

2015

**David K Gillett, an Individual, and Majestic Airlines Incorporated, a Utah Corporation, Plaintiffs/Appellants vs. Boyd J Brown, an Individual, Sentry Financial Corporation, a Utah Corporation, and Sfc Aircraft Corp I, a Utah Corporation, Defendants/Appell**

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

---

**Recommended Citation**

Brief of Appellee, *Gillett v Brown*, No. 20140682 (Utah Court of Appeals, 2015).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/3452](https://digitalcommons.law.byu.edu/byu_ca3/3452)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007– ) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.



Case No. 20140682-CA

---

IN THE  
UTAH COURT OF APPEALS

---

DAVID K GILLETT, an individual, and MAJESTIC AIRLINES,  
INCORPORATED, a Utah Corporation,  
*Plaintiffs and Appellants,*

v.

BOYD J BROWN, an individual, SENTRY FINANCIAL CORPORATION, a Utah  
Corporation, and SFC AIRCRAFT CORP I, a Utah Corporation,  
*Defendants and Appellees.*

---

BRIEF OF APPELLEES

---

*On Appeal from a grant of Summary Judgment in favor of Defendants/Appellees,  
entered in the Third Judicial District Court, in and for Salt Lake County,  
the Honorable L. A. Dever presiding, District Court No. 080921211.  
Appellant is not incarcerated.*

---

Stephen G. Homer (1536)  
Attorney at Law  
2877 W. 9150 S.  
West Jordan, Utah 84088  
[shomerlaw@netzero.com](mailto:shomerlaw@netzero.com)  
*Attorney for Plaintiffs/Appellants*  
*David K. Gillett and Majestic Airlines,*  
*Inc.*

Christopher M. Ault (11000)  
Zachary W. Powell (14756)  
The Ault Firm, P.C.  
8817 S. Redwood Road, Suite A  
Salt Lake City, Utah 84088  
[chris@aultlegal.com](mailto:chris@aultlegal.com)  
[zachary@aultlegal.com](mailto:zachary@aultlegal.com)  
*Attorneys for Defendants/Appellees*  
*Boyd J Brown and Sentry Financial*  
*Corporation*

FILED  
UTAH APPELLATE COURTS

APR 08 2015



IN THE  
UTAH COURT OF APPEALS

---

DAVID K GILLETT, an individual, and MAJESTIC AIRLINES,  
INCORPORATED, a Utah Corporation,  
*Plaintiffs and Appellants,*

v.

BOYD J BROWN, an individual, SENTRY FINANCIAL CORPORATION, a Utah  
Corporation, and SFC AIRCRAFT CORP I, a Utah Corporation,  
*Defendants and Appellees.*

---

**BRIEF OF APPELLEES**

---

*On Appeal from a grant of Summary Judgment in favor of Defendants/Appellees,  
entered in the Third Judicial District Court, in and for Salt Lake County,  
the Honorable L. A. Dever presiding, District Court No. 080921211.  
Appellant is not incarcerated.*

---

Stephen G. Homer (1536)  
Attorney at Law  
2877 W. 9150 S.  
West Jordan, Utah 84088  
[shomerlaw@netzero.com](mailto:shomerlaw@netzero.com)  
*Attorney for Plaintiffs/Appellants*  
*David K. Gillett and Majestic Airlines,*  
*Inc.*

Christopher M. Ault (11000)  
Zachary W. Powell (14756)  
The Ault Firm, P.C.  
8817 S. Redwood Road, Suite A  
Salt Lake City, Utah 84088  
[chris@aultlegal.com](mailto:chris@aultlegal.com)  
[zachary@aultlegal.com](mailto:zachary@aultlegal.com)  
*Attorneys for Defendants/Appellees*  
*Boyd J Brown and Sentry Financial*  
*Corporation*

---

TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	IV
STATEMENT OF JURISDICTION .....	1
STATEMENT OF THE ISSUES .....	1
STANDARD OF REVIEW .....	1
PRESERVATION .....	2
DETERMINATIVE PROVISIONS .....	2
STATEMENT OF THE CASE .....	3
STATEMENT OF FACTS .....	4
SUMMARY OF THE ARGUMENT .....	11
ARGUMENT .....	12
I. THE TRIAL COURT CORRECTLY GRANTED BROWN'S COUNTER MOTION FOR SUMMARY JUDGMENT .....	12
A. Gillett Has Presented No Disputed Material Facts That Preclude Summary Judgment .....	13
B. Appellees Are Entitled To Summary Judgment As A Matter Of Law ....	16
II. THE TRIAL COURT CORRECTLY DETERMINED AND APPLIED THE APPROPRIATE STATUTE OF LIMITATIONS .....	17
A. Appellant's Issues II, III, And IV Were Raised For The First Time In The Appellant's Brief And As Such Were Not Preserved And Are Not Properly Presented To This Court .....	17
B. The Trial Court Correctly Applied The 3-Year Statute of Limitation For Fraud .....	18
C. Even If Non-Preserved Arguments Are Addressed, They Further Show That The Trial Court Correctly Determined And Applied The Proper Statute Of Limitations In Granting Summary Judgment For Brown .....	20
1. The Trial Court Correctly Applied the 3-year Statute of Limitations for Fraud .....	20
2. The Trial Court Correctly Interpreted And Analyzed Utah Code § 78B- 2-104, Absence From The State, On The Statute Of Limitations In This	

Case.....	24
3. The Trial Court Correctly Ruled That Majestic Airlines Period For Winding-Up Had Expired.....	25
4. The Trial Court Correctly Analyzed And Applied The First Breach Doctrine To This Case .....	27
III. APPELLANT’S APPEAL IS DEFICIENT AND/OR MERITLESS AND/OR FRIVOLOUS .....	28
A. Appellant’s Brief Failed To Meet Utah R. App. P. 24(k)’s Requirements And Placed A Tremendous Burden Of Factual And Legal Research on Opposing Counsel.....	28
CONCLUSION.....	32
CERTIFICATE OF COMPLIANCE WITH RULE 24(F)(1) .....	33
CERTIFICATE OF SERVICE.....	34

## TABLE OF AUTHORITIES

### STATUTES

Utah Code § 16-10a-1405 .....	25, 26
Utah Code § 16-10a-1407 .....	26
Utah Code § 58-37a-5 .....	1, i
Utah Code § 78-12-35 .....	24, 25
Utah Code Ann. § 78B-2-111 .....	11

### RULES

Utah Rules of Appellate Procedure 33 .....	30, 31
Utah Rules of Appellate Procedure Rule 34 .....	31
Utah Rules of Civil Procedure 56(c) .....	1, 16
Utah Rules of Civil Procedure 60(b) .....	passim
Utah Rules of Civil Procedure Rule 56 .....	v, 2, 13

### STATE CASES

<i>Arnold v. Grigsby</i> , 2009 UT 88, 225 P.3d 781 .....	2
<i>Brown v. Wanlass</i> , 2001 UT App 30, 18 P.3d 1137 .....	16
<i>CCD, LC v. Millsap</i> , 2005 UT 42, 116 P.3d 366 .....	15, 27
<i>Chen v. Stewart</i> , 2004 UT 82, 100 P.3d 1177 .....	14
<i>Colony Ins. Co. v. Human Ensemble, LLC</i> , 2013 UT App 68, 299 P.3d 465 .....	31
<i>Cross v. Olsen</i> , 2013 UT App 135, 303 P.3d 1030 .....	15, 27, 28
<i>Franklin Covey Client Sales v. Melvin</i> , 2000 UT App 110, 2 P.3d 451 .....	18
<i>Gildea v. Guardian Title Co.</i> , 970 P.2d 1272 (Utah 1998) .....	31
<i>Harline v. Barker</i> , 912 P.2d 433 (Utah 1996) .....	28
<i>Higgins v. Salt Lake Cnty.</i> , 855 P.2d 231 (Utah 1993) .....	1
<i>Holman v. Callister, Duncan &amp; Nebeker</i> , 905 P.2d 895 (Utah Ct. App. 1995) .....	19
<i>In re Estate of Pahl</i> , 2007 UT App 389, 174 P.3d 642 .....	29, 30
<i>McArthur v. State Farm Mut. Auto. Ins. Co.</i> , 2012 UT 22, 274 P.3d 981 .....	27
<i>Orlob v. Wasatch Med. Mgmt.</i> , 2005 UT App 430, 124 P.3d 269 .....	16, 27
<i>Orvis v. Johnson</i> , 2008 UT 2, 177 P.3d 600 .....	1
<i>Park v. Stanford</i> , 2011 UT 41, 258 P.3d 566 .....	17
<i>Russell Packard Dev., Inc. v. Carson</i> , 2005 UT 14, 108 P.3d 741 .....	21, 22, 23

<i>Simmons Media Grp., LLC v. Waykar, LLC</i> , 2014 UT App 145, 335 P.3d 885 .....	29
<i>Smith v. Fairfax Realty, Inc.</i> , 2003 UT 41, 82 P.3d 1064.....	18
<i>Snyder v. Clune</i> , 390 P.2d 915 (Utah 1964) .....	24
<i>State v. Clark</i> , 2005 UT 75, 124 P.3d 235.....	14
<i>State v. Harker</i> , 2010 UT 56, 240 P.3d 780 .....	27
<i>State v. Irwin</i> , 924 P.2d 5 (Utah Ct. App. 1996) .....	17
<i>Themy v. Seagull Enters.</i> , 595 P.2d 526 (Utah 1979) .....	2
<i>Tracey v. Blood</i> , 3 P.2d 263 (Utah 1931).....	25
<i>Traco Steel Erectors, Inc. v. Comtrol, Inc.</i> , 2009 UT 81, 222 P.3d 1164 .....	14, 15, 16

### ADDENDA

Addendum A:	Order Transferring Review to Court of Appeals (R.963-66)
Addendum B:	Order from Hearing on Motions for Summary Judgment (R.913-15)
Addendum C:	Ruling on Gillett’s Rule 59 and Rule 60(b) Motions (R.946-56)
Addendum D:	Utah Code § 78B-2-10
Addendum E:	Utah Code § 78B-2-305
Addendum F:	Utah Rules of Civil Procedure, Rule 56
Addendum G:	Letter Agreement (R.299-302)
Addendum H:	Brown Guaranty and Waiver (R.304-06)
Addendum I:	Mutual Release (R.317)

## STATEMENT OF JURISDICTION

Appellees do not dispute this Court's jurisdiction. The Order transferring review of this matter to the Utah Court of Appeals is attached at Addendum A. R.963-65.

## STATEMENT OF THE ISSUES

### ISSUE 1

Whether the trial court correctly granted Defendant's counter-motion for summary judgment, because the facts are undisputed any applicable statutes of limitations ran prior to the filing of this case in 2008, in favor of the Defendants/ Appellees Boyd J. Brown, Sentry Financial Corporation, and SFC Aircraft Corp I, (hereafter collectively "Brown")?

### ISSUE 2

Whether the trial court correctly determined and applied the statute of limitations?

## STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). "An appellate court reviews a trial court's legal conclusion and ultimate grant or denial of summary judgment for correctness...." *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600. In reviewing the grant or denial of summary judgment, appellate courts view "[t]he facts and all reasonable inferences ... in the light most favorable to the nonmoving party." *Higgins v. Salt Lake Cnty.*, 855 P.2d 231, 233 (Utah 1993). However, appellate



courts affirm “where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law.” *Themy v. Seagull Enters.*, 595 P.2d 526, 528-29 (Utah 1979).

The application of a statute of limitations is a question of law. *See Arnold v. Grigsby*, 2009 UT 88, ¶ 7, 225 P.3d 781.

### PRESERVATION

Brown argued these issues before the trial court during the parties’ cross-motions for summary judgment. R. 264-65; 271-397; 913-15. See Order from Hearings on Motions for Summary Judgment at R.913-15, attached at Addendum B. The trial court gave further detail of the opinion granting summary judgment in its Ruling which denied Plaintiffs’ Rules 59(b) and 60(b) Motions. R. 946-56. Denial of the Rules 59(b) and 60(b) Motions has not been appealed but because the Ruling addresses the facts and law of the summary judgment decision in part, this information is applicable to this Appeal, while the arguments and facts raised by the Plaintiffs for the first time are not. See Ruling at R.946-56; attached as Addendum C.

### DETERMINATIVE PROVISIONS

Utah Code § 78B-2-104, attached at Addendum D

Utah Code § 78B-2-305, attached at Addendum E

Utah Rules of Civil Procedure, Rule 56, attached at Addendum F

## STATEMENT OF THE CASE

### Nature of the Case

This is essentially a statute of limitations case arising from a breached loan agreement. The loan contract ("Letter Agreement") was entered into by Appellant Majestic Airline Inc. ("Majestic") and by Appellee SFC AircraftCorp I, an entity initially formed and held by Appellee Sentry Financial Corporation (collectively "Sentry"). See Letter Agreement at R.299-302, attached at Addendum G. Sentry's \$483,102.43 loan to Majestic was personally guaranteed by two separate guaranty contracts, (1) between Appellant David Gillett ("Gillett"), the sole shareholder of Majestic, and Sentry; and (2) between Boyd Brown, who was an acquaintance of Gillett, and Sentry. R.299-302. See Brown Guaranty and Waiver at 304-06, attached at Addendum H.

After Majestic failed to make its first and multiple subsequent payments, Sentry demanded a partial guaranty payment by guarantor Brown in the amount of nearly \$250,000, which was less than half of Majestic's then outstanding balance owed to Sentry. R.214-215; 308; 389; 395. Brown made the partial guaranty payment as required by his guaranty contract, and neither Brown nor Sentry notified Gillett/Majestic of Brown's partial guaranty payment, as Sentry's demand for Brown's partial guaranty payment was pursuant to a separate agreement between Sentry and Brown, to which Gillett was not a party. R.390-

392; 304-306. Sentry subsequently initiated foreclosure proceedings against Majestic for Majestic's outstanding obligation, and ultimately held an auction in October 1995 at which the Majestic collateral was sold along with personal property put up by guarantor Gillett, in order to recoup Majestic's outstanding obligation to Sentry. R.352-353. Majestic's outstanding obligation was not reduced by Brown's partial guaranty payment, and Sentry promptly reimbursed Brown his partial guaranty payment from the auction proceeds. R.359; 394.

The Letter Agreement was signed more than twenty years ago, in April 1994, and by 1995, Gillett/Majestic's failure to perform their contracted obligations amounted to a breach of contract. R.299-302; 308; 913-915. In 2002, Gillett learned of Brown's partial guaranty payment of nearly \$250,000 made pursuant to Brown's personal guaranty. R.182; 304-306. Approximately five years later, in 2007, Gillett/Majestic filed a Complaint against Brown, SFC AircraftCorp I and Sentry, alleging breach of contract by Brown and Sentry, and fraud by Boyd Brown. R.1-17; 913-915; 946-956. After the 2007 case was dismissed without prejudice, Gillett/Majestic filed the case at bar in 2008. R.1-17.

#### STATEMENT OF FACTS

Gillett/Majestic's Statement of Facts sets forth several pages of information that contain numerous legal conclusions and factual allegations not supported by the Record. The district court's Order from Hearing on Motions for Summary

Judgment (Addendum B at R.913-915) and its Ruling on Plaintiff's Rule 59 & Rule 60(b) Motions (Addendum C at R.946-956) recite the material, undisputed facts upon which the court's legal conclusions are based; however, Gillett's Statement of Facts include alleged facts that contradict the facts stated by the district court. Thus, a significant portion of the "facts" in the opening brief essentially amount to unsupported allegations pulled from Gillett's own affidavits. Brown will not respond in kind, but instead will limit his statement of facts to those that are undisputed, supported by the Record, and relevant to the issues before the Court.

#### **Sentry's Loan to Majestic**

In 1994, Majestic Airlines Inc., a small airline company owned by David Gillett, was in default on a loan contract it had with Textron Financial Corporation in the amount of \$454,021.99. R.299; 343. On April 29, 1994, Majestic entered into a contract with Sentry for a loan to Majestic in the amount of \$483,102.43, which would be repaid to Sentry by Majestic. R.299. The purpose of the loan was to prevent the impending foreclosure of Majestic's collateral assets by Textron Financial Corporation as a result of Majestic's default on its loan with Textron. R.350; 370.

Due to Gillett/Majestic's default on the Textron loan, Sentry would not originate a loan to Gillett/Majestic with Majestic's assets as the only security for the loan. R.393. Accordingly, in addition to Majestic's assets as security for the loan, Gillett personally guaranteed the loan to Majestic; Sentry additionally



required a personal guaranty of the loan by Boyd Brown. R.304-306; 344-345; 350.

Brown was selected as a guarantor because of his personal relationships with both David Gillett and Jonathan Ruga, CEO of Sentry. R.344. Sentry and Majestic were signatory parties to a "Letter Agreement," the contract which outlines the terms of the loan from Sentry to Gillett/Majestic. R.299-302. David Gillett and Boyd Brown were both listed as personal guarantors of the loan in the "Letter Agreement." R.299-302. Consistent with his guaranty of the loan, on May 23, 1994, Brown entered into a separate contract with Sentry for his guaranty of the \$483,102.43 loan Sentry made to Majestic; Brown received \$20,000 as consideration for his guaranty contract with Sentry. R.304-306.

After entering the "Letter Agreement" with Sentry, Majestic failed to make its first several payments, including an approximately \$30,000 interim payment it was required to make. R.308. In fact, from the time Gillett/Majestic entered the Letter Agreement to the time of Sentry's foreclosure of Majestic's secured collateral, Majestic only made a total of three (3) payments in the amount of \$15,779.57 each. R.308. A credit of approximately \$8,000 against the loan balance was not actually paid by Majestic, but was applied to Majestic's loan payments because Sentry had received a credit from Textron. R.308; 351-352.

Sentry repeatedly attempted to contact Gillett regarding his/Majestic's multiple missed loan payments. R.350. Finally, as a result of Gillett/Majestic's failure to perform the terms of the Letter Agreement with Sentry, Sentry initiated default proceedings. R.386. Pursuant to Brown's contract with Sentry for Brown's

personal guaranty of the loan, Sentry could have required Brown to pay the full amount owed by Majestic, which at that time equaled over \$500,000. R.304-306; 308. However, on March 17, 1995, instead of demanding the full overdue balance owed by Majestic, Sentry required Brown to make a partial personal guaranty payment of \$249,964.88. R.214-215; 395. Brown paid the requested \$249,964.88 to Sentry on March 17, 1995. R.390-391. Neither Brown nor Sentry disclosed Brown's partial guaranty payment to Gillett, as Gillett was not a party to Brown's guaranty contract with Sentry. R.304-06; 392.

On April 26, 1995, Sentry was awarded a default judgment against Majestic for its claim for the outstanding obligation owed to Sentry by Majestic pursuant to the Letter Agreement. R.359. The judgment amount entered against Majestic was not reduced by Brown's partial guaranty payment. R.359.

In order to recover the default judgment awarded to Sentry against Majestic and recoup the unpaid loan, Sentry arranged for a public auction of the Majestic collateral to be held on October 5, 1995. R.352-353. Consistent with Gillett's personal guaranty of Sentry's loan to Majestic, some of Gillett's personal assets were additionally sold at the auction. R.179; 213.

After the auction, there was disagreement between Gillett and Sentry regarding the accounting from the auction of Majestic's collateral. R.355-358. On December 4, 1996, Gillett signed a Mutual Release with Sentry. R.948. See Mutual Release at R.317, attached at Addendum I. The plain language of the Release precludes suit between the parties over matters arising from Sentry's loan to

Majestic, Sentry's subsequent foreclosure on Majestic's collateral, and the auction held by Majestic; the Release also specifically states that the parties will release and hold harmless Boyd Brown for claims arising from the subject loan. R.317.

At a deposition of Jonathan Ruga (CEO of Sentry) in March 2002 for another matter, Gillett learned that Brown had made a partial guaranty payment to Sentry in 1995. R.182.

### **Status of Majestic Airlines Inc.**

Majestic Airlines, Inc. was registered as a Utah business on March 21, 1984. R.330-331. Majestic's business registration expired June 1, 1993. R.330-331. Majestic was again registered on January 18, 1995, and its registration again expired April 1, 1996. R.330-331. Majestic Airlines, Inc. is not currently registered as a business. R.330-331. Majestic Airlines, Inc. has been dissolved as a company since 1996, and Gillett's shares in Majestic were disposed of through his 1998 personal bankruptcy proceedings. R.336; 375.

### **Procedural History**

Gillett originally filed his Complaint, case no. 070409723, in June of 2007<sup>1</sup>. R.425; 901. Case no. 070409723 was dismissed without prejudice, and Gillett re-

---

<sup>1</sup> In their opening brief, Gillett alleged for the first time that he originally filed a Complaint for the claims alleged in the case at bar in 2003, case number 030919800 (*Appellant's Brief*, pg. 17 of hard copy, pg. 19 of digital copy). As evidenced by Gillett's failure to cite to the Record for such Complaint and case, such allegation was never made to the trial court; indeed, Gillett alleged to the trial court that this matter was filed in 2007 as case no. 070409723, and the trial court confirmed that this matter was first filed in 2007. R.901; 946; 949-50.

filed his Complaint under the “savings statute” on September 29, 2008. R.901; 946; 949-950. Gillett’s Complaint alleges 1) Breach of Contract against Brown; 2) Breach of Contract against Sentry and SFC; 3) Fraud against Brown; 4) Judicial Accounting; and 5) Declaratory Judgment. R.947.

At the time Gillett filed his Complaint, Boyd Brown was residing in Wyoming, but at all relevant times he was a resident of Salt Lake City and had an agent within the State of Utah. R.946. Sentry and its previous subsidiary, SFC Aircraft Corp I, are Utah corporations. R.947.

On August 24, 2012, Gillett submitted a Motion for Partial Summary Judgment. R.171-215. On October 10, 2012, Brown submitted a Memorandum in Opposition to Gillett’s motion and in support of Brown’s Counter-Motion for Summary Judgment. R.271-397.

After extensive briefing and a hearing on the parties’ motions on December 16, 2013, the trial court granted Brown’s Counter-Motion for Summary Judgment, dismissing Gillett’s Complaint with prejudice. R.913-15. The trial court found that Majestic had wound up its business and ceased to exist; the statute of limitations for Gillett’s claims of breach of contract had run in 2001, six years after Gillett/Majestic’s initial breach of the Letter Agreement; and that the statute of limitations for Gillett’s claims of fraud had run in 2005, three years after Gillett discovered Brown’s partial guaranty payment.



Gillett thereafter submitted a Rule 59 Motion for New Trial and Rule 60(b) Motion to Set Aside Judgment. R.606-08. Instead of submitting a Memorandum in Support his motion, Gillett submitted a document otherwise identical to the motion document, except it was electronically submitted as "Memorandum of Law in Support Plaintiff's Rule 59 Motion for New Trial and Rule 60(b) Motion to Set Aside Judgment." R.609-11; 950. Counsel for Brown notified counsel for Gillett of an error in his submission, but Gillett did not resubmit a Memorandum of Law. R.893; 921; 950.

Without an opportunity to review Gillett's Memorandum of Law, Brown submitted a Memorandum in Opposition to the post-trial motions based upon the limited content of Gillett's "Motion" document (R.881-901) and Affidavit of Gillett (R.612-14), and after Gillett failed to timely submitted a reply memorandum, Brown filed a Request to Submit Plaintiff's Rule 59 Motion for New Trial and Rule 60(b) Motion to Set Aside Judgment for Decision, on April 14, 2014. R.920-23. Gillett subsequently submitted his Reply supporting the Rule 59 and Rule 60(b) motions. R.926-33.

Although Gillett's Rule 59 and Rule 60(b) motions were not accompanied by a memorandum of law, the district court prepared and entered a Ruling on Gillett's post-trial motions, in which the district court provided the factual and legal basis for its decision to deny such motions. R.946-56.

Gillett subsequently filed the appeal at bar. R.957-58.

### SUMMARY OF THE ARGUMENT

In the summary judgment proceedings below, Gillett failed to present issues of material fact to preclude summary judgment. The trial court correctly held that the statute of limitations for Gillett's cause of action of fraud expired in 2005. This case was filed in 2008. Even considering the savings statute, Utah Code Ann. § 78B-2-111, Gillett failed to file his cause of action of fraud within the statute of limitations when he filed his initial case in 2007, and as such the trial court correctly dismissed the fraud claims with prejudice.

The trial court correctly held that the statute of limitations for Gillett's cause of action for breach of contract commenced in 1995 and ran in 2001. The trial court determined that the concealment at issue was an alleged concealment of fraud which therefore tolled the statute of limitations until 2002; the statute of limitations for any concealed fraud expired in 2005. The trial court also found that the parties signed a release of all claims in 1996 which released all claims thereby except for Gillett's alleged claim of fraud, discovered in 2002 and expired in 2005.

Gillett's appeal is meritless as it does not provide a basis in the law to overturn the trial court's decision and further attempts to continue to drag out this lawsuit, which the trial court termed to be "merely a veiled attempt to take a

second bite at the apple.” R.955. Gillett’s Brief attempts to raise arguments and present material that were not raised properly before the trial court. Gillett’s Brief is deficient according to the Utah Rules of Appellate Procedure in that the Brief does not support the arguments presented therein with analysis or application of applicable law and is predominantly conjecture and opinion, not legal argument based on the law and so fails to provide adequate legal analysis and legal authority in support of his claims. Thus Gillett has inappropriately compelled Brown to develop Gillett’s argument through his own research and interpretation of Gillett’s Brief as well as respond accordingly.

#### ARGUMENT

#### **I. THE TRIAL COURT CORRECTLY GRANTED BROWN’S COUNTER MOTION FOR SUMMARY JUDGMENT**

Gillett has limited the appeal to the trial court's ruling on the counter-motions for summary judgment. See Plaintiffs’ Notice of Appeal, R.957-58. Gillett has not pursued an appeal on any of the trial court's subsequent rulings.

Accordingly, in determining whether the trial court properly granted summary judgment, this Court should limit its consideration to the arguments before the trial court at the time it granted Brown’s counter-motion for summary judgment. As noted above, to the extent that the trial court’s Ruling addresses the summary judgment, it too is properly considered.

### **A. Gillett Has Presented No Disputed Material Facts That Preclude Summary Judgment**

Gillett's Brief provides three material facts as being in dispute and which thus prevent summary judgment; "1. Boyd Brown's continuous (since mid-1990s) residence out-of-state, as asserted by Plaintiffs ... and as acknowledged by Defendants." Appellant's Brief ¶22. "2. The claims of Majestic Airlines were pursuant to the 'winding up' of its corporate affairs." Appellant's Brief ¶22. "3. Majestic Airlines' default in making the monthly repayments does not necessarily constitute a 'breach'..." Appellant's Brief ¶22. To the extent that these three statements are facts, as opposed to questions of law, none are dispositive of the grant of summary judgment as will be fully illustrated below.

First, Gillett noted that both Defendants and Plaintiffs recognized Boyd Brown's residence out of state. R.946. This fact is clearly not in dispute and was not in dispute when the trial court determined correctly that "[j]urisdiction, both subject matter and personal, are appropriate before this court." Ruling ¶2 citing Complaint at ¶7, Addendum C at R.947. Thus Gillett's first disputed fact is not a disputed material fact that prevents summary judgment pursuant to Utah Rules of Civil Procedure, Rule 56.

Second, Majestic Airlines was found to "no longer be a viable corporation, Majestic's winding-up period has expired." Order from Hearing on Motions for Summary Judgment ¶2, Addendum B at R.914. Majestic was "dissolved as a



corporation in or about April 1996. Therefore, the true party in interest is David K Gillett.” Ruling ¶3, Addendum C at R.948. This fact was cited in Gillett’s Brief as preventing summary judgment though there is no reference to why and/or how this fact matters in regards to preventing summary judgment. Even if this fact were in dispute it would not prevent summary judgment. The trial court found that Majestic Airlines’ winding-up period had expired in both its Order from Hearing on Motions for Summary Judgment and in the later Ruling, as noted above.

“A trial court's findings of fact will not be set aside unless clearly erroneous.” *Traco Steel Erectors, Inc. v. Comtrol, Inc.*, 2009 UT 81, ¶ 17, 222 P.3d 1164 citing *Chen v. Stewart*, 2004 UT 82, ¶ 19, 100 P.3d 1177. “A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.” Utah R. App. P. Rule 24(a)(9) (2015). Thus, for Gillett to challenge this finding of fact, he would need to have marshaled the evidence. “To establish that a factual finding is clearly erroneous, the appealing party must marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below.” *Traco Steel Erectors, Inc. v. Comtrol, Inc.*, 2009 UT 81, ¶ 17, 222 P.3d 1164 citing *State v. Clark*, 2005 UT 75, ¶ 17, 124 P.3d 235 (internal quotation marks omitted). “If the evidence is inadequately marshaled, this court

assumes that all findings are adequately supported by the evidence.” *Traco Steel Erectors, Inc. v. Comtrol, Inc.*, 2009 UT 81, ¶ 17, 222 P.3d 1164 (internal citations omitted). Gillett’s second disputed fact has not been properly challenged and as such does not prevent summary judgment.

Third, Gillett contends that Majestic Airlines’ default in making the monthly repayments does not necessarily constitute a breach. The trial court found that the “Plaintiffs were the first party to breach the contract at issue in 1995.” R.947. The trial court cited to Plaintiff Gillett’s Complaint to show that “In 1994 Majestic Airlines entered into a contract with Defendants...” and, “In or about March 1995, Majestic was in default on the terms of the agreement it had with Sentry.” Ruling at ¶2 citing Complaint at ¶¶ 13 and 19, Addendum C at R.947. The trial court determined that under the first breach doctrine, Plaintiff’s default represented the first breach. “[U]nder the first breach rule a party first guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform. He can neither insist on performance by the other party nor maintain an action ... for a subsequent failure to perform.” *Cross v. Olsen*, 2013 UT App 135, ¶ 25, 303 P.3d 1030 citing *CCD, LC v. Millsap*, 2005 UT 42, ¶ 29, 116 P.3d 366 (citation and internal quotation marks omitted).

Further, “[w]hether a breach of a contract constitutes a material breach is a question of fact . . . .” *Cross v. Olsen*, 2013 UT App 135, ¶ 29, 303 P.3d 1030 citing

*Orlob v. Wasatch Med. Mgmt.*, 2005 UT App 430, ¶ 26, 124 P.3d 269. Thus the trial court's factual determination of the breach can only be challenged by Appellant's marshaling of the evidence, in accord with the discussion of the second disputed fact above. Namely, "If the evidence is inadequately marshaled, this court assumes that all findings are adequately supported by the evidence." *Traco Steel Erectors, Inc. v. Comtrol, Inc.*, 2009 UT 81, ¶ 17, 222 P.3d 1164 (internal citations omitted). Thus, Gillett's third disputed fact has not been properly challenged and as such does not prevent summary judgment.

#### **B. Appellees Are Entitled To Summary Judgment As A Matter Of Law**

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). As noted, Gillett has not presented this Court with any genuine issue of material fact that prevents summary judgment. Thus, summary judgment is proper as a matter of law pursuant to the trial court's determination that "[t]he parties signed a release of all claims in 1996. All claims are thereby released except for Plaintiff's claim of fraud, which was discovered in 2002. The statute of limitations for fraud expired in 2005." R.914. This Court has held that, summary judgment is appropriate where failure to provide reasons, as required by Utah R. App. P. 24(a)(9), to support the contention that disputes of material of fact existed. *Brown v. Wanlass*, 2001 UT App 30, 18 P.3d 1137. Further,

the Supreme Court of Utah has held that, an appellate court “may affirm a grant of summary judgment upon any grounds apparent in the record.” *Park v.*

*Stanford*, 2011 UT 41, ¶ 27, 258 P.3d 566.

## **II. THE TRIAL COURT CORRECTLY DETERMINED AND APPLIED THE APPROPRIATE STATUTE OF LIMITATIONS**

### **A. Appellant’s Issues II, III, And IV Were Raised For The First Time In The Appellant’s Brief And As Such Were Not Preserved And Are Not Properly Presented To This Court**

“It is a well-established rule that a defendant who fails to bring an issue before the trial court is generally barred from raising it the first time on appeal.” *State v. Irwin*, 924 P.2d 5, 7 (Utah Ct. App. 1996). The arguments II, III, and IV, raised by Gillett in this appeal were not properly raised before the trial court and as such were not preserved for appeal. See Appellant’s Brief, “Preservation,” at ¶¶7-10. However, even if these issues had been duly preserved, they would not have changed the trial court's correct decision to grant summary judgment in Brown’s favor.

Gillett states that his Issues II and III were “preserved for appeal within the plaintiffs’ “motion for new trial”, together with the supplemental materials related thereto.” Appellant’s Brief, ¶¶8-9 (internal quotations in original). As noted above, this appeal is from the trial court’s ruling on the counter-motions for summary judgment. See Plaintiffs’ Notice of Appeal, R.957-58. “An appeal of a Utah R. Civ. P. 60(b) order addresses only the propriety of the denial or grant



of relief. The appeal does not, at least in most cases, reach the merits of the underlying judgment from which relief was sought.” *Franklin Covey Client Sales v. Melvin*, 2000 UT App 110, ¶ 1, 2 P.3d 451.

Similarly, a denial of a Utah R. Civ. P. Rule 59 motion for new trial is reviewed under an abuse of discretion standard and the appellate court will reverse the trial court “only if there is no reasonable basis for the decision.” *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 25, 82 P.3d 1064. Thus, issues presented for the first time on appeal through Plaintiff’s motions for new trial and to set aside judgment should not be considered by this Court pursuant to precedent that, “[a]n inquiry into the merits of the underlying judgment or order must be the subject of a direct appeal from that judgment or order.” *Franklin Covey Client Sales v. Melvin*, 2000 UT App 110, ¶ 1, 2 P.3d 451. Because these were not raised below, and because Gillett has provided no additional basis for this Court to review an issue not preserved in the trial court, Gillett has waived the right to present this issue on appeal.

**B. The Trial Court Correctly Applied The 3-Year Statute of Limitation For Fraud**

As noted above, this issue, Appellant’s Issue II, was not properly preserved for appeal in Plaintiffs’ motions for new trial and to set aside judgment. In further support of the argument that this issue was not properly presented to the trial court and so should not be considered in this appeal, the

trial court noted that,

On March 15, 2014, Plaintiffs filed their Rule 59(b) and 60(b) Motion. Although the docket reflects that Plaintiffs filed a memorandum in support, the memorandum is the exact same as the original Motion. That is, both documents are approximately three (3) pages long and do not provide any legal support, analysis or discussion. The Court finds that Plaintiffs' arguments, as reflected in the Motion, are untenable.

Ruling, "Analysis and Discussion," Addendum C at R.950.

This Court has previously established how to determine if an issue is proper to be considered on appeal in that, "[t]he trial court must address an argument before it may be considered on appeal." *Holman v. Callister, Duncan & Nebeker*, 905 P.2d 895, 895 (Utah Ct. App. 1995). The Court further emphasized that, "The argument must be reasonably discernible from the pleadings, affidavits and exhibits." *Id.* Additionally, "even when an appellate court liberally construes the record in favor of a party, as it must on review of a summary judgment, there must be a factual showing or submission of legal authority before the argument will be deemed to have been raised at the trial court level." *Id.* Thus, pursuant to the standard provided in *Holman*, Gillett did not properly present the arguments to the trial court and as such they are not properly considered for appeal.

**C. Even If Non-Preserved Arguments Are Addressed, They Further Show That The Trial Court Correctly Determined And Applied The Proper Statute Of Limitations In Granting Summary Judgment For Brown**

**1. The Trial Court Correctly Applied the 3-year Statute of Limitations for Fraud**

Gillett alleged breach of contract claims against Brown, Sentry, and SFC; as well as a claim of fraud against Brown. R.9-12; 947. In 1994, Gillett/Majestic entered into a contract with Sentry where Brown was a guarantor of the loan from Sentry to Gillett/Majestic. R.393; 947. Gillett/Majestic had defaulted on the terms of the agreement with Sentry by or about March 1995. R.947. Gillett alleged in his Complaint that after Majestic defaulted on the loan Brown made a guarantor's payment to Sentry in or about July 1995. R.947. Gillett alleges he was unaware of this payment until March 2002. R.9; 947. The parties entered into a Mutual Release in which Gillett/Majestic released all their claims against Brown/Sentry. R.8; 947. Gillett alleges that they did not learn about the "fraud" of Brown – not disclosing his guarantor's payment made to Sentry – until March of 2002, which Gillett claims fraudulently induced his signing the Release. R.948.

However, as illustrated by the trial court, this alleged fraud occurred well after Gillett/Majestic's breach of contract. R.948. The trial court determined that "[a]lthough concealment is at issue, the concealment pertains to Defendants' alleged fraud inducing Plaintiffs to sign the release in December 1996, which Plaintiffs alleged to not have discovered until March 2002." R.949. The trial court

determined that “because the alleged fraud was discovered by Plaintiffs in March 2002, Plaintiffs’ third cause of action, Fraud against Mr. Brown ran in March 2005.” R.950. The trial court detailed the basis for this finding and further stated, “Moreover, Plaintiffs’ June 2007 case 070409723, filed in West Jordan, did not save or otherwise preserve Plaintiffs’ fraud claim because it was still filed two (2) years after the three (3) year statute of limitation had run.” R.950.

On appeal, Gillett references only one case in the first ten pages of his argument, *Russell Packard Development, Inc. v. Carson*, 2005 UT 14, 108 P.3d 741. Appellant’s Brief, ¶¶23-24. Gillett does not provide any analysis of *Russell Packard* to the instant case. However, at one point Gillett states that “commencement of that statute was ‘tolled’ pursuant to the ‘equitable discovery’ doctrine articulated in **Russell Packard**...” Appellant’s Brief ¶23 (internal quotations and bold in original). Gillett later states “the District Court seemingly correctly applied the ‘fraudulent concealment’ doctrine (from **Packard Development**, *supra*).” *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, 108 P.3d 741 (internal quotations and bold in original). Gillett concluded that the district court erred in its subsequent selection and application of the 3-year statute of limitations to bar the claims. *Id.*

In *Russell Packard*, the Court took the “opportunity to first clarify the appropriate circumstances under and the means by which the discovery rule

may operate to toll a statute of limitations.” *Russell Packard Dev. v. Carson*, 2005 UT 14, ¶ 19, 108 P.3d 741. The Court specifically provided that “[a]n example of a statutory discovery rule is found in the three-year statute of limitations governing claims based on fraud or mistake, which provides that a cause of action will not accrue “until the discovery by the aggrieved party of the facts constituting the fraud or mistake.” *Russell Packard Dev. v. Carson*, 2005 UT 14, ¶ 21, 108 P.3d 741 citing Utah Code Ann. § 78-12-26(3) (2002) current Utah Code Ann. § 78B-2-305 (2015). The Court in *Russell Packard* stated that the determination of when a plaintiff discovered or reasonably should have discovered their cause of action can be difficult/fact intensive. *Id.* However, “[o]nce the triggering event identified by the statutory discovery rule occurs--i.e., when a plaintiff first has actual or constructive knowledge ... of the cause of action--the statutory limitations period begins to run and a plaintiff who desires to file a claim must do so within the time specified in the statute. Otherwise, the claim will be barred.” *Russell Packard Dev. v. Carson*, 2005 UT 14, ¶ 22. Further, the Court held, “Mere ignorance of the existence of a cause of action will neither prevent the running of the statute of limitations nor excuse a plaintiff's failure to file a claim within the relevant statutory period.” *Id.* at 20.

This case is nearly identical to the specific example/explanation provided in *Russell Packard*, where applying a statutory discovery rule contained in the 3-

year statute of limitations for fraud, the statute would begin running from the date a plaintiff either discovered or should have discovered their claim. *Id.* at 23. "A plaintiff would then have three years from that date within which to file a complaint before the statute would bar recovery on the claim." *Id.* Gillett alleges that Brown's fraudulent concealment was discovered in 2002. R.8-12. Thus, the trial court correctly determined that the statutory 3-year statute of limitations for fraud would apply, thereby establishing that the statute of limitations ran in 2005 and Gillett's suit filed in 2007 did not save or preserve the fraud claim. R.949.

This conclusion would be reached even if the concealment version of the discovery doctrine applied. However, the Court in *Russell Packard* stated that, "it would be inappropriate to apply the concealment version of the discovery rule in the context of the three-year statute of limitations for fraud." *Id.* at 25. The Court stated that, "the concealment version of the discovery rule does not automatically operate to toll the limitations period until the plaintiff's actual or constructive discovery of his or her claim." *Russell Packard Dev. v. Carson*, 2005 UT 14, ¶ 26. Thus under either version of the discovery rule, Gillett's knowledge of a possible fraudulent concealment issue commenced the statute of limitations, for 3-years, from 2002 to 2005. As such the trial court correctly granted summary judgment based on relevant statute of limitations and should be affirmed by this Court.

**2. The Trial Court Correctly Interpreted And Analyzed Utah Code § 78B-2-104, Absence From The State, On The Statute Of Limitations In This Case**

Even though Gillett failed to support his argument for tolling the statute of limitations based on absence from the state, the trial court addressed the contentions and found, “Although Plaintiffs specifically cite Section 78B-2-104 in its Motion, following Defendants’ Opposition, Plaintiffs, in their Reply, assert that the pre-2008 amended version, Section 78-12-35 is applicable. The Court finds that under either version Plaintiffs’ claim that Mr. Brown’s out-of-state resident status tolls the statute of limitations fails.” R.951.

The trial court found that “in signing the April 29, 1994, Letter Agreement and Guarantee and Waiver, Mr. Brown consented to resolve all matters in the exclusive jurisdiction of the Third Judicial District Court for Salt Lake County, State of Utah.” R.951-52. Also, “neither party disputes the validity of the forum selection clauses.” R.952. The trial court determined that Gillett misconstrued the statutory language of Utah Code § 78-12-35, and therefore, the purpose of the provision. *See Snyder v. Clune*, 390 P.2d 915, 916 (Utah 1964) (The Utah Supreme Court explained “that the objective of [78-12-35] was to prevent a defendant from depriving a plaintiff of the opportunity of suing him by absenting himself from the state during the period of limitation.”) R.953.

Gillett did not argue that he was unable to locate Brown; rather he argued

that he was inconvenienced in having to serve and depose Brown, who was living in Wyoming. R.954. The trial court concluded stating, "The fact that Mr. Brown was served in Wyoming and the alleged inconvenience of Plaintiffs in attempting to timely depose Mr. Brown does not invoke Section 78-12-35 and therefore does not toll the statute of limitations of Plaintiffs' breach of contract and fraud claims." R.954. *See Tracey v. Blood*, 3 P.2d 263, 266 (Utah 1931) ("Apparently all courts are agreed ... that the burden was upon the plaintiff to plead and prove facts sufficient to toll the statute of limitations.") R.954-55. Therefore, the trial court correctly denied Gillett's argument in this regard. R.955.

### **3. The Trial Court Correctly Ruled That Majestic Airlines Period For Winding-Up Had Expired**

Gillett argues that Utah Code § 16-10a-1405 does not provide a stated period of limitations for the winding-up of a corporate entity. Appellant's Brief, ¶10. In Gillett's argument regarding the trial court's winding-up ruling, Gillett fails to cite to any relevant case law for support and/or analysis for his opinions regarding corporate winding up. Appellant's Brief, ¶¶53-55. Gillett fails to provide an argument in regards to a possible change in the result that could be affected by establishing that the winding-up period had not expired. However, even if Gillett had provided an argument in this regard it would fail. The trial court found that Majestic Airlines was dissolved as a corporation in April 1996. R.948. This is a non-disputed question of fact because it is based on public record,



specifically the Utah Division of Corporations and Commercial Code business records for Majestic Airlines show the corporation was expired in April 1996. R.330-31.

Gillett's interpretation of Utah Code § 16-10a-1405 ignores the provision regarding disposition of claims against a dissolved corporation in § 16-10a-1407 which states, "A dissolved corporation may publish notice of its dissolution and request persons with claims against the corporation present them in accordance with the notice." *Id.* (1) (2015). Further, the statute explicitly states that any claim unless sooner barred under § 16-10a-1406 or other applicable statute of limitations is barred unless the claimant commences an action against the dissolved corporation within five years after publication of the notice, or after seven years if no notification was published. Utah Code Ann. § 16-10a-1407(3)-(5) (2015). Thus, if claims are barred against a dissolved corporation after 5-7 years, then claims should intuitively be barred on behalf of a dissolved corporation to the same respect.

When interpreting statutes, Utah case law dictates that all parts of an act are considered, as a whole, for a complete understanding/interpretation of the section; pursuant to the Utah Supreme Court's instruction to "read the plain language of [a] statute as a whole and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *State v. Harker*, 2010 UT

56, ¶ 12, 240 P.3d 780. The trial court's determination that Majestic's time period for winding-up had expired was in accord with the relevant statute. Further, this issue was not properly presented for appeal nor has it been properly supported by citation to law and the record, nor does this argument change the outcome of the summary judgment decision. As such this argument does not provide this Court a basis for overturning the trial court's grant of summary judgment.

#### **4. The Trial Court Correctly Analyzed And Applied The First Breach Doctrine To This Case**

"[U]nder the first breach rule a party first guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform. He can neither insist on performance by the other party nor maintain an action against the other party for a subsequent failure to perform." *Cross v. Olsen*, 2013 UT App 135, ¶ 25, 303 P.3d 1030 citing *CCD, LC v. Millsap*, 2005 UT 42, ¶ 29, 116 P.3d 366 (citation and internal quotation marks omitted). The Utah Supreme Court has held that "Only a material breach will excuse further performance by the non-breaching party." *McArthur v. State Farm Mut. Auto. Ins. Co.*, 2012 UT 22, ¶ 28 n.7, 274 P.3d 981. Utah case precedent further provides, "Whether a breach of a contract constitutes a material breach is a question of fact . . . ." *Cross v. Olsen*, 2013 UT App 135, ¶ 29 citing *Orlob v. Wasatch Med. Mgmt.*, 2005 UT App 430, ¶ 26, 124 P.3d 269.

The Court in *Cross* stated, "Summary judgment is appropriate on such

factual questions when they fall on either end of a factual continuum: when there could be no reasonable difference of opinion, or when the facts are so tenuous, vague, or insufficiently established that determining [the factual issue] becomes completely speculative.” *Cross v. Olsen*, 2013 UT App 135, ¶ 29 citing *Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996) (citations and internal quotation marks omitted).

The case at hand presents a factual question appropriate for summary judgment pursuant to the standard expressed in *Cross*, above. Namely, both parties acknowledged that the loan between Gillett/Majestic and Sentry was meant to be paid back in monthly installments and further acknowledge that Majestic defaulted on those payments. Clearly where a contract is based on borrowing money to be paid back on a monthly basis, defaulting on payments is a material breach of the contract. Because Gillett/Majestic defaulted on the contract, the trial court correctly ruled that, “Plaintiffs’ were the first party to breach the contract at issue in 1995 and therefore, the six (6) year statute of limitations expired in 2001.” R.948-49.

### **III. APPELLANT’S APPEAL IS DEFICIENT AND/OR MERITLESS AND/OR FRIVOLOUS**

#### **A. Appellant’s Brief Failed To Meet Utah R. App. P. 24(k)’s Requirements And Placed A Tremendous Burden Of Factual And Legal Research on Opposing Counsel**

Rule 24(k) of the Utah Rules of Appellate Procedure requires a brief to be

"concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters." Utah R. App. P. 24(k) (2015). If the brief does not meet these requirements, rule 24(k) states that "the court may assess attorney fees against the offending lawyer." *Id.* "This court has previously awarded attorney fees where the failure to file an opening brief that complied with rule 24(k) placed a tremendous burden of factual and legal research on opposing counsel." *Simmons Media Grp., LLC v. Waykar, LLC*, 2014 UT App 145, ¶ 48, 335 P.3d 885 citing *In re Estate of Pahl*, 2007 UT App 389, ¶ 17, 174 P.3d 642 (internal quotation marks omitted).

The Utah Court of Appeals addressed the requirements under Rule 24(k) and stated, "Failure to adhere to these requirements increase[s] the costs of litigation for both parties and unduly burden[s] the judiciary's time and energy. Failure to adhere to the requirements may invite the court to impose serious consequences, such as disregarding or striking the briefs, or assessing attorney fees against the offending lawyer." *Ninow v. Lowe (In re Estate of Pahl)*, 2007 UT App 389, ¶ 17, 174 P.3d 642 citing *State v. Green*, 2004 UT 76, P11, 99 P.3d 820 (alterations in original) (citation omitted).

In *Ninow*, the Court of Appeals awarded reasonable attorney fees after the Petitioner pointed to several aspects of the Respondents' brief that failed to meet the briefing requirements and complained of the "convoluted" nature of

Respondents' opening brief with many issues completely lacking in cogent analysis or supporting authority. See *Ninow*, at 18. The Court held that "a reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." *Id.* at 17.

Gillett's appeal is frivolous pursuant to Utah R. App. P. Rule 33, which states that "a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." Utah R. App. P. Rule 33 (2015). As noted by the trial court, "Plaintiffs' objections are merely a veiled attempt to take a second bite at the apple and are therefore overruled." R.955.

This lawsuit has taken years to finally be correctly dismissed pursuant to summary judgment, at great cost to both parties as well as the judicial system. The only new facts/arguments presented by Gillett on appeal are improper for not being preserved but regardless were still thoroughly addressed and denied by the trial court as being misinterpretations and mischaracterizations of law. Finally, Gillett's appeal is so bereft of argument supported by law that it has placed a disproportionate burden on the opposing party and this Court to both decipher what arguments are being made by Gillett and to determine what, if any, support can be found for the contentions within relevant case law only to

also research and argue against these points as well as provide legal argument in support of the trial court's already detailed ruling.

Thus, pursuant to Rule 33(a), if the Court determines that an appeal is frivolous, "it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney." Utah R. App. P. Rule 33. The Supreme Court of Utah granted a motion for sanctions on an appeal taken from claims dismissed by the trial court on summary judgment after the trial court had stated the plaintiff's claims bordered on being frivolous and the plaintiff failed to defend the motion for sanctions. *Gildea v. Guardian Title Co.*, 970 P.2d 1265, 1272 (Utah 1998).

Pursuant to Utah R. App. P. Rule 34, "Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment or order is affirmed, costs shall be taxed against appellant unless otherwise ordered..." Utah R. App. P. Rule 34 (2015). This Court may award appellee costs under this rule even if Gillett's appeal is not found to be frivolous. See *Colony Ins. Co. v. Human Ensemble, LLC*, 2013 UT App 68, 299 P.3d 465. Thus, because Gillett's Brief and/or Appeal are deficient, meritless, and/or frivolous, attorney fees and costs should be awarded to Defendant/Appellees.

### CONCLUSION

Based on the foregoing, this Court should affirm the trial court's grant of Defendants' Counter-Motion for Summary Judgment, and award Defendants/Appellees the attorney's fees they have incurred on appeal.

CERTIFICATE OF COMPLIANCE WITH RULE 24(F)(1)

Certificate of Compliance With Type-Volume Limitation, Typeface requirements, and Type Style Requirements.

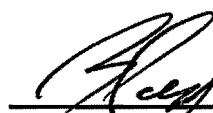
We hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 7,529 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface in 13-point Book Antiqua in Microsoft Word 2013.

DATED this 8 April 2015.

**The Ault Firm, P.C.**



---


Zachary W. Powell

*Attorney for Appellees/Defendants*



CERTIFICATE OF SERVICE

I hereby certify that on the <sup>8</sup>/<sub>7</sub> April 2015, I caused two true and correct copies of the foregoing APPELLEES' BRIEF to be mailed, postage prepaid, to the office of Mr. Stephen G. Homer, 2877 West 9150 South, West Jordan, Utah 84088 and that eight copies, one with original signature, were delivered to the Utah Court of Appeals.



---

## Addenda

ADDENDUM A

ORDER TRANSFERRING REVIEW TO UTAH COURT OF APPEALS  
(R.963-66)

AUG - 5 2014

IN THE SUPREME COURT OF THE STATE OF UTAH

—oo0oo—

David K. Gillett, an individual  
and Majestic Airlines, Inc., a  
Utah corporation,

Plaintiffs and Appellants,

v.

Case No. 20140682-SC  
080921211

Boyd J. Brown, an individual;  
Sentry Financial Corporation,  
a Utah corporation; and SFC  
Aircraft Corp I, a Utah corporation;

Defendants and Appellees.

—  
ORDER

Pursuant to rule 42(a) of the Utah Rules of Appellate Procedure, this matter will be transferred to the Utah Court of Appeals for disposition unless a timely request for retention (as detailed below) is received. This order may also be superseded by another order directing an immediate transfer if the Court deems such a transfer to be appropriate. Following transfer, all further pleadings and correspondence should be directed to the Court of Appeals.

Within ten calendar days of the date of this order, any party to the appeal may submit a letter to the Supreme Court concerning the appropriateness of retaining the matter on its own docket. The letter may request retention or may request transfer. The letter shall contain the following four categories of information, preceded by a heading describing each category:

1. The name of the case and the appellate case number,
2. The names of all parties involved in the case and the attorneys and firms representing the parties,
3. A concise statement of the issues presented on appeal, and
4. A brief explanation of the reasons supporting retention or transfer.

The Checklist for Appellate Jurisdiction (included with notice of this order) **must also be completed and returned with any letter requesting retention. Failure to complete and return the checklist will preclude consideration of a request for retention.**

The letter and checklist may not be combined with any other document or pleading. The letter shall not exceed five pages (excluding the checklist) and must be received within ten calendar days of the date of this order. **The Court will not consider any letter requesting retention that is received after the ten-day deadline.** In the event the deadline falls on a weekend or holiday, the letter must be received by the first business day thereafter.

Any response to a timely letter requesting retention must be filed with this Court within seven calendar days of service of that letter. The response may not exceed five pages.

In the event the matter is transferred by superseding order prior to expiration of the deadline, an otherwise timely request for retention will be treated as a request for recall from the Court of Appeals.

FOR THE COURT:

Aug. 5, 2014  
Date

Andrea R. Martinez  
Andrea R. Martinez  
Clerk of Court

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2014, a true and correct copy of the foregoing ORDER was sent by electronic mail to be delivered to:

STEPHEN G. HOMER  
shomerlaw@netzero.com

CHRISTOPHER M. AULT  
chris@aulllegal.com

THIRD DISTRICT, SALT LAKE  
ATTN: JULIE RIGBY AND CHERYL AIONO  
450 S STATE ST BX 1860  
SALT LAKE CITY UT 84114-1860  
cheryla@utcourts.gov, julier@utcourts.gov

By Merilyn Hammond  
Merilyn Hammond  
Judicial Assistant

Case No. 20140682-SC  
THIRD DISTRICT, SALT LAKE, 080921211

## Checklist for Appellate Jurisdiction

*(If a request for retention is submitted, this form must be returned with that request and must provide all applicable information or the request for retention will not be considered by the Court. Any additional information relevant to jurisdiction may be included in the letter requesting retention)*

The case number in the lower court \_\_\_\_\_

The date the final judgment was entered or, if the time for appeal was reinstated pursuant to Subparts (f) or (g) of Rule 4 of the Rules of Appellate Procedure, the date of reinstatement \_\_\_\_\_

The date of the filing of the appeal to which this retention request is directed \_\_\_\_\_

Whether any other appeals or cross-appeals in the same case have been filed: Yes \_\_\_\_ No \_\_\_\_.

The date(s) of those appeal(s) \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_

Whether the judgment listed above resolved the case as to all claims and parties: Yes \_\_\_\_ No \_\_\_\_

If no, whether the judgment was certified as final pursuant to Rule 54(b) of the Rules of Civil Procedure: Yes \_\_\_\_ No \_\_\_\_ . List the date of certification \_\_\_\_\_

Whether the judgment listed above included a ruling concerning attorney fees: Yes \_\_\_\_ No \_\_\_\_

If attorney fees were awarded at any time, whether the amounts of all awards of fees were fixed prior to the date of your latest appeal: Yes \_\_\_\_ No \_\_\_\_ Not Applicable \_\_\_\_ . List the date of the last order fixing the fees: \_\_\_\_\_

Whether Rule 4(b) of the Rules of Appellate Procedure is applicable: Yes \_\_\_\_ No \_\_\_\_

If yes, list the date of any motion listed in Rule 4(b) \_\_\_\_\_ and the date of resolution of that motion \_\_\_\_\_

Whether Rule 4(c) of the Rules of Appellate Procedure is applicable: Yes \_\_\_\_ No \_\_\_\_

Whether Rule 7(f)(2) of the Rules of Civil Procedure has been satisfied (see CUWCD. v. King, 2013 UT 13): Yes \_\_\_\_ No \_\_\_\_ Not Applicable \_\_\_\_ .

If yes, list the date of the order satisfying Rule 7(f)(2) \_\_\_\_\_

If no, list any actions that have been taken to comply with the requirements of Rule 7(f)(2): \_\_\_\_\_

Whether the time to file the appeal was extended: Yes \_\_\_\_ No \_\_\_\_ . List the date of any motion for an extension \_\_\_\_\_ and the date of the order extending the time \_\_\_\_\_

Whether the appeal was filed pursuant to Utah Code § 78B-11-129: Yes \_\_\_\_ No \_\_\_\_ . If yes, list the subsection(s) of that provision that is (are) applicable: \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_

The statutory provision conferring appellate jurisdiction on this Court — ie., the applicable subsection of Utah Code § 78A-3-102 ( \_\_\_\_\_ )

(rev. 1/2014)

ADDENDUM B

ORDER FROM HEARING ON MOTIONS FOR SUMMARY JUDGMENT  
[HEARING HELD DECEMBER 16, 2013]  
(R.913-15)



The Order of Court is stated below:

Dated: April 13, 2014  
11:03:10 PM

/s/ L. A. Dever  
District Court Judge



Christopher M. Ault, #11000  
Zachary W. Powell, #14756  
**THE AULT FIRM, P.C.**  
8817 S. Redwood Rd., Ste. A  
West Jordan, UT 84088  
Telephone: (801) 539-9000  
Facsimile: (801) 207-1056  
Email: zachary@aultlegal.com  
*Attorneys for Defendants*

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DAVID K. GILLETT, an individual, and  
MAJESTIC AIRLINES,  
INCORPORATED, a Utah Corporation,

Plaintiffs,

v.

BOYD J. BROWN, an individual, SENTRY  
FINANCIAL CORPORATION, a Utah  
Corporation, and SFC AIRCRAFT CORP I,  
a Utah Corporation,

Defendants.

**ORDER FROM HEARING ON  
MOTIONS FOR SUMMARY  
JUDGMENT  
(December 16, 2013)**

Civil No.: 080921211

Judge L.A. Dever

COMES NOW the Court, having held a hearing on the parties' Motions for Summary Judgment on December 16, 2013, with Plaintiff represented by Steven Homer and Defendants represented by Christopher M. Ault and Zachary W. Powell, having considered the parties' motions, memoranda, declarations, and arguments made by counsel, and for good cause showing,

It is hereby ORDERED, ADJUDGED, and DECREED that:

1. Plaintiff Majestic is no longer a viable corporation, Majestic's winding-up period has expired, and Majestic may not assert any claims.
2. Plaintiff Gillett is the successor in interest and has the right to assert Majestic's claims.
3. The statute of limitations for Plaintiff's cause of action of fraud expired in 2005.
4. Plaintiffs filed this case in 2008.
5. Even considering the savings statute, Plaintiff failed to file his cause of action of fraud within the statute of limitations, and all Plaintiff's fraud claims are dismissed with prejudice.
6. The statute of limitations for breach of contract is six years.
7. Gillett and/or Majestic breached its contract with Sentry in 1995, and the statute of limitations ran in 2001.
8. Concealment is at issue, but the alleged concealment was a concealment of fraud. The statute of limitations for the concealment is therefore tolled until 2002, and the statute of limitations for the concealed fraud expired in 2005.
9. The parties signed a valid release of all claims in 1996. All claims are thereby released except for Plaintiff's claim of fraud, which was discovered in 2002. The statute of limitations for fraud expired in 2005.
10. The Court dismisses with prejudice all claims asserted by Plaintiff in this matter.

***The Court's Signature and Date of Entry of this Order Appear on the First Page of this Document.***

**NOTICE TO PLAINTIFF AND COUNSEL**

Notice is hereby given that pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure, any objections you have to this proposed order must be filed with the Court within 5 days of service of this proposed order.

DATED this 19<sup>th</sup> day of March, 2014.

**THE AULT FIRM, P.C.**

*/s/ Zachary W. Powell*

\_\_\_\_\_  
Zachary W. Powell

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the forgoing document was served via electronic filing, this 19<sup>th</sup> day of March, 2014, to the following:

Stephen G. Homer  
2877 West 9150 South  
West Jordan, Utah 84088

*/s/ Zachary W. Powell*

\_\_\_\_\_

ADDENDUM C

RULING ON GILLETT'S RULE 59 AND RULE 60(b) MOTIONS  
(R.946-56)

IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY  
STATE OF UTAH

FILED DISTRICT COURT  
Third Judicial District

JUN 25 2014

By \_\_\_\_\_  
SALT LAKE COUNTY  
Deputy Clerk

DAVID K. GILLET, an individual, and  
MAJESTIC AIRLINES, INC., a Utah  
corporation,

Plaintiffs,

vs.

BOYD J. BROWN, an individual,  
SENTRY FINANCIAL CORPORATION, a  
Utah corporation, and SFC AIRCRAFT  
CORP I, a Utah corporation,

Defendants.

**RULING**

Case No. 080921211

Judge: L.A. DEVER

The above entitled matter is before the Court on Plaintiffs' Notice to Submit for Decision their Rule 59(b) Motion for New Trial and Rule 60(b) Motion to Set Aside Judgment and, Plaintiffs' Objections to Defendants' Judgment and this Court's entry thereof, filed April 29, 2014. Having reviewed Plaintiffs' Motion and Objection and Defendants' Oppositions thereto, and being duly advised in the premises of the matters before it, the Court makes the following Ruling.

Background

Plaintiffs filed their Complaint on September 29, 2008. The following are relevant claims as asserted by Plaintiffs in their Complaint:

1. Defendant Boyd J. Brown was, at the time of the filing of the Complaint, a resident of Wyoming. (Compl. ¶ 3).
2. However, at all relevant times, Mr. Brown was a resident of Salt Lake County, Utah. Id. at ¶ 4.

3. Defendants Sentry Financial Corporation ("Sentry") and SFC Aircraft Corp I ("SFC"), are Utah corporations, with headquarters in Salt Lake County, Utah. Id. at ¶¶ 4-5.
4. Jurisdiction, both subject matter and personal, are appropriate before this Court. Id. at ¶ 7.
5. Plaintiffs' causes of action include: (1) Breach of Contract against Mr. Brown, id. at ¶¶ 47-48; (2) Breach of Contract against Sentry and SFC, id. at ¶¶ 49-50; (3) Fraud against Mr. Brown, id. at ¶¶ 51-58; (4) Judicial Accounting, id. at ¶¶ 59-60; and (5) Declaratory Judgment, id. at ¶¶ 61-63.
6. In 1994, Plaintiff Majestic Airlines ("Majestic")<sup>1</sup> entered into a contract with Defendant(s) Sentry and/or SFC. Id. at ¶ 13. See also (Defs.' Opp. To Pls.' Mot. For Part. Summ. J. and Mem. In Supp. of Defs.' Counter Mot. For Summ. J. vi-x).
7. In or about March 1995, Majestic was in default on the terms of agreement it had with Sentry. Id. at ¶ 19.
8. Plaintiffs allege that they were unaware of Sentry's receipt of Mr. Brown's \$250,000<sup>2</sup>, payment until "March 2002 when such payment was disclosed during the deposition of Sentry officials[.]" Id. at ¶ 44; see also ¶ 50. Compare (Defs.' Opp. To Pls.' Mot. For Part. Summ. J. and Mem. In

---

<sup>1</sup>Majestic has been dissolved as a company since in or about April 1996. (Defs.' Opp. To Pls.' Mot. For Part. Summ. J. and Mem. In Supp. of Defs.' Counter Mot. For Summ. J. x, ¶¶ 24-25).

<sup>2</sup>Pursuant to Plaintiffs' Complaint, this alleged payment occurred after Majestic had defaulted the terms of the agreement at issue, in or about July 1995. Id. at ¶ 25.

Supp. of Defs.' Counter Mot. For Summ. J. 1-16).

9. On December 6, 1996, the parties entered into a release agreement in which Plaintiffs released all their claims against Defendants. Id. at ¶ 42. See Compare (Defs.' Opp. To Pls.' Mot. For Part. Summ. J. and Mem. In Supp. of Defs.' Counter Mot. For Summ. J. Ex. F).
10. Plaintiffs also allege that they did not "discover" Mr. Brown's alleged fraud<sup>3</sup>, i.e., allegedly fraudulently inducing Plaintiffs to sign the release, id. at ¶¶ 56-57, until the "March 2002 deposition of Jonathan Ruga, SFC Aircraft I[.]" Id. at ¶ 53. Compare (Defs.' Opp. To Pls.' Mot. For Part. Summ. J. and Mem. In Supp. of Defs.' Counter Mot. For Summ. J. 1-16).

Following a hearing on the parties' cross-motions for summary judgment on December 16, 2013, the Court held:

- (1) Majestic is not a proper party to the entitled matter as it was dissolved as a corporation in or about April 1996. Therefore, the true party in interest is Plaintiff David K. Gillett.
- (2) Plaintiffs' were the first party to breach<sup>4</sup> the contract at issue in 1995 and therefore, the six (6) year statute of limitations expired in 2001. Utah

---

<sup>3</sup>Again, pursuant to Plaintiffs' Complaint, the alleged fraud "in violation of [Mr. Brown's] own contractual obligations" in or about April 1996, occurred well after Majestic's breach of the contract. Id. at ¶ 40.

<sup>4</sup>See e.g. CCD, L.C. v. Millsap, 2005 UT 42, ¶ 29, 116 P.3d 366 ("We have explained that under the 'first breach' rule a party first guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform. He can neither insist on performance by the other party nor maintain an action against the other party for a subsequent failure to perform." (citations and quotations omitted)); Saunders v. Sharp, 840 P.2d 796, 806 (Utah Ct. App. 1992) (explaining that "a party committing a substantial breach of a contract cannot maintain an action against the other contracting party ... for a subsequent failure to perform if the promises are dependent." (citation omitted)).

Code Ann. §78B-2-309(2) (2008). See also (Defs.' Opp. To Pls.' Mot. For Part. Summ. J. and Mem. In Supp. of Defs.' Counter Mot. For Summ. J. Exs. A<sup>5</sup>, B<sup>6</sup>).

- (3) Although concealment is at issue, the concealment pertains to Defendants' alleged fraud inducing Plaintiffs to sign the release in December 1996, which Plaintiffs alleged to not have discovered until March 2002. (Compl. ¶¶ 53, 56-57).
- (a) Because the alleged fraud was claimed to be discovered by Plaintiffs in March 2002, Plaintiffs' Third Cause of Action, Fraud against Mr. Brown ran in March 2005. Moreover, Plaintiffs' June 2007 case 070409723, filed in West Jordan, did not save or

---

<sup>5</sup>The April 29, 1994 Letter Agreement, subsection 10 provides in relevant part:

*In the event of a breach by MAI [Majestic], Gillett or Boyd of any of these terms or conditions of the Sentry Loan Documents, MAI, Gillett and Boyd jointly and severally agree to pay all of Sentry's costs and expenses incurred with the breach[.]*

(emphasis added).

<sup>6</sup>The Guarantee and Waiver signed by Mr. Brown, which outlines the obligations and rights of Mr. Brown and Sentry, respectively, provides in relevant part:

(b) Sentry may at any time and from time to time . . . upon or without any terms or conditions and in whole or in part: . . . (2) sell, exchange, release, surrender, realize upon or otherwise *deal with in any manner and in any order any property by whomsoever at any time pledged or mortgaged to secure, or howsoever securing* the Liabilities of the Obligor [Majestic] hereby guaranteed . . . (4) settle or compromise any Liabilities of the Obligor hereby guaranteed, any security thereof, or any liability (including those hereunder) incurred directly or indirectly in respect or hereof, and may subordinate the payment of all or any part thereof to the payment of any liability (whether due or not) of the Obligor to creditors of the Obligor other than Sentry and the undersigned; and (5) apply any sums by whomsoever paid or howsoever realized to any and all Liabilities of the Obligor to Sentry regardless of what liability or Liabilities of the Obligor remain unpaid.

(emphasis added).



otherwise preserve Plaintiffs' fraud claim because it was still filed two (2) years after the three (3) year statute of limitations had run. See Utah Code Ann. §78B-2-305(3) (2008); see also Hom v. Utah Dep't of Pub. Safety, 962 P.2d 95, 102<sup>7</sup> (Utah Ct. App. 1998).

- (4) In order to set aside the December 1996 Mutual Release ("Release"), Plaintiffs' were required to have filed their Third Cause of Action, Fraud against Mr. Brown, no later than March 2005, which was three (3) years after the Plaintiffs allegedly discovered said fraud in March 2002. Having failed to timely file any fraud claim until 2007, the Release therefore appropriately applies to Plaintiffs' remaining claims.

#### Analysis and Discussion

##### 1 Plaintiffs Rule 59(b) and 60(b) Motion

On March 15, 2014, Plaintiffs filed their Rule 59(b) and 60(b) Motion. Although the docket reflects that Plaintiffs filed a memorandum in support, the memorandum is the exact same as the original Motion. That is, both documents are approximately three (3) pages long and do not provide any legal support, analysis, or discussion. The Court finds that Plaintiffs' arguments, as reflected in the Motion, are untenable.

First, Plaintiffs assert that "the Court misapprehended (and thus overlooked" the true 'contractually-based' nature of the Plaintiffs' claim (against SENTRY) and instead improperly converted Plaintiffs' claims to allege 'fraud,' for which a shorter statute of

---

<sup>7</sup> ("Simple ignorance of or obliviousness to the existence of a cause of action will not prevent the running of the statute of limitations. All that is required to trigger the statute of limitations is ... sufficient information to ... put [plaintiffs] on notice to make further inquiry if they harbor doubts or questions." (citations and quotations omitted)).

limitation would apply.” (Pls.’ R. 59(b) and 60(b) Mot. 2). This claim is inconsistent with the Court’s December 16, 2013, ruling, in which the Court specifically found that the contractual claims, i.e., Plaintiffs’ first and second causes of action, were barred by the six (6) year statute of limitations as Plaintiffs themselves asserted, *they breached the terms of the April 1994 Letter Agreement in mid-1995 but did not file any suit until June 2007. See supra at 4. See also* fn. 4.

Plaintiffs also assert that the Court failed to consider Utah Code Annotated Section 78B-2-104<sup>8</sup> in its consideration of Plaintiffs’ fraud claim against Mr. Brown. Although Plaintiffs specifically cite Section 78B-2-104 in its Motion, following Defendants’ Opposition, Plaintiffs, in their Reply, assert that the pre-2008 amended version, Section 78-12-35<sup>9</sup> is applicable. The Court finds that under either version Plaintiffs’ claim that Mr. Brown’s out-of-state resident status tolls the statute limitations fails.

In signing the April 29, 1994, Letter Agreement and Guarantee and Waiver, Mr. Brown consented to resolve all matters in the exclusive jurisdiction of the Third Judicial

---

<sup>8</sup>States:

If a cause of action accrues against a person while the person is out of the state *and the person is not subject to the jurisdiction of the courts of this state in accordance with Section 78B-3-205*, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues the person departs from the state, the time of his absence is not part of the time limited for the commencement of the action *unless Section 78B-3-205 applies*.

(emphasis added).

<sup>9</sup>States:

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

District Court for Salt Lake County, State of Utah. (Defs.' Opp. To Pls.' Mot. For Part. Summ. J. and Mem. In Supp. of Defs.' Counter Mot. For Summ. J. Exs. A at ¶12, B at ¶ i). Neither party disputes the validity of the noted forum selection clauses.

In instances in which there is an enforceable forum selection clause, "[only] a 'rational nexus' between Utah and the underlying dispute [must be shown]. This nexus need not meet the more rigorous minimum contacts standard utilized in those cases where a forum selection clause is not present." Jacobsen Const. Co., Inc. v. Teton Builders, 2005 UT 4, ¶32, 106 P.3d 719 (citing Phone Directories Co., Inc. v. Henderson, 2000 UT 64, ¶ 14<sup>10</sup>, 8 P.3d 256).

Accordingly, this Court concludes that the forum selection/consent-to-jurisdiction clause in the parties' contract, specifying Utah as the appropriate jurisdiction to resolve claims under the contract, creates a rebuttable presumption that the trial court has personal jurisdiction over Mr. Brown. See Jacobsen Const. Co., 2005 UT at ¶ 39 (holding that "forum selection clauses need not make specific mention of a consent to jurisdiction when the language of the clause makes the parties' intention to resolve disputes in a particular forum evident.") See also Curtis v. Curtis, 789 P.2d 717, 726 (Utah Ct.App.1990) (stating that "defects in personal jurisdiction can be waived" (citation omitted)). The Court also finds that the record before it establishes the

---

<sup>10</sup>Explaining:

In particular, we hold that, while a forum selection/consent-to-jurisdiction clause by itself is not sufficient to confer personal jurisdiction over a defendant as a matter of law, such clauses do create a presumption in favor of jurisdiction and will be upheld as fair and reasonable so long as there is a rational nexus between the forum selected and/or consented to, and either the parties to the contract or the transactions that are the subject matter of the contract. Although the rational nexus element does require some connection between Utah and either the parties to or the actions contemplated by the contract, it need not rise to the level required under section [78B-3-205].

necessary rational nexus<sup>11</sup>: (1) At the time of contracting, Plaintiff, Majestic was a Utah corporation, with its business headquarters in Salt Lake County, (Compl. ¶ 2); (2) At the time of contracting, Defendant, Mr. Brown was a resident of Salt Lake County, *Id.* at ¶ 3; (3) Defendant, Sentry is a Utah corporation, with its business headquarters in Salt Lake County, *Id.* at ¶ 4; (4) Defendant, SFC is a Utah corporation, with its business headquarters in Salt Lake County, *Id.* at ¶ 5; and, (5) In or about March 1995, Majestic was in default on the terms of agreement it had with Sentry, both Utah corporations. *Id.* at ¶ 19.

In regards to Section 78-12-35, the Court finds that Plaintiffs have misconstrued the statutory language and therefore, the purpose of the provision.

First, Section 78-12-35, specifically addresses the tolling of time for the *commencement of an action*. It clearly states:

Where a cause of action accrues against a person when he is out of the state, the *action may be commenced* within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the *commencement of the action*.

(2007)(emphasis added). The Utah Supreme Court explained “that the objective of . . . [78-12-35] was to prevent a defendant from depriving a plaintiff of the opportunity of suing him by absenting himself from the state during the period of limitation.” Snyder v. Clune, 390 P.2d 915, 916 (Utah 1964). Highlighting the purpose of the statute at issue, in the matter of Olseth v. Larson, 2007 UT 29, 158 P.3d 532, the court held that

---

<sup>11</sup>Explaining that the rational nexus “operates as a safety valve, providing a mechanism whereby Utah courts may decline to exercise jurisdiction when Utah has no real interest in the outcome of a given dispute.” *Id.* at ¶ 41.

because defendant was an out-of-state defendant whom plaintiff was unable to locate at the time she attempted to serve her second amended complaint, which then was outside of the applicable statute of limitations, the statute of limitations was tolled. Id. at ¶¶ 2-7 (holding "section 78-12-35 . . . does toll the applicable statute of limitations when a person against whom a claim has accrued has left the state of Utah *and has no agent within the state* upon whom service of process can be made, even where the person was at all times amenable to service pursuant to Utah's long-arm statute." (emphasis added)).

Unlike the matter in Olseth, Plaintiffs knew that "[in] the mid-1990s Mr. Brown relocated his permanent residence . . . to Teton County, Wyoming, where he has continuously maintained his permanent legal residence and domicile." (Gillett Aff. at ¶ 3). Plaintiffs filed their Complaint on September 29, 2008, (Compl.) and served Mr. Brown in Wyoming. (Pls.' Reply 2). Plaintiffs have never claimed that they were unable to locate Mr. Brown in order to appropriately serve him or, that Mr. Brown's absence from Utah deprived them of their ability to timely *commence* the entitled matter. Compare Olseth, 2007 UT at ¶¶ 3-7. Plaintiffs solely argue that they were required to serve Mr. Brown in Wyoming and that there was an extended period of time in attempting to take Mr. Brown's deposition. (Pls.' Reply at 2-3). The fact that Mr. Brown was served in Wyoming and the alleged inconvenience of Plaintiffs in attempting to timely depose Mr. Brown does not invoke Section 78-12-35 and therefore, does not toll the statute of limitations of Plaintiffs' breach of contract and fraud claims. See Tracey v. Blood, 3 P.2d 263, 266 (Utah 1931) ("Apparently all courts are agreed . . . that the burden was upon the plaintiff to plead and prove facts sufficient to toll the statute of

limitations[.]").

Based upon the foregoing, Plaintiffs' Rule 59(b) and 60(b) Motion is DENIED.

2 Plaintiffs' Objections to Defendants' Prepared Judgment

The Court finds that Defendants' proposed Order - submitted March 19, 2014, and entered by this Court on April 13, 2014, as the Order of the Court - is consistent with the Court's ruling on December 16, 2013.

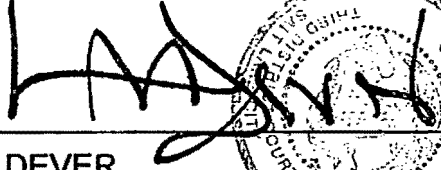
Moreover, Plaintiffs' "objections" are merely a veiled attempt to take a second bite at the apple and are therefore, OVERRULED.

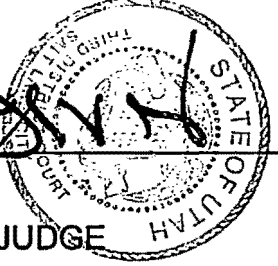
Accordingly, the Order entered April 13, 2014, is HEREBY AFFIRMED.

This Ruling stands as the Order of the Court. No further order is required.

Dated this 24<sup>th</sup> day of June, 2014.

BY THE COURT:

  
\_\_\_\_\_  
L.A. DEVER  
DISTRICT COURT JUDGE



## CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing Ruling dated this 25  
day of June, 2014, was issued via either electronic or standard mail to the following:

Christopher M. Ault  
Zachary W. Powell  
THE AULT FIRM, PC  
8817 South Redwood Road, Suite A  
West Jordan, UT 84088

Stephen G. Homer  
2877 West 9150 South  
West Jordan, UT 84088

  
CLERK OF COURT

ADDENDUM D

UTAH CODE § 78B-2-104



**78B-2-104. Effect of absence from state.**

If a cause of action accrues against a person while the person is out of the state and the person is not subject to the jurisdiction of the courts of this state in accordance with Section 78B-3-205, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues the person departs from the state, the time of his absence is not part of the time limited for the commencement of the action unless Section 78B-3-205 applies.

Utah Code. Ann. § 78B-2-104 (2009)

ADDENDUM E

UTAH CODE § 78B-2-305

**78B-2-305. Within three years.**

An action may be brought within three years:

- (1) for waste, trespass upon, or injury to real property; except that when waste or trespass is committed by means of underground works upon any mining claim, the cause of action does not accrue until the discovery by the aggrieved party of the facts constituting the waste or trespass;
- (2) for taking, detaining, or injuring personal property, including actions for specific recovery; except that in cases where the subject of the action is a domestic animal usually included in the term "livestock," which at the time of its loss has a recorded mark or brand, if the animal strayed or was stolen from the true owner without the owner's fault, the cause does not accrue until the owner has actual knowledge of facts that would put a reasonable person upon inquiry as to the possession of the animal by the defendant;
- (3) for relief on the ground of fraud or mistake; except that the cause of action does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake;
- (4) for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state; or

(5) to enforce liability imposed by Section 78B-3-603, or for damages under Section 78B-6-1701, except that the cause of action does not accrue until the aggrieved party knows or reasonably should know of the harm suffered.

Utah Code. Ann. § 78B-2-305 (2010).

ADDENDUM F

UTAH RULES OF CIVIL PROCEDURE, RULE 56

Rule 56. Summary judgment.

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 21 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the

pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file

such a response.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Utah R. Civ. P. 56 (2014).



ADDENDUM G

LETTER AGREEMENT  
(R.299-302)

**SFC** | SENTRY FINANCIAL CORPORATION  
One Utah Center, Suite 1400, Salt Lake City, Utah 84111-2215  
Telephone (801) 596-9600 Telefax (801) 596-9630

ORIGINAL

Jonathan M. Ruga

as of April 29, 1994

**HAND-DELIVERED**

Mr. David K. Gillett  
President  
MAJESTIC AIRLINES, INC.  
180 North 2400 West  
Salt Lake City, UT 84116

RE: \$483,102.43 loan ("Loan") made by Sentry Financial Corporation ("Sentry") to  
Majestic Airlines, Inc. ("MAI")

Dear Dave,

This letter agreement replaces and supersedes the Commitment Letter and Amendment each dated April 29, 1994 among Sentry, MAI, Boyd J. Brown ("Brown") and David K. Gillett ("Gillett"). Sentry, MAI, Brown, Gillett and Majestic Holding, Inc. ("MHI") (collectively the "Parties") agree as follows:

1. Sentry will pay the sum of \$454,021.99 to Textron Financial Corporation ("TFC") and TFC will assign all of TFC's right, title and interest in and to (a) four (4) Promissory Notes issued by MAI payable to TFC each dated December 15, 1992 in the following original principal amounts \$116,814.28 (s/n U-33, N433SA), \$116,814.28 (s/n U-35, N336PL), \$133,596.83 (s/n U-88, N7899R), and \$133,596.83 (s/n U-94, N9FH) (collectively the "Notes"); (b) Aircraft Security Agreement dated July 30, 1994 ("Textron Security Agreement") between MAI and TFC; (c) Guaranty dated July 30, 1994 ("Parent Guaranty") of Majestic Holding Inc. to TFC; and (d) Guaranty dated July 30, 1994 ("Guaranty") of David K. Gillett to TFC. The Notes, the Textron Security Agreement, the Guaranty the Parent Guaranty all other documents and agreements related thereto shall hereinafter collectively be referred to as the "Loan Documents". The four Beechcraft BE-99 aircraft, bearing FAA registration numbers N7899R, N9FH, N336PL and N433SA and serial numbers U-88, U-94, U-35 and U-33 shall collectively with all related equipment be referred to as the "Aircraft".
2. MAI and Gillett represent and warrant to Sentry that: (a) attached hereto as Exhibit B are true and correct copies of the Loan Documents; (b) the Loan Documents constitute all of the documents relating to MAI's financing with TFC; (c) the Loan Documents are valid, binding and enforceable in accordance with their terms; and (d) the Loan Documents create a valid, first priority security interest in favor of Sentry in four Beechcraft BE-99 aircraft, bearing FAA registration numbers N7899R, N9FH, N336PL and N433SA and serial numbers U-88, U-94, U-35 and U-33 (collectively with all related equipment the "Equipment").
3. MAI will execute and deliver a Security Agreement ("Additional Security Agreement") in a form acceptable to Sentry granting Sentry a security interest in additional collateral described therein as further security for the Loan.
4. Brown, Gillett and MHI will each execute and deliver a Guarantee and Waiver (in a form acceptable to Sentry) of all of MAI's obligations to Sentry under the Loan Documents, this Agreement, the Additional Security Agreement and all documents contemplated thereby or hereby (collectively the "Sentry Loan Documents"). In consideration for

1173LA-1

Brown executing and delivering the Guarantee and Waiver, MAI will pay Brown a fee of \$20,000.

5. In consideration of Sentry agreeing to purchase the TFC Loan Documents from TFC, MAI shall pay to Sentry (on or before May 31, 1994) a loan origination fee of \$9,080.44. MAI, Gillett, Brown and MHI have requested and Sentry has agreed to fund the loan origination fee and the guarantee fee to Brown by increasing the amount of the Loan by \$29,080.44 to \$483,102.43.
6. The repayment terms of the Loan Documents shall be changed as follows: (a) the outstanding principal amount of the Loan shall be increased to \$483,102.43; (b) MAI shall repay the Loan in advance, in 36 equal monthly payments of \$15,779.57 (each a "Monthly Payment"), payable on the first day of each month commencing on July 1, 1994 and continuing through June 1, 1997; and (c) MAI shall make an interim payment (due on or before July 1, 1994) of \$30,654.66 for the period from the date hereof through June 30, 1994.
7. In the event the Aircraft or any one them is destroyed, damaged beyond repair, lost, stolen, or taken by government action for an indefinite period or for a stated period extending beyond June 30, 1997 (each an "Event of Loss"), MAI must promptly notify Sentry and pay to Sentry, as the case may be, on the date the Monthly Payment is due and payable following the Event of Loss, an amount equal to the Casualty Value set forth in Exhibit A. If the Event of Loss is in respect of some but not all of the Aircraft, the amount of the payment to Sentry shall be a fraction of the Casualty Value, the numerator of which is the original principal amount of the Note(s) by TFC issued in respect of such destroyed or lost Aircraft and the denominator of which is \$500,822.22.
8. MAI shall have the right to prepay the Loan at any time upon thirty days written notice to Sentry. In the event the Loan has not been repaid in full on or before October 1, 1994 the Monthly Payment shall be increased to \$16,430.33. In the event the Loan has not been repaid in full on or before January 1, 1995 the Monthly Payment shall be increased to \$17,207.20.
9. All payments made by MAI to Sentry shall be made at 201 S. Main Street, Salt Lake City, UT 84111-2115, unless notified of a change in writing by Sentry.
10. In the event of a breach by MAI, Gillett or Boyd of any of the terms or conditions of the Sentry Loan Documents, MAI, Gillett and Boyd jointly and severally agree to pay all of Sentry's costs and expenses incurred in connection with the breach and/or the enforcement of any of the Sentry Loan Documents including, without limitation, reasonable attorneys' fees.
11. For the avoidance of doubt, the Textron Security Agreement shall secure all of MAI's obligations hereunder.
12. Anything to the contrary notwithstanding, this agreement and all other Sentry Loan

Mr. David K. Gillett  
as of April 29, 1994  
Page 3


Documents shall be governed by, and construed in accordance with, the laws of the State of Utah (without giving effect to principles relating to conflicts of laws). The Parties hereby consent to the exclusive jurisdiction of the Third Judicial District Court for Salt Lake County, State of Utah ("Court"), for a determination of any dispute as to any matters hereunder and authorizes service of process by the Court for a determination of any dispute as to any such matters by service of process on the Parties by certified or registered mail sent to Lessee at the address referred to in Section 19 (b) above. If the Third Judicial District Court set forth above does not have jurisdiction to hear and decide the matter before it, the Parties consent to the exclusive jurisdiction of the Federal District Court for the District of Utah, Central Division; provided, however, that nothing herein shall preclude Sentry if it thinks fit, from instituting proceedings against any or all of the Parties in any country or place which may have jurisdiction for the purpose of protecting and enforcing Sentry's rights either hereunder or under any other Sentry Loan Agreements, documents, instruments or otherwise.


Sincerely,

  
Jonathan M. Ruga  
Chief Executive Officer

Accepted and Agreed to as of  
this 29th day of April, 1994.

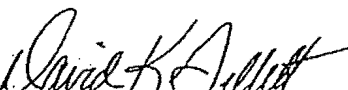
MAJESTIC AIRLINES, INC.

By:   
Name: David K. Gillett  
Title: President

  
David K. Gillett, personally

  
Boyd J. Brown, personally

MAJESTIC HOLDING, INC.

By:   
Name: David K. Gillett  
Title: President

CASUALTY VALUES

EXHIBIT A

to LETTER AGREEMENT dated as of April 29, 1994

among

SENTRY FINANCIAL CORPORATION, MAI, BOYD BROWN, and DAVID K. GILLET

The Casualty Value of the Aircraft is the percentage of \$483,102.43 set forth opposite the applicable loan payment:

AFTER LOAN PAYMENT NUMBER	CASUALTY VALUE	AFTER LOAN PAYMENT NUMBER	CASUALTY VALUE
1	100.00%	19	57.78%
2	97.65%	20	55.56%
3	95.29%	21	53.33%
4	92.94%	22	51.11%
5	90.59%	23	48.89%
6	88.24%	24	46.67%
7	85.88%	25	44.44%
8	83.53%	26	42.22%
9	81.18%	27	40.00%
10	78.82%	28	37.78%
11	76.47%	29	35.56%
12	74.12%	30	33.33%
13	71.76%	31	31.11%
14	69.41%	32	28.89%
15	67.06%	33	26.67%
16	64.71%	34	24.44%
17	62.35%	35	22.22%
18	60.00%	36	20.00%

ADDENDUM H

BROWN GUARANTY AND WAIVER  
(R.304-06)

ORIGINAL

GUARANTEE AND WAIVER

of \$483,102.43 Loan  
made by SENTRY FINANCIAL CORPORATION,  
a Utah corporation, to  
MAJESTIC AIRLINES, INC., a Utah corporation

Background

Sentry Financial Corporation, a Utah corporation, ("Sentry"), made a loan in the amount of \$483,102.43 to Majestic Airlines, Inc., a Utah corporation ("MAI") evidenced by four (4) Promissory Notes issued by MAI payable to Textron Financial Corporation ("TFC") each dated December 15, 1992 in the following original principal amounts \$116,814.28 s/n U-33, N433SA), \$116,814.28 (s/n U-35, N338PL), \$133,596.83 (s/n U-88, N7899R), and \$133,596.83 (s/n U-94, N9FH) (collectively the "Notes"). The Notes were secured by an Aircraft Security Agreement dated July 30, 1994 ("Security Agreement") between MAI and TFC. The Notes, the Security Agreement and all related documents ("TFC Loan Documents") were assigned to Sentry by TFC pursuant to an Assignment dated as of May 2, 1994 ("Assignment"). The TFC Loan Documents were modified by a letter agreement dated as of April 29, 1994 ("Letter Agreement") among MAI, Sentry, Boyd J. Brown ("Brown") and David K. Gillett ("Gillett"). The TFC Loan Documents as assigned to Sentry pursuant to the Assignment and modified by the Letter Agreement shall hereinafter be referred to as the ("Loan Documents").

(a) In order to induce Sentry to make the Loan and enter into the Loan Documents to which it is a party, and to otherwise extend credit or financial accommodations to MAI ("Obligor"), and for other good and valuable consideration, the receipt, adequacy, and legal sufficiency of which are hereby acknowledged, the undersigned (the "Guarantor") hereby irrevocably and unconditionally guarantees and promises to and for the benefit of Sentry, its successors and assigns, payment and performance when due, whether by acceleration or otherwise, of any and all Liabilities of the Obligor to Sentry arising from or in connection with the Loan Documents. The term "Liabilities of the Obligor" is used herein in its most comprehensive sense and shall include, but is not limited to, all liabilities, debts and obligations, voluntary or involuntary, direct or indirect, absolute or contingent, joint, several or independent, of the Obligor, now or hereafter existing, due or to become due, whether created directly or acquired by assignment or otherwise, arising from or in connection with the Loan Documents, whether such indebtedness may be or hereafter become barred by any statute of limitations or whether such indebtedness may be or hereafter become otherwise unenforceable. This is a continuing guaranty relating to all indebtedness of the Obligor to Sentry, including that arising under successive Equipment Schedules and lease and/or loan transactions. In addition, the Guarantor agrees to indemnify, hold harmless and defend Sentry against any loss, damage, or liability because of any wrongful acts or fraud of the Obligor arising from or in connection with the Loan Documents.

(b) The Guarantor hereby waives notice of acceptance of this Guarantee and Waiver and notice of any liability to which it may apply, and waives diligence, presentment, demand for payment and performance, protest, notice of dishonor or nonpayment of any such liabilities or nonperformance, suit or taking of other action by Sentry against, and any other notice to, any party liable thereon (including the Obligor and Guarantor) and waives any defense, offset, recoupment, reduction, or counterclaim for or on account of any reason or event whatever to any liability of the Guarantor hereunder. Sentry may at any time and from time to time (whether or not after revocation or termination of this Guarantee and Waiver) without the consent of, or notice to the Guarantor, without incurring responsibility to the Guarantor, without impairing or releasing, in any manner whatsoever, the obligations of the Guarantor hereunder, upon or without any terms or conditions and in whole or in part: (1) renew, modify, amend, compromise, extend, accelerate, discharge or otherwise change the manner, place, or terms of payment and/or change or extend the time of payment of, renew or alter, any and all Liabilities of the Obligor, any security therefor, or any liability incurred directly or indirectly in respect thereof, and the guarantee herein made shall apply to the Liabilities of the Obligor as so changed, extended, renewed or altered; (2) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property by whomsoever at any time pledged or mortgaged to secure, or howsoever securing the Liabilities of the Obligor hereby guaranteed or any liabilities (including any of those hereunder) incurred directly or indirectly in respect thereof or hereof, and/or offset thereagainst; (3) exercise or refrain from exercising any rights against the Obligor or others (including the Guarantor) or otherwise act or refrain from acting; (4) settle or compromise any Liabilities of the Obligor hereby guaranteed, any security therefor, or any liability (including any of those hereunder) incurred directly or indirectly in respect thereof or hereof, and may subordinate the payment of all or any part thereof to the payment of any liability (whether due or not) of the Obligor to creditors of the Obligor other than Sentry and the undersigned; and (5) apply any sums by whomsoever paid or howsoever realized to any and all Liabilities of the Obligor to Sentry regardless of what liability or Liabilities of the Obligor remain unpaid.

(c) No invalidity, irregularity or unenforceability of all or any part of the Liabilities of Obligor hereby guaranteed or of any security therefor shall affect, impair, or be a defense to this Guarantee and Waiver. The liability of the Guarantor hereunder is primary and unconditional and shall not be subject to any offset, defense, or counterclaim of the Obligor. This Guarantee and

117207EE.000

001039

12

Waiver is a continuing one and all liabilities to which it applies or may apply under the terms hereof shall be conclusively presumed to have been created in reliance hereof. The books and records of Sentry shall be admissible as prima facie evidence of the Liabilities of the Obligor. As to the Guarantor, this Guarantee and Waiver shall continue until written notice of revocation signed by the Guarantor shall have been actually received by Sentry, notwithstanding a revocation by, or complete or partial release for any cause of, either the Guarantor or the Obligor, or of any one liable in any manner for the Liabilities of the Obligor hereby guaranteed, or for the liabilities (including those herein) incurred directly or indirectly in respect thereof or hereof, and notwithstanding the dissolution, termination, or increase, decrease, or change in personnel of any one or more of the undersigned which may be partnerships or corporations.

(d) No revocation or termination hereof shall affect in any manner any rights arising under this Guarantee and Waiver with respect to (1) liabilities which shall have been created, contracted, assumed, or incurred prior to receipt by Sentry of written notice of such revocation or termination, or (2) liabilities which shall have been created, contracted, assumed, or incurred after receipt of such written notice pursuant to any contract entered into by Sentry prior to receipt of such notice; and the sole effect of revocation or termination hereof shall be to exclude from this Guarantee and Waiver liabilities thereafter arising which are unconnected with liabilities theretofore arising or transactions theretofore entered into.

(e) If, within ten (10) days after the date of the happening of any default of Obligor under the Loan Documents, Guarantor has not fully cured the such default, then at any time thereafter, Sentry may, without notice to the Obligor, but with written notice to the Guarantor, make the Liabilities of the Obligor to Sentry, whether or not then due, immediately due and payable hereunder as to the Guarantor, and Sentry shall be entitled to enforce the obligations of the Guarantor hereunder. In addition, upon the happening of any of the following events: the insolvency or suspension of business of the Guarantor or the issuance of any warrant or attachment against any of the property of the Guarantor (and any such warrant or attachment is not discharged within twenty (20) days), or the making by the undersigned of any assignment for the benefit of creditors, or a trustee or receiver being appointed for the Guarantor or for any of its property (and such appointment is not terminated in favor of the Guarantor within twenty (20) days), or any proceeding being commenced by or against the Guarantor under any bankruptcy, reorganization, arrangement of debt, insolvency, readjustment of debt, receivership, liquidation or dissolution law or statute (and such proceeding is not dismissed within twenty (20) days) — then and in any such event, and at any time thereafter, Sentry may, without notice to the Obligor, but with written notice to the Guarantor, make the Liabilities of the Obligor to Sentry whether or not then due, immediately due and payable hereunder as to the Guarantor, and Sentry shall be entitled to enforce the obligations of the Guarantor hereunder. Any and all claims of any nature which the Guarantor may now or hereafter have against the Obligor are hereby subordinated to the full payment to Sentry of the Liabilities of the Obligor and are hereby assigned to Sentry as additional collateral security therefor.

(f) In the event Sentry retains an attorney (whether in-house or otherwise) for the purpose of effecting collection of the Liabilities of the Obligor or of the Guarantor hereunder, the Guarantor shall pay all costs and expenses of every kind for collection, including reasonable attorneys' fees.

(g) If claim is ever made upon Sentry for repayment or recovery of any amount or amounts received by Sentry in payment or on account of any of the Liabilities of the Obligor and Sentry repays all or part of said amount by reason of (1) any judgment, decree, or order of any court or administrative body having jurisdiction over Sentry or any of its property, or (2) any settlement or compromise of any such claim effected by Sentry with any such claimant (including the Obligor), then and in such event the Guarantor agrees that any such judgment, decree, order, settlement, or compromise shall be binding upon the Guarantor, notwithstanding any revocation hereof or the cancellation of any note or other instrument evidencing any liability of the Obligor, and the Guarantor shall be and remain liable to Sentry hereunder for the amount so repaid or recovered to the same extent as if such amount had never originally been received by Sentry.

(h) No delay on the part of Sentry in exercising any of its options, powers or rights, or partial or single exercise thereof, shall constitute a waiver thereof. No waiver of any of its rights hereunder, and no modification or amendment of this Guarantee and Waiver, shall be deemed to be made by Sentry unless the same shall be in writing, duly signed on behalf of Sentry, and each such waiver, if any, shall apply only with respect to the specific instance involved, and shall in no way impair the rights of Sentry or the obligations of the Guarantor to Sentry in any other respect at any other time. The Guarantor shall have no right of subrogation against the Obligor or any security held for any Liabilities of the Obligor until Sentry shall have been paid in full all Liabilities of the Obligor, in which case Sentry will assign and subrogate all of its right, title and interest in and to the Loan Documents.

(i) This Guarantee and Waiver and the rights and obligations of Sentry and of the Guarantor hereunder shall be governed and construed in accordance with the laws of the State of Utah; and this Guarantee and Waiver is binding upon the Guarantor, its successors and assigns, and shall inure to the benefit of Sentry, its successors and assigns. The undersigned hereby consents to the exclusive jurisdiction of the Third Judicial District Court for Salt Lake County, State of Utah (the "Court"), for a determination of any dispute as to any matters hereunder and authorizes service of process by the Court for a determination of any dispute as to any such matters by service of process on the Guarantor by certified or registered mail sent to the Guarantor at the address of the Guarantor set forth below. This Guarantee and Waiver may be assigned, transferred and set over by Sentry



to any other person, firm or corporation without the consent of the Guarantor and, upon notice in writing made by Sentry's assignee or transferee of such assignment of this Guarantee and Waiver, all of the rights and remedies of Sentry and the liabilities of the Guarantor hereunder shall inure to the use and benefit of such assignee or transferee and the liabilities of the Guarantor hereunder shall apply with the same force and effect as if this Guarantee and Waiver had originally been executed and delivered by the Guarantor directly to such assignee and transferee.

(j) This Guarantee and Waiver and the rights and obligations of Sentry and the Guarantor hereunder shall remain in full force and effect until the Obligor has satisfied in full all of the obligations and Liabilities of the Obligor under the Loan Documents.

Dated as of April 29, 1994

"GUARANTOR:"

  
BOYD J. BROWN, personally

STATE OF UTAH )

: ss.

COUNTY OF SALT LAKE )

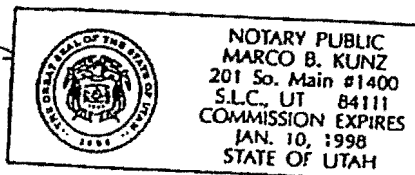
On this 22<sup>nd</sup> day of May, 1994, personally appeared before me, BOYD J. BROWN who, being by me duly sworn, did say that he is the signer of the above Guarantee and Waiver who, upon being by me duly sworn, duly acknowledged to me that he executed the same and that the statements contained herein and therein are true.

  
NOTARY PUBLIC

Residing at

My Commission Expires:

1/10/98



ADDENDUM I

MUTUAL RELEASE  
(R.317)

## MUTUAL RELEASE

This Mutual Release is entered into this 4th day of December, 1994, by and between Sentry Financial Corporation ("Sentry"), a Utah Corporation, and David K. Gillett, ("Gillett"), an individual.

### RECITALS

WHEREAS, Sentry and Gillett agreed to compromise and settle any and all disputes among them arising from and in connection with (a) the loan made by Sentry to Gillett, the terms of which are set forth in a letter agreement dated as of April 29, 1994, (b) the subsequent foreclosure action by Sentry and SFC Aircraft Corp. I ("SFC Aircraft") (c) the auction of Majestic Airlines, Inc. property on or about October 6, 1995 by Starman Bros. Auctions, Inc., (d) the sale or other disposition of property on which Sentry or SFC Aircraft holds a lien and (e) any other transaction related to or connected with the above-referenced transactions.

NOW, THEREFORE, for the consideration hereinafter set forth and the mutual promises and covenants contained herein and other good and valuable consideration, the sufficiency of which is hereby acknowledged, IT IS HEREBY AGREED AS FOLLOWS:

1. Sentry and Gillett mutually release, forever discharge and agree to hold harmless each other, and any and all of their allied or related companies, employees, partners, agents, officers, directors, shareholders, representatives and all other allied or related persons, and Boyd Brown, an individual, from any and all claims, demands, damages, actions, counts, causes of action, or suits at law of whatever kind and nature, and from all costs and attorneys' fees accruing and to accrue to each other on account of any and all known and unknown losses or damages directly or indirectly related to the facts or transactions set forth ~~in paragraph 1A~~ above.
2. A condition precedent to the release of Gillett by Sentry is that Gillett turn over to Sentry or to such person or persons as Sentry shall authorize to accept property on behalf of Sentry all property that is owned or held as collateral by Sentry and or SFC Aircraft, including without limitation all aircraft, aircraft logbooks and other records, aircraft parts and equipment, claims and causes of action against insurance companies, freight carriers and other parties relating to aircraft and aircraft parts and equipment (the "Property") that is held by Gillett, Majestic Airlines, Inc., other related entities owned or controlled by Gillett, and other entities not related to Gillett but to which Gillett or an entity controlled by Gillett have given possession of the Property.
3. This Agreement shall be binding on and shall inure to the benefit of the parties hereto and their respective successors and assigns.

SENTRY FINANCIAL CORPORATION

By: Jonathan M. Huga  
Name: Jonathan M. Huga  
Title: CEO

FAUC03LR011071173W07RELEASE2 CIL

DAVID K. GILLETT, an individual

David K. Gillett

WITNESS:

Keith E. McArthur  
Keith E. McArthur

001149

35