



## STATEMENT OF FACTS

1. On June 24, 2011, Plaintiff Incentive Capital filed its second Motion for Extension of Time to Respond to Defendant Ted Baer's Motion to Dismiss and to Defendant Peter Jarowey's Motion to Quash, requesting an extension until five days after Defendants Robert Atwell, Camelot Distribution Group, Camelot Entertainment Group, Camelot Film Group, Steven Istock, and Jamie Thompson (referred to by Plaintiff as the "Atwell Defendants") file their answer to Plaintiff's Amended Complaint. (Docket Entry No. 62).

2. On June 29, 2011, Lynette Ambrose a paralegal at Morgan, Minnock, Rice & James, L.C., counsel for Defendant Ted Baer, called the offices of Judge Clark Waddoups and spoke with his administrative assistant and informed the Court that Defendant Ted Baer would be filing an opposition to Plaintiff's Motion for Extension of Time to Respond to Defendant Ted Baer's Motion to Dismiss. (Affidavit of Lynette Ambrose at ¶¶2-3, Exhibit "A").

3. Lynette Ambrose understood from the conversation that the Court would not take action on the Order until Defendant Ted Baer's opposition memorandum was filed with the Court, and she understood that the rules allowed 14 days from the filing of Plaintiff's Motion for the filing of an opposition memorandum. (*Id.* at ¶4-6, Exhibit "A").

4. Defendant Ted Baer's Memorandum in Opposition to Plaintiff's Motion for Extension of Time to Respond to Defendant Ted Baer's Motion to Dismiss was filed at approximately 3:00 p.m. on July 1, 2011. (*Id.* at ¶7, Exhibit "A"; Docket Entry No. 66, attached as Exhibit "B").

5. The Court's docket shows that the Court entered the July 1, 2011 Order on Plaintiff's Motion for Extension of Time to Respond to Defendant Ted Baer's Motion to Dismiss for Lack of Jurisdiction before Defendant Ted Baer's opposition memorandum was received by the Court. (Docket Entry No. 65).

### **ARGUMENT**

Under DUCivR 7-1(B), Defendant Ted Baer timely opposed Plaintiff's Motion of Extension of Time to Respond to Defendant Ted Baer's Motion to Dismiss for Lack of Jurisdiction by filing his opposition memorandum on July 1, 2011, within 14 days of June 24, 2011, when Plaintiff first filed its Motion. In addition, prior to filing his opposition, Defendant Ted Baer put the Court on advance notice that he would be filing an opposition memorandum to avoid having the Order entered before the time for opposing the Motion expired. Defendant Ted Baer understood that no action would be taken on the Order until his opposition had been filed.

However, the Order was entered on July 1, 2011—only seven days after Plaintiff filed its Motion, and before Defendant Ted Baer filed his opposition to the Motion for the Court to consider. Because Defendant Ted Baer's opposition was filed in a timely manner in accordance with the deadlines set by local rule, and because the Court was put on notice that Defendant Ted Baer would be filing an opposition memorandum, his arguments against Plaintiff's Motion for Extension should have been considered before any action was taken on the Plaintiff's Motion and before the Order was entered. The Court has discretion to reconsider the Order, Fed. R. Civ. P. 54(b); *see also Anderson v. Deere & Co.*, 852 F.2d 1244, 1246 (10th Cir. 1988); *Artificial Nail Technologies, Inc. v. Flowering Scents, LLC*, 2007 WL 3254744 (D. Utah Nov. 2, 2007), and

Defendant Ted Baer therefore requests that the Court exercise its discretion to reconsider its entry of the Order and fully consider Defendant Ted Baer's timely opposition to the Motion.

DATED this 1<sup>st</sup> day of July, 2011.

MORGAN, MINNOCK, RICE & JAMES, L.C.

/s/ Dennis R. James  
Dennis R. James  
Brian H. Hess  
*Counsel for Defendant Ted Baer*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1<sup>st</sup> day of July, 2011, I electronically filed a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANT TED BAER'S MOTION TO RECONSIDER ORDER ON PLAINTIFF'S MOTION FOR EXTENSION OF TIME TO RESPOND TO DEFENDANT TED BAER'S MOTION TO DISMISS FOR LACK OF JURISDICTION** with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

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