

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.

**COMBINED REPLY IN FURTHER
 SUPPORT OF MOTION TO PERMIT
 FILING OF OPPOSITION TO MOTION
 TO DISMISS TODAY**

AND

OPPOSITION TO MOTION TO STRIKE

Civil No. 2:11-cv-00288

Judge Clark Waddoups

(Oral Argument Requested)

Plaintiff Incentive Capital, LLC (“Plaintiff” or “Incentive”), by and through counsel of record, hereby submits this Reply in Further Support of its Motion to Permit Filing of Opposition to Motion to Dismiss Today (“Motion”).

ARGUMENT

Defendant Ted Baer is requesting that this Court rule on its Motion to Dismiss without considering Plaintiff's Opposition Memorandum. Mr. Baer's argument is procedural, not substantive. It is based on Plaintiff filing its Opposition one day after the Court ruled on Defendant's Motion to Reconsider granting an extension, and two days after the period previously requested by Plaintiff expired.

By way of background, an Answer or other responsive pleading was due to be filed by Mr. Baer on or before May 16, 2011 [Dckt. Entry No. 25]. Defendants Camelot Entertainment Group, Inc., Camelot Film Group, Inc., Camelot Distribution Group, Inc., Robert P. Atwell, Jamie R. Thompson, Steven Istock ("Camelot Defendants") and Peter Jarowey were required to file Answers or other responsive pleadings by May 23, 2011. [Dckt. Entry Nos. 12-18].

Mr. Baer filed a Motion to Dismiss on May 16, 2011 [Dckt. Entry No. 42]. The Camelot Defendants filed for several extensions to Answer that were granted, resulting in a liberal sixty-four (64) day extension [Dckt Entry. No. 63]. In light of these extensions, Plaintiff also sought an extension whereby it might respond to Mr. Baer's Motion to Dismiss five days after the Camelot Defendants filed their Answer. This request was granted [Dckt. Entry No. 65]. Defendant filed a Motion to Reconsider the order [Dckt Entry No. 71].

Before the Court had ruled on the Motion to Reconsider, the five day term requested by Plaintiff came due on August 3, 2011 (excluding the weekend). Baer Opp., at 2. The next day on August 4, 2011, the Court entered a minute entry stating that it had reconsidered its order and "conclude[d] that the grant was correct" [Dckt Entry No. 80]. Plaintiff's counsel happened to be out of state on a family vacation at the time the Order was issued and did not see it until the next

morning, at which point he immediately prepared the Motion. *See* Decl. of Pia, at ¶¶ 1-9, attached hereto as Exhibit A.¹ The Opposition brief to the Motion to Dismiss had already been prepared and was filed that same day, August 5, 2011. *Id.*

Mr. Baer's counsel argues that Plaintiff's Opposition should be disregarded because it was filed two days late. Defendant is hoping to gain a substantive windfall (*i.e.*, dismissal from this case) from a *de minimis* procedural mistake. The Federal Rules, governing case law, and the dictates of reason and justice dictate otherwise.

Plaintiff has met the "excusable neglect" standard under Federal Rule 6(b). Determining whether a party's neglect is excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *U.S. v. Torres*, 372 F.3d 1159, 1162 (10th Cir. 2004) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)). There are four factors to consider in determining excusable neglect, including the danger of prejudice to the nonmoving party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, and whether the movant acted in good faith. *See id.* All four of these factors weigh in favor of the Plaintiff.

There is no prejudice to Mr. Baer because the delay was minimal. *See e.g. Smith v. Rockett*, No. CIV-06-492-M, 2010 WL 274497, at *3 (W.D. Okla., Jan. 15, 2010) (excusable neglect present where one month delay in filing an answer); *Scott v. Power Plant Maint. Specialists, Inc.*, No. 09-CV-2591-KHV, 2010 WL 1881058, at *3 (D. Kan., May 10, 2010) (excusable neglect present where delay was less than two months). Furthermore, the length of

¹ Mr. Baer's counsel complains that Plaintiff's attorney's representation that he was out of town on a family vacation and did not see the Court's ruling until August 5, 2011 lacks credibility because a declaration was not filed in its support, notwithstanding the fact that Mr. Pia signed the Memorandum himself. Attached as Exhibit A is a declaration in support of these statements.

the delay—a mere 2 days—which is far less than the two months referred to in *Scott*, is unlikely to have a disruptive effect on the judicial proceedings.

The reason for the delay is two-fold: (1) the Court had not yet ruled on the Motion to Reconsider, and (2) inadvertence. While in retrospect, Plaintiff would have filed the Opposition sooner, it respectfully suggests that the mistake is “excusable.” Regarding the final factor, there is little question that Plaintiff acted in good faith. Upon realizing the mistake, Plaintiff immediately prepared a Motion and submitted the already-prepared Opposition the same day, despite being out of state and *en route* to the airport. Ex. A, Decl. of Pia, at ¶¶ 6-9. Based on all of the relevant circumstances surrounding the omission, and the fact that a delay of two days is a relatively short period in light of the other cited cases, Plaintiff requests the Court to permit the filing.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that its Motion be granted.

DATED this 26th day of August, 2011.

PIA ANDERSON DORIOUS REYNARD & MOSS

/Joseph Pia/ _____
Joseph Pia
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2011, a true and correct copy of forgoing
**COMBINED REPLY IN FURTHER SUPPORT OF MOTION TO PERMIT FILING OF
OPPOSITION TO MOTION TO DISMISS TODAY AND OPPOSITION TO MOTION
TO STRIKE** was served by electronic mail on the following:

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

Jonathan M. Levitan
jonathanlevitan@aol.com

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

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

By: /s/ Joseph Pia_____