and a security agreement giving [the plaintiff] a security interest in the caterpillar as collateral for the loan"); *Jensen v. Eames*, 519 P.2d 236, 237-39 (Utah 1974) (allowing issuance of writ of attachment by the plaintiff who had loaned the defendant, a nonresident of Utah, the principal sum of $25,000, attaching 16,812,460 shares of common stock held by the defendant in another company, evidence by two stock certificates); *Pac. Chromalox Div., Emerson Elec. Co. v. Irey*, 787 P.2d 1319, 1320-24 (Utah Ct. App. 1990) (case involving writ of attachment on the machine that was at the center of the dispute between the parties regarding what monies were owed by whom and order that the machine be taken from the possession of the defendant); *Fitzgerald v. Critchfield*, 744 P.2d 301, 302-03 (Utah Ct. App. 1987) (allowing issuance of prejudgment writ of attachment commanding the Utah County Sheriff to "attach and safely keep" forty-six beef cows and calves owned by Defendant for failure to pay amounts owed on contract for the feeding of Defendant's livestock).

Based on the foregoing, a prejudgment writ of attachment attaching the revenues generated by Camelot from its exploitation of the Liberation Library is appropriate in this case. Accordingly, the Court should grant Incentive's present Motion.

II. GIVEN THE PARTIES DISPUTE OVER THE OWNERSHIP OF THE LIBRARY, SEQUESTRATION OF THE LIBRARY USING UTAH'S ATTACHMENT RULE IS APPROPRIATE IN THIS CASE.

Because this case also involves a dispute as to which party owns the Library and the proceeds derived therefrom, it is also appropriate that the revenues of the Library be sequestered using Utah's attachment rule. Generally, a writ of sequestration is available to a plaintiff in a suit if: "(i) the suit is for title or possession of personal property, and (ii) a reasonable conclusion may be drawn that there is immediate danger that the defendant or the party in possession of the

property will conceal, dispose of, ill-treat, waste, or destroy the property or remove it from the county during the suit." *See, e.g.*, *McMakin v. Golden*, 09-97-289 CV, 1997 WL 723280 (Tex. App. Nov. 20, 1997), citing Tex. Civ. Prac. & Rem.Code Ann. § 62.001 (Vernon 1997).

Sequestration is listed among the types of writs available under Federal Rule 64 (listing "arrest; attachment; garnishment; replevin; sequestration; and other corresponding or equivalent remedies"). Rule 70 of the U.R.C.P. also lists sequestration as a possible remedy. *See* U.R.C.P. 70 (stating, in relevant part, that "the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment.") Federal courts have repeatedly found that it is appropriate to use a state's attachment rule to sequester property. *See, e.g., Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 944 (1982) (explaining that sequestration of certain assets may be accomplished through prejudgment attachment of the property in the possession of debtors); *Baxter v. United Forest Products Co.*, 406 F.2d 1120, 1122-28 (8th Cir. 1969) (holding that district court's order sequestering monies of the defendants in a federal diversity case required compliance with state law governing attachment); *J.C. Trahan Drilling Contractor, Inc. v. Sterling*, 335 F.2d 65 (5th Cir. 1964) (same); *United States v. Stone*, 59 F.R.D. 260, 262-67 (D. Del. 1973) (upholding order that writ of sequestration be issued against the defendant to "seize and hold the stock and debentures" owned by the defendant in several Delaware corporations" to satisfy United States' claim for unpaid taxes).

In *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), the United States Supreme Court provided a meaningful overview of sequestration in examining the issue of whether a state's (Louisiana's) sequestration statute violated the Due Process Clause of the Fourteenth Amendment and. In *Mitchell*, the petitioner had defaulted on his payment obligations for goods he had purchased from the respondent/seller under an installment sales contract. The respondent

then had the goods sequestered pursuant to the Louisiana statute pending the outcome in the case. In holding that the statute did not violate the Fourteenth Amendment, the Court began its analysis by discussing the parties' respective interests in the sequestered goods because "[r]esolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well." *Id.* at 604.

The Court noted that while petitioner "no doubt 'owned' the goods" he had purchased under the installment sales contract, his title to them was heavily encumbered. *Id.* The Court also noted that the respondent/seller also had an interest in the goods because they were used "to secure the unpaid balance of the property." *Id.* Thus, according to the Court, petitioner's "right to possession and his titled were subject to defeasance in the event of default in paying the installments due from him." *Id.* It therefore found that petitioner's "interest in the property, until the purchase price was paid in full, was no greater than the surplus remaining, if any, after foreclosure and sale of the property in the event of his default and satisfaction of outstanding claims." *Id.* The Court further found that the interest of respondent in the goods, as seller of the proper and holder of a lien over the goods securing their payment, "was measured by the unpaid balance of the purchase price" and that the "monetary value of that interest in the property diminished as payments were made, but the value of the property as security also steadily diminished over time as it was put to its intended use by the purchaser." *Id.*

Accordingly, the Court concluded that "[p]lainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor" and that "[t]he reality is that both seller and buyer had current, real interests in the property." *Id.*

After concluding that both parties had an interest in the sequestered property, the Court discussed the use of sequestration as a device to resolve conflicting claims to property. *See id.* at

605 (referring to sequestration as an "ancient civil law device"). The Court noted that "[h]istorically, the two principal concerns have been that, pending resolution of the dispute, the property would deteriorate or be wasted in the hands of the possessor and that the latter might sell or otherwise dispose of the goods." *Id.* Thus, an aim of sequestration is that through official intervention "violent self-help and retaliation" will be forestalled. *Id.*

Based on the foregoing, Incentive believes that because the parties dispute which of them is the present owner of the Liberation Library, Utah's attachment rule (Rules 64A and 64C) should be used to sequester the Liberation Library itself pending the Court's determination of its rightful owner in this case.

CONCLUSION

For the reasons set forth above, the Court should grant Incentive's Motion.

DATED this 1st day of September, 2011.

PIA ANDERSON DORIUS REYNARD & MOSS

/s/ Joseph Pia
Joseph Pia

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 2011, a true and correct copy of forgoing **MEMORANDUM IN SUPPORT OF MOTION FOR WRIT OF ATTACHMENT** was served by electronic mail on the following:

John A. Snow
Karen E. O'Brien
VAN COTT BAGLEY CORNALL & McCARTHY
jsnow@vancott.com
kobrien@vancott.com

Jonathan M. Levitan
jonathanlevitan@aol.com

Wayne G. Petty
MOYLE & DRAPER, P.C.
wayne@moylelawfirm.com

Marc E. Kasowitz
David J. Shapiro
KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
mkasowitz@kasowitz.com
dshapiro@kasowitz.com

By: /s/ Joseph Pia