

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA 18-0386

KALISPELL AIRCRAFT COMPANY, LLC,

Appellee/Cross-Appellant,

v.

BRUCE PATTERSON, LEROY LEPLEY, BILL GRIFFIN, DOES I-V,

Appellants/Cross-Appellees.

**APPELLEE'S RESPONSE BRIEF AND CROSS-APPELLANT'S
OPENING BRIEF**

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INTRODUCTION

The above named Cross-Appellant, Kalispell Aircraft Company, (“KAC”), herein appeals to the Supreme Court in the interests of justice, to uphold the District Court’s Order Granting Plaintiffs’ Motion for Judgment on the Pleadings and to overturn the District Court’s Order denying Plaintiff’s Combined Motions *in Limine*, specifically, denying the existence of a contract and granting sanctions against Plaintiff’s counsel, Henning, Keedy & Lee, (“HK&L”), and denying KAC’s Motion for Prejudgment Interest.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- 1. Whether the District Court Correctly Granted Judgment on the Pleadings in Favor of KAC, as Articulated in the District Court’s Order Granting KAC’s Motion for Judgment on the Pleadings?**
- 2. Whether the District Court Erred when it Concluded as a Matter of Law that a Contract was Not Formed to Extend the Discovery Deadline?**
- 3. Whether the District Court Erred when it Sanctioned KAC?**
- 4. Whether the District Court Erred when it Concluded as a Matter of Law that KAC was not Entitled to Pre-Judgment Interest?**

STATEMENT OF THE CASE

This action was commenced by KAC after Appellants/Defendants/Buyers, (“Buyers”), breached the contract for sale of the airplane. Dkt. 1. KAC filed its Motion for Judgment on the Pleadings asking the District Court to recognize the formation and subsequent breach of a contract between KAC and Buyers. Dkt.

20. The court granted KAC's motion holding the Buyers were liable for breaching of contract. Dkt. 24, pg. 3. Before the parties could prepare for a trial on damages, however, Buyers untimely filed a Notice of Appeal regarding this order on liability and eventually withdrew it. Dkt. 26, 26, 29. KAC then filed its Motion for Summary Judgment on the only remaining issue, damages. Dkt. 30. The court denied this motion, holding that there were material issues of disputed facts, including prejudgment interest. Dkt. 36, pg. 4.

Before trial, the Buyers stipulated to damages, protecting their claim to appeal the court's order concerning **liability only, not damages**. Dkt. 73, 74. However, in Appellants' Opening Brief, Appellants offered five and a half pages of facts concerning damages that cannot be described as anything other than irrelevant and inflammatory. If Buyers wanted to be heard on the issue of damages, they should have proceeded to trial. However, as damages have been completely stipulated to, Appellants' are well aware that issue is not appealable, and their decision to include facts concerning damages, was an inappropriate attempt to prejudice this Court against KAC.

It is in violation of Rule 12(1)(d) of the Rules of Appellate Procedure to include facts that are not relevant to the issues presented for review and indeed were presented with the purpose of prejudicing this Court against and harassing KAC, which is sanctionable conduct under Rule 19, Rules of Appellate procedure.

Thus, KAC requests that the irrelevant and inflammatory facts, starting on the last paragraph on page 4 through the first full paragraph on page 10, be stricken as sanctions for this egregious conduct.

Concerning KAC's cross-appeal, the court clearly erred concerning an informally extended discovery deadline and in its refusal to grant KAC prejudgment interest. First, when the discovery deadline approached, Buyers' counsel requested an informal extension of discovery to August 31, 2017, which KAC's counsel readily agreed to. Appellants later wrongfully rescinded the agreement/contract.

After the trial was vacated pursuant to the stipulation, Dkt. 73, 74, KAC submitted its Motion for Prejudgment Interest which the court wrongfully denied as well as wrongfully ordering attorney's fees as a sanction against HK&L for alleged discovery abuse and Rule 11 sanctions. Dkt. 80, 81.

STATEMENT OF FACTS

FACTS RELEVANT TO BUYERS BREACH OF CONTRACT REGARDING THE SALE OF THE AIRPLANE.

1. This action was commenced by KAC, a Montana limited liability company, which previously owned a Skymaster twin engine airplane with a home base of Glacier International Airport in Kalispell, Montana. The aircraft was the

principal asset of KAC, and was leased to a Kalispell resident, Lee Henning. Dkt. 5, ¶ 6.

2. In order to conclude its operations, KAC sought to sell the Skymaster and to do so, placed advertisements in various publications for prospective buyers to come to Kalispell to inspect the aircraft, test fly the aircraft, and make a bid for the aircraft, with delivery and change of title and possession to occur in Kalispell. *Id.*, ¶ 7.

3. Defendant Griffin, on behalf of all the Buyers, initiated contact with KAC and inquired about purchasing the aircraft. During the period of negotiation over the purchase, Buyers, through Griffin, engaged in multiple correspondence and telephone calls with Lee Henning, who was acting on behalf of KAC. *Id.*, ¶ 8.

4. On August 28, 2013, KAC signed a written “Agreement for Sale of Aircraft,” (“Agreement”) with Buyers to purchase a twin-engine Skymaster aircraft, (“airplane”) for \$90,000. **Appx. 1, Agreement for Sale of Aircraft.** The Agreement states in relevant part that:

Buyers shall have 30 days from the date of this Agreement to complete any reasonable inspection, whether pre-buy, flight inspection, etc. If Buyers note any discrepancies which KAC is unable to reasonably remedy, then Buyers shall have an absolute right to withdraw from this Agreement with no penalty or obligation.

Id.

5. Buyers admit that an inspection of the aircraft was scheduled, but never completed. Dkt. 5, ¶¶ 9-10, Dkt. 19, ¶¶ 9-10.

6. On 9/12/13, less than 30 days after the contract was signed, before any inspection was completed, Buyers emailed KAC's agent, Lee Henning, to explain that they were backing out of the deal because their finances required four insurable partners, and "we don't have that fourth person currently." **Appx. 2.** The email goes on to say: "If you feel we owe you some compensation for tieing (sic) your plane up for two weeks let us know and we will compensate you accordingly." *Id.*

7. Lee Henning, informed Buyers, "I told Bill I would draft a very simple contract for sale giving you an absolute out **if** you found any discrepancies". (Emphasis added); **Appx. 3.**

8. Buyers breached their contract with KAC and KAC filed suit to be reimbursed for its lost profits from Buyers' breach. Dkt. 5, Amended Complaint and Dkt. 24, pg. 3.

FACTS RELEVANT TO AGREED DISCOVERY EXTENSION AND RESCISSION

9. The court ordered all discovery to be closed and all exhibits and lists of witnesses to be exchanged no later than July 27, 2017. Scheduling Order. Dkt. 37, 1:24-25.

10. Soon after, the parties began to discuss settlement. **Appx. 5**. During these discussions, Plaintiff's counsel alerted Buyers from the beginning that at least one Defendant must be present with full authority to settle. *Id.* The Plaintiff was relying on the court's Standing Order, the current law of the 11th Judicial District Court, as follows:

Counsel who will actually try the case shall attend the settlement conference. All parties shall attend in person, with authority to settle.

It is the responsibility of counsel to timely advise all named parties of this conference and to ensure the personal attendance of the named individuals. Availability of any required individuals by telephone is not acceptable, and requests to excuse personal attendance will not be entertained without exceptional justification.

Appx. 4, Standing Order Re: Settlement Conferences, ("Standing Order"), ¶¶ 2-3.

It is a lawyer's responsibility to be competent and keep abreast of changes in the law and its practice. M.R.P.C. Preamble (5); 1.1.

11. On June 27, 2017, Buyers' counsel, Marybeth Sampsel, ("Ms. Sampsel"), made an **offer** to Plaintiff's counsel to informally extend the current discovery deadline:

I think it would be ideal to do things in that order, but I am worried about timeline. My July is packed and so I don't see how I can do both. Would you agree to informally extend the discovery deadline to (sic) end of August with the idea that we'd get (sic) settlement conference in by the end of July? (emphasis added) I'd even extend the timeline to respond to discovery requests and would hold off on deposing Lee until a couple of weeks after (sic) settlement conference

so that you aren't putting time/energy into them when we might be able to settle. Thoughts?

Appx. 5.1.

12. In response to Buyers' **offer** to extend discovery until the end of August 2017, Plaintiffs' counsel **accepted** Buyers' **offer** and responded,

Good to go on informally extending discovery until the end of August.

I spoke with Lee on a settlement and he agrees to settle for \$25,791 (difference between the contract price and the actual selling price + carrying costs). That offer is good until close of business on Monday, July 3rd. If we do continue to a settlement conference, total demand will be sought (difference between the contract price and the actual selling price + carrying costs + full interest amount). Only one of your clients must attend the settlement conference in person, however they must have authority to settle for the full demand amount. If not, then all of your clients must attend. If Michael Viscomi is agreed to as the Master, I can look into dates he is free. We can then look at dates in August for Lee's depo.

Let me know what you think.

Id., page 1. In this email Plaintiff's counsel stated he spoke to the client, made an informal settlement offer to Buyers, continued to plan for a settlement conference and planned for a deposition. *Id.*

13. Plaintiff **accepted** Buyers' **offer**; nowhere was there a counteroffer, as Buyers claim. The fact that one Defendant must be present with full authority to settle is not a condition, or as Buyers state a "contingency," to extending discovery, this is the policy of the Eleventh Judicial District Court regarding Settlement

Conferences. **Appx. 4, ¶ 2.** The entirety of Plaintiff's response has been produced and Plaintiff's counsel stated **no conditions in its acceptance to Buyers' offer** to extend discovery until the end of August 2017.

14. After, Plaintiff emailed Ms. Sampsel attempting to coordinate a mediator and dates, in good faith, **Appx. 5.2**, Ms. Sampsel made it clear that although she indicated her clients' willingness to participate in an early settlement conference – she did not and would not agree to the "constraints," i.e., Standing Order, Plaintiff demanded. **Appx. 5.3; Appx. 5.4, pg. 2.** Negotiations continued with no rescission of the extended discovery deadline.

15. Additionally, the parties discussed other discovery and on July 11, 2017, the parties each served each other with Discovery Requests, including Requests for Admissions. As discovery takes 30 days, this put the expected discovery responses from each party due well after the first discovery deadline of July 27, 2017. **Appx. 5.5.** (Plaintiff answered these requests in good faith before Ms. Sampsel rescinded the contract out of the blue). Buyers are informed and aware that discovery is ongoing, and the deadline remains at August 31, 2018. *Id.*

16. On July 31, 2017, Ms. Sampsel sent a letter to Plaintiff's counsel. In her letter, Ms. Sampsel alleged discovery, though both parties agreed to an August 31, 2017 extension, closed on July 26, 2017. **Appx. 5.6.** This is the first time

since Ms. Sampsel was served with Plaintiff's Discovery that she claims she is following the original Scheduling Order, and not the agreed upon extension.

17. Essentially, all parties agreed upon an extension in order to conduct a settlement conference, and though scheduling the Settlement Conference was ongoing, Buyers' rescinded their offer to extend discovery over a month after Plaintiff's accepted the offer and relied on Defendant's offer in good faith.

18. On August 7, 2017, Plaintiff's counsel responded to Buyers' disagreeing with their allegations that discovery closed in July 2017, and again explaining the requirements of the Standing Order. Further, if it's Ms. Sampsel's "contention that discovery has not been extended, then we cannot agree to allow you to depose Lee since the cutoff has now run." **Appx. 5.7.** This is not a rescission of the extension agreement, merely informing Ms. Sampsel the ramifications if she refuses to honor the agreement to extend discovery until August 30, 2017.

19. After no response, Plaintiff's counsel continued to try to schedule a Settlement Conference pursuant to the discovery extension agreement. **Appx. 5.8.** Ms. Sampsel indicated that there was no such requirement in the rules of civil procedure, district court rules, or local rules but ignored the Standing Order and thus still refused to adhere to the parties' agreement to extend discovery until August 31, 2017. **Appx. 5.9.**

20. On October 23, 2017, Buyers filed their Motion to Leave to Appear Telephonically at Settlement Conference, but finally realized their error and acknowledged the Standing Order and withdrew the motion. Buyers agreed their clients must attend the Settlement Conference in person. Thus, the “constraint” that Buyers relied on to claim that no contract was formed because a counteroffer was made, is non-existent. **Appx. 5.10, pg. 2; 5.11, pp. 1-3; 5.12.** Discovery was extended to August 31, 2017.

FACTS RELEVANT TO SANCTIONS/ATTORNEY-FEES

21. On February 12, 2018, Plaintiff filed its Combined Motions *in Limine*. In its Motion No. 2, Plaintiff moved for the Court to admit Plaintiff’s Requests for Admissions No. 1-4 in Plaintiff’s First Discovery Requests because Buyers failed to respond to any of Plaintiff’s discovery, though both parties agreed to extend discovery until August 31, 2017. **Dkt. 59, pp. 2-3.**

22. On February 27, 2018, Ms. Sampsel wrote an email to Plaintiffs’ counsels threatening them with Rule 11 Sanctions. In her email, Ms. Sampsel states:

In review of your Motion I was shocked to see obvious misrepresentation concerning the correspondence and circumstances surrounding discovery deadlines and settlement conference. In the nearly ten years I have practiced, I have never once filed a Motion for Rule 11 Sanctions [...] I have yet to experience such blatant misrepresentation of facts by opposing counsel. Absent your

immediate withdrawal of the Motion *in Limine*, I feel I have no choice but to file a Motion for Rule 11 Sanctions.

Appx. 5.13. Never once does Ms. Sampsel bring up the fact she made an offer to Plaintiff to extend discovery, Plaintiff accepted the offer without conditions, she had no knowledge of the court's Standing Order regarding Settlement Conferences, or that there were ongoing negotiations between the parties regarding settlement and attempts to schedule a Settlement Conference.

23. In fact, Ms. Sampsel states in this communication that Plaintiff's counsel alleged to the Court in its Motions *in Limine* that the email exhibit "was the only relevant communication." **Appx. 5.14.** That is inaccurate. Nowhere in Plaintiff's Motion *in Limine* No. 2 did Plaintiff represent that was "the only" email.

24. On the same day, Buyers' filed their Response and Objection to Plaintiff's Motion *in Limine*. **Dkt. 64.** In their Response, Buyers accuse Plaintiff, among other things, of intentionally misrepresenting the facts, concealing information, and misleading the Court. *Id.*, at pp. 1, 4-5. Additionally, Ms. Sampsel accused Plaintiff's counsel of lying to the Court and she personally threatened him with Rule 11 Sanctions.

25. Plaintiff's counsel again attempted to explain to Ms. Sampsel, to no avail, that there was no Rule 11 violation because there was an offer and acceptance to extend the discovery deadline. **Appx. 5.15.** Additionally, Plaintiff's Motions *in*

Limine did not state that the email was “the only relevant communication”, and explained the rationale behind including only the one email. *Id.* Defendant never responded.

26. When Plaintiff filed its Motions *in Limine*, Buyers alleged that no agreement had been reached to informally extend discovery and that Plaintiff intentionally misrepresented the facts surrounding the discussions that took place between counsel. The district court erroneously held that no contract had been formed to informally extend discovery and Plaintiff had misrepresented the facts. The court further erroneously ordered sanctions against Plaintiff, “Plaintiff is further precluded from using any of its First Discovery Requests to Buyers at trial and must pay Defense counsel’s reasonable expenses in opposing the motion, including attorney fees.” **Dkt. 71, pg. 5.**

FACTS RELEVANT TO THE COURT’S DENIAL OF PREJUDGMENT INTEREST

27. KAC filed a Motion for Summary Judgment on Damages, which included prejudgment interest, which was denied as untimely. **Dkt. 30, Dkt. 36.**

28. Before trial, the parties entered a stipulation on the amount of damages, pending appeal and the trial was vacated. Pursuant to the stipulation, the issue of prejudgment interest was presented to the court who then denied Plaintiff’s statutory right to prejudgment interest. **Dkt. 75, 80.**

STANDARD OF REVIEW

A district court's decision on a motion for judgment on the pleadings, interpretation and application of a statute, and the existence of a contract are conclusions of law, which this Court reviews de novo to determine if the court's decision was correct. *Firelight Meadows, LLC v. 3 Rivers Tel. Co-op., Inc.*, 2008 MT 202, ¶ 12, 344 Mont. 117, 186 P.3d 869; *Hulstine v. Lennox Industries, Inc.*, 2010 MT 180, ¶16, 357 Mont. 228, ¶16, 237 P.3d 1277, ¶16; *Chipman v. Nw. Healthcare Corp., Applied Health Servs.*, 2014 MT 15, ¶ 12, 373 Mont. 360, 317 P.3d 182. The initial determination of whether an ambiguity exists in a contract is a question of law for a court to determine. *King Resources, Inc. v. Oliver*, 2002 MT 301, ¶ 21, 313 Mont. 17, 59 P.3d 1172.

A district court's findings of facts are reviewed to determine whether they are clearly erroneous. *In re Baird*, 2009 MT 81, ¶ 7, 349 Mont. 501, 204 P.3d 703. Either a district court misapprehended the effect of the evidence, or if, after reviewing the record, the Court is left with a firm conviction that a mistake has been made. *In re Guardianship of Saylor*, 2005 MT 236, ¶ 10, 328 Mont. 415, 121 P.3d 532.

A district court's order affecting discovery is reviewed for an abuse of discretion. *Hegwood v. Montana Fourth Judicial Dist. Court*, 2003 MT 200, ¶

16, 317 Mont. 30, 75 P.3d 308. A district court's decision to grant or deny sanctions, that the pleading, motion or other paper violates Rule 11, is reviewed de novo. *Byrum v. Andren*, 2007 MT 107, ¶ 19, 337 Mont. 167, 159 P.3d 1062. The district court's findings of fact underlying that conclusion are reviewed to determine whether such findings are clearly erroneous. *Id.* If the court determines that Rule 11 was violated, then the district court's choice of sanction is reviewed for abuse of discretion. *Id.*

ARGUMENT

1. Whether the District Court Correctly Granted Judgment on the Pleadings in favor of KAC, as Articulated in the District Court's Order Granting KAC's Motion for Judgment on the Pleadings?

A motion for judgment on the pleadings is appropriate when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided by the district court. M.R.Civ. P. 12(c); *Firelight Meadows, L.L.C., v. 3 Rivers Tel. Coop., Inc.*, 2008 MT 202, ¶ 10, 344 Mont. 117, 186 P.3d 869; Dkt. 24, Order on Plaintiff's Motion for Judgment on the Pleadings, pg. 2. Here, the court properly concluded that all material facts were admitted or not controverted in the Amended Complaint and Answer, and that only questions of law, i.e., contract interpretation, existence of an ambiguity, remained undetermined. Dkt. 24, pg. 3

This Motion put before the court a question of contract interpretation; a question of law. *Corporate Air v. Edwards Jet Ctr. Mont. Inc.*, 2008 MT 283, ¶ 30, 345 Mont. 336, 190 P.3d 1111. If the terms of a contract are clear, the court “must determine that intent of the parties from the wording of the contract alone.” *Rich v. Ellington*, 2007 MT 346, ¶ 16, 340 Mont. 285, ¶ 16, 174 P.3d 491, ¶ 16.

A. The District Court Correctly Concluded that there is a Binding Contract Between the Parties and the Buyers Did Not Perform their Obligations Under the Contract.

Buyers admit that:

- 1) They signed a valid Agreement on August 28, 2013, Statement of Facts, (“SOF”), ¶ 4;
- 2) The Agreement states: "Buyers shall have 30 days from the date of this Agreement to complete any reasonable inspection, whether pre-buy, flight inspection, etc. **If** Buyers note any discrepancies which KAC is unable to reasonably remedy, **then** Buyers shall have an absolute right to withdraw from this Agreement." (emphasis added), SOF, ¶ 4;
- 3) Lee Henning sent an email that stated, "I told Bill I would draft a very simple contract for sale giving you an absolute out **if** you found any discrepancies." (Emphasis added), SOF, ¶ 7;
- 4) No inspection was completed, reasonable or otherwise, SOF, ¶6;
- 5) They “withdrew” from the Agreement prior to completing an inspection, because they could not secure affordable insurance, *Id.*;
- 6) They never purchased the aircraft, *Id.*

Dkt. 19, Answer ¶9; Dkt. 5, Complaint ¶10. There are no facts in controversy, there was a binding contract between the parties and the buyers did not fulfill their obligations under the contract. Dkt. 24, pg. 3.

B. The District Court Correctly Concluded that the Right to Withdraw was Conditional, on KAC's Failure to Timely Remedy Discrepancies Arising from Buyer's Inspection.

Buyers argue that the contract states, "If Buyers note any discrepancies which KAC is unable to reasonably remedy, then Buyers shall have an absolute right to withdraw from this Agreement with no penalty or obligation. The Provision says nothing about the discrepancy being contingent on an inspection taking place before it is recognized." Appeal Brief, pg. 21. However, Buyers have taken this sentence out of context and out of the contract as a whole which reads:

Buyers shall have 30 days from the date of this Agreement to complete any reasonable inspection, whether pre-buy, flight inspection, etc. **If** Buyers note any discrepancies which KAC is unable to reasonably remedy, **then** Buyers shall have an absolute right to withdraw from this Agreement KAC with no penalty or obligation.

The use of the word "if" in the text makes explicitly clear that the parties intended a right to withdraw to be conditional – namely, upon the condition that KAC fail to timely remedy discrepancies that arose from Buyer's inspection. Appx.

1. Taking the contract as a whole as is required in contract interpretation, the "if" "then" language expressly creates a condition. The right to withdraw is contingent

upon finding a discrepancy. If no discrepancies could have arisen, then there could have been no failure by KAC to remedy them, thus the conditional right to withdraw could not have been satisfied.

C. The Terms of the Contract are Clear and Unambiguous.

A contract is ambiguous only where it is “reasonably subject to two different interpretations.” *Id.* “An instrument does not contain an ambiguity simply because the parties have or suggest opposing interpretations thereof or disagree as to whether the language is reasonably open to just one interpretation; rather, the determination of whether an ambiguity exists in a contract is made on an objective basis.” *Mary J. Baker Revocable Trust v. Cenex Harvest States, Coops., Inc.*, 2007 MT 159, ¶ 20, 338 Mont. 41, 164 P.3d 851 (quoting Richard A. Lord, *Williston on Contracts* vol. 11 § 30:4, at 51–54 (4th ed., West 1999) (footnotes omitted)). “Ambiguity does not exist just because a claimant says so.” *Heggem v. Capitol Indem. Corp.*, 2007 MT 74, ¶ 30, 336 Mont. 429, ¶ 30, 154 P.3d 1189, ¶ 30.

“The circumstances under which an instrument was made, including the situation of the subject of the instrument and of the parties to it, may be shown and considered to aid the court in determining, as a preliminary matter, whether the instrument contains an ambiguity.” *Baker Revocable Trust*, ¶ 20. The whole of a

contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other. M.C.A., § 28-3-202.

First, for the first time on Appeal, Buyers allege that “etc.” is ambiguous. These arguments were never presented to the district court, and therefore should be disregarded. *See, e.g., Pilgeram v. Greenpoint*, 2013 MT 354, ¶ 20, 373 Mont. 1, 313 P.3d 839. This Court generally will not address an issue raised for the first time on appeal because “[a] district court cannot be placed in error for something which it never had the opportunity to decide.” *In re Marriage of Gerhart*, 2003 MT 292, ¶ 31, 318 Mont. 94, 78 P.3d 1219. Even if this Court were to consider such arguments, they lack merit.

Buyers allege that “etc.” is ambiguous and the court erred by not specifically considering this term of the contract. **Opening Brief of Appellants/Cross-Appellees, (“Opening Brief”), pg. 17-18.** However, Buyers are mistaken as the court acknowledged its responsibility under § 28-3-202, M.C.A., to consider the contract as a whole, “Taking the contract as a whole with each clause helping to interpret the other [...],” Dkt. 24, pg. 3. Not only did the court take into consideration the term etc., it also took into consideration every term and clause of the contract. *Id.* Buyers also did not cite any authority for this position that it is

the judge's responsibility to specially write down its analysis of each and every term it considered in a contract to come to its conclusion.

Second, Buyers allege that the term discrepancy is ambiguous, "Discrepancies [...] is defined as the quality or state of disagreeing or being at variance or an instance of disagreeing or being at variance (Merriam Webster Dictionary), [...] or a lack of similarity between two or more facts (no citation)."

Opening Brief, pg. 18-19. Buyers go on to allege that if you insert the definitions above into the contract it makes it clear that there is an ambiguity. "If Buyers note any *instances of disagreement* or *variance* which KAC is unable to remedy..." However, Buyers argument is fatally flawed for two reasons, first, the words inserted do not change the meaning, second, Buyers started with the second clause of the contract and thus tried to take this sentence out of context and give it more meaning rather than interpreting the contract as a whole, as the Buyers acknowledge they are supposed to do. **Opening Brief, pg. 14, 17.**

It remains totally unclear what the first fact would be for this second fact to be discrepant with. [Therefore] (t)he term discrepancy, as used in the contract, creates an ambiguity and renders Plaintiff's reliance on it inappropriate for judgement on the pleadings."

Id., pg. 17-18. Buyers admit they entered into a contract to buy the airplane they had never physically inspected. SOF, ¶ 5. The obvious purpose of an "inspection" of goods for which one is already contractually bound to buy is to give the buyer a

chance to determine whether the goods actually are in the condition that seller purports them to be. Thus, given "the circumstances under which [the] instrument was made" (see *Baker Revocable Trust*, ¶ 20), the two sets of facts obviously involved are the condition of the aircraft as represented by KAC (and relied on by Buyers in entering into a contract to purchase it) and the inspection results. Buyers fail to allege that use of the word 'discrepancies' can --given the context in which the agreement was made -- be **reasonably** interpreted to reference any other two sets of facts. Dkt. 19, Answer; Dkt. 21, Response to Plaintiff's Motion.

Indeed, the terms of the contract are very clear. The first sentence grants to Buyers a limited right to conduct a "reasonable inspection" of the aircraft, "whether pre-buy, flight inspection, etc." Dkt. 19, Answer ¶ 8; Dkt. 5, Complaint, Ex. A.¹ The next sentence grants a conditional right to withdraw, **if** discrepancies arise which KAC is "unable to reasonably remedy". (Emphasis added); Dkt. 19, Answer ¶ 8; Dkt. 5, Complaint, Ex. A. Given the clear terms of the contract, the parties intended to grant Buyers a limited right to "reasonably" inspect the aircraft that they had agreed to purchase. Also, given the clear terms of the contract, parties intended KAC to have the right to "reasonably remedy" any discrepancies that might arise as a result of that inspection. In conclusion, given the circumstance in which the

¹ Note: a "pre-buy" is a trade term that refers to a ground inspection of an aircraft.

contract was formed and the clear terms of the contract, use of the word 'discrepancies' does not create an ambiguity.

D. The District Court Correctly Determined that “Reasonable Inspection” Does Not Include Buyers’ Ability to Secure Insurance.

Buyers allege that the term “reasonable inspection” encompasses “**any** sort of inspection the buyers may wish to pursue”. (Emphasis added); Opening Brief, pg. 21-23. This characterization is unreasonable given the clear terms of the contract.

The contract reads as follows:

"Buyers shall have 30 days from the date of this Agreement to complete any **reasonable inspection**, whether pre-buy, flight inspection, etc. If Buyers note any discrepancies which KAC is unable to **reasonably remedy**, then Buyers shall have an absolute right to withdraw from this Agreement." (Emphasis added). *See*, Answer ¶ 8; Amended Complaint, Ex. A.

On its face, the right to inspect is modified by the term “reasonable.” *Id.* Thus, given the explicit terms of the contract, parties intended the right to inspect to be limited, at least to some extent.

Furthermore, ‘inspection’ is not an ambiguous term. According to Merriam-Webster, ‘inspection’ is “the act of looking at something closely in order to learn more about it, to find problems, etc.” The notion that “reasonable inspection” encompasses whether or not a given buyer can in fact obtain insurance, tests the bounds of credulity. One’s ability to obtain affordable insurance is a subjective

matter particular to the unique situation of the individual seeking the insurance –it is not the sort of thing a seller is in the position to make representations about that could result in a ‘discrepancy’; or the sort of thing a seller has an opportunity to “reasonably remedy”; or the sort of thing that is likely to be revealed by an ‘inspection’ of an airplane.

Furthermore, even if this Court is willing to entertain Buyers’ odd definition of ‘reasonable inspection’, Buyers’ statements strongly suggest that such a creative definition of the term was not, in fact, the intent of the parties. After signing the contract, Buyers told Henning, they could not afford insurance, were backing out of the deal, but wanted to compensate KAC for tying up the Airplane for two weeks. SOF, ¶ 6. The clear inference here is that Buyers thought their failure to obtain affordable insurance would not absolve them of contractual liability. Therefore, Buyers themselves believed that the ability to obtain insurance did not fall within the scope of the term “reasonable inspection” sufficiently to avail themselves of the right to withdraw clause.

E. The District Court Correctly Concluded that Considering Extrinsic Evidence was Inappropriate as no Ambiguities Existed.

Basic rules of contract interpretation provide that if the terms of a contract are clear, the court “must determine that intent of the parties from the wording of the contract alone.” *Rich v. Ellington*, ¶ 16.

Buyers allege that extrinsic evidence proves that the parties intended the right to withdraw to be absolute. *See* Response to Plaintiff's motion, (Section I, ¶ C). However, the terms used in the contract are clear on their face: Use of the word "if" makes the withdraw clause a conditional sentence and, therefore, explicitly clear that parties intended the right to withdraw to be conditional. *See* Answer ¶ 8; *See* Amended Complaint, Exhibit A.

Furthermore, Buyers allege that they entered into a contract on or about August 28. *See* Answer ¶ 8. If there was an absolute right to unilaterally withdraw under any circumstances whatsoever, no contract could have existed between the parties because "a contract is an agreement to do or not do a certain thing." Mont. Code Ann. 28-2-101. "Agreements to agree" are not contracts. *JEM Contracting, Inc. v. Morrison-Maierle Inc.*, ¶ 21, 391, Mont. 318 P.3d 678. Therefore, because Buyers allege that a contract was entered into between the parties, their position that the right to withdraw was absolute is untenable.

Nevertheless, Buyers seek to introduce extrinsic evidence that KAC's agent, Lee Henning, informed Buyers via email that they had "an absolute right to back out." Opening Brief, pg. 19-20. Buyers fail to note that the comment was preceded by the following: "I told Bill I would draft a very simple contract for sale giving you an absolute out **if** you found any discrepancies". (Emphasis added);

Appx. 3. Use of the word “if” in the email makes it explicitly clear that both parties understood that the right to withdraw was not absolute. Thus, the extrinsic evidence that Buyers wish to introduce, if evaluated in proper context, actually supports the notion that parties intended the right to withdraw to be conditional rather than absolute. The court properly concluded the terms of the contract were clear and unambiguous and thus consideration of Buyers offered extrinsic evidence was inappropriate. Dkt. 24, pg. 3.

2. Whether the District Court Erred when it Concluded as a Matter of Law and Found that a Contract was Not Formed to Extend the Discovery Deadline?

A. The District Court’s Findings of Fact Regarding the Formation of the Contract were Clearly Erroneous

A district court's findings of facts are reviewed to determine whether they are clearly erroneous. *In re Baird*, 2009 MT 81, ¶ 7, 349 Mont. 501, 204 P.3d 703. Either a district court misapprehended the effect of the evidence, or if, after reviewing the record, the Court is left with a firm conviction that a mistake has been made. *In re Guardianship of Saylor*, 2005 MT 236, ¶ 10, 328 Mont. 415, 121 P.3d 532.

The court erroneously found that:

a) The date Plaintiff submitted the requests for admission at issue did not allow Buyers 30 days to answer as allowed by Montana Rules of Civil Procedure 36(a)(3).

b) The June 27, 2017, email correspondence from defense counsel to Plaintiff's counsel shows that Buyers offered to informally extend the discovery deadline to the end of August "with the idea that we would get the settlement conference in by the end of July ... so that you aren't putting time/energy into them [discovery requests and deposition] when we might be able to settle.

c) Subsequent correspondence shows no agreement to a settlement conference by the end of July."

The court was clearly mistaken here. The reason no settlement conference was held by the end of July was because Ms. Sampsel refused to acknowledge the District Court's Standing Order requiring a party to be present with full authority to settle. The court erred because it did not conclude/analyze whether an informal contract had been formed to extend the discovery deadline, even though contract formation is a conclusion of law. Instead, the court erroneously made findings of fact instead of conclusions of law regarding the contract formation. A contract to extend discovery was formed and KAC's counsel was wrongfully sanctioned due to the court's mistaken findings on the issue.

B. The District Court Erred as a Matter of Law when it Concluded an Agreement/Contract to Informally Extend Discovery had not been Formed.

The district court erred when it did not conclude whether or not as a matter of law that a contract to informally extend discovery had not been formed between the parties.

A contract was formed between Plaintiff's counsel and Buyers' counsel to informally extend discovery by the parties' objective manifestations of assent. To prove the existence of a contract, there must have been identifiable parties capable of contracting; their consent; a lawful object; and a sufficient cause or consideration.

MCA §28-2-102. Further:

The consent of the parties must be "communicated by each to the other." MCA §28-2-301(3). Mutual consent consists of an offer and an acceptance of that offer. *Daniels v. Thomas, Dean & Hoskins, Inc.*, 246 Mont. 125, 133, 804 P.2d 359, 363 (1990). To be considered an offer, the offeror must manifest a willingness to enter into a bargain. *Daniels*, 246 Mont. at 133, 804 P.2d at 364. "We determine whether the parties have mutually consented to a contract by inquiring whether a reasonable person, based upon the objective manifestation of assent, and all the surrounding circumstances, would conclude that the parties intended to be bound by the contract." *Bitterroot Int'l Sys. v. W. Star Trucks, Inc.*, 2007 MT 48, ¶ 33, 336 Mont. 145, 153 P.3d 627. Consent is not determined by the parties' subjective, undisclosed intent, but by their objective manifestations of consent. *Olsen v. Johnston*, 2013 MT 25, ¶¶ 11, 16, 22, 368 Mont. 347, 301 P.3d 791;

Chipman v. Nw. Healthcare Corp., Applied Health Servs., 2014 MT 15, ¶ 15, 373 Mont. 360, 364–65, 317 P.3d 182, 185. Here, on June 27, 2017, Ms. Sampsel, made an offer to Plaintiffs’ counsel stating,

I think it would be ideal to do things in that order, but I am worried about timeline. My July is packed and I don’t see how I can do both. Would you agree to informally extend the discovery deadline to (sic) end of August with the idea that we’d get (sic) settlement conference in by the end of July?

SOF, ¶¶ 11-12. In response to Buyers’ offer to extend discovery until the end of August 2017, Plaintiffs’ counsel accepted Buyers’ offer. (“Good to go on informally extending discovery until the end of August.”). *Id.* Plaintiff stated no conditions in its acceptance of Buyers’ offer to extend discovery until the end of August 2017.

SOF, ¶ 13. In the same email, Plaintiff’s counsel also discussed settlement issues and scheduling Lee’s deposition. SOF, ¶¶ 12-13. Nowhere is there a counteroffer, as Buyers claim. Plaintiff did state “[o]nly one of your clients must attend the settlement conference in person, however they must have authority to settle for the full demand amount.” This is not a condition, or a “contingency”, to extending discovery, this is the policy of the Eleventh Judicial District Court; a fact that was conceded by Buyers. Appx. 4; SOF, ¶ 10.

Clearly, there were identifiable parties capable of contracting (Plaintiff’s and Buyers’ counsel), a lawful object (the informal extension of discovery until the end

of August), consideration (each party received the benefit of an extended discovery deadline), and consent (offer and acceptance). *Daniels*, 246 Mont. at 133, 804 P.2d at 363. Further, Ms. Sampsel, as the offeror, clearly manifested a willingness to enter the bargain, i.e., “Would you agree to informally extend the discovery deadline to (sic) end of August with the idea that we’d get (sic) settlement conference in by the end of July?” Plaintiff’s counsel then manifested his assent, i.e., “Good to go on informally extending discovery until the end of August.” A reasonable person, based upon the objective manifestation of assent, and all the surrounding circumstances, would conclude that the parties intended to be bound by the contract.” *Bitterroot Int’l Sys. v. W. Star Trucks, Inc.*, 2007 MT 48, ¶ 33, 336 Mont. 145, 153 P.3d 627. That is the standard, the objective reasonable person standard. What Ms. Sampsel may or may not have been subjectively thinking is irrelevant.

Ms. Sampsel asserted that she emailed Plaintiff’s counsel to state “Buyers’ willingness to extend the discovery deadline provided the parties accomplish settlement conference by the end of July.” Dkt. 64, Response and Objection to Plaintiff’s Motions *in Limine*, pg. 2. That was a misrepresentation of the plain language of the June 27 emails. Ms. Sampsel requested a discovery extension. If she was granted the discovery extension, she intended to schedule an early settlement conference and take Lee’s deposition. She had to get the discovery

extension first, as a threshold issue before she could start scheduling the settlement conference and deposition. Plaintiff's counsel granted her this extension. She further asserted that "Plaintiff's counsel responded to extend the discovery deadline," without acknowledging the necessity that we attend early settlement conference and instead included a variety of contingencies necessary for your client to participate." *Id.* However, Plaintiff's counsel clearly "acknowledged the necessity that we attend an early settlement conference" which is why he immediately, after accepting Ms. Sampsel's offer, started trying to schedule the settlement conference and Lee's deposition in good faith. SOF, ¶ 14. The fact that a settlement conference was still in the process of being scheduled at the end of July, does not give Buyers the right to rescind the contract. In fact, the only reason a settlement conference had not been accomplished was due to Sampsel's lack of knowledge concerning the Standing Order regarding settlement conferences. *Appx. 4; SOF, ¶20.*

The "variety of contingencies" that Ms. Sampsel claimed Plaintiff's counsel added to his acceptance of her offer "[o]nly one of your clients must attend the settlement conference in person, however they must have authority to settle for the full demand amount. If not, then all your clients must attend." That is not a contingency it is the Standing Order of the Eleventh Judicial District Court.

Further, Plaintiff's counsel told Ms. Sampsel, before she ever requested an extension on discovery, that at least one client with the full authority to settle had to be at the settlement conference in person. SOF, ¶10. Ms. Sampsel is hanging everything on the idea that she won't agree to the "constraints that Lee has demanded," (i.e., Standing Order regarding settlement conferences).

However, Ms. Sampsel conceded that is indeed what the Standing Order says and she withdrew her Motion to Appear Telephonically, acknowledging that Plaintiff's counsel had not added a condition to his acceptance, instead he had only stated a known necessity to a settlement conference. SOF, ¶ 20. Ms. Sampsel's letter where she denies any extension of discovery comes before she concedes that the standing order regarding settlement conferences does require a client with full authority to settle to be present at a settlement conference. SOF, ¶ 16.

Ms. Sampsel's further conduct made it clear she knew an agreement had been reached to extend the discovery deadline. Until Ms. Sampsel sent this letter, she acted as if discovery had been extended. Plaintiffs' attorney stated, "I'm drafting our discovery right now, so you should have it by tomorrow." SOF, ¶ 15. This statement informed Buyers discovery was ongoing and the deadline remained at August 31, 2018. On July 11, 2017 at 9:41a.m., a staff member from Plaintiff's counsel's firm sent Buyers a PDF copy of Plaintiff's First Discovery Requests

including Requests for Admission and sent a hard copy via mail. *Id.* On July 11, 2017 at 9:58a.m., Ms. Sampsel responded to KAC's email sending her KAC's Discovery by stating, "Thanks for sending those. Here are mine in Word format." *See* Exhibit 14. Three subsequent emails occur on the same day exchanging discovery in various formats. *See* Exhibits 15-16. Never does Ms. Sampsel object or question the timing of discovery being served.

All of Ms. Sampsel's conduct indicates she was acting as if discovery had been extended because it had been extended. Any reasonable person looking objectively at all of the facts and circumstances would find all contractual elements were present, there was mutual consent, i.e., a meeting of the minds and the parties intended to enter a contract and did, in fact, enter a contract.

3. Whether the District Court Erred when it Ordered Sanctions Against KAC?

The district court's conclusion that KAC's representations in its Motions *in Limine* were either negligently or intentionally misleading in violation of Rule 11, is clearly erroneous. **None of KAC's Counsel's Actions are Sanctionable.** Ms. Sampsel levels several baseless accusations against KAC's counsel, none of which are true. KAC is accused of lying by concealing substantial correspondence and, "intentionally misrepresenting the circumstances surrounding discovery, including Plaintiff's failure to timely serve discovery requests and the correspondence that

followed ... Plaintiff misleads the Court by sharing only a sliver of information.” As discussed above, an agreement to informally extend discovery had been reached and KAC timely served discovery requests under the new deadline. Further, KAC carefully reviewed all email correspondence and concluded that the June 27, 2017, email was the most relevant to support his discovery extension position. However, inclusion of all correspondence only makes it clearer that the agreement regarding the discovery extension was never “contradicted” as Buyers’ claim. The inclusion of all correspondence actually strengthens KAC’s argument.

Next, Ms. Sampsel made a huge leap when she represented that, “ [...] Plaintiff’s counsel [blatantly] lied when he represented an agreement had been reached.” Dkt. 64. Ms. Sampsel appears to have confused a proponent presenting a contrary opinion/argument/legal analysis with lying. KAC’s counsel reviewed all of the facts, evidence, and applicable law and has arrived at the conclusion that an agreement was reached, a contract was formed concerning the extension of discovery and he has shared his analysis with the Court. Ms. Sampsel clearly has a different opinion of what happened and what evidence and correspondence is relevant to her analysis. Does that make her a liar for presenting the conclusion that an agreement was not reached? Of course not. This is a classic case of two attorney’s in the adversarial system presenting and defending two different points of

view, not lies. This is not the first time two attorneys have read and reviewed the same facts, evidence, and legal statutes and ended up having different points of view, and it will not be the last. An attorney should not be sanctioned or threatened with sanctions every time he or she presents a point of view that is unpopular with opposing counsel.

Ms. Sampsel clearly had a full schedule and asked KAC's counsel for an extension of the discovery deadline which he granted her in good faith. He extended this courtesy and every action he took to arrange a settlement conference and schedule Lee's deposition were also taken in good faith. There is no shame in asking for more time, almost every attorney has either asked for more time, given an extension when requested or both. However, turning around and throwing that courtesy in Mr. McCormack's face is untoward and is bad policy as it actively discourages everyone from extending this courtesy in the future, as will be the case here. As all of the above facts and exhibits make clear, Plaintiff did not intentionally lie, misrepresent or conceal relevant circumstances, facts or information. The court relied on erroneous findings of fact and abused its discretion when it sanctioned Plaintiff's counsel.

4. Whether the District Court Erred when it Concluded as a Matter of Law that KAC was not Entitled to Pre-Judgment Interest?

A. The District Court Erred when it Concluded that Plaintiff is not Entitled to Prejudgment Interest as a Matter of Law.

KAC filed for summary judgment on damages, including prejudgment interest, and the entire motion was denied because, “The record shows that disputed issues of material fact exist.” Dkt. 36, pg. 4. Essentially the motion was premature as there were outstanding issues that made the amount of damage uncertain or disputed. All damages issues continued toward trial, including KAC’s right to prejudgment interest. The parties then signed a Stipulation as to the amount of damages; making the damages certain and undisputed. Dkt. 73, 74, SOF, ¶28. The Stipulation also specifically included KAC’s right to prejudgment interest over and above the stipulated damage amount. Dkt. 73, 74. Thus, KAC moved for its statutory right to prejudgment interest which the court wrongfully denied for three reasons. Dkt. 75, 80.

First, the court incorrectly reasons that because prejudgment interest was brought up in KAC’s motion for summary judgment, it cannot be relitigated. Dkt. 80, pg. 2. However, a denial on summary judgment on damages that then proceed to trial does not become the law of the case as the court reasoned. The facts have changed since the summary judgment argument that change the outcome of the

prejudgment interest determination. Second, the court reasons that filing a stipulation cannot alter the law of the case, Dkt. 80, pg. 2, however, as stated above, the summary judgment denial was not a final binding decision; if damages are disputed and move forward to trial, naturally prejudgment interest cannot be determined either.

Third, and most illogically, the court erroneously concludes that, “None of these [prejudgment interest] criteria can be satisfied until the court approves the amount of attorneys’ fees and costs.” Dkt. 80, pg. 2. The court essentially denied KAC’s statutory right to prejudgment interest because it had not determined the amount of attorney’s fees and costs. However, when the court denied this motion, it had in its possession Buyers Amended Affidavit of Attorneys’ Fees, that was unopposed, that was filed on April 4, 2018, a month and a half before the court denied this motion on May 16, 2018. Dkt. 77, Dkt. 80. This was an inappropriate and erroneous result. Thus, the court’s Order on Plaintiff’s Motion for Prejudgment Interest should be reversed.

B. KAC is Entitled to Prejudgment Interest as a Matter of Law.

Each person who is entitled to recover damages certain or capable of being made certain by calculation and the right to recover that is vested in the person upon a particular day is entitled to recover interest on the damages from that day except

the time that the debtor is prevented by law or by the act of the creditor from paying the debt. Mont. Code Ann. § 27-1-211 (2018). “[T]he statute has three requirements: (1) an underlying monetary obligation, (2) an amount of recovery that is certain or capable of being made certain by calculation, and (3) a right to recover that vests on a particular day.” *Amour v. Collection Prof’ls, Inc.*, 2015 MT 150, ¶ 24, 379 Mont. 344, 350 P. 3d 71. If these elements are met an award of interest is not discretionary; instead a trial court is required to award prejudgment interest. *New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls, Inc.*, 2014 MT 69, ¶ 70, 374 Mont. 229, 328 P. 3d 586. Section 27-1-211, MCA requires a court to award an injured party prejudgment interest “from the particular day that the right to a sum certain in damages vests.” *Dew v. Dower*, 258 Mont. 114, 126, 852 P. 2d 549, 556 (1993).

C. Prejudgment Interest Should Be Calculated from December 6, 2013 to the Present.

Section 27-1-211, MCA requires a court to award an injured party prejudgment interest “from the particular day that the right to a sum certain in damages vests.” *Dew v. Dower*, 258 Mont. 114, 126, 852 P. 2d 549, 556 (1993). “[N]o interest can run until a fixed amount of damages has been arrived at, either by agreement, appraisal, or judgment.” *Lincoln County Port Authority v. Amanz Global Risks U.S. Ins. Co.*, 2013 MT 365 ¶ 64, 373 Mont. 60, 315 P.3d 934. “A numerical

amount for damages actually must be calculated, or be capable of calculation, before interest can begin to accrue. *Id.* at 68.

In *Lincoln County Port Authority*, the Port Authority filed an insurance claim after one of its buildings was destroyed in a fire. After the insurance companies denied the claim, the trial court ruled in favor of the Port Authority and granted prejudgment interest beginning on the date of the fire. On appeal, the Montana Supreme Court held prejudgment interest does not begin to accrue until damages were capable of being made certain by calculation, which was not calculable on the date of fire, but from the date an appraisal was made. *Id.* at 68-69.

In this case, after Defendant's breached the contract, KAC was able to sell the plane on December 6, 2013 for \$65,000, \$25,000 less than the contract with Defendant's. It was also know at that time there was \$791 in hanger storage fees. As such, December 6, 2013 is the date that total damages were capable of being calculated. Therefore, prejudgment interest should begin to accrue on December 6, 2013.

D. Prejudgment Interest Rate Should Be Calculated at the Statutory Rate and Continue to Accrue until the Court Issues its Judgment and Order.

Interest is payable on judgments recovered in the courts of this state at a rate equal to the rate for bank prime loans published by the Federal Reserve System in its

statistical release H.15 Selected Interest Rates on the day judgment is entered, plus 3%. Mont. Code Ann. § 25-9-205 (2018). Once this Court issues its Judgment and Order, the exact interest rate can be determined, pursuant to §25-9-205, M.C.A., and that rate should start to accrue on December 6, 2013 and continue until the date the Judgment and Order is signed.

Prejudgment interest is required to be awarded in this matter because an underlying monetary obligation of \$25,791 was capable of being calculated on December 6, 2013, the date KAC was able to sell the aircraft to a subsequent buyer. Additionally, prejudgment interest should be calculated at the statutory rate and should begin to accrue from December 6, 2013 and continue until this Court issues its Judgment and Order.

Buyers underlying monetary obligation was \$90,000 for the purchase of the aircraft. *See* Exhibit 1. After due diligence, KAC was able to sell the aircraft for \$65,000 on December 6, 2013. *See* Exhibit 2. Holding costs (i.e. hanger rental) were \$791. *See* Exhibit 3. As a result, on December 6, 2013, when the aircraft was ultimately sold, the amount of recovery was \$25,791.00. Of note, the parties stipulated to this amount in the Stipulation to Vacate Trial and Regarding Damages, filed on March 21, 2018, and the court issued its Order Approving and Adopting Stipulation on March 22, 2018. Therefore, an award of prejudgment interest is

required because there is an underlying monetary obligation by the Defendant's for \$25,791, that amount is certain and KAC's right to recover vested on December 6, 2013 when it sold the plane to a subsequent buyer. The district court erred when it concluded as a matter of law that KAC was not entitled to prejudgment interest.

CONCLUSION

The court correctly concluded that a contract was entered into voluntarily by the parties that had clear and unambiguous terms regarding a conditional, not absolute, right to withdraw from the contract; the Buyers failure to secure affordable insurance did not satisfy the Buyers responsibility to conduct a reasonable investigation of the aircraft; and as the Buyers did not fulfill their obligations under the contract, they breached the contract. The court's order granting Plaintiff's Motion for Judgment on the Pleadings should be upheld.

The court incorrectly determined and concluded that a contract to informally extend discovery was not formed between KAC's counsel and Buyer's counsel and wrongfully sanctioned KAC's counsel as a result. KAC's counsel reviewed all the relevant communications and presented what he believed to be relevant, the email forming a contract. Thus, the court's Order denying Plaintiff's Combined Motions *in Limine*, specifically, denying the existence of a contract and granting sanctions against Plaintiff's counsel, should be overturned. Further, the court

erroneously denied Plaintiff's right to prejudgment interest, based on misinformation and inapplicable case law and authority. The court's Order Denying Plaintiff's Motion for Prejudgment interest should be overturned, so KAC's prejudgment interest can finally be appropriately determined.

RESPECTFULLY SUBMITTED this 7th day of January, 2019.

/s/ Ashley McCormack

By: _____

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately-spaced Times New Roman text typeface of 14 points; is double-spaced; and is not more than 10,000 words, excluding the Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance and Appendix.

Dated this 7th day of January, 2019.

/s/ Ashley C. McCormack

By: _____

Ashley C. McCormack, Attorneys for
Plaintiff/Appellee/Cross-Appellant

CERTIFICATE OF SERVICE

I, Ashley C. McCormack, attorney for the Plaintiff/Appellee/Cross-Appellant, hereby certify that on the 7th day of January, 2019, I have served, by e-Service, true and accurate copies of the foregoing on the following:

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/s/ Ashley C. McCormack

By: _____
Ashley C. McCormack, Attorneys for
Plaintiff/Appellee/Cross-Appellant

APPENDIX

- 1 8/28/2013 Agreement for Sale of Aircraft
- 2 9/12/2013 Email from Buyers to Lee Henning backing out of purchase
- 3 8/22/2013 Email from Lee Henning to Appellants
- 4 1/19/2016 Standing Order re: Settlement Conferences
- 5 6/27/2017 Email exchange between Plaintiff's counsel and Sampsel re: settlement conference scheduling
- 5.1 6/27/2017 Email exchange between Plaintiff's counsel and Sampsel re: discovery extension
- 5.2 7/6/2017 Email exchange between HK&L staff and Sampsel re: settlement conference scheduling
- 5.3 7/6/2017 Email exchange between Plaintiff's counsel and Sampsel re: attendance at settlement conference
- 5.4 7/6/2017 Email exchange between Plaintiff's counsel and Sampsel re: attendance at settlement conference
- 5.5 7/11/2017 Email exchanges between HK&L and Sampsel re: discovery requests
- 5.6 7/31/2017 Letter from Sampsel to Plaintiff's counsel re: discovery recision
- 5.7 8/7/2017 Letter from Plaintiff's counsel to Sampsel re: discovery extension and personal attendance at settlement conference
- 5.8 9/12/2017 Letters and emails from Plaintiff's counsel to Sampsel re: scheduling a settlement conference
- 5.9 9/18/2017 Letter from Sampsel to Plaintiff's counsel re: attendance at settlement conference
- 5.10 10/5/2017 Emails between Plaintiff's counsel and Sampsel re: attendance at settlement conference
- 5.11 10/5/2017 Emails between Plaintiff's counsel and Sampsel re: attendance at settlement conference
- 5.12 11/1/2017 Emails between Plaintiff's counsel and Sampsel re: attendance at settlement conference

- 5.13 2/27/2018 Email from Sampsel to Plaintiff's counsel re: Rule 11 sanctions
- 5.14 3/1/2018 Email from Sampsel to Plaintiff's counsel re: email exhibit
- 5.15 3/5/2018 Letter from Plaintiff's counsel to Sampsel denying Rule 11 violation

CERTIFICATE OF SERVICE

I, Ashley C. McCormack, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee and Cross-Appellant to the following on 01-07-2019:

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