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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 PLAINTIFF'S EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION** Civil No. 2:11-cv-00288 Judge Paul Warner **(Oral Argument Requested)**

Plaintiff Incentive Capital, LLC ("Plaintiff" or "Incentive"), by and through its counsel, does hereby submit the following memorandum in support of its Ex Parte Motion for a Temporary Restraining Order and Motion Preliminary Injunction against Camelot Entertainment

Group, Inc., a Delaware corporation ("CEG"), Camelot Film Group, Inc., a Nevada corporation ("CFG"), Camelot Distribution Group, Inc., a Nevada corporation ("CDG") (CEG, CFG and CDG may be collectively referred to herein as "Camelot"), Robert P. Atwell, an individual ("Mr. Atwell"), Jamie Thompson, an individual ("Mr. Thompson"), Steven Istock, an individual ("Mr. Istock"), Ted Baer, an individual ("Mr. Baer"), and Peter Jarowey, an individual ("Mr. Jarowey") (Mr. Atwell, Mr. Thompson, Mr. Istock, Mr. Baer and Mr. Jarowey are collectively referred to herein as the "Atwell Defendants") (Camelot and Atwell Defendants may be collectively referred to herein as the "Defendants").

INTRODUCTION

Plaintiff Incentive has suffered irreparable harm at the hands of Defendants. First, CFG has breached its agreement with Incentive by refusing to repay the loan Incentive made to it. Second, CDG, CEG and Mr. Atwell have breached their agreements with Incentive by failing to repay Incentive's loan pursuant to their guarantees and security agreements. Third, Camelot and the Atwell Defendants made gross misrepresentations about Camelot's financial stability, its ability to pay back loans, its track record in marketing and distributing films, and its ability to distribute and exploit the "Liberation Library," a film and television library containing approximately 880 film and television as well as other titles owned by Camelot, to induce Incentive to provide it with funds to acquire and distribute the Library.

Due to Camelot and Mr. Atwell's breach of the plain terms of the loan documents, including the guarantees and the security agreements Incentive received in connection with loaning the funds for the purchase of the Liberation Library, Incentive foreclosed on the

Liberation Library. As a result, Incentive is presently the legal title holder of all of the Liberation Library motion picture and television titles.

Despite the legal acquisition of title to the Liberation Library by Incentive pursuant to the foreclosure sale, Camelot and the Atwell Defendants are falsely holding themselves out as the owner of the motion picture Liberation Library. Camelot and the Atwell Defendants are withholding physical elements of the Library in locked warehouses, and improperly converting and diverting assets and funds belonging to Incentive. There is a substantial risk that they are or will move these assets to continue to avoid Incentive. The largest film market of the year is in Cannes, France beginning in two weeks, mid-May 2011. The market is only held once a year, and it is to the strong economic benefit of the Defendants to conceal information and physical elements of the Library until after the market has passed and they have cut secret deals with international buyers to the exclusion of Incentive. Incentive is and will be precluded from using the market to capitalize on its business relationships and consummate its own deals.

The library is comprised of unique intellectual property audio/visual works. Once titles in the library are marketed and sold, there is no way to undo the perception in the market-place. There is no way to value the loss and injury to the library being caused by Camelot. Additionally, Camelot has wrongfully initiated copyright infringement suits as if it was the owner of the Liberation Library. Finally, it appears that Camelot is nearly insolvent, with the value of its shares at 0.0001 of a penny. These shares are presently not trading at full capacity because of the improprieties by Camelot in the marketplace.

Defendants have already damaged Incentive, and unless Defendants are immediately enjoined from furthering their destructive actions, Incentive will continue to suffer irreparable harm.

STATEMENT OF FACTS

1. In March of 2010, Defendants approached Incentive for a loan of funds to secure acquisition of a large library of 880 motion pictures and television series episodes (the "Liberation Library").

Camelot and the Atwell Defendants Made Fraudulent Misrepresentations in Order to Induce Incentive to Make the Loan

2. In order to induce Incentive to make the loan, Camelot and the Atwell Defendants misrepresented Camelot's financial stability, its ability to undertake and pay back loans, its abilities as distributor of the Liberation Library, and the value and actual ownership of assets and holdings.

3. Additionally, Camelot and the Atwell Defendants represented that 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 $205,375 each month ("Payment Benchmark"). This representation was false.

4. Alternatively, Camelot and the Atwell Defendants represented that Incentive would receive 10% of the Existing Sales Revenue from the Liberation Library, or at least $15,000 monthly, and 10% of the Exploitation Revenues as modified by the 25% cushion referenced in the preceding paragraph, or at least $142,781.25 monthly, for a total of $157,781.25 ("Cushioned Benchmark"). This representation was false.

5. Based on Camelot's and the Atwell Defendants' misrepresentations, on or about April 27, 2010, Incentive entered into a loan agreement (the "Note") with Camelot Film Group ("CFG"), attached hereto as **Exhibit A**, whereby Incentive agreed to loan CFG a principal amount of $650,000.00 with fees and interest. *See* Exh. A. Pursuant to the terms of the Note, the principal amount of $650,000.00, fees of approximately $32,500.00, and applicable interest, and costs were due on or before January 31, 2011. *See id*.

6. Additional terms of the Note require CFG to pay: (a) interest of one and one-half percent (1.5%) of the outstanding balance of the Note per month commencing May 27, 2010; and (b) ten percent (10%) of all gross revenues received by CFG for the exploitation of the Liberation Assets described in the CFG Security Agreement. *See id.*

7. The same day that the Note was entered into, on April 27, 2010, Incentive entered into a guaranty agreement with CEG (the "CEG Guaranty"), attached hereto as **Exhibit B**, whereby CEG unconditionally and absolutely guaranteed CFG's repayment obligations under the Note. *See* Exh. B.

8. On or about April 27, 2010, Incentive entered into a second guaranty agreement (the "Atwell Guaranty") with the CEO of the Camelot Entities, Robert Atwell ("Atwell"), attached hereto as **Exhibit C**, whereby Atwell unconditionally and absolutely guaranteed CFG's repayment obligations under the Note. *See* Exh. C.

9. On or about April 27, 2010, Camelot Distribution Group ("CDG") entered into a third guaranty agreement with Incentive (the "CDG Guaranty") as further inducement for the Note, attached hereto as **Exhibit D**, whereby CDG unconditionally and absolutely guaranteed CFG's repayment obligations under the Note. *See* Exh. D.

10. The Note, and the CEG, Atwell and CDG Guarantees (collectively the "Guarantees") are secured by collateral described in a security agreement between Incentive and CDG (the "CDG Security Agreement"), attached hereto as **Exhibit E**, as "Distribution Assets," a series of thirteen (13) films being distributed by CDG. *See* Exh. E.

11. The parties entered into another security and participation agreement between Incentive and CFG (the "CFG Security Agreement"), attached hereto as **Exhibit F**, wherein the Note was further secured by collateral described as the "Liberation Assets," a large library of 880 motion pictures and television series episodes (the "Liberation Library"). *See* Liberation Library, attached hereto as **Exhibit G**.

12. The Guarantees are further secured by collateral described in a separate escrow agreement between Incentive and CEG (the "Escrow Agreement"), attached hereto as **Exhibit H**, referred to as "Pledged Shares." *See* Exh. H.

13. On or about June 11, 2010, Incentive entered into a loan modification agreement with Camelot and Mr. Atwell (the "Loan Modification Agreement"), attached hereto as **Exhibit I**, whereby Camelot agreed to meet certain sales and payment benchmarks in addition to their obligations under the Note. In exchange, Incentive agreed to continue its monetary advances to CFG and to refrain from instituting legal action against Camelot and Mr. Atwell. *See id.*

14. This Motion and accompanying Memorandum has been filed "ex parte" for at least the following reasons:

a. Camelot and the Atwell Defendants are wrongfully withholding the physical assets of the Library, including DVDs, audio/visual recordings, masters, files, contracts, and the like, all of which now belong to Incentive and are interfering with ongoing business

relations of Incentive relative to exploitation of the library; (*See* Exhibit K, Declaration of Joseph G. Pia, at ¶4).

b. Titles in the library are licensed and being sold in nearly every territory throughout the world in every venue and media such as theatrical, television, video on demand, internet, DVD, and the like. The exceeding complexity of selling and licensing the library is dependent upon being able to locate all the physical assets and files and other information associated with the various rights of the library titles (*id*.);

c. If notice is provided to the Defendants, they will remove or transfer the assets to other undisclosed locations and/or will destroy records and other files and electronic information regarding each of the titles in the library, which information is irreplaceable and necessary for exploiting the library (*id*.);

d. The largest film market of the year is in Cannes, France beginning in two weeks, mid-May 2011. The market is held only once a year, and it is to the strong economic benefit of the Defendants to conceal information and physical elements of the library until after the market has passed (*id*.);

e. Camelot will undoubtedly seek to continue to exploit the library at the Cannes Film Market and enter into deals that irreparably, and materially injure Incentive and its ability to market the library at the same film market (*id*.);

f. Camelot has created a cloud on the title and is continuing to hold itself out as the owner of the library; so much so, that Camelot has recently brought a copyright infringement lawsuit against over 5,000 infringers on one of the titles of the library that is now not owned Camelot, but rather by Incentive. *See Camelot Distribution Group, Inc. v. Does 5865,*

inclusive, Central District of California, Case No.: CV11-01949 DDP (FMOX) ("Infringement Suit") (*id*.).

15. Camelot is running rampant in violation of Incentive's unique intellectual property rights and if not immediately restrained, will continue to cause irreparable harm (*id*, at ¶5).

Camelot and Mr. Atwell Breached the Terms of the Note

16. It was only a matter of months after Incentive made the loan that Camelot was seriously underperforming on its agreed-to benchmarks for distributing the Liberation Library, resulting in immediate breach of its contracts with Incentive. To date Camelot and Mr. Atwell have failed to meet their payment and performance obligations to Incentive in breach of the Loan Documents.

17. In an attempt to work through Camelot's and Mr. Atwell's breach of the Loan Documents, Incentive entered into the Loan Modification Agreement. However, Defendants failed to meet their payment and performance obligations under the Loan Modification Agreement as well.

18. Camelot eventually disclosed that it had financial problems and was unable to perform in accordance with its loan agreements. After many futile attempts to work out the issues, Camelot defaulted on its loans.

Incentive Properly Foreclosed on the Collateral Set Forth in the Security Agreements

19. Incentive has notified Camelot and Mr. Atwell of their breach of the Loan Documents and the Loan Modification Agreement on numerous occasions.

20. After many unsuccessful attempts to settle the matter, Incentive began steps to foreclose on the collateral set forth in the security agreements and guarantee agreements.

21. On February 21, 2011 at 9:00 a.m., Incentive held a properly noticed creditor's sale ("Foreclosure Sale") in the state of Utah to foreclose on the collateral set forth in the Security Agreements.

22. Also on February 21, 2011, Incentive issued a Transfer Statement to Debtors stating, among other things:

> The debtors, Camelot Distribution Group, Inc., Camelot Entertainment Group, Inc., and Camelot Film Group, Inc. (collectively, "Debtor"), defaulted under their loan obligations to the secured party, Incentive Capital, LLC (the "Secured Party"). As a result thereof, the Secured Party, pursuant to its Notice of Disposition of Collateral by Public Sale dated February 9, 2011, did conduct a public sale of the following personal property constituting a portion of Secured Party's collateral (the "Collateral"):
>
> > All of Debtor's rights to the film library described herein below and referred to as the "Distribution Assets", along with all products and proceeds of or from (a) the Distribution Assets; and (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 Distribution Assets in all media, from all sources, worldwide during the term hereof. The Distribution Assets include without limitation the following films, and all of Debtor's right, title and interest therein, including distribution rights, royalty interests, and contract/account payments: Samurai Avenger; First Strike; Screwball: The Ted Whitfield Story (aka The Wiffler); The Fallen; One Lucky Dog (aka Weiner Dog Nationals); Never Sleep Again; Hellraiser Unleashed; Fink!; Nude Nuns With Big Guns; Zombie Culture; National Lampoons Dirty Movie; Who Is KK Downey; and Next of Kin.
> >
> > All of Debtor's personal property assets and interests as more particularly described in the Asset Purchase Agreement (the "Asset Purchase Agreement") dated April 28, 2010 between Camelot Film Group, Inc., a Nevada corporation, on the one hand, and CMBG Advisors, Inc., a California corporation in its sole and limited capacity as assignee for the benefit of creditors of Liberation Group, Inc., on the other hand, and all products and proceeds thereof, including without limitation (a) that certain film library referred to as the Liberation Assets (as defined in the Asset

> Purchase Agreement); (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 in the Asset Purchase Agreement.

See Transfer Statement, attached hereto as **Exhibit J**.

23. No objection was made to the Foreclosure Sale, and as of that date Incentive became the legal title holder to the Liberation Library, including the Distribution Assets.

24. The Foreclosure Sale transferred ownership of the collateral set forth in the Security Agreements as set forth in the Transfer Statement.

25. Camelot and the Atwell Defendants refuse to acknowledge the ownership interests of Incentive 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.

26. Camelot and the Atwell Defendants are holding themselves out to the world as the owners of the Liberation Library.

27. CDG also wrongfully filed a copyright infringement action in California federal court against nearly 5,865 doe defendants who have allegedly downloaded one or more of the Liberation Library films without authorization. CDG claims to possess exclusive rights to distribute the Liberation Library. Contrary to such representations, all distribution and ownership rights belong solely to Incentive.

28. Camelot and the Atwell Defendants are diverting and converting revenue that is being generated from the Liberation Library that rightfully belongs to Incentive.

29. Camelot and the Atwell Defendants are wrongfully holding and refusing to provide information regarding the location of physical elements of the Liberation Library, such as where master video and audio recordings are stored, the many licensing contracts, where revenue and funds are being deposited that are derived from the Liberation Library.

30. These actions violate the property rights of Incentive, are a breach of the parties' agreements, and amount to, among other things, conversion, theft, and trespass.

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ARGUMENT

A. Good Cause Exists to Grant the Proposed Temporary Restraining Order and Preliminary Injunction.

Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, this Court may enter a temporary restraining order and preliminary injunction upon the grounds that

> (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
>
> (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

FED. R. CIV. P. 65(b). This Court has previously held that in order for a preliminary injunction to be granted, Plaintiff must show

> (1) a substantial likelihood of success on the merits;
>
> (2) irreparable harm to the movant if the injunction is denied;
>
> (3) the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and
>
> (4) the injunction, if issued, will not adversely affect the public interest.

Tahitian Noni Int'l v. Dean, 2:09-CV-51 TS, 2009 WL 197525, at *1 (D. Utah Jan. 26, 2009). Further, evidence of irreparable harm, injury to the plaintiff, and no adversity to the public interest, allows courts to be more lenient regarding the element of likelihood of success on the merits. *See id.*

As set forth below, the Court should exercise its authority pursuant to Rule 65 and grant the requested motion for a temporary restraining order and preliminary injunction preventing (1) Defendants' further interference with the Liberation Library and business associated with the Liberation Library, (2) Defendants' improper infringement suit, and (3) any activities interfering

with, hindering, or delaying Incentive's exercise of its rights and interest in and to the Liberation Library, including exploitation of the Liberation Library and all payments received under any distribution or licensing agreements.

B. Incentive Will Suffer Irreparable Harm Unless a Temporary Restraining Order and Preliminary Injunction are Issued.

This action presents a classic example of irreparable harm: (1) difficulty or impossibility in calculating monetary damages, (2) loss of unique performance services, (3) loss of opportunity to distribute a unique product, (4) continuing harm to reputation and goodwill, (5) and diminishment (or obliteration) of competitive positions in the marketplace. *See Dominion Video Satellite, Inc. v. Echostar Satellite Corp*., 356 F.3d 1256, 1260 (10th Cir. 2004) (outlining these factors).

Courts are particularly likely to impose an injunction when the irreparable harm involves unique intellectual property such as the film and television series in the Liberation Library:

> Unlike most property rights, the value of this [intellectual property] interest is often fleeting. The popular demand for a new literary, musical, sculptural or other "work of authorship," often may last only until the next fad. In such situations, the commercial value of the copyright owner's tangible expression, appropriated by an infringer, may be lost by the time litigation on the claim is complete. Furthermore, monetary recovery at that point may be inadequate to redress the harm.

Concrete Machinery Co., 843 F.2d 600, 611 (1st Cir. 1988) (internal quotations and citations omitted), citing *Apple Computer, Inc. v. Formula Int'l Inc.*, 725 F.2d 521 (9th Cir. 1984); *see also Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607 (7th Cir.) *cert. denied*, 459 U.S. 880, (1982); *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090 (2d Cir. 1977). Although the foregoing cases largely relate to copyright infringement, the

principle favoring injunctions holds true in this case where Incentive is the owner and possesses legal title of all rights to the films and television series in the Liberation Library.

As rightful owner of the Liberation Library, Incentive owns all of the licensing rights to the titles in the Liberation Library, including the rights to sell and distribute the titles worldwide. However, Camelot and the Atwell Defendants continue to improperly hide and retain physical elements of the Library, including all files and information regarding the sale, licensing and distribution of the titles. First, Camelot and the Atwell Defendants refuse to provide Incentive the status of the Liberation Library's licensing rights, including what assets have been licensed, and to whom. Second, Camelot and the Atwell Defendants refuse to disclose what assets from the Liberation Library have been distributed by Camelot, and to whom. Third, Camelot and the Atwell Defendants will not supply Incentive with any information relating to the amount of revenue being generated from exploitation of the Liberation Library. Fourth, Camelot and the Atwell Defendants are wrongfully withholding the physical assets of the Library, including DVDs, audio/visual recordings, masters and the like, and refuse to provide Incentive access to the offices, warehouses, and facilities where the physical assets are kept. Finally, Camelot is taking actions that make clear that it intends to exploit the Library at the Cannes Film market, while effectively preventing Incentive from doing the same. The Cannes Film market is the largest film market in the world and is only held once a year in mid-May. Missing this May's film market – or worse yet, allowing Camelot to hold itself out as the owner of the Library at the film market – will irreparably harm Incentive. Accordingly, Camelot and the Atwell Defendants have wrongfully locked out Incentive from receiving the benefit of its ownership rights.

As a direct and proximate result of Camelot's and Mr. Atwell's breach of the Loan Documents and continual illicit activities with regard to Incentive's ownership of the rights to the Liberation Library, Camelot and the Atwell Defendants are creating confusion in the marketplace as to the rightful ownership, licensing and distribution rights to the assets therein. The injury caused by such irreparable confusion makes it nearly impossible to calculate Incentive's monetary damages.

Additionally, Camelot's and the Atwell Defendants' actions have prevented Incentive from receiving the unique performance services which Camelot and Mr. Atwell promised and are obligated to provide upon breach of the Loan Documents, *i.e.*, all ownership rights to the film and television programs in the Liberation Library, the value of which continues to decrease each day. While Incentive has rightfully foreclosed on the assets in the Liberation Library pursuant to the terms of the parties' agreements and in an effort to make itself whole, Camelot and the Atwell Defendants refuse to provide Incentive the physical location of the Liberation Library's DVDs, audio/visual recordings, masters and the like, and are refusing to provide the physical copies themselves.

C. Irreparable Harm is Shown, Even on Monetary Damages, Where Camelot and Mr. Atwell Do Not Appear to Have Substantial Assets.

Due to Camelot's and Mr. Atwell's lack of substantial assets to sufficiently compensate Incentive's loss, Incentive has and will continue to suffer irreparable harm. Though irreparable harm is usually not found where money damages may compensate loss, an exception to that rule exists where it is unlikely that a party will have assets to pay an award of money damages. *See*, *e.g., ClearOne Communications, Inc. v. Chiang*, 670 F. Supp. 2d 1248, 1258 (D. Utah 2009) (noting concern of court that movant will suffer irreparable harm if assets leave respondent, and

respondent may be unable to respond to judgment); *Carabillo v. ULLICO Inc. Pension Plan and Trust*, 355 F.Supp.2d 49, 55 (D.D.C.2004) (economic loss may constitute irreparable harm where defendant would become insolvent or otherwise judgment proof prior to the conclusion of litigation thus making the plaintiff's alleged damages unrecoverable"); *Foltz v. U.S. News and World Report, Inc*., 613 F. Supp. 634, 643 (D.D.C.1985) (concluding that the unavailability of assets to pay a damage award would irreparably injure the plaintiffs).

Based on Camelot's and Mr. Atwell's failure to meet their payment obligations to Incentive, despite the modified repayment terms to which Incentive agreed in Camelot's and the Atwell's Defendants' favor pursuant to the Loan Modification, it appears that neither Camelot nor Mr. Atwell have sufficient financial resources to repay all of the funds that they have received and misallocated as well as to offset the losses incurred through wrongful distribution and sale of the assets in the Liberation Library. Furthermore, pursuant to the most recent stock quote provided by Camelot on their website, their current stock value is $0.0001 per share, with total monthly earnings of $391.75. It is clear that neither Camelot nor Mr. Atwell have adequate assets to compensate Incentive for Camelot's and Mr. Atwell's breach and all Defendants' related illicit activities.

The primary asset securitizing the parties' agreements is the Liberation Library and Incentive's right to own, possess and exploit the same under the Loan Documents. Because Camelot and Mr. Atwell lack the financial resources to make good on their obligations to Incentive, and due to their refusal to allow Incentive to exercise its ownership rights to the Liberation Library, there is no alternative means of generating revenue in order to pay on the contractual obligations set forth in the agreements. The harm and uncertainty to Incentive is

irreparable and will continue to be so absent an injunction from the Court prohibiting Camelot and the Atwell Defendants from continuing to distribute and commercialize the assets in the Liberation Library, and maintain all of the physical files, contracts, DVDs, film elements and other assets in contravention of Incentive's ownership and possessory interest rights.

D. Plaintiff Meets the Likelihood of Success Factor with Respect to Its First, Third, Fifth, and Ninth Causes of Action.

1. First Cause: Camelot and Mr. Atwell have Breached their Contracts.

Camelot and Mr. Atwell have breached nearly all of the provisions of the parties' agreements. In order to establish a likelihood of success sufficient to satisfy the requirement for a restraining order and preliminary injunction, Incentive need merely show a single breach of the parties' agreements. In this case, Incentive can establish numerous such instances.

This Court has held that where a contract is unambiguous, "Interpretation of the contract is a matter of law." *First Sec. Bank of Utah, N.A. v. Gillman*, 158 B.R. 498, 505 (D. Utah 1993) (citing *Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist,* 773 P.2d 1382, 1385-86 (Utah 1989) and *Isaac v. Temex Energy, Inc. (In re Amarex, Inc.*), 853 F.2d 1526, 1529 (10th Cir.1988)). If contract terms are clear and unambiguous, the court also may interpret the intent of the parties as a matter of law. *Anaconda Minerals Co. v. Stoller Chem. Co., Inc.*, 773 F. Supp. 1498, 1504 (D. Utah 1991) (citing *Gomez v. Amer. Electric Power Serv. Corp.,* 726 F.2d 649, 651-52 (10th Cir.1984) (applying Utah law)). In interpreting contracts, "[A] court must give language its usual and ordinary meaning." *See id.* (citing *Commercial Bldg. Corp. v. Blair,* 565 P.2d 776, 778 (Utah 1977)).

In the present case, the contracts known as the Loan Documents, including the Loan Modification, are straightforward, unambiguous and direct as to the parties' intentions and

agreement. Camelot and Mr. Atwell 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.

Incentive has met its burden with respect to a likelihood of success on one or more of its breach of contract claims.

2. Third Cause: Defendants Should be Estopped from Going Back On Their Promises to Provide Specific Performance.

Camelot and Mr. Atwell should be estopped from dodging their payment and performance obligations to Incentive. Promissory estoppel is established by showing 1) reasonable reliance by the promisee on a promise made by the promisor; 2) knowledge on the part of the promisor that the promisee relied on the promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise; 3) awareness by the promisor of all material facts; and 4) reliance by the promisee on the promise which resulted in a loss to the promisee. *MediaNews Group, Inc. v. McCarthey*, 432 F. Supp. 2d 1213, 1237 (D. Utah 2006) (citing *Lantec, Inc. v. Novell, Inc.,* 306 F.3d 1003, 1020-21 (10th Cir.2002)).

Incentive relied to its detriment on Camelot's and Mr. Atwell's obligations, representations and commitments to comply with the payment obligations of the Note. Had Incentive known that neither Camelot nor Mr. Atwell would not repay it, Incentive would not have granted the loan to CFG. Incentive has fully performed all of its obligations under the Loan Documents. Incentive has further demanded repayment from Camelot and Mr. Atwell of any

remaining balance owed for the loan granted to CFG under the Loan Documents, but Camelot and Mr. Atwell have failed to make payment. Incentive has incurred substantial detriment in light of its reliance, and Camelot and Mr. Atwell should be estopped from reneging on its strict performance and payment obligations. Incentive has met the likelihood of success factor in establishing promissory estoppel.

3. Fifth Cause: Defendants Breached the Implied Covenant of Good Faith and Fair Dealing.

Camelot and the Atwell Defendants have breached the implied covenant of good faith and fair dealing. Inherent in each contract is the parties' implied agreement "[t]o comply with [their] obligation to perform a contract in good faith. . ." *Iadanza v. Mather*, 820 F. Supp. 1371, 1388 (D. Utah 1993) (citing *See St. Benedict's Development Company v. St. Benedict's Hospital,* 811 P.2d 194 (Utah 1991)). Further, "To state a claim for breach of the covenant of good faith and fair dealing," plaintiff must allege that Defendants "'intentionally or purposely' acted to destroy [plaintiff's] 'right to receive the fruits of the contract'." *See id.* at 199. Toward that end, Camelot and the Atwell Defendants breached the implied covenant of good faith and fair dealing by, among other things, misrepresenting Camelot's financial resources and stability, Camelot's ability to generate income and distribute the Library, and by improperly diverting and converting funds and assets belonging to Incentive to themselves. As set forth above, Camelot and the Atwell Defendants have acted with extreme bad faith and have acted both directly and indirectly to destroy Incentive's benefits under the contracts. Incentive has sufficiently carried its burden regarding this claim.

4. Ninth Cause: All Defendants Conspired Against Incentive.

In order to succeed on a claim for civil conspiracy the plaintiffs must be able to show the following elements: (1) a combination of two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result thereof. *Wenneman v. Brown*, 49 F. Supp. 2d 1283, 1291 (D. Utah 1999) (referencing *Israel Pagan Estate v. Cannon,* 746 P.2d 785 (Utah App.1987)). Additionally, it is not necessary in a civil conspiracy action to prove that the parties actually came together and entered into a formal agreement to do the acts complained of by direct evidence. *See id.* Instead, "[C]onspiracy may be inferred from circumstantial evidence, including the nature of the act done, the relations of the parties, and the interests of the alleged conspirators."

Camelot and the Atwell Defendants satisfy the first element. They have also collectively taken a course of action to Incentive's detriment, *i.e.*, refusing the meet their repayment obligations to Incentive and preventing Incentive from its ownership rights to possess and exploit the assets in the Liberation Library, satisfying the second, third and fourth elements. And finally, as a proximate result of Camelot's and the Atwell Defendants' aforesaid actions, Incentive has incurred significant damages. Accordingly, the elements for a claim of civil conspiracy have been met.

E. The Balance of Harms Weighs in Incentive's Favor.

The balance of harms weighs in Incentive's favor. Incentive is being prevented from entering into and negotiating other profitable investment opportunities which will never occur again while Camelot and the Atwell Defendants, with the funds loaned to them by Incentive and the revenues from their exploitation of the assets in the Liberation Library, are able to freely

conduct business as usual. Incentive's good will and reputation is also being destroyed in the marketplace, because Camelot is claiming to be the owner of the assets. Incentive has also lost the value of the assets in the Liberation Library, which constitute property and revenue rightfully and legally belonging to Incentive, but wrongfully diverted and converted by Camelot and the Atwell Defendants. The only potential harm Camelot and the Atwell Defendants is monetary in nature. Even then, whatever monetary value Camelot and the Atwell Defendants may claim to be at issue is purely speculative.

F. The Public Interest is Served by Enforcing Specific Performance Contracts.

The public interest in enforcing specific performance agreements is served by the issuance of an injunction. Deals in the entertainment industry often rely upon unique relationships. Neglecting these important elements of consideration in film contracts will have a chilling effect in the industry. Thus, the balance of the harms and public interest considerations weigh in favor of enjoining Camelot and the Atwell Defendants.

There are numerous cases in which courts have granted requests by a copyright owner, such as Incentive, for a preliminary injunction that enjoins a defendant from improperly distributing a motion picture or other work. *See Twentieth Century Fox Film Corp. v. Warner Bros. Entertainment, Inc*., 630 F. Supp. 2d 1140 (C.D. Cal. 2008) (granting injunction where petitioner "own[ed] at least a copyright interest consisting of, at the very least, the right to distribute the "Watchmen" motion picture."); *see Danjaq, LLC v. Sony Corp*., 49 U.S.P.Q.2D (BNA) 1341 (C.D. Cal. 1998).

The fact that courts have routinely granted preliminary injunctions to enjoin the offering or release of motion pictures demonstrates that this is the type of relief that should be granted here.

G. Federal Law Does Not Require Notice to Defendants Before Issuing a Temporary Restraining Order.

It is unnecessary for this Court to provide notice to Camelot or the Atwell Defendants before issuing the requested temporary restraining order. Rule 65(b) provides that this Court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

> (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
>
> (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

FED. R. CIV. P. 65(A) (2010). In this case the temporary restraining order should be issued without notice because there is a chance that further actions are being taken concerning the exploitation and distribution of the assets in the Liberation Library which belong to Incentive. Such actions, once done, cannot be undone. Furthermore, Incentive has attested to specific facts in its complaint and by affidavit that clearly show immediate and irreparable injury, loss and damage to Incentive if Camelot and the Atwell Defendants are permitted the opportunity to be heard in opposition. Moreover, Camelot and the Atwell Defendants are well aware of Incentive's intention to recover its ownership rights in the Liberation Library as evidenced by their improper filing of suit in California. Any notice to Camelot or the Atwell Defendants

would be futile. For all the reasons set forth herein, the damage to Incentive is irreparable, immediate, and must be enjoined.

CONCLUSION

For the foregoing reasons, the Court should enter a Temporary Restraining Order and grant a preliminary injunction.

This case should be set for an expedited hearing.

DATED this 27th day of April, 2011.

PIA ANDERSON DORIUS REYNARD & MOSS

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