

**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

Quality Bank and )  
 Timothy Cavett, )  
 )  
 Plaintiffs/Appellees, )  
 )  
 vs. )  
 )  
 Lynette Cavett, )  
 a/k/a, Lynette Cavett, )  
 )  
 Defendant/Appellant. )

**Supreme Ct. No.: 20100024**

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Appeal from the October 14, 2009, Memorandum Opinion Granting and the  
 November 16, 2009 Order Quality Bank’s Motion for Summary Judgment Dismissal  
 of Cavett’s Counterclaim and the November 16, 2009, Summary Judgment Order  
 Civil No. 37-8-C-151  
 Ramsey County District Court, Southeast Judicial District  
 The Honorable John T. Paulson

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**BRIEF OF QUALITY BANK PLAINTIFF/APPELLEE**

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## **I. STATEMENT OF THE ISSUES**

[1] Whether the district court erred as a matter of law in granting Quality Bank's motion for summary judgment dismissal of Lynn Cavett's counterclaim. Cavett asserts that Quality Bank charged Cavett unconscionable overdraft fees. Cavett failed to file an affidavit in opposition to Quality Bank's motion for summary judgment.

## **II. STATEMENT OF THE CASE**

[2] Cavett is appealing from the district court's memorandum opinion granting Quality Bank summary judgment dismissal of Cavett's counterclaim dated October 14, 2009, and judgment dismissing Cavett's counterclaim dated November 16, 2009. Cavett's counterclaim asserted four claims. Cavett's App. PP. 15-19. At the September 8, 2009, hearing, Cavett withdrew all of her claims except the allegation that Quality Bank has charged Cavett unconscionable overdraft fees. Tr. P. 4. Cavett failed to file any affidavit in opposition to Quality Bank's motion for summary judgment. Cavett's App. PP. 71-82. Cavett failed to raise any genuine issues of fact regarding Quality Bank's motion for summary judgment. Cavett's App. PP. 71-82 and 91-92. The district court held that Cavett failed to demonstrate any genuine issues of material fact existed preventing the district court from granting Quality Bank's motion for summary judgment. Cavett's App. PP. 91-92.

[3] Cavett has a history of incurring overdraft charges with Quality Bank from 2004 through June 2, 2008. Quality Bank's App. PP. 82-194. During this period of time, Cavett paid Quality Bank 842 overdraft fees. Quality Bank's App. PP. 82-194. Cavett never objected to paying overdraft fees until Quality Bank commenced the present proceedings seeking to foreclose its liens in Cavett's farming assets, including her hog

operation. Upon filing the litigation, Cavett for the first time ever filed a counterclaim alleging that the overdraft fees that Quality Bank charged Cavett were unconscionable. See Appellant's Brief at 1; Tr. P. 4. Cavett's App. PP. 15-17.

[4] At the September 8, 2009, hearing, since Cavett did not file any affidavit in opposition to Quality Bank's motion for summary judgment, Cavett's legal counsel agreed with the court that no genuine issues of fact existed as to the claims other than unconscionability. Transcript P. 4. Cavett recognized that despite the fact that the banking industry is heavily regulated by state and federal regulators, the regulators have chosen not to cap overdraft fees. Cavett's App. PP. 83-92.

[5] The district court properly dismissed Cavett's counterclaim since no genuine issues of fact existed and, as a matter of law, Quality Bank had not charged Cavett unconscionable overdraft fees. Cavett's App. PP. 92. Despite heavy regulation of the banking system by state and federal regulators, the court found Quality Bank's overdraft fees were appropriate and not unconscionable.

### **III. STATEMENT OF THE FACTS**

[6] Quality Bank commenced the present cause of action against Cavett pursuant to a Complaint dated November 21, 2008. Cavett's App. PP. 3-13. Quality Bank's complaint sought to enforce two promissory notes with balances outstanding in excess of \$50,000.00, and to obtain a judgment for the amount of Cavett's overdraft balance in her checking account in excess of \$75,953.05. The overdraft account consisted of Quality Bank honoring checks with insufficient deposits in the amount of \$65,044.28 and overdraft fees of \$11,776.00. Cavett's App. PP. 3-15. Cavett's

obligations outstanding to Quality Bank were secured by Cavett granting Quality Bank a lien in her farming assets. Cavett's App. PP. 4-5, 14, 24.

[7] Shortly after Quality Bank commenced the present litigation, Cavett filed for Chapter 12 bankruptcy relief. Cavett's App. P. 24. Immediately thereafter, the Bankruptcy Court granted Quality Bank possession of Cavett's livestock. Cavett's App. P. 24. Quality Bank sold the same. Cavett's App. P. 27. After the sale of Cavett's livestock, Quality Bank filed with the Bankruptcy Court a motion for dismissal of Cavett's Chapter 12 bankruptcy proceedings. The Bankruptcy Court granted Quality Bank's motion to dismiss Lynn Cavett's Chapter 12 bankruptcy proceedings.

[8] After dismissal of Cavett's Chapter 12 proceedings, Cavett's son, Tim Cavett, paid Cavett's obligation outstanding to Quality Bank in full including Cavett's overdraft checking account balance in the amount of \$75,953.05. Cavett's App. P. 2. Quality Bank assigned all of its rights, title and interest in the Cavett promissory notes and overdraft checking account to Tim Cavett. Cavett's App. P. 2. Quality Bank agreed to indemnify Tim Cavett from Cavett's counterclaims. Cavett's App. P. 2.

[9] Prior to Cavett establishing a checking account with Quality Bank, Quality Bank provided Cavett with a brochure entitled "Fees and Service Charges". Cavett's App. P. 31; Quality Bank's App. P. 11. The brochure provides the following overdraft charge information:

**OVERDRAFT CHARGES**

Overdrafts of Checking Accounts are not encouraged and we have not changed our policy regarding accepting and paying checks that overdraw your account, but we realize that they do happen.

The fees listed below are based on the overdraft balance of your account. **The fees will be charged each day that the**



**overdraft balance remains on your account based on the following charge schedule.**

<u>On Balance</u>	<u>Daily Charge</u>
\$1.00 - \$50.00	\$4.00
\$50.01 - \$100.00	\$10.00
\$100.01 - \$250.00	\$12.00
\$250.01 - \$500.00	\$16.00
\$500.01 - \$1,000.00	\$20.00
\$1,000.01 - \$5,000.00	\$30.00
\$5,000.01 - \$10,000.00	\$50.00
OVER \$10,000.00	\$100.00

Cavett's App. PP. 31, 96-97 (emphasis in original); Quality Bank's App. P. 75.

[10] The account information provides that overdraft charges are charged each day that an overdraft balance/negative balance remains outstanding on the account. Cavett's App. PP. 31, 96-97; Quality Bank's App. P. 75. The account information further provides that Quality Bank encourages its customers to make careful records and practice good account management to avoid writing checks or drafts without sufficient funds and incurring a resulting fee. Quality Bank's App. P. 76-80. The fees charged are based on the amount of the overdraft balance outstanding. Cavett's App. PP. 31, 96-97; Quality Bank's App. P. 75.

[11] Quality Bank sends daily notices to its customers when an overdraft occurs. Quality Bank's App. P. 80. Quality Bank requests its customers to deposit sufficient funds to cover each overdraft. Id. The daily notice informs the customer of the daily overdraft charge and the amount of the overdraft balance on the customer's account. Cavett's App. P. 32; Quality Bank's App. P. 12.

[12] Cavett also received a bank statement each month regarding her account at Quality Bank. Cavett's App. PP. 32, 98; Quality Bank's App. P. 12. The bank statement

clearly reveals the amount of daily overdraft charges and the date the overdraft charges were incurred. Cavett's App. PP. 32, 98; Quality Bank's App. P. 12.

[13] In support of Quality Bank's motion for summary judgment, Quality Bank filed an affidavit of Dan McLeod. Attached to the affidavit of Dan McLeod was a history of Cavett's overdraft fees with Quality Bank from January 1, 2004, through December, 2008. Quality Bank's App. PP. 82-194. During this period of time, Cavett repeatedly overdrew her account, and repeatedly paid off her overdraft balance. Quality Bank's App. PP. 82-194.

[14] From January 1, 2004, to June 2, 2008, Cavett incurred 842 overdraft fees on her account with Quality Bank. Quality Bank's App. PP. 82-194. Cavett often paid her overdraft balance off in full within one or two months. Quality Bank's App. PP. 82-194. At times, Cavett paid the overdraft balance off the day after she overdrew her account. Quality Bank's App. PP. 82-194, 119. For example, Cavett maintained an overdraft balance on her account from March 9, 2004, until September 17, 2004. Quality Bank's App. PP. 89-101. The overdraft went as high \$43,715.96. Quality Bank's App. PP. 89-101. When Cavett deposited \$384,000 on September 17, 2004, Cavett once again had a positive balance. Quality Bank's App. P. 101. From September 20, 2004, until May 20, 2005, Cavett again overdrew her account, to the point that she had a negative balance in the amount of \$49,807.05. Quality Bank's App. PP. 102-118. Cavett deposited \$50,000.00 into her account on May 23, 2005, to bring a positive balance to her account. Quality Bank's App. P. 101. From November 17, 2005, until September 11, 2006, Cavett's account remained overdrawn, and by September 1, 2006, it was overdrawn in the amount of \$118,326.66. Quality Bank's App. PP. 128-148. Cavett then

deposited \$116,232.88 on September 6, 2005, and another \$6,020.05 on September 11, 2005, to bring her account balance positive. Quality Bank's App. P 148.

[15] The last time that Cavett had a positive balance on her account with Quality Bank was on June 3, 2008. Quality Bank's App. P. 181. From June 3, 2008, until the date that Quality Bank commenced this litigation on November 21, 2008, Cavett's account was overdrawn. Quality Bank's App. PP. 181-192. The overdraft fees from June 3, 2008, until November 21, 2008, were \$11,776.00. Quality Bank's App. PP. 181-192. During that period of time, Quality Bank honored \$82,218.73 of checks that Lynn Cavett issued with insufficient funds. Quality Bank's App. PP. 181-192.

[16] The evidence overwhelmingly demonstrates that Quality Bank did not charge Cavett an unconscionable overdraft fee. For the reasons cited herewithin, this Court should affirm the district court's summary adjudication of Cavett's remaining counterclaim, unconscionable overdraft fees.

#### **IV. STANDARD OF REVIEW**

##### **THIS COURT'S REVIEW OF THE DISTRICT COURT'S JUDGMENT IS DE NOVO**

[17] This Court reviews the district court's decision to grant summary judgment de novo. Dunford v. Tryhus, 2008 ND 212, ¶5, 776 N.W.2d 539. On appeal, this Court is to decide whether the information available to the trial court was void of any genuine issues of material fact thereby entitling Quality Bank to summary judgment as a matter of law. Rutherford v. BNSF Ry. Co., 2009 ND 88, ¶9, 765 N.W.2d 705. The interpretation of a contract to determine its legal affect is a question of law fully reviewable upon appeal by this court. Industrial Financial Corporation v. Redmond, 383

N.W.2d 847, 848 (N.D. 1986); Felco v. Doug's North Hill Bottle Shop, Inc., 1998 N.D. 111, 579 N.W.2d 576.

## V. LAW AND ARGUMENT

### THE TRIAL COURT'S SUMMARY DISPOSITION OF CAVETT'S COUNTERCLAIM SHOULD BE AFFIRMED BY THIS COURT.

#### A. Summary Judgment Disposition of Cavett's counterclaim was Proper.

[18] Cavett argues that Quality Bank's overdraft fees were unconscionable. Cavett failed to raise any genuine issues of fact regarding unconscionability. The trial court properly summarily dismissed Cavett's counterclaim since no genuine issues of fact existed and, as a matter of law, Quality Bank did not charge Cavett unconscionable overdraft fees.

[19] Summary judgment is appropriate against parties who fail to establish the existence of factual dispute on an essential element of the claim in which the non-moving party bears the burden of proof at trial. Rutherford, ¶9.

[20] When a motion for summary judgment is made and supported by the appropriate documentation demonstrating there are no genuine issues of material fact, Cavett must, by affidavits or otherwise, set forth specific facts demonstrating there are genuine issues of fact for trial. N.D. R. Civ. P 56(e). Cavett cannot rely on factual assertions in a brief or pleadings or on other unsupported allegations. Jones v. Barnett, 2000 ND 207, ¶4, 619 N.D.2d 490. Conclusory assertions are insufficient to raise a genuine issue of material fact. Id.

[21] Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Williams v. Borough of Westchester Pennsylvania, 891 F.2d 458, 463-464 (3d Cir. 1989).

Summary judgment motions require a judge to assess how one sided the evidence is or what a fair minded jury could reasonably decide. Williams v. Bourough of Westchester, 891 F.2d at 460; Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2550 (1986). When presented with a summary judgment motion, the judge must decide whether the evidence presents a sufficient disagreement to require submission to a jury or whether the evidence is so one sided that the moving party must prevail as a matter of law. Williams v. Bourough of Westchester, 891 F.2d at 460. The courts have further recognized that factual disputes which are irrelevant or unnecessary will not preclude the entry of summary judgment. Id.; Celotex, 106 S. Ct. at 2510.

[22] A genuine issue of fact exists if there is sufficient evidence favoring Cavett for a jury to return a verdict for Cavett; if the evidence is merely colorful or is not sufficiently probative, summary judgment may be granted against Cavett. Id.; Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2510 (1986). Factual disputes which are irrelevant or unnecessary will not preclude the entry of summary judgment. Anderson, 106 S. Ct. at 2510. In the case of Timmerman Leasing, Inc. v. Christianson, 525 N.W.2d 659, 662 (N.D. 1991), this Court stated that on motion for summary judgment, once the moving party makes a prima fascia case, the burden of producing facts or raising genuine issues shifts to the opposing party. The non-moving party must adduce more than a mere scintilla of evidence in its favor. Williams, 893 F.2d at 463-64. The non-moving party cannot simply reassert factually unsupported allegations contained in the pleadings. Jones v. Barnett, 2000 ND 207, ¶4, 619 N.W.2d 490.

[23] The issue before the District Court was a question of law since no genuine issues of fact existed. For the reasons cited herewithin, the district court properly granted Quality Bank summary dismissal of Cavett's counterclaim.

**B. The Trial Court Properly Construed The Parties Agreement.**

[24] Cavett contractually agreed that should Cavett have a negative balance in her checking account, Cavett's checking account would be assessed overdraft fees. Cavett received the schedule of overdraft fees prior to opening her account at Quality Bank. Cavett's agreement with Quality Bank is a contract.

[25] The construction of a contract is a question of law for the Court to decide. In re Estate of Dionne, 2009 ND 172, ¶ 16, 772 N.W.2d 891. A contract must be interpreted to give effect to the mutual intention of the parties as it existed at the time of contracting. N.D.C.C. § 9-07-03. "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others." N.D.C.C. § 9-07-06. "[A]n unambiguous contract is particularly amenable to summary judgment." Garofalo v. Saint Joseph's Hosp., 2000 ND 149, ¶ 7, 615 N.W.2d 160. A course of dealing may be used to interpret the terms of an agreement. N.D.C.C. § 41-01-17(2).

[26] Cavett did not file an affidavit in opposition to Quality Bank's motion for summary judgment adjudication of Cavett's counterclaims. Thus, no genuine issue of fact existed regarding the parties' contract that allowed Quality Bank to charge Cavett overdraft fees. From the banking records attached to Dan McLeod's affidavit, Cavett has paid overdraft fees to Quality Bank as early as January 15, 2004. Quality Bank's App. P.

82. From January 1, 2004, to June 2, 2008, Cavett paid Quality Bank 842 overdraft fees. Quality Bank's App. PP. 82-181.

[27] The parties' course of dealing demonstrates that Cavett knew if she issued a check on an account with insufficient funds to cover the check, and Quality Bank honored the check, Cavett would incur overdraft fees. Prior to June 3, 2008, through November 21, 2008, Cavett incurred and paid 842 overdraft fees to Quality Bank. Quality Bank's App. PP. 82-181. On 842 occasions, Cavett knew the consequences and the costs of directing Quality Bank to honor the checks she wrote with insufficient funds in her account. After 4 years and 842 transactions, Cavett could not and did not claim surprise. Each and every time Cavett directed Quality Bank to honor Cavett's checks written on her account with insufficient funds, Cavett would be charged an overdraft fee that was conspicuous and well known to Cavett.

[28] The determination of whether a contractual provision is unconscionable is a question of law. Rutherford, ¶ 20. However, a finding of unconscionability is dependent upon the specific facts of each case. Id. "Because the determination of unconscionability is fact specific, courts must consider such claims on a case-by-case basis, and assess the totality of the circumstances." Id. (emphasis added).

[29] There are two factors that must be examined in an unconscionability analysis: (1) procedural unconscionability; and (2) substantive unconscionability. Id. at ¶ 22. There must be some quantum of both procedural and substantive unconscionability for a party to establish that a contract is unconscionable. Id.

C. **Quality Bank's Overdraft Fees Are Not Unconscionable.**

1. **Procedural Unconscionability.**

[30] Procedural unconscionability focuses on whether there was any unfair surprise, oppression, or inequality of bargaining power. Id. Procedural unconscionability may exist in consumer transactions but generally does not exist in a commercial setting. In a commercial setting, the parties are experienced parties. Strand v. U.S. Bank National Association ND, 2005 ND 68, ¶ 13, 693 N.W.2d 918. A consumer transaction is carefully examined to ensure the terms of the contract are not unfair and have not been applied in an unconscionable manner against the consumer who did not participate in the contract's drafting. Id.

[31] Since Cavett is not a consumer, greater scrutiny is not required. A "consumer" is defined as "an individual who enters into a transaction primarily for personal, family, or household purposes." N.D.C.C. § 41-01-09; see also N.D.C.C. § 41-01-02. Cavett's transactions with Quality Bank were consummated for Cavett's farming operation. Cavett's App. p.35. Cavett was a hog producer, and she used her Quality Bank account for hog production sales and acquisitions. Brief of Appellant, at P. 2. A debt incurred for a farming purpose is not a consumer debt, but a commercial debt. In re Thompson, 750 F.2d 628 (8th Cir.1984) (the debtors hog-raising business was a capital business venture, and the financing of such was not a consumer debt); In re Shaffer, 315 B.R. 90, 94 (Bankr. W.D. Mo. 2004) (a loan to an individual debtor to purchase a pickup used for farming operation was not a consumer debt since pickup was not incurred primarily for a personal, family, or household purpose); Robertson v. State Farm Fire and Cas. Co., 890 F. Supp. 671, 680 (E.D.Mich. 1995) (the purchase of insurance for a dairy



farm was not for personal, family, or household purposes and thus not a consumer transaction); Miller v. Hubbard-Wray Co., 630 P.2d 880, 885 (Or. Ct. App. 1981) (the purchase of a baler for the family farm was not a purchase for personal, family, or household purposes).

[32] Cavett's transactions with Quality Bank were in pursuit of Cavett's hog operation and were therefore commercial transactions. Cavett did not present an affidavit asserting that Cavett was not a sophisticated borrower or that Cavett did not understand the terms of the overdraft agreement – an agreement that she honored and tendered 842 overdraft fees for in excess of 4 years. Cavett failed to file an affidavit raising any genuine issues of fact that Cavett could not obtain financing from any other lender, that Quality Bank was the lender of last resort, or that Cavett was ineligible to obtain financing through other lenders. The evidence demonstrates otherwise. The evidence demonstrates that Cavett was experienced in writing numerous checks on her account at Quality Bank with insufficient funds to cover the checks, and Cavett paid the overdraft fees that she incurred with Quality Bank prior to June 3, 2008, through November 21, 2008. Cavett's App. PP. 101-210; Quality Bank's App. PP. 82-194. Cavett's App. PP. 101-210; Quality Bank's App. PP. 82-194. Cavett's App. PP. 101-210; Quality Bank's App. PP. 82-194.

[33] Cavett could have ceased incurring overdraft fees by no longer writing checks on her account with nonsufficient funds. The record is clear that Cavett has failed to demonstrate procedural unconscionability existed between the parties.

[34] Cavett also failed to demonstrate unfair surprise, oppression, or inequality of bargaining power. Cavett failed to file any affidavit with the court stating that she was

surprised that if she had an overdraft account at Quality Bank or wrote a check with insufficient funds, she would be charged an overdraft fee. Cavett's course of dealing with Quality Bank demonstrated that for four years, Cavett was in fact charged overdraft fees 842 times when she issued checks on her account with insufficient funds. Cavett requested Quality Bank to honor her insufficient fund checks, which Quality Bank did for a fee. Cavett has a history/a course of dealing for at least four years that demonstrates that Cavett, on numerous occasions, issued checks on her account with insufficient funds, directing Quality Bank to honor the checks, and resulting in Quality Bank charging Cavett an overdraft fee.

[35] Cavett did not present any evidence to the court that there was any oppression or inequality in bargaining power regarding Cavett's checking account at Quality Bank. Cavett was in charge of her financial affairs. Cavett had the option of not writing checks in excess of her funds on deposit with Quality Bank. Cavett had the option of living within her means instead of writing checks in excess of her funds on deposit with Quality Bank. Cavett chose not to live within her means and chose to issue checks on her account with insufficient funds. Cavett consciously requested Quality Bank to honor Cavett's checks issued on her account with insufficient funds.

[36] Cavett knew from 842 previous occasions that requesting Quality Bank to honor Cavett's NSF checks would result in an overdraft fee. Cavett had a four year course of dealing with Quality Bank in which she knew each and every time she wrote a check without sufficient funds, she would be charged an overdraft fee by Quality Bank until Cavett deposited sufficient funds in her account to maintain a positive balance in her checking account. Cavett failed to demonstrate that she was unfairly surprised, or that

there is inequality of bargaining power regarding her maintaining her account at Quality Bank. Cavett has never asserted that she did not know or realize she was writing checks that resulted in overdraft fees.

[37] When an overdraft occurred, Quality Bank sent notices to Cavett each day an overdraft fee was incurred and monthly statements demonstrating the dates and amounts of overdraft fees. Cavett's App. PP. 31-32; Quality Bank's App. PP. 11-12. The monthly statements explained that Quality Bank was honoring the overdrafts and requested that Cavett deposit sufficient funds to cover the overdraft. Cavett's App. PP. 31-32; Quality Bank's App. PP. 11-12. The monthly statements provided Cavett with account information and encouraged Cavett to make careful records and practice good account management. Cavett's App. P. 32; Quality Bank's App. P 12.

[38] At the summary judgment hearing, Quality Bank provided documentation establishing that there were no genuine issues of fact regarding Cavett being charged overdraft fees on her account with Quality Bank. Cavett failed to demonstrate that she was surprised by being assessed overdraft fees or that somehow she was oppressed or had inequality of bargaining power in maintaining her account with Quality Bank. For the reasons cited herewithin, this Court should summarily affirm the district court's dismissal of Cavett's counterclaim.

[39] Cavett makes conclusory allegations that procedural unconscionability exists. See Appellant's Brief at 16-17. Pursuant to the decision rendered in Koehler v. County of Grand Forks, 2003 ND 44, ¶ 15, 658 N.W.2d 741, the Cavett district trial court properly dismissed Cavett's counterclaim. In Koehler, plaintiff commenced litigation asserting she was discriminated against on the basis of a disability. Id. The Koehler

Court granted summary judgment dismissal of the plaintiff's complaint asserting the plaintiff failed to raise a genuine issue of material fact in opposition to the defendant's motion for summary judgment. Id. Like Koehler, Cavett has failed to cite specific evidence in the record that created a genuine issue of material fact precluding the district court from granting Quality Bank's motion for summary judgment dismissal of Cavett's counterclaims.

[40] In Tarvasky v. Rankin, 2009 ND 149, ¶ 11, 771 N.W.2d 578, the plaintiff filed a motion for summary judgment. The defendant failed to file an affidavit in opposition to the plaintiff's motion. Id. at ¶ 21. The Tarvasky court found that the lower court appropriately granted the plaintiff summary judgment on its complaint since the defendant failed to demonstrate that competent admissible evidence existed to raise a genuine issue of material fact as to whether the plaintiff was entitled to relief. Id.

[41] Consistent with the Koehler and Tarvasky decisions, Quality Bank has provided appropriate documentation demonstrating Quality Bank was entitled to summary dismissal of Cavett's counterclaim. Quality Bank's App. PP. 3-13. Cavett failed to file any affidavit to create any issues of material fact. Cavett asserted procedural unconscionability existed because: (1) Cavett processed loan applications through Quality Bank and therefore could not abandon her account at Quality Bank; and (2) the overdraft agreement was standardized. Appellant's Brief, PP. 16-17. Cavett provided no affidavit to support her proposition. Nor did Cavett present any evidence that she tried to negotiate terms and conditions of her overdraft agreement.

[42] Like Koehler, Cavett has made unsupported, vague, and conclusory allegations. Cavett's unsupported statements are not sufficient to create a genuine issue

of material fact. Because Cavett has failed set forth any specific facts creating any genuine issues for trial, the district court appropriately granted Quality Bank's motion for summary judgment dismissal of Cavett's counterclaims.

**2. Substantive Unconscionability.**

[43] Substantive unconscionability focuses upon the harshness and one-sidedness of a contract and whether the specific contractual terms are commercially reasonable. Construction Associates, Inc. v. Fargo Water Equipment Co., 446 N.W.2d 237, 243 (N.D. 1989). In Construction Associates, this Court concluded that the contract was unconscionable because it left the plaintiff with no effective legal remedy. Id. at 243-44. In Strand, this Court found the opposite – that the parties contract was not unconscionable since the enforcement of the contractual provision granted the plaintiff effective legal remedies. Strand, at ¶¶ 23-24.

[44] In the present case, Cavett has not asserted the overdraft charge policy has left her without an effective remedy. The agreement between the parties does not limit Cavett's remedy at law. See Cavett's App. p.97. Because there is no contractual provision that limits Cavett's remedies at law in any way, substantive unconscionability is not present. Cavett has failed to demonstrate how her conscious decision to write checks on her overdrawn account and knowingly incur an overdraft fee is unconscionable. Cavett failed to explain why she believes she should be able to dictate all of the terms and conditions of her knowingly writing checks on an account with insufficient funds and directing Quality Bank to honor the checks without paying for any consequences of her voluntary actions – an overdraft fee. That overdraft fee was charged to discourage irresponsible behavior.

[45] Additionally, there is no evidence to establish that the contractual terms are one sided and harsh or that Cavett had no choice but to take the contractual terms. In In Re Chabot, 369 B.R. 1, 23 (Bkrcty. D. Mont. 2007), the debtor argued that the loan documents she signed with the creditor were unconscionable because the interest rate was excessively high. The creditor, in support of the creditor's motion for summary judgment, filed supporting documents, deposition testimony, and sworn statements. Id. The debtor failed to file an affidavit demonstrating that the contractual terms were unreasonably favorable to the creditor or that the debtor had no meaningful choice regarding acceptance of the contractual provisions. Id. The Chabot court granted the creditor summary judgment on its complaint because the debtor failed to present any sworn affidavits or other evidence to raise a genuine issue of material fact. Id. at 24. Additionally, the Chabot court observed that the debtor had a meaningful choice regarding acceptance of the contractual provisions of the loan documents and exercised that meaningful choice when she tried to rescind the loan transaction, but then abandoned rescission when the creditor offered the debtor additional funds. Id. at 23.

[46] As in Chabot, Cavett has not presented any affidavits to support her contentions. Cavett has not presented any affidavits to establish that the overdraft provisions were one sided. Cavett has not presented any affidavits demonstrating that Cavett did not have any meaningful choice other than accepting the overdraft fee agreement. Cavett failed to demonstrate that she could not balance her check book, live within her means, or obtain funds from other sources. Cavett presented no evidence in support of any contentions she attempted to raise. As in the past, Cavett could have ceased overdraft fees by ceasing to write checks on account with insufficient funds.

Cavett is seeking to shift the blame for poor management of her farming operation to her creditors. Cavett's course of dealing with Quality Bank demonstrates that Cavett would rather issue checks on insufficient funds and pay overdraft fees than try to better manage her hog operation.

[47] By Cavett's failing to file an affidavit in opposition to Quality Bank's motion for dismissal of Cavett's counterclaim, Cavett agrees that Quality Bank adhered to the funds contract and provided Cavett with notice each and every day that Cavett had an overdraft fee incurred on her bank account. Cavett's failure further demonstrates that Cavett understood she would be charged an overdraft fee, that Cavett understood the amount of the overdraft fees she would be assessed based upon the balance of her overdraft account, and that Cavett's course of dealing demonstrated that Cavett paying overdraft fees was part of her costs of operating a commercial hog operation. Cavett has not contested the terms and conditions of her overdraft fee agreement with Quality Bank were ambiguous or unclear. Cavett has failed to demonstrate that Quality Bank's overdraft fees are substantially unconscionable. Since Quality Bank was "careful to make written disclosures of its charges, Quality Bank cannot be criticized for failing to use good faith in setting its NSF fees." 2 White & Summers-UCC § 21-2 (emphasis added).

[48] This court must affirm the trial court's summary adjudication of Cavett's counterclaim. Cavett has failed to satisfy the element of unconscionability. Cavett has failed to demonstrate: (a) that she was surprised that she be assessed fees for writing checks on account with insufficient funds; (b) that she would be assessed fees by Quality Bank in protecting Cavett from being criminally charged with writing checks on an

insufficient account and procuring services without sufficient funds on account; c) that despite a previous course of dealing of being assessed 842 previous overdraft fees for issuing checks with insufficient funds on deposit with Quality Bank, that Cavett would be charged fees in continuing to do so; d) that the fees charged by Quality Bank were excess of the market rates; e) that Quality Bank was only lender in the area that would allow Cavett to maintain a checking account; f) that Cavett had no other option in procuring supplies for a hog operation and financing the same; g) that terms and conditions of Cavett's overdraft fees with Quality Bank were in excess of what Quality Bank charged other clients.

[49] The course of dealing between the parties demonstrates that Cavett on 842 occasions paid Quality Bank overdraft fees for issuing checks with insufficient funds that Quality Bank honored. The evidence demonstrates that Cavett in 2004, had 222 overdraft notices/overdraft fees. In 2005, Cavett had 204 overdraft notices and payment of overdraft fees. In 2006, Cavett had 197 overdraft notices/overdraft fees. In 2007, Cavett had 167 overdraft notices/167 overdraft fees. The overdraft fees were not increased from January 1, 2004 – November 21, 2008. Cavett has failed to demonstrate procedural and substantive unconscionability regarding the overdraft fee agreement with Quality Bank. For the reasons stated herewithin, this court should affirm the district court's summary adjudication of Cavett's counterclaim.

**D. The overdraft fees that Quality Bank charged Cavett conform with the Parties agreement and the law.**

[50] Quality Bank's relationship with its customers is heavily regulated by both state and federal bank regulatory agencies. The regulatory agencies have not limited



what a bank can charge its customers for overdraft fees. Quality Bank's overdraft fees is within the purview of the law and both the state and federal regulations.

[51] N.D.C.C. § 41-04-32 provides that “[a] bank may charge against the account of a customer an item which is properly payable from the account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and complies with any agreement between the customer and bank.” Id. A customer is liable for overdraft fees when the customer signs a check and benefits from the proceeds of the check. Id.

[52] In Pulaski State Bank v. Kalbe, 364 N.W.2d 162, 163 (Wis. 1985), the defendant issued a check for the amount of \$7,260, which created an overdraft. The defendant argued that her bank should not have honored the customer's check when it created such a large overdraft. Id. The court recognized that banking laws give banks the discretion to honor an overdraft and banks are not limited as to which overdrafts to honor. Id. at 164. The Pulaski court stated that the law does not place limits on the size of the overdrafts that a bank can honor nor does the law require banks to provide a rationale for honoring certain overdrafts and dishonoring other overdrafts. Id. The Pulaski court concluded that a bank customer impliedly promises to pay its bank the amount of each and every draft the bank customer writes on their account with the bank and the resulting overdraft fees. The Pulaski court observed that if the bank customer seeks to avoid overdraft fees, the bank customer should cease writing checks on account with insufficient funds. Id.

[53] It is appropriate for banks to charge overdraft fees and then seek repayment from their customers. In Continental Bank v. Fitting, 559 P.2d 218, 219 (Ariz.

Ct. App. 1977), the bank brought an action to recover the amount of overdraft fees which it paid on a check drawn on the bank customer's account. The bank customer claimed that the bank should not have paid the overdraft. Id. The Continental court observed that Arizona law allows banks to charge overdraft fees. Id. The Court stated that “[t]he bank, by paying the overdraft and charging the customer's account, was acting in accordance with procedures specifically authorized by law, and violated no claimed contractual agreement with its customer.” Id. at 220. The court observed that by a bank paying an overdraft and charging the customer's account, a fee, the bank was following the customer's request – honoring a check written on account with insufficient funds.

[54] As in Pulaski and Continental, North Dakota law does not restrict overdraft charges. N.D.C.C. § 41-04-32 does not limit the amount of overdraft charges a bank can charge its customers. A bank customer is liable for overdraft fees incurred when the bank customer issues a check on account with insufficient funds and the bank honors the check resulting in the customer avoiding criminal prosecution for writing a check on an account with insufficient funds.

[55] The State of North Dakota has likewise chosen not to cap the amount of fees in other credit transactions. See, e.g., N.D.C.C. § 51-13-06.1 (no cap on retail installment contract interest rates and fees); N.D.C.C. § 51-14-02 (no limit on the amount and rate of the credit service charge to be charged and paid); N.D.C.C. Ch. 51-14.1 (no limit on the interest and fees that can be charged for credit cards). North Dakota Legislature and the state and federal regulatory agencies allow financial institutions and credit card companies to charge what the market will bear for interest rates and fees for products utilized by North Dakota customers. The North Dakota Legislature and the state

and federal regulatory agencies have determined that it is permissible for banks to charge customers a fee for issuing checks on account with insufficient funds. Quality Bank has not violated any rules or regulations assessing Cavett a fee for directing Quality Bank to honor her checks written on her account with insufficient funds. From January 1, 2004 through June 3, 2008, on 842 occasions Cavett received notice that her account at Quality Bank was overdrawn and that she was paying Quality Bank fees for being overdrawn. By June 3, 2008, Cavett paid the 842 overdraft charges in full. Quality Bank did not increase its fees for overdraft charges from January 1, 2004 through November 21, 2008. Cavett has not raised any genuine issues of fact regarding her contractual agreement with Quality Bank or Quality Bank honoring checks Cavett issued on account with insufficient funds. Cavett has not contested the fact that she incurred during the period of time January 1, 2004 through June 3, 2008, 842 overdraft fees and paid them voluntarily. Evidently, the fees were paid by Cavett's son, Tim Cavett. The fees are \$11,776.00. Quality Bank's overdraft fees have not increased since January 1, 2004. Quality Bank continued to send Cavett the same notices she received post-June 3, 2008, Cavett had received post January 1, 2004. Cavett has failed to demonstrate that fees Quality Bank has charged Cavett are unconscionable.

[56] In City Bank of Honolulu v. Tenn, 469 P.2d 816, 817 (Haw. 1970), the bank sued its customer to recover \$6,000 the bank paid out on overdraft checks issued by the customer. The customer issued the check in the amount of \$6,000, knowing that the check was approximately \$4,700 in excess of the funds the customer had on deposit with the bank. Id. The court held that the bank customer impliedly gave the bank authority to honor the customer's check since the bank customer issued the check. Id. The court

stated that “the depositor, having initiated the circulation of the instrument in question, must in conscience and in law bear the ultimate consequence thereof” – the overdraft fees. Id.

[57] When a bank customer causes an overdraft, the customer has an obligation to repay the bank. Id. Overdrafts are considered to be loans granted by the bank, resulting in customers having an obligation to repay their loans to the bank. See Thiele v. Security State Bank of New Salem, 396 N.W.2d 295, 298 (N.D. 1986) (indicating that overdrafts are an unsecured loan). In First-Citizens Bank & Trust Co. v. Perry, 252 S.E.2d 288, 289 (N.C. App. 1979), the bank alleged that it honored \$86,268.99 of its customer’s checks written without sufficient funds. The customer contended that the overdrafts were a result of the bank failing to deliver bank statements to the defendant in a timely manner. Id. The court held since the customer admitted that he wrote the checks, admitted that the checks were drawn against the customer’s account, and admitted that the checks were paid by the bank to respective payees or endorsers that were designated by the customer, the overdrafts were considered loans. Id. As such, the bank was entitled to a judgment against the customer for the amount of the overdrafts honored by the bank, including fees. Id. The court stated that an action to recover overdrafts and resulting fees are premised upon the implied promise which arises from the bank customer issuing a check on insufficient funds and requesting the bank to honor the check. Id.

[58] Pursuant to the Tenn and Perry decisions, when Cavett issued checks on her account with insufficient funds and requested that Quality Bank honor the checks drawn by Cavett, Cavett consented to the terms and conditions of her overdraft fee

agreement with Quality Bank. Quality Bank charged Cavett a fee for honoring checks that would have otherwise been returned for having nonsufficient funds and would have otherwise subjected Cavett to potential criminal proceedings. Cavett issued the checks pursuant to the parties' contract which explicitly described in detail the fees Cavett would be charged for issuing checks on account with nonsufficient funds. Cavett knowingly issued said checks. Cavett consciously incurred the fees. Cavett should bear the consequences of her actions and repay Quality Bank for the overdraft fees charged. This court should affirm the trial court's decision to grant Quality Bank's motion for summary judgment dismissal of Cavett's counterclaim.

**E. The Parties Course of Conduct Demonstrates That Cavett Understood The Overdraft Fee Agreement.**

[59] Quality Bank honored Cavett's overdrafts with the understanding that Cavett would repay the checks she issued with insufficient funds and in addition Cavett would pay the resulting overdraft fees. Cavett's course of conduct, 842 prior non-contested paid overdraft fees, demonstrates that Cavett understood she agreed to pay Quality Bank a fee for honoring her overdrafts each and every time she wrote a check on her account with insufficient funds. Cavett paid overdraft fees from January 1, 2004, through June 3, 2008. Cavett received both daily overdraft notices and notices in her monthly bank statement regarding the overdrafts, the date of the overdrafts, and the amount of the overdraft fees. Cavett's course of conduct establishes that Cavett understood the parties' overdraft fee contract, the ramifications of issuing checks on her account with insufficient funds, and the resulting costs and fees associated with the same. Cavett voluntarily paid 842 overdraft fees without objection.

[60] “A course of dealing is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.” N.D.C.C. § 41-01-17(2). A course of dealing is relevant to demonstrate the parties’ understanding and ramifications of their agreement. N.D.C.C. § 41-01-17(4).

[61] Cavett repeatedly issued checks with insufficient funds, requesting Quality Bank to honor the checks, paying Quality Bank the amount of funds that Quality Bank advanced Cavett to cover checks, and paying the resulting fees. Cavett’s conduct establishes a course of dealing that demonstrates that Cavett understood the parties’ overdraft fee agreement. Cavett understood each and every time she requested Quality Bank to honor her check drawn on her account with insufficient funds that a resulting fee would be incurred.

[62] In Sayan v. Riggs National Bank of Washington, 544 A.2d 267, 268 (D.C. Ct. App. 1988), the bank commenced litigation seeking repayment of over \$1 million in overdraft checks and fees. Id. The district court granted the bank summary judgment on its complaint even though the bank customer submitted an affidavit in opposition to the bank’s summary judgment motion. Id. at 268-69. The bank customer’s affidavit did not dispute that an overdraft remained unpaid and did not dispute that the bank customer disputed the amount of the overdrafts. Id. The Sayan court held that the bank customer failed to set forth specific facts demonstrating that there was a genuine issue for trial. Id. at 269. Because no genuine issues of fact existed, the Sayan court granted the bank

summary judgment as a matter of law on its complaint against the bank customer for the amount of the overdrawn bank account, including overdraft fees. Id.

[63] The bank's payment of an overdraft check results in an implicit agreement by the customer to repay the overdraft and any resulting fees. Id. The Sayan court recognized the official comment to UCC 4-401:

It is fundamental that upon proper payment of a draft the drawee may charge the account of the drawer. This is true even though the draft is an overdraft since the draft itself authorizes the payment for the drawer's account *and carries an implied promise to reimburse the drawee.*

The Sayan court mandated that when a bank honors an overdraft, a duty arises upon the bank customer to repay the overdraft. Id. Moreover, the court held that the course of conduct between the parties can dictate that an implicit overdraft/loan arrangement had been reached. Id. The Sayan court found that the bank honored the defendants' overdrafts for eleven months, resulting in the bank essentially loaning the defendant funds to cover the overdrafts and assessing the customer overdraft fees. Id. The Sayan court held that due to the bank customer's conduct, the bank customer effectively conceded the obligation to repay to the bank the amount of all overdrafts honored and the resulting fees. Id.

[64] Consistent with the Sayan decision, the Cavett district court appropriately granted summary judgment dismissing Cavett's counterclaim. Cavett's course of conduct demonstrates that Cavett knew that each and every time she wrote a check with insufficient funds and Quality Bank honored the check, that Cavett would be liable to Quality Bank for overdraft fees. Cavett's course of dealing/contract from January 1, 2004, through June 3, 2008, demonstrates that Cavett was assessed 842 overdraft fees for issuing checks with insufficient funds. Quality Bank's App. P. 82-194. Cavett does not

dispute that she was aware of Quality Bank's overdraft charges and fees. Cavett does not dispute that Quality Bank provided notice to Cavett of the overdraft and resulting fees. Cavett does not dispute that she owes Quality Bank overdraft fees. Cavett does not dispute the amount of the overdraft fees. Cavett simply objects to the fees asserting that the fees are excessive. However, on the 842 prior occasions, Cavett never objected to the fee nor asserted the fees were excessive. The fees have not changed from January 1, 2004, to the present.

[65] Cavett repeatedly requested Quality Bank to honor checks that she issued without sufficient funds in her account to honor the checks. By Quality Bank honoring said checks, Cavett avoided criminal prosecution for issuing NSF checks. Cavett's course of conduct demonstrates that Cavett understood that writing checks on her account with insufficient funds would generate bank overdraft fees. On 842 occasions between January 1, 2004, and June 3, 2008, Cavett was notified of the overdraft fees and paid the same. Cavett never objected to the payment of the fees. Nor did Cavett ever assert she was unaware of the fees. The parties' agreement has not changed subsequent to the 842 Cavett overdraft notices and fee payments.

[66] Cavett started receiving overdraft fee notices as early as January 1, 2004, and continued to receive overdraft fee notices on 842 occasions as of June 3, 2008. During this same period of time, Cavett received monthly bank statements from Quality Bank informing Cavett of the daily overdraft fee she was paying to Quality Bank for issuing checks with nonsufficient funds. Cavett never objected to Quality Bank assessing Cavett an overdraft fee. Cavett knew if Quality Bank honored Cavett's overdrawn check,



Cavett would be liable to Quality Bank for overdraft fees. There is no genuine issue of fact that Cavett:

1. maintained a checking account at Quality Bank;
2. received information when establishing her bank account at Quality Bank that if Cavett wrote check with insufficient funds, Cavett would be charged an overdraft fee if Quality bank honored the check;
3. was provided with overdraft fee schedules and information;
4. received from January 1, 2004, up to and including June 3, 2008, monthly banking statements which disclosed the amount of overdraft fees charged daily;
5. paid 842 overdraft fees from January 1, 2004, though June 3, 2008;
6. incurred \$11,772.00 of overdraft fees that were eventually paid by her son, Tim Cavett;
7. never objected to Quality Bank charging her an overdraft fee until litigation was commenced in this matter;
8. never objected to Quality Bank honoring her overdrafts, including the overdrafts which resulted in the fees Cavett is now contesting; and
9. does not assert that Quality Bank's overdraft fees are in contravention of either state or federal regulatory laws.

[67] Cavett's course of conduct demonstrates that Cavett understood the terms of the parties' overdraft fee agreement and the ramifications of issuing checks on her account with insufficient funds to pay the same. The district court properly granted

summary judgment adjudication of Cavett's counterclaim determining that the overdraft fee agreement between the parties was not unconscionable.

**F. The Trial Court Correctly Concluded That Overdraft Fees Are Not Interest.**

[68] Cavett asserts that overdraft fees are interest. At the September 8, 2009, hearing, Cavett waived all arguments and withdrew her counterclaim regarding usury. Transcript P. 4. Overdraft fees are not interest. The district court opined that overdraft fees are not interest based on case of Video Trax, Inc. v. NationsBank, N.A., 33 F. Supp. 2d 1041, 1050-52 (S.D. Fla. 1998). The Video Trax court found that overdraft fees are not interest and thus not subject to usury statutes. Id.; see also Nicholas v. Deposit Guar.Nat. Bank, 182 F.R.D. 226, 231 (S.D.Miss.1998); Soto v. Bank of Lancaster County, 2010 WL 1381640, at \*2 (E.D. Pa., March 31, 2010) (“[A]ll courts which have addressed the issue have concluded that overdraft fees are not interest.”).

[69] Despite Cavett waiving the argument that overdraft fees are interest, Cavett asserts that Quality Bank's overdraft fees are interest. Cavett fails to acknowledge that she waived this argument.

[70] Cavett asserts that Quality Bank charged Cavett 169% interest during the period of time from May 25, 2004, through June 24, 2004. Brief of Appellant, at 10. Quality Bank's fees are not interest and cannot be deemed to be interest by law. See, e.g., N.D.C.C. § 13-08-12(2). For example, N.D.C.C. § 13-08-12 governs payday loans. A licensed payday loan provider may charge 20% of the amount that it advances to the customer for payday loans as a fee. Id. A payday loan cannot be greater than \$500.00. Payday loan cannot be paid over a period of time shorter than 15 days. Id. When converting the payday loan fee of 20% into interest and assuming a \$500.00 payday loan

is paid in 15 days, the fee/rate of interest of \$100.00 for \$500.00 borrowed equates to an interest rate of 520% annually. Quality Bank's alleged overdraft fee when converted into annual interest rate for the period of time of May 25, 2004, through June 4, 2004, is not unconscionable since the converted fee into annual interest rate is 300% less than legislatively approved payday loan fees. Quality Bank's overdraft fees are not unconscionable.

[71] Cavett has analyzed the period of time May 25, 2004, through June 24, 2004, when Cavett had an overdrawn balance at Quality Bank. When examining the entire duration of Cavett's overdraft balance, March 11, 2004, through September 11, 2004, Cavett overdrew her account with Quality Bank in the amount of \$94,797.00. Quality Bank's App. PP. 93-101. During that same six month time period, Quality Bank charged Cavett \$9,147.00 in overdraft fees. Quality Bank's App. 93-101. The overdraft fees Quality Bank charged Cavett during this period of time if analyzed into a rate of interest equates to an annual interest rate/fee of 19%, not the 169% illustrated by Cavett. From June 3, 2008, through November, 2008, Cavett incurred overdraft fees in the amount of \$11,776.00 for issuing NSF checks in the amount of \$82,218.73. Quality Bank's App. PP. 181-192. Using Cavett's convoluted method of converting fees into interest, by incurring \$11,776.00 in fees for a period of 6 months for the utilization of Quality Bank's \$82,218.73 of funds, Cavett's annual interest rate would be 28%, 1800% less than maximum fees/interest allowed on payday loans.

## **VI. CONCLUSION**

For the foregoing reasons, Quality Bank respectfully requests that this Court affirm the district court's summarily dismissing Cavett's counterclaim.

Dated this 28th day of April 2010.

*/s/ Brad A. Sinclair*

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Peter W. Zuger

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**ATTORNEYS FOR**

**PLAINTIFFS/APPELLEES QUALITY**

**BANK**

**CERTIFICATE OF COMPLIANCE**

The undersigned, as attorney for the Plaintiffs/Appellees Quality Bank, in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellant Procedure, that this Brief was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 8,489.

Dated this 28th day of April 2010.

*/s/ Brad A. Sinclair*

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**ATTORNEYS FOR**

**PLAINTIFFS/APPELLEES QUALITY**

**BANK**

**AFFIDAVIT OF SERVICE BY ELECTRONIC MEANS**

**Quality Bank**

v.

**Lynette Cavett a/k/a Lynnette Cavett**

**District Court File No.: 37-8-C-151**

**Supreme Court File No.: 20100024**

STATE OF NORTH DAKOTA      )  
  ) ss.  
COUNTY OF CASS              )

Sherry Michelson, being duly sworn, deposes and says that she is a resident of the City of Moorhead, State of Minnesota, is of legal age; and that she served the within:

**BRIEF OF QUALITY BANK PLAINTIFF/APPELLEES; AND  
APPENDIX OF QUALITY BANK PLAINTIFF/APPELLEES**

on April 28, 2010, by sending a true and correct copy thereof by electronic means to the following e-mail addresses, to-wit:

<a href="mailto:supclerkofcourt@ndcourts.gov">supclerkofcourt@ndcourts.gov</a>	Clerk of the Supreme Court North Dakota Supreme Court 600 E Boulevard Ave. Dept. 180 Bismarck, ND 58505-0040
<a href="mailto:rudra@svogellaw.com">rudra@svogellaw.com</a>	(Appellant’s Attorney)  Rudra Tamm SARAH VOGEL LAW FIRM, P.C. 222 North 4th Street Bismarck, ND 58501-4004
<a href="mailto:fkelly@drtel.net">fkelly@drtel.net</a>	(Attorney for Plaintiff/Appellee Tim Cavett)  Fallon Kelly Attorney at Law P.O. Box 391 Lisbon, ND 58054-0391

To the best of affiant's knowledge, the e-mail addresses above given are the actual addresses of the parties intended to be so served as published in the North Dakota Supreme Court's online directory.

/s/Sherry Michelson

Subscribed and sworn to before me this 28<sup>th</sup> day of April 2010.

(SEAL)

/s/Carmen D. Rohr

Notary Public

Cass County, North Dakota

My Commission Expires: 3/25/15