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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 OPPOSITION TO TED BAER'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION** Civil No. 2:11-cv-00288 Judge Clark Waddoups **(Oral Argument Requested)**

Plaintiff Incentive Capital, LLC ("Plaintiff" or "Incentive"), by and through its counsel, respectfully submits the following Memorandum in Opposition to the Motion to Dismiss for Lack of Personal Jurisdiction (the "Motion") filed by Defendant Ted Baer ("Baer").

INTRODUCTION

This dispute and the claims alleged against Baer and the other Defendants arise out of certain loans (collectively the "Loan" or "Loan Transaction") that Camelot Entertainment Group, Inc. ("CEG"); Camelot Film Group, Inc. ("CFG"); and Camelot Distribution Group, Inc. ("CDG" and collectively with CEG and CFG, "Camelot") took from Plaintiff Incentive to finance the acquisition and distribution of a film and television library containing hundreds of media titles (collectively referred to as the "Liberation Library"). *See* Plaintiff's Amended Complaint at ¶1. Baer seeks through his present Motion to be dismissed as a Defendant in this case on the basis that this Court lacks personal jurisdiction over him.

Baer's Motion, in essence, presents the following fundamental question to the Court: Whether Baer, acting as Camelot's lead counsel in the Loan Transaction, purposefully availed himself of jurisdiction in the State of Utah by allegedly making false representations and providing knowingly false information to Incentive via email and/or telephone calls which Incentive relied upon in deciding to make the Loan to Camelot, which Loan Baer personally benefited from. At this stage of the proceedings, when faced with a motion to dismiss for lack of jurisdiction (such as Baer's present motion), the Tenth Circuit and Utah law mandates that the plaintiff need only make a *prima facie* showing that jurisdiction exists. Moreover, because all allegations and factual disputes are resolved in favor of the plaintiffs, Incentive's allegation that Baer made false representations and provided false information to it must be accepted as true.

Utah's long-arm statute is broad and inclusive. Jurisdiction in Utah exists over a non-resident based on an individual's causing of any tortious injury within Utah or transaction of any business within the State, without the need for the individual to ever set foot in or purchase property within the State. *See* Utah Code Ann., § 78B-3-205. Additionally, this statute explains

that "transaction of business within this state" includes "activities of a nonresident person, his ***agents***, or ***representatives*** in this state which ***affect*** persons or businesses within the state." Utah Code Ann. § 78B-3-202(2) (emphasis added). Governing case law establishes that even contacts as minimal as a single phone call resulting in an oral contract can be enough to create jurisdiction.

In his capacity as Camelot's lead counsel in charge of handling the negotiation and preparation of the Loan Transaction Documents, Baer was heavily involved and played a crucial role in obtaining the Loan from Incentive. Baer's contacts with the State of Utah in connection with the Loan Transaction consist of, among other things— (i) discussing, negotiating and exchanging drafts of numerous different agreements relating to the Loan Transaction with individuals and entities residing in Utah, many of which Utah choice of law and forum selection provisions; (ii) providing critical financial information regarding Camelot and the profitability of its business operations to Plaintiff's counsel in Utah, which was relied upon by Plaintiff in making its decision to proceed with the Loan Transaction and which included false and inflated figures; (iii) failing to correct or otherwise notify Plaintiff's counsel that other financial information provided to them and to Baer in connection with the Loan Transaction by another attorney working on Camelot's behalf was substantially overstated and undoubtedly known to Baer to be false; and (iv) exchanging during the course of negotiations and discussions regarding the Loan Transaction dozens of e-mails, phone calls and faxes with individuals residing in Utah in an effort to make the Loan Transaction happen— all establish jurisdiction in Utah.

Indeed, Baer admits that he sent the email to Incentive's representatives on April 1, 2010, that included attached documents containing false information about the value of Camelot's

assets and which, according to Incentive's allegations, contained false representations by Baer regarding Camelot's financial stability, its ability to undertake and pay back loans, and its track record and abilities as a distributor of films. Although Baer asserts in his supporting affidavit that he did not personally prepare the falsified financial documents attached to his email, conspicuously absent from Baer's affidavit is any statement that he did **not** know that the information contained in these documents regarding the value of Camelot's assets was false at the time he provided them to Plaintiff's counsel. Mr. Baer offers no explanation for the representations he made to Incentive's representatives regarding, among other things, Camelot's financial stability or its ability to repay the Loan., which representations Baer knew Incentive would rely on these representations in making its decision whether to proceed or not with the Loan Transaction with Camelot. These contacts are, taken alone, establish that Baer has sufficient minimum contacts with the State of Utah to provide this Court with specific personal jurisdiction over him.

As demonstrated below, Baer personally benefitted from the Loan Transaction given the fact that the legal fees he charged Camelot were to be paid directly from the proceeds of the Loan and given that he is a 5% owner of Camelot's shares. Furthermore, evidence provided by Baer supports Incentive's assertion that Baer knew that the information and representations he provided to Incentive's representatives were false at the time he made them. Within a mere 10 days of the closing of the Loan, on or about May 7, 2010, Baer and Camelot executed a Business and Legal Services Consultant Agreement (the "Consultant Agreement"), which provides, among other things, that: (i) Baer had provided legal services to Camelot since August 12, 2009; (ii) Baer had billed Camelot for the legal services provided to it during the period of August 12, 2009 through May 7, 2010 the amounts of $260,517.67 in cash and $221,440 in Camelot's

common stock; and (iii) as of May 7, 2010, Camelot had paid Baer a mere $60,000 in cash and $124,500 in common stock. Therefore, at virtually the same time Baer was representing to Incentive that Camelot was financial stable, possessed assets with values that far exceeded the Loan amount of $650,000 and that the Liberation Library was generating profits of between $200,000 to $300,000 per month, Baer was aware that Camelot had paid him less than 1/6 of the cash he was owed for the legal services he had provided to it and barely ½ of the amount of common stock owed to him. Funds from the Incentive Loan were certainly used to pay him, reflected by his adamancy that the transaction be expedited. Also of note is that Mr. Baer was simultaneously arguing that his personal guarantee requested by Incentive was unnecessary.

Despite Baer's heavy involvement in the Loan Transaction and extensive contacts with Incentive's counsel in Utah in connection therewith, Baer remarkably claims that he had no contact whatsoever with Utah and that the claims against him should be dismissed for lack of personal jurisdiction. That Baer was not required to set foot in Utah in negotiating and closing the Loan Transaction on Camelot's behalf is irrelevant in this textbook example of modern era electronic business transactions that create jurisdiction.

While Baer was not an officer or director of Camelot and did not personally execute any of the documents pertaining to the Loan Transaction, Baer was integrally involved in the negotiations and preparation of each of these documents and played a key role in convincing Plaintiff to enter into the Loan Transaction with Camelot. In sum, Baer was a key participant in reaching out to Utah and helping Camelot obtain a loan from Incentive based in large part on the false financial information and representations Baer provided to Incentive.

For the reasons set forth more fully below jurisdiction over Baer is appropriate here.

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" means 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 (Plaintiff's "Memorandum in Support of Second TRO Motion"), Declaration of James Mecham ("Mecham Declaration") at ¶ 8.]

2. Over the next approximately 5 week period, Camelot and Incentive negotiated the terms of the Loan, the security and guarantees thereto, along with the terms of the promissory note and other documents that would memorialize the Loan Transaction. [*See* Declaration of Joseph G. Pia ("Pia Declaration"), attached hereto as **Exhibit "A"**, at ¶ 7.]

3. 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* **Exhibit "A"** hereto, Pia Declaration at ¶8, Exhibit 1 thereto, the Note.]

4. Defendant Baer acted as Camelot's representative in negotiating the Loan Transaction and was Camelot's primary counsel with regard to the Loan. [*See* **Exhibit "A"** hereto, Pia Declaration at ¶9.] Indeed, as Baer notes in an email to Incentive's counsel Nathan Dorius dated March 29, 2010, there were only four individuals participating in reviewing and

preparing the Loan Transaction document on behalf of Camelot—(i) Baer; (ii) Bob Atwell, Camelot's CEO; (iii) Peter Jarowey ("Jarowey"), Camelot's financial advisor in Boston; and (iv) Phil Levoff ("Levoff"), the only other attorney working for Camelot on the deal who, like Jarowey, is based out of Boston and who, prior to the Loan Transaction, had done no previous work for Camelot. [*See id.* at ¶9 and Exhibit 2 thereto, Email from Baer to Dorius dated 3/29/2010.] Baer, unlike Levoff who had not previously represented Camelot, began providing legal services to Camelot nearly 7 months earlier in August of 2009. [*See* Baer's Memorandum in Support of Motion to Dismiss Plaintiff's Amended Complaint for Lack of Jurisdiction (Baer's "Supporting Memo") at p. 6, ¶22 and Exhibit C thereto, Representation Agreement.]

5. Beginning in March 2010 and continuing until the Loan Transaction closed on or about April 27, 2010, Baer, on the one hand, and Dorius and Pia, on the other hand, exchanged dozens of emails and telephone calls in which the terms and conditions of the Note and the other Loan Transaction documents were discussed, negotiated and agreed upon. [*See* **Exhibit "A"** hereto, Pia Declaration at ¶10.]

6. Although Incentive's counsel prepared first drafts of many of the Loan Transaction documents, Baer was integrally involved in redrafts, providing updated information, and drafted himself the Asset Purchase Agreement ("APA") pertaining to Camelot's purchase of the Liberation Library (using a portion of the Loan proceeds) and was primarily responsible for negotiating, reviewing and making changes and edits to the provisions of the Loan Transaction documents. . [*See* **Exhibit "A"** hereto, Pia Declaration at ¶11.] Indeed, Baer admits that in connection with his representation of Camelot, he "participated in negotiations with legal counsel for Plaintiff Incentive Capital regarding the final language and execution of the loan agreements, security agreements, guaranty agreements, and escrow agreements identified in

Plaintiff Incentive Capital's Amended Complaint." [*See* Exhibit "B" to Baer's Supporting Memo, Affidavit of Julius Arthur Baer III ("Baer Affidavit") at ¶ 30.]

7. Incentive alleges in its Amended Complaint that "Baer, acting as general counsel for CEG, CFG, and CDG during the negotiation of the loan agreements [i.e. the Loan Transaction documents], misrepresented that CDG's assets have a significantly higher value than the amount of the proposed loan and the interest thereon." [*See* Baer's Supporting Memo at p. 3, ¶6 and Exhibit "A" thereto, Plaintiff's Amended Complaint, at ¶80; **Exhibit "A"** hereto, Pia Declaration at ¶12.]

8. In addition, Incentive alleges in its Amended Complaint that, in order to induce Incentive to make the Loan, Baer (along with the other Defendants) 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* Exhibit "A" to Baer's Supporting Memo, Plaintiff's Amended Complaint, at ¶¶ 2, 75; **Exhibit "A"** hereto, Pia Declaration at ¶13.]

9. In particular, in an email to Baer dated April 1, 2010, Incentive's counsel stated, among other things, that "[a]s for the guarantors [of the Loan], the lender requires that Bob Atwell, Ted Baer, and Peter Jarowey personally guaranty payment of the Note." [*See* **Exhibit "A"** hereto, Pia Declaration at ¶14, Exhibit 3 thereto, Email from Dorius to Baer dated 4/1/2010.] Incentive wanted Baer and Jarowey to guarantee the Loan, despite neither of them being a director of Camelot at the time (Baer was an owner), 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 regarding such that they

made in connection with the Loan Transaction. [*See* **Exhibit "A"** hereto, Pia Declaration at ¶14.]

10. 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 Dorius 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, Pia Declaration at ¶15, Exhibit 4 thereto, Email from Baer to Dorius dated 4/1/2010.]

11. 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 an escrow agreement (the "Escrow Agreement") at the Closing of the Loan which required that a share certificate valued at the Principal amount of $650,000 worth of CEG Class F Convertible Preferred shares ("Pledged Shares") shall be delivered to an unnamed escrow agent. [*See* **Exhibit "A"** hereto, Pia Declaration at ¶16, Exhibit 5 thereto, Escrow Agreement at p. 1, ¶ 1(a).]

12. Baer also attached four (4) separate files to his email dated April 1, 2010, which Baer represented as "cover[ing] the unencumbered assets of the two borrowing entities: Camelot Film Group [CFG] and Camelot Distribution Group [CDG]." [*See* **Exhibit "A"** hereto, Pia Declaration at ¶17, Exhibit 4 thereto, Email from Baer to Dorius dated 4/1/2010.] Baer named

these four (4) attached files to his April 1, 2010 email as follows:

> "1 – the Camelot Distribution Group Sales Revenue Projections on Liberation Library titled to be purchased" (herein after referred to as "File #1");
>
> "2 – the Up-dated 2010 valuation of the Liberation Library prepared by the Liberation management (i.e. an update from the Salter report enclosed)" (herein after referred to as "File #2");
>
> "3 – the Camelot Distribution Group Sales Revenue Projections for the new film titles licensed by CDG over the last number of months" (herein after referred to as "File #3"); and
>
> 4 – the Salter Library valuation report of the Liberation Library" (herein after referred to as "File #4").

[*See id.*]

13. After listing the files attached to his April 1, 2010 email, Baer represented to Incentive that "[t]ogether these assets [i.e. the Liberation Library (including the Distribution Assets)] have a significantly higher value than the amount of the Loan and the interest thereon." [*See* **Exhibit "A"** hereto, Pia Declaration at ¶18, Exhibit 4 thereto, Email from Baer to Dorius dated 4/1/2010.]

14. File #1 (attached by Baer to his April 1, 2010 email) provides, in sum, the following revenue projections from the Liberation Library:

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, Pia Declaration at ¶19, Exhibit 4 thereto, Email from Baer to Dorius dated 4/1/2010 at attached File #1.]

15. File #1 is attached as Exhibit A to the Note and is initialed by Camelot's CEO,

Atwell, as representing the gross proceeds to be generated from the Liberation Library ("Gross Revenue Representations"). In addition to sending the Gross Revenue Representations to Incentive's representative's as File #1 to his April 1, 2010 email, Baer, acting as Camelot's general counsel in the Loan Transaction, reviewed, edited and made modifications and changes to the Note and the attached Exhibit A to the Note containing the Gross Revenue Representations. [*See* **Exhibit "A"** hereto, Pia Declaration at ¶20, Exhibit 1 thereto, the Note at Exhibit "A".]

16. In relation to the Gross Revenue Representations, the Note (which Baer personally reviewed and edited) provides the following "Warranties":

> . . . 6. The Borrower [CFG] has furnished to the Lender financial assumptions which, in the opinion of Borrower, fairly and accurately reflect the financial assumptions for the operations of Borrower, and there has been no material adverse change in the Borrower's financial prospects since that date which would require revision of the same;
>
> 7. The Borrower represents and warrants that the international sales projections previously provided by Borrower in connection with the parties' initial term sheet shall not vary by more than 25% less than that represented therein on the estimated low value and short term sales potential 10% columns. A copy of the international sales projections is attached hereto [to the Note] as Exhibit A. . . .

[*See* **Exhibit "A"** hereto, Pia Declaration at ¶21, Exhibit 1 thereto, the Note at p. 3, ¶¶ 6 – 7.]

17. Based on the Gross Revenue Representations made by Atwell, which were included as File #1 to Baer's April 1, 2010 email and in Exhibit A to the Note attached thereto by Baer, along with the Warranties contained in the Note itself, it was Incentive's understanding that Incentive would receive at least 25% of $2,284,500 to $4,153,650 in gross participation from the Library. [*See* Exhibit "A" to Baer's Supporting Memo, Plaintiff's Amended Complaint, at ¶16; **Exhibit "A"** hereto, Pia Declaration at ¶22.]

18. Incentive materially relied upon Baer's and the other Defendants' representations that Incentive would receive at least 25% of $2,284,500 to $4,153,650 in gross participation from the Library in entering into the Note. [*See* Exhibit "A" to Baer's Supporting Memo, Plaintiff's Amended Complaint, at ¶ 17; **Exhibit "A"** hereto, Pia Declaration at ¶23.]

19. Moreover, also included in Exhibit A to the Note were File #2 and File #3 attached to Baer's April 1, 2010 email, that Baer also reviewed and included with the Note. According to the representations made by Camelot, Baer and the other Defendants in 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 $205,375 each month ("Payment Benchmark"). These representations about the sales projections were false. [*See* Exhibit "A" to Baer's Supporting Memo, Plaintiff's Amended Complaint, at ¶89; **Exhibit "A"** hereto, Pia Declaration at ¶24.]

20. Alternatively, according to File #2 and File #3 (attached to Baer's April 1, 2010 email and as Exhibit "A" to the Note) the representations made by Camelot, Baer and the other Defendants in the sales projections reviewed and included in the Note by Baer, 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"). These representations were also false. [*See* Exhibit "A" to Baer's Supporting Memo, Plaintiff's Amended Complaint, at ¶ 90; **Exhibit "A"** hereto, Pia Declaration at ¶25.]

21. Baer admits that he sent Files #1-4 as an attachment to his April 1, 2010 email to Incentive. [*See* Exhibit "B" to Baer's Supporting Memo, Baer Affidavit at ¶24; **Exhibit "A"** hereto, Pia Declaration at ¶26.]

22. Baer claims that he "did not prepare any of the four documents that were sent as attachments" to his April 1, 2010 email. [*See* Exhibit "B" to Baer's Supporting Memo, Baer Affidavit at ¶27.] Baer also claims that he "did not prepare or calculate any of the information or estimates contained in the four attached documents" to his email but rather, the information contained in the documents was "were prepared by someone other than" Baer and was "provided to him" by Camelot "to send to a representative of Plaintiff Incentive Capital." [*See id.* at ¶¶ 28, 29; **Exhibit "A"** hereto, Pia Declaration at ¶27.]

23. Conspicuously absent from Baer's Affidavit is any statement denying that he reviewed the information contained in Files #1-4 attached to his April 1, 2010 email to Dorius or regarding whether or not he knew the information contained in the files was false, inaccurate and/or overstated. [*See* **Exhibit "A"** hereto, Pia Declaration at ¶28.]

24. Furthermore, Baer does not deny that he made the following representations to Incentive his April 1, 2010 email (as identified above), that he knew such representations were false at the time they were made, or that he knew Incentive relied on such representations when it accepted the escrowed stock of Camelot in lieu of receiving the personal guarantees of both Jarowey and Baer which Incentive had initially requested and in making its decision to make the Loan to Camelot:

a. That CEG has "substantial value";

b. That the value of CEG is "far more secure" than the personal guarantees of Atwell, Jarowey and Baer requested by Incentive; and

c. That the Liberation Library (including the Distribution Assets) "have a significantly higher value than the amount of the Loan and the interest thereon."

[*See* **Exhibit "A"** hereto, Pia Declaration at ¶29, Exhibit 4 thereto, Email from Baer to Dorius dated 4/1/2010.]

25. On March 24, 2010, Camelot's representative and Boston-based financial advisor, Defendant Jarowey, sent an e-mail to Plaintiff's counsel stating:

> It took me a while to locate the best document to provide the detail on revenue distribution for the Liberation Library. Attached is an income statement with actuals through 9/30/2009 and monthly forecasts for the 4Q 2009. The forecast actually came in very close the final numbers for 2009. This will give you a sense of the annual and monthly cash generation. Also included in the file for your consideration, are SGA actuals for 2009 and SGA an estimate for 2010. As you know, Camelot will not be acquiring any overhead in its purchase of the Liberation assets, so all the estimated SGA goes to the bottom line.
>
> This responds to your request for specific revenue figures as we discussed the other day. After reading your note to Jamie yesterday regarding the "independent review of the library", I believe these numbers serve to solidly support that, in fact, the library does generate significant revenue exclusive of some of the territories Jamie is focusing on--supporting the cash price the Company is paying. Jamie plans to get back to you directly on the specifics raised in your email to him, but the attached is my contribution to the position that the Liberation assets are a good buy and can generate sufficient cash flow to pay back the loan in short order.

[*See* **Exhibit "A"** hereto, Pia Declaration at ¶30, Exhibit 6 thereto, Email from Jarowey dated 3/24/2010.]

26. Attached to the March 24, 2010 Jarowey E-mail is a spreadsheet with three tabs: (1) Year to Date Revenue; (2) 2009 Forecast and SGA Detail; (3) SGA 2009 & 2010 Forecasts. [*See* **Exhibit "A"** hereto, Pia Declaration at ¶31, Exhibit 6 thereto, Email from Jarowey dated 3/24/2010, attachments thereto.] Tab 1 of these spreadsheets, consisting of the purported Year to Date Revenue for the Liberation Library, shows total revenues on the Liberation Library of $6,004,373. [*See id.*] This information is false. [*See id.*]

27. Jarowey's email dated March 24, 2010 cc'd Baer and was provided as a joint representation. [*See* **Exhibit "A"** hereto, Pia Declaration at ¶32, Exhibit 6 thereto, Email from

Jarowey dated 3/24/2010.] Baer does not deny receiving and reviewing Jarowey's email, knowing that the information contained therein was false and took no action to correct such information or otherwise notify Incentive that it was inaccurate.

28. On March 30, 2010 Jarowey sent a follow-up e-mail stating 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* **Exhibit "A"** hereto, Pia Declaration at ¶33, Exhibit 7 thereto, Email from Jarowey dated 3/30/10.] This information was also false. [*See id.*]

29. Jarowey's March 30, 2010 email was also sent to Baer. [*See* **Exhibit "A"** hereto, Pia Declaration at ¶34, Exhibit 7 thereto, Email from Jarowey dated 3/30/10.] As with Jarowey's March 24, 2010 email, Baer does not deny receiving and reviewing Jarowey's email, knowing that the information contained therein was false and took no action to correct such information or otherwise notify Incentive that it was inaccurate.

30. Incentive materially relied upon Jarowey's representations in the March 24, 2010 e-mail and the March 30, 2010 e-mail in making its decision to provide the Loan to Camelot. [*See* Exhibit "A" to Baer's Supporting Memo, Plaintiff's Amended Complaint, at ¶ 45; **Exhibit "A"** hereto, Pia Declaration at ¶35.]

31. It was only a matter of months after Incentive made the loan that Camelot was 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 Assets. [*See* Exhibit "A" to Baer's Supporting Memo, Plaintiff's Amended Complaint, at ¶ 38; **Exhibit "A"** hereto, Pia Declaration at ¶36.]

32. On Wednesday, June 2, 2010, Incentive's legal counsel sent a letter to Camelot

entitled "Notice and No Waiver." [*See* **Exhibit "A"** hereto, Pia Declaration at ¶37, Exhibit 8 thereto, Notice and No Waiver Letter dated 6/2/2010.] The June 2, 2010 letter states:

> [T]here is no question that the amount of revenue generated by the acquisition represented by Camelot was and continues to be "material." It was represented to Incentive Capital that the film library was currently generating $150,000 of gross revenues each month. We reminded you of this material representation in our email to you on April 27th, which reads in relevant part as follows:
>
> > The lender is "uneasy about advancing operational funds to a distributor before having some level of comfort that the distributor will perform as agreed – i.e., make its participation payments. As you have represented to us that the library now generates approximately $150,000 in gross revenues monthly, this should not pose much of a hardship."
>
> Your representations in the final Note confirm this to be the case and specifically reference the sales projections enclosed herewith as Exhibit A. The Note states in pertinent part that payment is 'conditioned upon the (a) Borrower's and Guarantors' performance of all other obligations under th[e] Note and the related loan documents . . . (b) all representations and warranties by Borrower and the Guarantors in the Loan Documents being true and accurate . . . Incentive Capital now believes that the Warranties set forth in the Note are in breach. That relevant section of the Note reads: 'The Borrower represents that the international sales projections previously provided by Borrower in connection with the parties' initial term sheet shall not vary by more than 25% less than that represented therein on the estimated low value and short term sales potential 10% columns. A copy of the international sales projections is attached hereto as Exhibit A.' 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.

> To make sure that there was a meeting of the minds between lender and borrower on this critical issue, the Note provides for operational advances on the express condition that all representations be accurate and true, including (as mentioned above) the representation that the film library would generate revenues within 25% of the projections provided by borrower to lender (which were attached as an exhibit to the Note and incorporated by reference). Those projections indicate that the library will generate $22,845,000 annually (under the "Estimated Total Value – Low" column"). The film library would need to generate gross revenues of approximately $1,427,812.50 per month in order to hit the annualized target amount of $17,133,750 (given the 25% margin provided for in the Note). Clearly, the participation payments made to lender thus far show that borrower's exploitation of the film library is generating revenues far below the projected amounts.
>
> 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. Despite the occurrence of what lender believes to be material breaches of the loan documents by borrower, lender, without waiving its rights and remedies under the loan documents, has made the promised operational advances to borrower.

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

33. 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* Exhibit "A" to Baer's Supporting Memo, Plaintiff's Amended Complaint, at ¶ 46; **Exhibit "A"** hereto, Pia Declaration at ¶38.]

34. 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" to Baer's Supporting Memo, Plaintiff's Amended Complaint, at ¶ 58; **Exhibit "A"** hereto, Pia Declaration at ¶39.]

35. Despite Baer's representations to Incentive in his April 1, 2010 email to Dorius 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 most recent stock quote on its website shows its current stock value to be $0.0001 per share, with total monthly earnings of $391.75. [*See* Exhibit "A" to Baer's Supporting Memo, Plaintiff's Amended Complaint, at ¶ 63; **Exhibit "A"** hereto, Pia Declaration at ¶40.] Apparently, Camelot's stock is in lock-down and has been unable to trade more than a few thousand dollars per day. [*See id.*] Investigation into Camelot's financials indicates that there is no discernable market for Camelot's stock nor can it be readily liquidated. [*See id.* at ¶ 64.]

36. Moreover, Atwell as a guarantor (the only personal guarantee obtained by Incentive has few or no assets because, among other things, he pledged all of his assets towards the building of a motion picture studio resulting in the loss of his home and other value. [*See* Exhibit "A" to Baer's Supporting Memo, Plaintiff's Amended Complaint, at ¶ 64; **Exhibit "A"** hereto, Pia Declaration at ¶41.]

37. Baer alleges that he is "a resident of California," "an attorney who is admitted to the California State Bar," maintains a private law practice in Santa Barbara, California, and "performs the majority of his legal work in the State of California." [*See* Exhibit "B" to Baer's Supporting Memo, Baer Affidavit at ¶¶3-6.]

38. Baer claims he is not, and has not ever been, an officer or director of any of the entities that comprise Camelot. [*See* Exhibit "B" to Baer's Supporting Memo, Baer Affidavit at ¶ 15.] Baer also claims he has never been an employee of Camelot. [*See id.* at ¶ 16.] Baer admits, however, that he acted as a representative of Camelot in connection with the Loan Transaction in the capacity as lead counsel. [*See id.* at ¶ 30.] Baer also admits he is a

stockholder of Camelot (having "received some shares of registered common stock in partial payment" for his legal services). [*See id.* at ¶ 17.]

39. Baer admits that in connection with acting as Camelot's lead counsel with regard to the Loan Transaction that he made phone calls and sent email messages from California to representatives of Incentive in Utah (although he did not have any face-to-face meetings with these representatives within Utah). [*See* Exhibit "B" to Baer's Supporting Memo, Baer Affidavit at ¶¶ 22-23.]

40. On or about May 7, 2010, approximately ten (10) days after the closing of the Loan Transaction on April 27, 2010, Baer (as "Consultant") and Camelot Entertainment Group, Inc. ("CEG" as the "Corporation") executed a Business and Legal Services Consultant Agreement (the "Consultant Agreement"), which replaced the Representation Agreement executed by Baer and Camelot in August 2009 and which states, among other things, that:

a. "The Consultant has provided and continues to provided specific business consulting and entertainment and contractual legal services to the Corporation ('Services' as further defined below) . . ." [*See* Exhibit "B" to Baer's Supporting Memo, Baer Affidavit, at Exhibit 2 thereto, Consultant Agreement, at p. 1, Recitals, ¶B.]

b. "The Consultant has provided Services to the Corporation since August 12, 2009, pursuant to the Representation Agreement . . ." [*See id*. at p. 1, Recitals, ¶C.]

c. "As of May 7, 2010 hereof, the Consultant has billed the Corporation for legal and business services provided to date in the amounts of $260,517.67 in cash and $221,440 in the Corporation's $.0001 par value common stock ('Common Stock')." [*See id*. at p. 1, Recitals, ¶D.]

d. "As of the date hereof [i.e. May 7, 2010], the Consultant has been paid $60,000 in cash and $124,500 in the Common Stock . . . for Services provided to date." [*See id*. at p. 1, Recitals, ¶E.]

e. "The Corporation has requested Consultant to continue to provide entertainment and contractual legal Services (collectively and as further described in Exhibit H,

the 'Services') to the Corporation on an on-going basis." [*See id*. at p. 1, Recitals, ¶H.]

f. "The Board of Directors of the Corporation (the 'Board') has determined that it is in the best interests of the Corporation and its stockholders that the Corporation retain the services of Consultant to consult with (i) the board, (ii) officers of the Corporation, and (iii) administrative staff of the Corporation concerning issues which may occur relating to the business of the Corporation, including assisting the Corporation in implementing its business model and providing entertainment and contractual legal Services as further described in Exhibit H attached hereto." [*See id*. at p. 1, Recitals, ¶I.]

g. "The Consultant shall provide the Services to the Corporation on an independent contractor basis pursuant to the terms and conditions of this Agreement." [*See id*. at p. 1, Recitals, ¶J.]

h. "**Incorporation of Recitals**. The Recitals are hereby incorporated into this Agreement." [*See id*. at p. 2, ¶1.]

i. **Term of Agreement**. This Agreement shall be in full force and effect commencing May 7, 2010 and concluding at the close of business on December 31, 2015 (the "Term"), unless extended by mutual agreement of the parties." [*See id*. at p. 2, ¶2.]

j. "**Consultation**. The Consultant shall make appropriate personnel available to consult with the Board, the officers of the Corporation, and the department heads of the administrative staff of the Corporation, at reasonable times, concerning matters relating to any issue of importance regarding the business affairs of the Corporation, including, but not limited to, the specific Services detailed on Exhibit H attached hereto." [*See id*. at p. 2, ¶3.]

k. **Confidentiality**. The Consultant has and will have access to and participate in the development of or be acquainted with confidential or proprietary information and trade secrets related to the business of the Corporation, its parent, subsidiaries and affiliates (the 'Corporations'), including but not limited to (i) business plans, operating plans, marketing plans, bid strategies, bid proposals, financial reports, operating data, budgets, wage and salary rates, pricing strategies and information, terms of agreements with suppliers or customers and others, customer lists, formulae, patents, devices, software programs, reports, correspondence, tapes, discs, tangible property and specifications owned by or used in the Corporations' businesses, operating strengths and weaknesses of the Corporations' officers, directors, employees, agents, suppliers and customers . . .(the 'Confidential Information'). . . ." [*See id*. at p. 7, ¶16.]

l. Exhibit H of the Consultant Agreement, which sets forth the Specific Services to be performed by Baer, as Consultant, lists the following:

i. Provide business, management, consulting and legal services and business development and production legal services and support to the Corporation.
ii. Provide a general business and financial analysis of the Corporation's proposed business plan with respect to the business of Corporation.
iii. Assist in the formulation and evaluation of various structural and financial alternatives.
iv. Provide the Corporation with business advisory services.
v. Review and analyze all respects of the Corporation's structure and its goals and make recommendations on feasibility and achievement of desired goals.
vi. Provide Entertainment, Contractual and General Business Legal Services to the Corporation.
vii. Assist Corporation in the preparation of all legal documents, business plans, offering statements, private placement memorandums, registrations and all other documents as requested by Corporation.

[*See id*. at p. 17, Exhibit H.]

41. Baer alleges that he began providing legal services to Camelot on August 12, 2009 (with the execution of the Representation Agreement) and terminated his representation of it in November 2010. [*See* Exhibit "B" to Baer's Supporting Memo, Baer Affidavit at ¶¶ 10, 34.] Baer makes no attempt to explain why he terminated his representation of Camelot in November 2010 despite the fact that the Consultant Agreement's initial term did not end until December 31, 2015. [*See id.*, at Exhibit 2 thereto, Consultant Agreement, Term of Agreement, at p. 2, ¶2.]

42. In an email from Jamie Thompson ("Thompson"), Camelot's Sales Manager, dated April 16, 2010, Thompson represents that the proceeds from the Loan will, in part, be used to pay all fees incurred by Camelot (i.e. legal fees billed by Baer in addition to other consultants retained by Camelot) associated with the Loan Transaction. [*See* **Exhibit "A"** hereto, Pia Declaration at ¶42, Exhibit 9 thereto, Email from Thomson to Pia dated 4/16/2010.]

43. Incentive has alleged the following causes of action against Baer by including him in the designation of "All Defendants": Fraud, Fraud in the Inducement, Alter Ego, Civil Conspiracy, Negligent Misrepresentation, Gross Negligence, Declaratory Relief, and Tortious Interference with Economic Relations. [*See* Exhibit "A" to Baer's Supporting Memo, Plaintiff's Amended Complaint.]

ARGUMENT

I. PLAINTIFF HAS MADE A *PRIMA FACIE* SHOWING OF JURISDICTION.

Defendants' Motion essentially asks this Court to hold as follows: an out-of-state individual who makes misrepresentations, provides knowingly false information, and fails to correct blatantly misleading information given to a resident of Utah for purposes of inducing such Utah resident to enter into a loan which personally benefits the out-of-state individual is not subject to jurisdiction in Utah because such conduct was merely directed towards Utah and did not occur within the State.

Incentive alleges in its Amended Complaint that: "On April 1, 2010, Baer, acting general counsel for Camelot during negotiation of the loan agreements [i.e. the Loan Transaction documents], misrepresented that CDG's assets have a significantly higher value than the amount of the proposed loan [of $650,000] and the interest thereon." [See Incentive's Amended Complaint at ¶80.] Baer's assertion that this allegation "fails on its own to specifically tie Defendant Ted Baer to the forum state or otherwise show that personal jurisdiction in Utah is appropriate" is misplaced. The allegation refers to the email that Baer sent to Incentive's counsel on April 1, 2010. As set forth in the Statement of Facts above and further discussed below, Baer made several misrepresentations of fact in this email and provided false information to Incentive in the documents attached thereto (Files #1-4) about the financial strength of Camelot and its ability to generate revenue as a distributor of the film library.

Baer's key role in making the Loan Transaction occur, is sufficient to demonstrate a *prima facie* showing that a Utah court has personal jurisdiction over him.

A. Under Utah and Tenth Circuit Law, Only a Prima Facie Showing of Jurisdiction is Required and All Factual Disputes Must be Resolved in Plaintiffs' Favor.

To determine whether a federal court has personal jurisdiction over a nonresident defendant in a diversity action, the court looks to the law of the forum state. *Taylor v. Phelan,* 912 F.2d 429, 431 (10th Cir.1990). In Utah, the assertion of personal jurisdiction must both: (1) satisfy the requirements of Utah's long-arm statute; and (2) comport with due process. *Doering v. Copper Mountain, Inc.,* 259 F.3d 1202, 1209 (10th Cir.2001). Utah's long-arm statute subjects a defendant to personal jurisdiction for causing any tortious injury within Utah or transacting any business within the State, without the need for the individual to ever set foot in or purchase property within the State. *See* Utah Code Ann., § 78B-3-205.

To comport with due process, a defendant must have minimum contacts with the forum state such that maintenance of the lawsuit would not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Accordingly, this Court has repeatedly held that under Utah law, a court may assert jurisdiction to the fullest extent permitted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See, e.g.*, *STV Int'l Marketing v. Cannondell Corp.*, 750 F. Supp. 1070, 1074 (D. Utah 1990).

At the pleading stage, when faced with a motion to dismiss for lack of jurisdiction and accompanying evidence in the form of affidavits and other written materials, Utah law makes clear that "the plaintiff need ***only*** make a *prima facie* showing that jurisdiction exists." *Rusakiewicz v. Lowe*, 556 F.3d 1095, 1100 (10th Cir. 2009) (emphasis added); *see also Neways, Inc. v. McCausland*, 950 P.2d 420, 422 (Utah 1997)*; Hafen v. Strebeck,* 338 F. Supp. 2d 1257, 1260 (D. Utah 2004) (internal citations omitted). "The burden on the plaintiff is light." *Encore*

Prods, Inc. v. Promise Keepers, 53 F. Supp. 2d 1101, 1114 (D. Colo. 1999), citing *Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995). Additionally, any "factual disputes are resolved in favor of the plaintiffs when determining the sufficiency of this showing." *Rusakiewicz*, 556 F.3d at 1100; *see also Wenz*, 55 F.3d at 1505 (10th Cir. 1995); *Kuenzle v. HTM Sport-Und Freizeitgerte AG*, 102 F.3d 453, 456 (10th Cir. 1996); *Far West Capital Inc. v. Towne*, 46 F.3d 1071, 1075 (10th Cir. 1995) (factual disputes resolved in favor of the Plaintiff in a motion to dismiss).

Moreover, "[t]he allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor . . ." *Spectator Blankets II, LLC v. Jack McKeon*, 2009 U.S. Dist. LEXIS 35309 at *8 (D. Utah 2009) (Stewart, J.) (quoting *Kennedy v. Freeman*, 919 F.2d 126, 128 (10th Cir. 1990). Because the allegations in the Complaint must be resolved in Incentive's favor, and given that the allegations make far more than simply a *prima facie* case of jurisdiction over Baer, this Court's exercise of personal jurisdiction over Baer satisfies both due process and Utah law.

B. Personal Jurisdiction Over Defendants Is Proper.

The United States Supreme Court and Utah law recognizes two types of personal jurisdiction: specific and general. *See Carter v. H.R. Plus*, 992 F. Supp. 1293, 1294 (D. Utah 1998). "A court may exercise specific jurisdiction if a defendant has purposefully directed his activity at residents of the forum and the litigation results from claims that arise out of or relate to those activities." *Id.*; *see also Burger King*, 471 U.S. at 472. "A court may exercise general jurisdiction where the defendant's contacts with the forum rise to the level of being 'continuous and systematic.'" *Id.*, citing *Kuenzle v. HTM Sport-und Freizeitgerate AG*, 102 F.3d 453, 455

(10th Cir. 1996)). Incentive does not claim that this Court has general jurisdiction over Baer. However, as demonstrated below, Incentive can establish a *prima facie* showing of specific jurisdiction over Baer which comports with the due process requirements of the Fourteenth Amendment. To establish specific jurisdiction "(1) the defendant's act or contact must implicate Utah under the Utah long-arm statute; (2) a 'nexus' must exist between the plaintiff's claims and the defendant's acts or contacts; and (3) application of the Utah long-arm statute must satisfy the requirements of federal due process." *Harnischfeger Eng'rs, Inc. v. Uniflo Conveyor, Inc.*, 883 F. Supp. 608, 612-613 (D. Utah 1995).

1. Plaintiff Has Made a *Prima Facie* Showing that Specific Personal Jurisdiction Exists over Baer Under Utah's Long-Arm Statute.

As noted above, Utah's long-arm statute makes clear that a Utah court may exercise jurisdiction over a non-resident based on an individual's "transaction of any business within the state," or "the causing of any injury within this state whether tortious or by breach of warranty." Utah Code Ann., § 78B-3-205. Additionally, this statute explains that "transaction of business within this state" includes "activities of a nonresident person, his ***agents***, or ***representatives*** in this state which ***affect*** persons or businesses within the state." Utah Code Ann. § 78B-3-202(2) (emphasis added). Thus, the initial inquiry of specific personal jurisdiction under Utah law consists of determining whether Incentive has made allegations in its Amended Complaint which establish a *prima facie* showing that Baer either committed a tort directed or felt in Utah, the forum state, or as an agent or representative of Camelot transacted business which "affected" Incentive within Utah.

Baer repeatedly emphasizes in his Motion that he did not physically travel to Utah and that all the work he performed and the conduct he engaged in connection with the Loan

Transaction was done in his capacity as a representative and counsel for Camelot. The inference Baer would like this Court to take from those statements is that the absence of physical presence in Utah and the fact that all his conduct was done in a representative capacity makes jurisdiction improper here. Plaintiff does not disagree with the fact that Baer was not physically present in the state of Utah when he engaged in his tortious conduct or that he engaged in all his conduct in the capacity as lead counsel for Camelot in connection with the Loan Transaction. However, Baer's lack of physical presence in Utah and the fact that he acted as Camelot's counsel is immaterial.

Utah's long-arm statute is interpreted expansively so that "a person may transact business within the state despite an absence of physical presence in Utah." *Nova Mud Corp. v. Fletcher*, 648 F. Supp. 1123, 1126 (D. Utah 1986) (one phone call by a defendant to a Utah company constituted "transacting business" because it resulted in an oral contract which affected individuals in Utah); *Berrett v. Life Ins. Co. of the Southwest*, 613 F. Supp. 946, 949 (D. Utah 1985) (telephone conversation to a Utah resident from an individual outside of Utah is sufficient to satisfy Utah's long arm statute.) Thus, whether a defendant is physically present in the jurisdiction is immaterial when his conduct outside the jurisdiction "affect[s] persons or businesses ***within*** the state," as Baer's conduct in California has affected Plaintiff here in Utah. *See* Utah Code Ann. § 78B-3-202(2) (emphasis added).

In addition, although there is no decision by a Utah court addressing this issue, courts in other jurisdictions have repeatedly found that where corporate counsel communicates false information or otherwise participates in conduct that constitutes a tort which is directed to the forum state, a tort has been committed in the forum state by counsel which satisfies the state's long-arm statute (despite the fact that he did not step foot inside the forum state). For example,

in *Mihlon v. Superior Court*, 215 Cal. Rptr. 442 (Cal. Ct. App. 1985), the plaintiff, a California attorney, filed a complaint alleging that defendants, a foreign corporation, certain of its officers, along with its corporate counsel, had caused, induced and assisted two of the plaintiff's clients to tortiously breach their attorney retainer agreements with the plaintiff. *Id.* at 443. The defendants appeared specially and moved to quash service of summons arguing that their activities within California and their other contacts with California in relation to plaintiff's action were in performance of their duties as officers, directors or corporate counsel for the foreign corporation and that such conduct did not constitute a valid basis for jurisdiction over them as individuals. *Id.* at 444. The affidavit submitted by corporate counsel for the foreign corporation in support of her motion to quash stated that at the relevant time period, she was a resident of the state of Maryland who had never done business in California, had never owned property there, and had never entered an appearance in any legal proceeding in California in her individual or representative capacity. Importantly, the corporate counsel also averred in her affidavit that "[m]y contacts with California *in connection with this cause of action* were made *in my role as corporate officer and counsel.* I received and reviewed documents, advised as to the nature of their contents, suggested revisions, and transmitted drafts and executed documents back to California. I also placed and received telephone calls to and from California to facilitate the performance of my function. I performed these actions in the State of Maryland and in the District of Columbia." *Id.* (emphasis in original).

In upholding the trial court's ruling that the plaintiff had made a *prima facie* showing that personal jurisdiction over the corporate counsel existed in the State of California, the California Court of Appeal found that the "real question" before it was "**w**hether corporate counsel for a foreign corporation is acting for or as the corporation so as to render counsel's performance of

duties in that official capacity irrelevant for purposes of demonstrating minimum contacts as an individual. Otherwise stated, does corporate counsel stand in the same position as corporate officers and directors in this regard?" *Id.* at 447.

The court answered this question by concluding that "corporate counsel should be treated as employees or independent contractors for jurisdictional purposes." *Id.* The court noted that unlike officer and directors of a corporation "who may not reasonably be subjected to personal jurisdiction for their actions *qua* the corporation," corporate counsel "merely provides legal counsel and services, and does not 'speak for' or act *qua* the corporation." *Id.* at 449. It then found that:

> The capacity of corporate counsel, whether in-house or independent counsel, is analogous to that of accountants providing services as professional employees of or independent contractors for the corporation. It is not subject to serious dispute that if accountants provide ***fraudulent financial documents on behalf of their corporate client, knowing or reasonably foreseeing direct injury to residents of another state***, the accountants should be subjected to personal jurisdiction as joint tortfeasors. It follows that corporate counsel should be treated for purposes of personal jurisdiction in the same manner as employees of or independent contractors for the corporation rather than as officers or directors.

Id. (emphasis added).

Based on these findings, the court held that "[a]n intentionally tortious act of the corporation would confer personal jurisdiction over participating corporate counsel where knowledge of the wrongful nature of the corporation's acts is alleged," and that "[t]his conclusion is consistent with the consideration that there is no good reason for treating counsel advising corporations differently than counsel advising individual clients for purposes of personal jurisdiction." *Id.* at 449-50; *see also Linzer v. EMI Blackwood Music, Inc.*, 904 F. Supp. 207, 215 (S.D.N.Y. 1995) (holding that allegation that corporate counsel for foreign corporation knowingly provided false information and

documents to the plaintiff in New York to help bolster foreign corporation's claim to a renewal of copyrights to songs constituted "an allegation of tortious activity in New York" and falls under the ambit of New York's long-arm statute.")[1]

[1] The holdings in *Mihlon* and *Linzer* are consistent with the holdings routinely made by other courts that an attorney or other representative of a company are liable for the torts of the company if they personally participate in such torts, including knowingly send false information directed into the forum state. *Wyatt v. Union Mortgage Co. .,* 24 Cal.3d 773, 785, 157 Cal.Rptr. 392, 598 P.2d 45 (1979) (a representative of a corporation may become liable for the torts of the company "if they directly ordered, authorized or participated in the tortious conduct."); *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.*, 32 Cal. Rptr.3d 325, 341 (Cal. Ct. App. 2005) (finding that attorneys have an independent duty to avoid engaging in conduct that constitutes fraud); *Skarbrevik v. Cohen, England & Whitfield*, 231 Cal.App.3d 692, 711, 282 Cal.Rptr. 627 (Cal. Ct. App. 1991) (holding that an attorney has personal duty to abstain from harming another by false representation or actual fraud, a duty independent of a client's duty to disclose that may give rise to its own, but not its lawyer's, liability for constructive fraud by concealment); *PMC, Inc. v. Kadisha,* 78 Cal.App.4th 1368, 1380, 93 Cal.Rptr.2d 663 (2000) (a corporate representative's participation in tortious conduct "may be shown not solely by direct but also by knowing consent to or approval of unlawful acts."); *Miceli v. Stromer*, 675 F. Supp. 1559, 1561 (D. Colo. 1987) (finding that "negligent conduct in a foreign state which causes injury in [the forum state] may be deemed an act committed within [the forum state] for purposes of the long-arm statute."); *Cherin v. Cherin*, 72 Mass. App. Ct. 288, 295, 891 N.E.2d 684, 689 (Mass. App. Ct. 2008) (holding that for purposes of personal jurisdiction, "an intentional misrepresentation made in or sent into [a forum state], for the purpose of inducing the plaintiff's reliance, constitutes an act within [that state]."), citing *Rye v. Atlas Hotels, Inc.,* 30 Mass.App.Ct. 904, 906, 566 N.E.2d 617 (1991) (finding that out-of-State defendant's attorney's intentional misrepresentations by telephone and mail sufficient to provide jurisdiction), *Murphy v. Erwin–Wasey, Inc.,* 460 F.2d 661, 664 (1st Cir.1972) ("Where a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state"); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 609 (S.D. Tex. 2002) (holding that "an attorney has an established duty to third parties not to make material misrepresentations on which the attorney 'knew or had reason-to-expect' that the parties would rely or the attorney intended to reach and influence a limited group that might reasonably be expected to have access to that information and act in reliance on it."), citing *Likover v. Sunflower Terrace II, Ltd.,* 696 S.W.2d 468, 472 (Tex.Civ.App. 1985) ("an attorney is liable if he knowingly commits a fraudulent act that injures a third person, or if he knowingly enters into a conspiracy to defraud a third person"); *see also* The Restatement (Second) of Torts § 531 (1977) ("One who makes a fraudulent misrepresentation is subject to liability to the person or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced."); The Restatement

In the end, viewing the allegations against Baer in the light most favorable to Incentive, as the law requires for Baer's present motion, it is clear that the Plaintiff has more than made a sufficient *prima facie* showing of long arm jurisdiction over Baer.

2. Plaintiff Has Made a *Prima Facie* Showing that a 'Nexus' Exists between Plaintiff's Claims and Baer's Acts or Contacts.

To make a *prima facie* showing that this Court possesses specific personal jurisdiction over Baer, Incentive must next show that a "nexus" exists between its claims and Baer's actions or contacts with the State of Utah. In order to satisfy this requirement, Incentive must show that "but for" Baer's forum-related conduct, the injury to Incentive would not have occurred. *See, e.g.*, *Myers v. Bennett Law Offices,* 238 F.3d 1068, 1075 (9th Cir.2001); *Panavision Int'l, L.P. v. Toeppen,* 141 F.3d 1316, 1322 (9th Cir.1998). Baer's contacts must also be "sufficiently related to the underlying causes of action" and "have some degree of proximate causation to be considered for purposes of jurisdiction." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.,* 243 F.Supp.2d 1073, 1085 (C.D.Cal.2003), citing *Doe v. American Nat'l Red Cross,* 112 F.3d 1048, 1051-52 (9th Cir.1997).

In the present action, Incentive has alleged that "but-for" the false information supplied by Baer to Incentive's counsel in Baer's April 1, 2010 email, which Baer also attached to the Note (and which Baer does not claim he did not review or know to be false), Incentive would not have entered into the Loan with Camelot. Moreover, "but-for" Baer's misrepresentations regarding the financial stability of Camelot and value of its stock (which ended up being

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(Second) of Torts § 552 (1977) ("One who, in the course of his business, profession or employment, or in any transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.")

virtually valueless), it would have not agreed to accept Camelot's escrowed stock in lieu of the guarantees of both Jarowey and Baer which Incentive had originally requested. In other words, Baer's contacts with Utah (the making of false representations and the supplying of false information (together with his failure to correct the false claims made by Jarowey in his emails dated March 24, 2010 and March 30, 2010 to both Incentive's counsel and Baer) clearly are "sufficiently related to the underlying causes of action" alleged against Baer and "have some degree of proximate causation" to the injuries asserted by Incentive in its Amended Complaint. Thus, but for Baer's conduct in California directed at Utah, Incentive would not have been injured in Utah. Accordingly, the Court should find that Incentive can make a *prima facie* showing that the nexus element is satisfied as well.

3. Plaintiff Has Made a *Prima Facie* Showing that Jurisdiction over Baer is Proper Under a Due Process Analysis.

Because Incentive can make a prima facie showing that the requirements of Utah's long-arm statute have been met and that a nexus exists between Baer's alleged conduct and the injury suffered by Incentive here, the final element required for a showing of specific personal jurisdiction over Baer—a nonresident defendant in a diversity action—is a prima facie showing by Incentive "that the exercise of jurisdiction does not offend the due process clause of the Fourteenth Amendment." *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1295 (10th Cir. 1999), quoting *Far West Capital*, 46 F.3d at 1074).[2] The United States Supreme Court has established that the due process clause "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful

[2] This Court has noted that "[i]t is frequently helpful to undertake the due process analysis first, because any set of circumstances that satisfies due process will also satisfy the long-arm statute." *Sys. Designs, Inc. v. New CustomWaare Co.*, 248 F. Supp. 2d 1093, 1097 (D. Utah 2003).

'contacts, ties, or relations.'" *Soma Medical*, 196 F.3d at 1298, quoting *Burger King*, 471 U.S. at 471-72. The Court must engage in a two-step analysis to determine whether jurisdiction over the defendant comports with due process: first, does the defendant have "minimum contacts" with the forum state, and, second, does assertion of personal jurisdiction offend traditional notions of fair play and substantial justice? *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945).

Minimum contacts are established when a defendant "purposefully directs" his activities to residents of the forum state, *Burger King,* 471 U.S. at 476, citing *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 774-75, (1984), and the litigation results from alleged injuries that "arise out of or relate to" those activities. *Id.,* 471 U.S. at 472, 105 S.Ct. at 2182, citing *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 (1984). Because the second part of the showing of minimum contacts is satisfied by the nexus test discussed above, Incentive can establish Baer has minimum contacts with Utah by showing that Baer purposely directed his tortious acts towards Utah or at Incentive here or that he purposely availed himself of the privilege of conducting activities here. A defendant's physical presence in the state is not required, as long as his or her efforts were "purposely directed" toward residents of that state. *See Burger King,* 471 U.S. at 476.

Thus, personal jurisdiction may be exercised over a defendant who has caused an effect in the forum state by an act or omission occur ring elsewhere. *See McGee v. International Life Ins. Co.* (1957) 355 U.S. 220, 223–224 (1957). Accordingly, Contrary to the general theme of Baer's motion, the United States Supreme Court's "minimum contacts" analysis does not require actual physical presence in the forum, a defendant's "contacts are sufficient if the defendant purposefully avails itself of the privilege of conducting activities within the forum state." *Far*

West, 46 F.3d at 1074 (internal quotations omitted); *see also Rambo v. Am. S. Ins. Co.*, 839 F.2d 1415, 1418-19 (10th Cir. 1988). In other words, if plaintiff can show a *prima facie* case that Baer's conduct was tortious or that his conduct adversely affected Incentive's business (which it has), then Incentive has satisfied its burden that the harm is based on the "effects" of defendant's out-of-state conduct. . *See Calder v. Jones,* 465 U.S. 783, 789, 104 S.Ct. 1482, 1486-87, 79 L.Ed.2d 804 (1983), citing *World-Wide Volkswagen v. Woodson,* 444 U.S. 286, 298-99, (1980).

In *Calder,* the United States Supreme Court discussed the "effects" doctrine. The Court found that an allegedly libelous article written in Florida by a Florida resident about a California resident could bring the Florida resident under the jurisdiction of the California court, although the defendant had no other contacts with that state. The Supreme Court approved of the effects test adopted by the lower court, which the Supreme Court described as standing for the proposition that: "[T]he fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects." *Id.* at 787, 104 S.Ct. at 1485. The Court in *Calder* also emphasized the intentional nature of the defendants' conduct and its calculated injurious effect in the forum state. *Id.* at 788-90. According to the Court, the defendants knew that the article "would have a potentially devastating impact on respondent. And they knew that the brunt of that injury would be felt by respondent in the state in which she lives and works...." *Id.* at 789-90, 104 S.Ct. at 1487.

Courts have found that the "essence of *Calder* is that intentional tortfeasors should be prepared to defend themselves in any jurisdiction where they direct their alleged tortious activity." *Taylor-Rush*, 265 Cal. Rptr. at 680, citing *Calder,* 465 U.S. at 790. Thus, like the defendants in *Calder,* if Baer was a "primary participant[ ] in an alleged wrongdoing

intentionally directed at a [Utah] resident," then a *prima facie* showing of minimum contacts by Baer has been established. *Id.*

Indeed, Courts have repeatedly held that an employee, representative (including corporate counsel), officer, or director may be subject to personal jurisdiction where the individual is a "primary participant" in the alleged wrongdoing; i.e., where the individual had "control of, and direct participation in the alleged activities." *Wolf Designs, Inc. v. DHR Co.,* 322 F.Supp.2d 1065, 1072 (C.D.Cal.2004), citing *Transgo, Inc. v. Ajac Transmission Parts Corp.,* 768 F.2d 1001, 1021 (9th Cir.1985). Therefore where corporate counsel (or other representative or agent of the company), is alleged to have directly engaged in the alleged wrongful acts directed at the forum state, these acts are properly considered in determining that the purposeful availment prong has been satisfied.

For example, in *Seagate Tech. v. A. J. Kogyo Co.*, 219 Cal. App. 3d 696, 268 Cal. Rptr. 586 (Cal. Ct. App. 1990), the California Court of Appeals reversed an order quashing service of summons against a Japanese citizen, who was president of a Japanese corporation and a California corporation and had no contacts with California in his individual capacity. The president there had met with the plaintiff vendor in California, and had sent a letter guaranteeing any debts to the vendor which the California corporation might incur. The California corporation went bankrupt and plaintiff filed suit to recover its loss. *Id.* at 699-700. There, the court recognized that although a court cannot rely solely on the status of a defendant as a director or officer to find the existence of personal jurisdiction, a corporate officer may be held personally responsible for causing a corporation to act (i.e., the corporate officer authorized, directed, or meaningfully participated in tortious conduct), and that act may be imputed to the officer for purposes of establishing personal jurisdiction over him, notwithstanding the so-called "fiduciary

shield doctrine." *Id.* at 702-03. The court determined that a California court could properly assume jurisdiction over a non-resident corporate officer whose only contacts with the state were in a corporate capacity if (1) the officer's act was one for which the officer would be personally liable; and (2) the officer's act in fact created contacts between the officer and the forum state. *Id.* at 703-04. In so holding, the court explained that tortious acts by corporate officers that create contact with the forum state are not only acts of the corporation but also acts of the individual, and may be considered contacts of the individual for purposes of determining whether long-arm jurisdiction may be exercised over the individual. *Id.* at 701-04, 268 Cal.Rptr. 586. That is, the acts may be considered in determining if the contacts between the individual and the state are substantial enough as to permit the state to exercise personal jurisdiction over the individual, or whether the exercise of personal jurisdiction over the individual offends "traditional notions of fair play and substantial justice." *Id.* at 703-04, 268 Cal.Rptr. 586; *see also Neal v. Janssen,* 270 F.3d 328 (6th Cir.2001).

Here, Incentive has alleged that Baer knew that the information and representations that he made in his April 1, 2010 email, along with those contained in Jarowey's emails to Baer and Incentive's counsel dated March 24, 2010 and March 30, 2010, would be and were in fact relied on by Incentive in making its decision to enter into the Loan Transaction with Camelot and in determining not to require a personal guarantee from either Jarowey or Baer. He therefore knew that his statements regarding the financial stability of Camelot and value of its stock, along with the information he and Jarowey supplied to Incentive's counsel regarding the value, revenue and sales projections and monthly earnings of the Liberation Library, which were false, would adversely affect Incentive's business and that the brunt of that injury would be felt by Incentive in Utah—its principal place of business. Therefore, to the extent that Baer harmed Incentive's

business, and the damage occurred in Utah, Baer should have reasonably anticipated being "haled into court" here. *See World-Wide Volkswagen*, 444 U.S. at 297.

While Baer's Motion emphasizes his lack of physical presence in Utah, such emphasis is surely out of place in the year 2011. Even in 1985, a decade before e-mail communications became commonplace, the Supreme Court stated that "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." *Burger King*, 471 U.S. at 477. Courts have clarified that if parties are "routinely exchang[ing] marked-up documents via electronic communication," then such contacts "are sufficient to establish a *prima facie* case" of jurisdiction. *Stone v. Patchett*, 2009 U.S. Dist. LEXIS 35049 at *29 (S.D.N.Y. Apr. 23, 2009).

Under the second arm of the due process analysis required by International Shoe and its progeny, the Court should also find that it would not violate standards of fairness to bring Baer under the jurisdiction of a Utah court. The United States Supreme Court has stated that as a part of the fairness inquiry, courts should look at the public policy interests of the forum state:

> A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort.

Keeton, 464 U.S. at 776, 104 S.Ct. at 1479. Utah has a strong interest in providing a forum for its residents to redress injuries suffered here. Therefore, the Court should conclude that Baer's contacts with Utah satisfy the requirements of due process.

In short, by viewing the allegations in the Complaint in the light most favorable to Incentive, it is clear that Incentive can and has made a prima facie showing that specific personal jurisdiction exists over Baer in Utah.

II. ALTERNATIVELY, IN THE EVENT THE COURT FINDS THAT PLAINTIFF HAS FAILED TO MEET ITS BURDEN OF MAKING A *PRIMA FACIE* SHOWING THAT JURISDICTION EXISTS OVER BAER, PLAINTIFF SHOULD BE GRANTED LEAVE TO CONDUCT LIMITED DISCOVERY ON BAER'S JURISDICTIONAL CHALLENGE.

Alternatively, if the Court determines that Incentive has failed to meet its burden of making a prima facie showing that specific personal jurisdiction exists in Utah over Baer, then Incentive should be granted leave to conduct limited discovery on Baer's challenge to jurisdiction in Utah. A plaintiff whose prima facie case of personal jurisdiction is contested by contradictory evidence "may request a period of limited discovery for the purpose of obtaining further jurisdictional evidence." *In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538, 572 (M.D. Pa. 2009). Courts are to assist the plaintiff by allowing jurisdictional discovery unless the plaintiff's claim is "clearly frivolous." *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. N.J. 2003) In *Far W. Capital v. Towne*, 46 F.3d 1071 (10th Cir. Utah 1995), the Tenth Circuit expressly noted that it is appropriate for a plaintiff to request "limited discovery from the district court in connection with the defendants' motion to dismiss." *Id.* at 1077, citing *Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir. 1982) ("when a defendant challenges personal jurisdiction, courts generally permit depositions confined to the issues raised in the motion to dismiss.").

Discovery is appropriate when it could reveal information relevant to determining whether the court has personal jurisdiction. "When the defendant disputes the factual bases for

jurisdiction . . . the court may receive interrogatories, depositions, or 'any combination of the recognized methods of discovery' to help it resolve the jurisdictional issue." *Walk Haydel & Assocs., v. Coastal Power Produc. Co.*, 517 F.3d 235, 241 (5th Cir. 2008). Thus, so long as Plaintiff's claim is not "clearly frivolous," this Court should allow Incentive to conduct limited discovery on the issue of personal jurisdiction in the event it finds that it has failed to make a prima facie showing the personal jurisdiction exists in Utah over Baer.[3]

In order to demonstrate that jurisdictional discovery is appropriate, Plaintiff must identify particular facts that demonstrate the likelihood of contacts sufficient to corral defendants within the court's jurisdiction and must produce evidence suggesting that discovery will bear fruit. *See In re Chocolate*, 602 F. Supp. 2d at 572; *Brown v. AST Sports Sci., Inc.*, No. Civ.A. 02-1682, 2002 U.S. Dist. LEXIS 12294, 2002 WL 32345935, at *10 (E.D. Pa. June 28, 2002) (citations omitted). A court weighing a jurisdictional discovery request must "accept the plaintiff's allegations as true, and . . . construe disputed facts in favor of plaintiff." *Toys "R" Us*, 318 F.3d at 457. If a plaintiff presents factual allegations that suggest "with reasonable particularity" the possible existence of the requisite contacts between [the party] and the forum state, the plaintiff's right to conduct jurisdictional discovery should be sustained." *Id.* at 456 (internal citations omitted).

[3] The decision of whether to allow limited discovery on the issue of personal jurisdiction in left to the court's discretion. Nevertheless, as noted by the Fifth Circuit in *Wyatt*, (the case cited by the Tenth Circuit as support in *Far W. Capital*), "we will not hesitate to reverse a dismissal for lack of personal jurisdiction, on the ground that the plaintiff was improperly denied discovery." *Wyatt*, 686 F2d. at 283, citing *Skidmore v. Syntex Laboratories*, 529 F.2d 1244, 1248-49 (5th Cir. 1979).

Incentive makes the alternative request that this Court allow it to conduct limited discovery on the following two jurisdictional issues: (1) whether Baer knew that the representations he made regarding the financial stability of Camelot and the value of its stock were false and whether he knew that the information he received from Jarowey regarding the monthly revenues generated during 2009 from the Liberation Library which was provided to Incentive's counsel was inaccurate and misleading, and (2) whether Baer reviewed the information he provided to Incentive's counsel pertaining to the revenue and sales projections for the Liberation Library and/or had knowledge that such information was false and misleading at the time he provided it to Incentive.

CONCLUSION

For the reasons set forth above, the Court should deny Baer's Motion or alternatively grant Incentive leave to conduct limited Discovery.

DATED this 5th day of August, 2011.

PIA ANDERSON DORIUS REYNARD & MOSS

/s/ Joseph Pia
Joseph Pia

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2011, a true and correct copy of forgoing **MEMORANDUM IN OPPOSITION TO TED BAER'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION** was served by electronic mail on the following:

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