

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
PLAINTIFFS' MOTION TO REQUIRE
APPEARANCE OF PARTY WITNESSES
AT HEARING FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

Civil No. 2:11-cv-00288

Judge Clark Waddoups

Plaintiff Incentive Capital, LLC ("Plaintiff" or "Incentive"), by and through its counsel, does hereby submit the following Memorandum in Support of Plaintiff's Motion to Require

Appearance of Party Witnesses at Hearing on Temporary Restraining Order and Preliminary Injunction (“Motion for Appearance”).

INTRODUCTION

At a hearing before this Court on May 2, 2011, Plaintiff moved the Court for a temporary restraining order and preliminary injunction (“First Motion”). Plaintiff presented limited factual testimony regarding certain statements made by Defendants and/or Defendants’ representatives. However, Defendants’ counsel objected to much of said testimony based on the rule against the admission of hearsay.

At this early stage in the case, the Plaintiff has sufficient evidence to support the Second Motion for Temporary Restraining Order and Preliminary Injunction (“Second Motion”); however, Plaintiff requests out of convenience for the parties, to streamline the upcoming hearing, avoid certain objections as to adequacy of the evidence, and to more fully complete the record, that the following party witnesses present themselves for examination at the upcoming hearing on the Second Motion, scheduled for May 12, 2011, at 3:30 P.M. before this Court: a representative of Camelot Film Group, Inc., a representative of Camelot Entertainment Group, Inc., a representative of Camelot Distribution Group, Inc., Robert Atwell, Jamie Thompson and Steven Istock.

Alternatively, Plaintiff requests that the Court permit Plaintiff’s alleged hearsay testimony in the absence and unavailability of witnesses to proceed as evidence pursuant to well-established precedent permitting hearsay evidence at preliminary injunction hearings.

ARGUMENT

I. DEFENDANTS' PARTY WITNESSES AND REPRESENTATIVES SHOULD BE REQUIRED TO APPEAR AT THE UPCOMING TRO/PRELIMINARY INJUNCTION HEARING TO PERMIT PLAINTIFF THE OPPORTUNITY TO PRESENT ITS CASE.

The purpose of a temporary restraining order and preliminary injunction is to preserve the status quo and prevent irreparable harm pending a full hearing on the matter. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Almeda County*, 415 U.S. 423, 439, 94 S. CT. 1113, 1124 (1974); *Tri-State Generation and Transmission Association v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986).

In the instant case, Plaintiff must satisfy a heightened burden of persuasion in presenting its case. Plaintiff can satisfy this burden on its own testimony and the documents of record in this case. Nonetheless, at the hearing on the First Motion, Defendants made numerous objections based on the hearsay rule that pertained to unavailable witnesses. The Court sustained many of Defendants' objections. Due to the fact that this case is in its very early stages of litigation, Plaintiff has not had the opportunity to elicit testimony from Defendants by way of the traditional discovery procedures.

Defendants have indicated to Plaintiffs' counsel that they will not be available at the May 12, 2011 hearing. As such, it is very likely that Defendants' counsel will, again, object to Plaintiff's testimony based on the inadmissibility of hearsay. It appears that Defendants' intent in not attending the upcoming hearing is to prevent cross-examination that would more irrefutably establish irreparable harm. Defendants will explain that their witnesses are unavailable for the ironic reason that they are attending the Cannes Film Market and are disposing of the only asset at issue in this case: the Liberation Library comprised of

approximately 880 media titles (“Liberation Assets”) and 13 other miscellaneous titles (“Distribution Assets”). It is this very act that is causing irreparable harm.

Defendants should not be permitted on the one hand to take advantage of hearsay objections, while on the other hand making their witnesses unavailable so that they can perpetuate harm. It is well-established that courts have broad discretion in the governance of temporary restraining order and preliminary injunction proceedings. *Penn Galvanizing Co. v. Lukens Steel Co.*, 468 F.2d 1021, 1023 (3d Cir. 1972) (*citing Commonwealth of Pennsylvania v. O’Neill*, No. 72-1614 (3d. Cir. 1972) “The district court has broad discretion, since its task involves weighing the benefits and burdens that granting or denying the injunction will have on each of the parties and on the public.”); *Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1185 (10th Cir. 1975) (Grant or denial of preliminary injunction is subject to trial court’s discretion.); *A.L.K. Corp. v. Columbia Pictures Industries, Inc.*, 440 F.2d 761, 763 (3d. Cir. 1971) (“[A] district court must have considerable discretion because of the infinite variety of situations which may confront it.”); 11 A Fed. Prac. & Proc. Civ. § 2948 (2d. ed.) (“The grant or denial of a preliminary injunction rests in the discretion of the trial court.”).

Accordingly, it is in this Court’s discretion to order the previously named party witnesses to appear at the May 12, 2011 hearing for examination. At the very least, Plaintiff respectfully requests that at least one representative of the Camelot entities be required to appear for cross-examination. While such an order does not guarantee that Plaintiff’s motion for temporary restraining order and preliminary injunction will be granted, it, will permit the fair and proper adjudication of the matter.

II. ALTERNATIVELY, PLAINTIFF REQUESTS THAT THIS COURT PERMIT CERTAIN HEARSAY TESTIMONY AS EVIDENCE PURSUANT TO APPLICABLE LAW.

Should the Court determine that one or more of the Defendants are not required to appear for examination before the Court at the May 12, 2011 hearing, Plaintiff requests that the Court allow Plaintiff to introduce testimony regarding statements made and actions taken by Defendants as evidence in support of Plaintiff's motion for temporary restraining order and preliminary injunction pursuant to applicable law.

This Court has previously held that the Federal Rules of Evidence do not apply to preliminary injunction proceedings. *Nilson v. JPMorgan Chase Bank, N.A.*, 690 F.Supp 1231, n. 2 (D. Utah 2009) ("The Court notes that because this is a preliminary injunction proceeding, the Federal Rules of Evidence do not apply."). This Court has further referenced the discretion of the courts to consider hearsay evidence in deciding whether to grant a preliminary injunction. *Id.* (citing *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir.2003), and *Pharmanex, Inc. v. HPF, LLC*, No. 99-4116, 2000 WL 703164, *3 (10th Cir. April 20, 2000) (unpublished) (citing James Wm. Moore, et al., Moore's Federal Practice § 65.23 (1999)) ("The Court can consider evidence outside the pleadings, including hearsay, when deciding whether to grant a preliminary injunction."))

In the present case, and based on the foregoing authority, it is clearly within this Court's discretion to admit evidence which may be considered hearsay for purposes of deciding whether to grant Plaintiff's motion for temporary restraining order and preliminary injunction. This is particularly appropriate here where Defendants witnesses are unavailable. Accordingly, Plaintiff requests that the Court permit the introduction of hearsay evidence at the May 12, 2011 hearing.

CONCLUSION

For the forgoing reasons, Plaintiff requests that its motion be granted.

DATED this 11th day of May, 2011.

PIA ANDERSON DORIUS REYNARD & MOSS

/s/ Joseph G. Pia
Joseph Pia
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2011, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO REQUIRE APPEARANCE OF PARTY WITNESSES AT HEARING FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** to be served as indicated below, upon the following:

Jonathan M. Levitan, Esq. LAW OFFICES OF JONATHAN MARK LEVITAN 12400 Wilshire Blvd., Suite 1300 Los Angeles, CA 90025	<input type="checkbox"/> Sent via U.S. Mail <input type="checkbox"/> Sent via Email <input checked="" type="checkbox"/> Sent via CMECF Filing
Michael O'Brien VANCOTT BAGLEY 36 S. State St., Suite 1900 Salt Lake City, UT 84111	<input type="checkbox"/> Sent via U.S. Mail <input type="checkbox"/> Sent via Email <input checked="" type="checkbox"/> Sent via CMECF Filing
Peter Jaroway 360 N Curson Ave. Apt 1 Los Angeles, CA 90036 Pmjarowey2@aol.com	<input checked="" type="checkbox"/> Sent via U.S. Mail <input checked="" type="checkbox"/> Sent via Email <input type="checkbox"/> Sent via CMECF Filing
Ted Baer 21 E Canon Perdido St. #223 Santa Barbara, CA 93101 Jatedbaer@aol.com	<input checked="" type="checkbox"/> Sent via U.S. Mail <input checked="" type="checkbox"/> Sent via Email <input type="checkbox"/> Sent via CMECF Filing

/s/ Joseph G. Pia
Joseph Pia
Attorneys for Plaintiff