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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Titan Machinery, Inc., Plaintiff/Appellee, vs. Renewable Resources, LLC, Defendant and Third-Party Plaintiff/Appellee. vs. Shawn Kluver and Little Knife Disposal, LLC, Third-Party Defendants/Appellants.	**SUPREME COURT NO. 20200021** Cass County No. 09-2017-CV-3746
Titan Machinery, Inc., Plaintiff/Appellee, vs. Shawn Kluver, Defendant and Third-Party Plaintiff/Appellant. vs. Renewable Resources, LLC, Third-Party Defendants/Appellee.	Cass County No. 09-2019-CV-274

ON APPEAL FROM JUDGMENT DATED JANUARY 23, 2020
STATE OF NORTH DAKOTA
CASS COUNTY
THE HONORABLE JUDGE TRISTAN VAN DE STREEK

ORAL ARGUMENT REQUESTED

APPELLEE TITAN MACHINERY, INC.'S BRIEF

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STATEMENT OF JURISDICTION

[¶1] The district court had jurisdiction pursuant to N.D. Const. Art. VI § 8 and N.D.C.C. § 27-05-06. This Court has jurisdiction under N.D. Const. Art. VI §§ 2 and 6 and N.D.C.C. § 28-27-01.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The district court did not err in its findings of fact.

A. The district court's findings of fact and conclusions of law identified by Kluver and Little Knife are not subject to reversal.

B. The district court did not err in finding that the contracts are commercially reasonable.

i The Guaranty is not procedurally unconscionable.

ii The Guaranty is not substantively unconscionable.

II. The district court did not err in holding Kluver liable under the Guaranty.

A. Kluver executed an enforceable guaranty of payment.

i There was mutual consent between Titan and Kluver as to the Guaranty.

ii The Guaranty is both procedurally and substantively conscionable.

B. Kluver is liable under the Guaranty whether the Guaranty was signed by Kluver or at Kluver's direction and on Kluver's behalf.

III. The district court did not err in determining the extent of Kluver's liability under the Guaranty.

A. Kluver is liable for all amounts due and owing from Renewable Resources to Titan under the Guaranty.

B. The handwritten notation to the Credit Application does not limit Kluver's liability under the Guaranty.

C. Kluver waived notice of any modification, amendment, or extension of the Rental Agreement pursuant to the express terms of the Guaranty.

D. Kluver waived notice of any modification, amendment, or extension of the Rental Agreement by his conduct.

STATEMENT REGARDING ORAL ARGUMENT

[¶2] Titan requests oral argument given the procedural posture of this case. Additionally, Kluver and Little Knife have requested oral argument on this appeal.

STATEMENT OF FACTS

[¶3] This case arises from the 2016 lease of an excavator and related equipment by Defendant and Third-Party Plaintiff/Appellee Renewable Resources, LLC ("Renewable Resources") from Plaintiff/Appellee Titan Machinery, Inc. ("Titan"), at the direction of Third-Party Defendant/Appellant Shawn Kluver ("Kluver"). (Index No. 202 Case Number 09-2017-CV-3746). The leased equipment was not returned to Titan until October of 2017. (Index No. 205 Case Number 09-2017-CV-3746). The excavator was damaged while it was out on lease. App. 49 at ¶ 14. Additionally, the bucket for the excavator was not returned. (Trans. 1/57:15-19)[1].

[¶4] On October 16, 2018, Titan obtained a money judgment against Renewable Resources in the sum of $140,042.83 as follows: unpaid rentals and finance charges accrued on the same in the sum of $104,788.35; expenses for repairing the leased equipment damaged during the course of the lease, and finance charges accrued on the same, in the sum of $33,819.98; attorneys' fees in the sum of $1,314.5; and costs taxed and allowed in the sum of $120.00. App. 57-58.

[1] As noted by Kluver/Little Knife, trial in this matter consisted of two days of testimony, transcribed separately. References to the trial transcript herein are formatted as "Trans. Day/Page:Line(s)".

[¶5] Kluver executed a personal guaranty (the "Guaranty") in conjunction with the Rental Agreement and with respect to all obligations by Renewable Resources, which includes Renewable Resources' judgment debt to Titan. App. 64. Pursuant to the Guaranty, Kluver "unconditionally, absolutely and irrevocably guarantees the prompt and full payment and performance of all [of Renewable Resources'] obligations under" the Rental Agreement. *Id*. The Guaranty further "waives notice of any modifications, amendments, or extensions of the [Rental] Agreement, and of [Renewable Resources'] non-performance or breach of the [Rental] Agreement." *Id*.

[¶6] A bench trial was held on November 12 and 13, 2019 before the Honorable Tristan Van de Streek, district court Judge. On December 19, 2019, the district court issued its Findings of Fact, Conclusions of Law, and Order for Judgment, awarding judgment in favor of Titan and Renewable Resources and against Kluver and Third-Party Defendant/Appellant Little Knife Disposal, LLC ("Little Knife"). App. 47. Judgment was entered in Titan's favor and against Kluver and Little Knife, jointly and severally, in the sum of $140,655.43. App. 59-60. Kluver and Little Knife filed their Notice of Appeal on January 23, 2020. App. 61.

LAW AND ARGUMENT

I. Standard of Review

[¶7] The standard of review on appeal from a bench trial is well-established:

> In an appeal from a bench trial, the trial court's findings of fact are reviewed under the clearly erroneous standard of N.D.R.Civ.P. 52(a) and its conclusions of law are fully reviewable. *Fargo Foods, Inc., v. Bernabucci*, 1999 ND 120, ¶ 10, 596 N.W.2d 38. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, we are left with a definite and firm conviction a mistake has been made. *Moen*

> *v. Thomas*, 2001 ND 95, ¶ 19, 627 N.W.2d 146. 'In a bench trial, the trial court is "the determiner of credibility issues and we do not second-guess the trial court on its credibility determinations." ' *Id*. at ¶ 20."

Service Oil, Inc. v. Gjestvang, 2015 ND 77, ¶ 12, 861 N.W.2d 490 (quoting *Brash v. Gulleson*, 2013 ND 156, ¶ 7, 835 N.W.2d 798). "A trial court's findings are 'presumptively correct.'" *Service Oil, Inc.*, 2015 ND 77, ¶ 12, 861 N.W.2d 490 (quoting *Tweeten v. Miller*, 477 N.W.2d 822, 824 (N.D.1991)).

[¶8] Furthermore:

> In applying the clearly erroneous standard of review, we will not substitute our judgment for the trial court's judgment. *Erickson v. Olsen*, 2014 ND 66, ¶ 19, 844 N.W.2d 585. "A trial court's choice between two permissible views of the weight of the evidence is not clearly erroneous, and simply because we may have viewed the evidence differently does not entitle us to reverse the trial court." *Id*. (quoting *RRMC Constr., Inc. v. Barth*, 2010 ND 60, ¶ 7, 780 N.W.2d 656). A trial court's findings are adequate if the record enables us to understand the court's factual determinations and the basis for its conclusions of law and judgment. *See Almont Lumber & Equip., Co. v. Dirk*, 1998 ND 187, ¶ 13, 585 N.W.2d 798; *First Am. Bank W. v. Berdahl*, 556 N.W.2d 63, 65 (N.D.1996).

Service Oil, Inc., 2015 ND 77, ¶ 13, 861 N.W.2d 490.

II. Titan limits its response to sections B(1) and (2), C, and D of Appellant's Brief as the other sections solely pertain to Renewable Resources.

[¶9] As to the arguments set forth by Kluver and Little Knife and not specifically addressed herein, Titan incorporates herein by reference those arguments as set forth in Renewable Resources' Appellee Brief.

III. The district court did not err in its findings of fact.

A. The district court's findings of fact and conclusions of law identified by Kluver and Little Knife are not subject to reversal.

[¶10] Kluver and Little Knife allege that certain of the district court's findings of fact are actually conclusions of law and thus fully reviewable by this Court. *See* Appellant's

Brief at ¶¶ 25-27. Specifically, Kluver and Little Knife assert that the following findings of fact are actually conclusions of law:

> i. "The Guaranty executed by Kluver unconditionally, absolutely, and irrevocably guarantees the prompt and full payment and performance of all of Renewable Resources' obligations under the Rental Agreement." App. 49 at § 9.
>
> ii. "The Guaranty further waives notice of any modifications, amendments, or extensions of the Agreement, and of Renewable Resources' non-performance or breach of the Agreement." App. 49 at ¶ 10.
>
> iii. "No testimony or evidence regarding the formation of the Rental Agreement and the subsequent extension of credit evidences or establishes unfair surprise, inequality of bargaining power, or oppression." App. 49 at ¶ 11.

[¶11] "Findings of fact are the realities as disclosed by the evidence as distinguished from their legal effect or consequences. Where the ultimate conclusion can be arrived at only by applying rules of law the result is a 'conclusion of law.'" *E. E. E., Inc. v. Hanson*, 318 N.W.2d 101, 104 (N.D. 1982) (citing *Slope Cty., Etc. v. Consolidation Coal Co.*, 277 N.W.2d 124, 127 (N.D.1979)).

[¶12] As to the first and second findings of the district court identified by Kluver and Little Knife, the Guaranty executed by Kluver states, in relevant part, as follows:

> If an Account is opened in response to the foregoing application, in consideration of Lender granting Application the Account, the undersigned Guarantor hereby ***unconditionally, absolutely and irrevocably guarantees the prompt and full payment and performance of all Applicant's obligations*** under the agreement establishing the Account (the "Agreement") … The Guarantor hereby ***waives notice of any modification, amendments, or extensions*** of the Agreement, and of Applicant's non-performance or breach of the Agreement.

App. 64 (emphasis added). In addressing the language of the Guaranty, it is apparent the district court is referring to the underlying contract in making its findings of fact.

[¶13] Written contracts are construed to give effect to the parties' mutual intention when the contract was formed, and if possible, the writing alone determines the parties' intent. *Myaer v. Nodak Mut. Ins. Co.*, 2012 ND 21, ¶ 10, 812 N.W.2d 345 (citations omitted). *See also* N.D.C.C. §§ 9-07-02 and 9-07-03. The Guaranty executed by Kluver clearly states that Kluver, as guarantor, "unconditionally, absolutely and irrevocably guarantees the prompt and full payment and performance *of all Applicant's obligations* under the agreement establishing the Account (the "Agreement"), and further agrees, in the event of any default under the Agreement, *to pay the total balance due* on the Account upon demand." App. 64 (emphasis added). "Words in a contract are construed in their ordinary and popular sense, unless they are used by the parties in a technical sense, or unless a special meaning is given to them by usage." *Myaer*, 2012 ND 21, ¶ 10, 812 N.W.2d 345 (citations omitted).

[¶14] Kluver does not argue that the Guaranty is ambiguous, nor did Kluver and Little Knife present any evidence sufficient to challenge the Court's conclusions as to the express language of the Guaranty. Interpretation of the Guaranty thus becomes a question of law. However, because the Guaranty is unambiguous, the Guaranty alone determines the parties' intent. *Myaer*, 2012 ND 21, ¶ 10, 812 N.W.2d 345. Accordingly, even if the first two findings of fact identified by Kluver and Little Knife could be viewed as conclusions of law, those conclusions are supported by the district court's findings as to the express language of the Guaranty and are thus not in error.

[¶15] The third finding identified by Kluver and Little Knife is a summation of the evidence presented by the parties at trial, specifically, that "[n]o testimony or evidence regarding the formation of the Rental Agreement and the subsequent extension of credit

evidences or establishes unfair surprise, inequality of bargaining power, or oppression." App. 49 at ¶ 11. It is a reality "as disclosed by the evidence." *See Hanson*, 318 N.W.2d at 104. The third finding by the district court is a factual determination supported by a preponderance of the evidence and not, as Kluver and Little Knife insist, a conclusion of law.

B. The district court did not err in finding that the contracts are commercially reasonable.

[¶16] The district court found that "[n]o testimony or evidence regarding the formation of the Rental Agreement and the subsequent extension of credit evidences or establishes unfair surprise, inequality of bargaining power, or oppression" and that "[t]he Rental Agreement, Credit Application and Guaranty, as well as any of the terms therein, are commercially reasonable." App. 49 at ¶¶ 11-12. The district court concluded that "[n]othing within the Guaranty is unconscionable." App. 55 at ¶ 46. Although Kluver and Little Knife challenge this finding by the district court, their argument is limited to the Guaranty. There is ample evidence in the record to support the district court's finding of fact and conclusion of law that nothing within the Guaranty is unconscionable. With respect to the doctrine of unconscionability, the North Dakota Supreme Court has stated:

> This Court has held the doctrine of unconscionability allows a court to "deny enforcement of a contract because of procedural abuses arising out of the contract's formation and substantive abuses relating to the terms of the contract." *Strand v. U.S. Bank Nat'l Ass'n ND*, 2005 ND 68, ¶ 4, 693 N.W.2d 918 (citing *Weber v. Weber*, 1999 ND 11, ¶ 11, 589 N.W.2d 358). When a trial court determines whether a contractual provision is unconscionable, it is to:
>
> > look at the contract from the perspective of the time it was entered into, without the benefit of hindsight. The determination to be

> made is whether, under the circumstances presented in the particular commercial setting, the terms of the agreement are so one-sided as to be unconscionable. The principle underlying the Code's unconscionability provisions is the prevention of oppression and unfair surprise.
>
> *Id*. (quoting *Construction Assocs., Inc. v. Fargo Water Equip. Co.*, 446 N.W.2d 237, 241 (N.D.1989)).

Rutherford v. BNSF Ry. Co., 2009 ND 88, ¶ 20, 765 N.W.2d 705.

[¶17] "The issue of whether a contractual provision is unconscionable is a question of law." *Rutherford*, 2009 ND 88, ¶ 21, 765 N.W.2d 705 (citation omitted). The determination as to whether a contractual provision is unconscionable involves a two-prong framework. *Id*. at ¶ 22. "The first prong pertains to procedural unconscionability, which encompasses factors relating to unfair surprise, oppression, and inequality of bargaining power." *Id*. (internal quotation and citation omitted). "The second prong pertains to substantive unconscionability, which focuses upon the harshness or one-sidedness of the contractual provision in question." *Id*. (internal quotation and citation omitted). In order to prevail on an unconscionability claim, "a party alleging unconscionability must demonstrate some quantum of both procedural and substantive unconscionability, and courts are to balance the various factors, viewed in totality, to determine whether the particular contractual provision is 'so one-sided as to be unconscionable.'" *Id*. (citation omitted).

i. The Guaranty is not procedurally unconscionable.

[¶18] The district court specifically found that "[n]o testimony or evidence regarding the formation of the Rental Agreement and the subsequent extension of credit evidences or establishes unfair surprise, inequality of bargaining power, or oppression." App. 49

at ¶ 11. This finding is clearly supported by the record and evidence presented to the district court.

[¶19] First, Kluver testified that he was provided with an opportunity to review the Credit Application as well as the terms of the Guaranty prior to signing. (Trans. 2/40:16-20; 2/41:12-15). Second, Kluver admitted, and Brandon Messer confirmed, that Kluver did not question the terms or the Credit Application and Guaranty, nor did he object to the terms of either, despite the fact that he had an opportunity to do so before signing. (Trans. 1/79:21-25; 1/80:1-8; 2/40:19-20; 2/41:12-18). Third, no objections were made by Kluver as to the balance accruing under the Rental Agreement as and for the Leased Equipment, or the fact that payments were not being made under the Rental Agreement. (Trans. 1/27:20-21; 2/42:11-25; 2/43:1-5). Fourth, as noted above, Kluver testified that he has been in the business of thermal treatment since 2000, acknowledged that he is familiar with what a personal guaranty is, and that he may have – or likely – executed personal guarantees in the past. (Trans. 2/41:22-25; 2/42:1-10). A preponderance of the evidence supports the district court's findings as to an absence of procedural unconscionability, and Kluver and Little Knife have failed to identify any evidence presented which would be sufficient to challenge those findings.

ii. The Guaranty is not substantively unconscionable.

[¶20] "Substantive unconscionability concerns the question whether the terms themselves are commercially reasonable." *Quality Bank v. Cavett*, 2010 ND 183, ¶ 14, 788 N.W.2d 629 (internal quotation and citation omitted). The record does not reflect that the terms of the Guaranty are unduly harsh and provide no benefit to Kluver. *See Strand v. U.S. Bank Nat'l Ass'n ND*, 2005 ND 68, ¶ 20, 693 N.W.2d 918 (stating

substantive unconscionability concerns the "harshness" of contractual terms). It would be unrealistic to expect Titan to extend credit in significant amounts without obtaining security from the borrowing party. The Guaranty is a standard guarantee of payment, utilized and enforceable across a broad spectrum of commercial transactions. As set forth above, Kluver had an opportunity to question Titan regarding the terms of the Guaranty and object to the same. (Trans. 1/79:21-25; 1/80:1-8; 2/40:19-20; 2/41:12-18). He failed to do so. *Id.* Kluver was also well aware of the balance accruing under the Rental Agreement and failed to object to the same. (Trans. 1/27:20-21; 2/42:11-25; 2/43:1-5). By Kluver's own admission, this was likely not the first personal guaranty that he had executed in a business setting. (Trans. 2/41:22-25; 2/42:1-10). Furthermore Kluver has failed to identify any evidence in the record whereby the Court would compare Titan's Guaranty to other personal guarantees, and thus conclude that Titan's Guaranty is not commercially reasonable. *See Constr. Assocs., Inc. v. Fargo Water Equip. Co.*, 446 N.W.2d 237, 243 (N.D.1989) ("Substantive unconscionability concerns the question whether the terms themselves are commercially reasonable.") (quotation omitted). Instead, against the greater weight of the evidence, Kluver simply asks this Court to conclude that the Guaranty he voluntarily executed is unconscionable.

[¶21] A personal guaranty is not unconscionable simply because it imposes liability upon the guarantor for the debts of another. "A guarantor, not being a joint contractor with his principal, is not bound to do what the principal has contracted to do, but only to answer for the consequences of the default of the principal." *Trinity Med. Ctr., Inc. v. Rubbelke*, 389 N.W.2d 805, 807 (N.D.1986). *See also* N.D.C.C. § 22-01-10. There is no evidence that either the Rental Agreement, Credit Application, or the Guaranty

were provided on a "take it or leave it" basis, as Kluver and Renewable Resources were free to either: (a) reject the agreement; or (b) obtain similar equipment elsewhere. Nor is there evidence that Kluver was unfairly surprised by the contents of the Guaranty. Similarly, the evidence does not demonstrate any harshness or one-sidedness of the Guaranty, or that the Guaranty is not commercially reasonable. *See, e.g., Alerus Fin., N.A. v. Marcil Grp. Inc.*, 2011 ND 205, ¶ 26, 806 N.W.2d 160 (finding that personal guaranties executed in connection with promissory note and commercial real estate were not procedurally unconscionable so as to be unenforceable adhesion contracts). The record clearly establishes that Kluver, Little Knife, and Renewable Resources received a direct benefit from execution of the Credit Application and Guaranty: use and enjoyment of the Leased Equipment at both Renewable Resources' work site as well as Little Knife's work site. (Trans. 1/95:10-12; 1/97:14-17; 1/183:12-20; 2/6:16-21). *See also* App. 52 at ¶ 32 ("The Leased Equipment benefited [sic] both Renewable Resources and Little Knife/Kluver. When the Leased Equipment was at the Renewable site it was used to further the operations of Renewable Resources. When it was at the Killdeer site and [sic] benefitted Little Knife and Kluver.").

IV. The district court did not err in holding Kluver liable under the Guaranty.

A. Kluver executed an enforceable guaranty of payment.

[¶22] Kluver and Little Knife argue the Guaranty is not enforceable. In support of this argument, Kluver and Little Knife assert that the district court erred in holding Kluver liable to Titan under the Guaranty on two theories: (a) an alleged lack of mutual consent between the parties as to the Guaranty; and (b) the alleged unconscionability of the Guaranty. *See* Appellant's Brief at ¶¶ 49-50. However, Kluver and Little Knife fail to

identify any findings by the Court which are against the greater weight of the evidence and are contrary to the Court's conclusions regarding the enforceability of the Guaranty and Kluver's liability thereunder.

[¶23] The Guaranty executed by Kluver was a continuing guaranty of payment, which guaranteed the payment of all obligations and debts of Renewable Resources to Titan under the Rental Agreement. The Guaranty signed by Kluver states, in part, as follows:

> If an Account is opened in response to the foregoing application, in consideration of Lender granting Applicant the Account, the undersigned Guarantor hereby *unconditionally, absolutely and irrevocably guarantees the prompt and full payment and performance of all Applicant's obligations under the agreement establishing the Account (the "Agreement")*, and further agrees, in the event of any default under the Agreement, to pay the total balance due on the Account upon demand, without requiring Lender or its assignees to make demand and/or proceed first to enforce the Agreement against the Applicant.

App. 64 (emphasis added).

[¶24] There is no dispute that Titan is entitled to payment from Kluver by virtue of Kluver's position as a guarantor of the obligations of Renewable Resources:

> The contract of a guarantor is his own separate contract. It is in the nature of a warranty by him that the thing guaranteed to be done by the principal shall be done, and not merely an engagement jointly with the principal to do the thing. . . . (Citations omitted.) A liability such as this, although it may result in requiring a guarantor to pay the note, is not predicated upon 'the terms of the instrument,' but upon a contract entirely separate and distinct.

Bank of Kirkwood Plaza v. Mueller, 294 N.W.2d 640, 643 (N.D. 1980) (quoting *Northern State Bank v. Bellamy*, 19 N.D. 509, 125 N.W. 888, 890 (1910)). *See also* N.D.C.C. § 22-01-01(2) (defining a guaranty as "a promise to answer for the debt, default, or miscarriage of another person"). Furthermore, "where the obligation of the guarantors was absolute and was a guaranty of payment" an entity can proceed directly

against guarantors for a money judgment. *Bank of Kirkwood Plaza*, 294 N.W.2d at 644. *See also* N.D.C.C. § 22-01-10 ("A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal *and without a demand or notice*") (emphasis added).

[¶25] It is clear from the language of the Guaranty that Kluver's continuing guaranty is one of payment, defined as follows:

> The fundamental distinction between a guaranty of payment and one of collection is that, in the first case, the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor without taking any step to collect of the principal debtor, . . . while, in the second case, the undertaking is that, if the demand cannot be collected by legal proceedings, the guarantor will pay, and consequently legal proceedings against the principal debtor and a failure to collect of him by those means are conditions precedent to the liability of the guarantor, ...

Bank of Kirkwood Plaza, 294 N.W.2d at 644 (quoting *State Bank of Burleigh County v. Porter*, 167 N.W.2d 527, 532, 533 (N.D.1969)). To get around the black letter laws of contracts of guaranty, Kluver and Little Knife instead rely on the theories of mutual consent and unconscionability. Both of these theories are unsupported by the evidence presented at trial.

i. There was mutual consent between Titan and Kluver as to the Guaranty.

[¶26] Kluver and Little Knife's argument as to a lack of mutual consent is completely against the greater weight of the evidence presented at trial. The district court found that:

> [s]ubsequent to execution of the Rental Agreement, Renewable Resources submitted a Credit Application to Titan. The Credit Application dated July 20, 2016 was executed by Kluver on behalf of Renewable Resources. Kluver also executed a [Guaranty] in conjunction

> with the Credit Application and Rental Agreement. The Credit Application and Guaranty were submitted by Renewable Resources in order to establish a charge account so that Renewable Resources would not need to prepay for use of the Leased Equipment. A charge account was subsequently established for Renewable Resources for use of the Leased Equipment under the Rental Agreement.

App. 49 at ¶ 8. This finding by the district court clearly shows overt acts by both parties establishing consent for the transaction.

[¶27] Kluver and Little Knife provide no basis in the record to support their assertion that there was an absence of mutual consent between Titan and Kluver when Kluver executed the Guaranty, except to make the blanket statement that "Kluver cannot be said to have consented to himself and his heirs forever being liable to Titan for every amount that Renewable every incurs, even without Titan needing to ask Renewable to pay it first . . . ." *See* Appellant's Brief at ¶ 49. That is not what the Guaranty requires. The Guaranty imposes liability upon Kluver for Renewable Resources' obligations under the Credit Application related to the Rental Agreement for the Leased Equipment. As set forth below, this is an enforceable obligation contracted for between Titan and Kluver.

[¶28] Brandon Messer's testimony at trial established that this specific account for Renewable Resources was begun as a prepay account, following Kluver's request for lease of the Leased Equipment as set forth on the Rental Agreement. (Trans. 1/14:16-19; 1/19:11-13; 1/59:8-11). Because the account was initially begun as a prepay account, no credit application was submitted contemporaneously with the Rental Agreement. (Trans. 1/19:14-17). However, approximately one month after leasing of the Leased Equipment, Renewable Resources requested the establishment of a charge

account and executed a Credit Application. App. 64. As further established by the testimony of Brandon Messer at trial, Renewable Resources desired the establishment of a charge account so that it would not need to prepay for use of the Leased Equipment each month. (Trans. 1/20:16-25; 1/21:1). Courtney Kluver (Kluver's daughter) and Kluver were Titan's primary contacts for Renewable Resources with respect to the Credit Application. (Trans. 1/21:2-9). Renewable Resources, by and through Courtney Kluver, was provided a Credit Application by Brandon Messer in order to establish the charge account. (Index No. 210 Case Number 09-2017-CV-3746). In connection with the Credit Application, it was determined that a personal guaranty was necessary. *Id*. The Credit Application, executed by Kluver (or, as discussed below, executed on behalf of Kluver and at Kluver's direction), with the Guaranty also executed by Kluver (or, as discussed below, executed on behalf of Kluver and at Kluver's direction), was returned to Titan by Courtney Kluver, on behalf of Renewable Resources, on July 22, 2016. *Id*. *See also* App. 64. Subsequent to receipt of the fully executed Credit Application, a charge account for Renewable Resources was opened. (Trans. 1/23:8-21). As Brandon Messer testified at trial, the "Account" referenced in the personal guaranty section of the Credit Application was the account opened for Renewable Resources for the Leased Equipment under the Rental Agreement executed by John Quinn at Kluver's direction. *Id*. *See also* Index No. 202 Case Number 09-2017-CV-3746 and App. 64.

[¶29] In determining the basis for a trial court's conclusions of law and judgment, this Court "may rely on implied findings of fact when the record enables us to understand the factual determinations made by the trial court and the basis for its conclusions of law and judgment." *Almont Lumber & Equip., Co. v. Dirk*, 1998 ND 187, ¶ 13, 585

N.W.2d 798 (citations omitted). The testimony of the parties and the evidence presented by Titan at trial documents Kluver's execution of the Guaranty in conjunction with the Credit Application and Rental Agreement between Titan and Renewable Resources, and supports the district court's finding as to the same. This includes the testimony and evidence which documents the fact that the Credit Application was submitted in order to establish a charge account for Renewable Resources for use of the Leased Equipment under the Rental Agreement. There is simply no factual basis to support Kluver and Little Knife's claim that formation and execution of the Guaranty lacked mutual consent between Titan and Kluver, or that a plain reading of the Guaranty does not support the district court's interpretation of its terms. *See Myaer*, 2012 ND 21, ¶ 10, 812 N.W.2d 345 ("We construe written contracts to give effect to the parties' mutual intention when the contract was formed, and if possible, we look to the writing alone to determine the parties' intent."). *See also* N.D.C.C. §§ 9-07-02 and 9-07-03.

ii. The Guaranty is both procedurally and substantively conscionable.

[¶30] Additionally, as set forth in Part III(b), *supra*, there is no factual support to Kluver and Little Knife's claim that the Guaranty was procedurally or substantively unconscionable, nor can Kluver or Little Knife point to any factual determinations by the district court (either inferred from the record and the evidence presented at trial, or specifically made) which would challenge the district court's conclusion that nothing within the Guaranty is unconscionable.

B. Kluver is liable under the Guaranty whether the Guaranty was signed by Kluver or at Kluver's direction and on Kluver's behalf.

[¶31] At trial, Kluver argued, for the first time ever, that the signature under the personal guaranty section of the Credit Application is not his, but was signed – at Kluver's direction - by his daughter and Renewable Resources' employee Courtney Kluver[2]. (Trans. 2/33:13-15; 2/40:5-9). As an initial matter, Kluver had never previously questioned the authenticity of his signature to the Credit Application or Guaranty, nor raised this issue, prior to trial, despite the filing of motions for summary judgment by both Titan and Kluver. (Trans. 2/39:12-25). It defies logic, belief and credibility that so important a defense would not have been raised by Kluver at any point prior to trial in this matter. The evidence clearly establishes that Kluver personally executed the Guaranty and Credit Application:

> Attorney Cailao: You would agree with me – and I understand – I understand that you're not a handwriting expert, but you would agree with me that the handwriting for the personal guaranty is not similar to the handwriting that apparently Courtney [Kluver] filled out on the top half of the credit application. Fair to say?
>
> Shawn Kluver: Fair to say, yes.

(Trans. 2/40:10-15).

[¶32] Additionally, during a motion hearing held on November 27, 2018, in a companion matter between Renewable Resources and Kluver, Kluver was asked about the Guaranty by his attorney and acknowledged that it appeared his signature was on the Guaranty:

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[2] Courtney Kluver was not present for, or available to testify at, the trial held in this matter.

> Attorney Johnson: Are you familiar with the excavator that Titan Rentals leased out to purportedly Renewable Resources?
>
> Kluver: Yes.
>
> Attorney Johnson: You signed a personal guaranty for that lease; correct?
>
> Kluver: I don't recall doing that, but that's what the paper shows.
>
> Attorney Johnson: You see a guaranty –
>
> Kluver: It looks like my signature, but I don't ever remember signing a personal guaranty.

(Trans. 2/63:17-25; 2/64:1). In consideration of the above, the district court's finding that "Kluver did not testify credibly about his signature on the guarantee and this negatively impacted his credibility throughout his testimony" is clearly supported by the record. App. 52 at ¶ 31.

[¶33] However, even if Kluver did not personally sign the Credit Application and Guaranty, both were signed at his direction and under his authority, and are thus fully enforceable against him, a fact which even Kluver acknowleged at trial:

> Attorney Sanstead: You don't contend that the personal – that you're not subject to the personal guaranty, do you?
>
> Shawn Kluver: I'm saying I didn't sign it.
>
> Attorney Sanstead: That wasn't my question.
>
> Shawn Kluver: What's that?
>
> Attorney Sanstead: You're not saying that you're not subject ot this personal guaranty. You're still subject to the terms of this personal guaranty; correct?
>
> Shawn Kluver: I guess I don't – I don't know the answer to that, if I'm – I mean, legally, if I authorized it, I assume I probably am.

(Trans. 2/48:3-13).

[¶34] The Guaranty is enforceable against Kluver even if signed by Courtney Kluver at Kluver's direction and on Kluver's behalf. First, Kluver did not dispute at trial that he would be subject to the terms of the Guaranty and liable thereunder if the Guaranty had in fact been signed by Courtney Kluver at his direction and on his behalf. (Trans. 2/48:3-13). Second, Kluver testified that he directed his daughter, Courney Kluver, an employee of Renewable Resources, to sign the Guaranty on his behalf. (Trans. 2/33:13-15; 2/40:5-9). As such, Courtney Kluver was acting as Kluver's actual agent when she executed the Guaranty on Kluver's behalf. "An agency relationship results when one entity, called the principal, authorizes another entity, called the agent, to act for the principal in dealing with third parties." *Stockman Bank of Montana v. AGSCO, Inc.*, 2007 ND 26, ¶ 11, 728 N.W.2d 142 (citing N.D. Cent. Code § 3-01-01). As noted by the *Stockman* Court:

> An agency is either actual or ostensible and is actual when the agent really is employed by the principal. N.D.C.C. § 3–01–03. Any person having capacity to contract may appoint an agent and any person may be an agent. N.D.C.C. § 3–01–04. An agent has the actual authority that the principal intentionally confers upon the agent, *and an agent may do any acts the principal may do*. N.D.C.C. §§ 3–01–05, 3–02–01, and 3–02–02. An agent has authority to do everything necessary or proper and usual in the ordinary course of business to effect the purpose of the agency. N.D.C.C. § 3–02–08(1).

Stockman Bank of Montana, 2007 ND 26, ¶ 11, 728 N.W.2d 142 (emphasis added).

[¶35] Because Kluver directed and authorized Courtney Kluver to sign the Guaranty on his behalf (assuming that Kluver did not in fact personally sign the Guaranty portion of the Credit Application), Courtney Kluver was acting as Kluver's actual agent, with the authority to execute the Guaranty on Kluver's behalf, such that Kluver is subject to the terms of the Guaranty and liable thereunder. Additionally, in that Kluver raises any

objection to the Guaranty having been executed subsequent to the Rental Agreement, such an objection is without merit. "A guaranty, although executed subsequently to the creation of the principal obligation, if given in fulfillment of an agreement on the faith of which the principal obligation was created, is deemed contemporaneous in effect and requires no other consideration." *Porter*, 167 N.W.2d at 531.

[¶36] The district court correctly concluded, as a matter of law, that "[p]ursuant to the plain, express terms of the Guaranty, Kluver is liable for *all* of the obligations of Renewable Resources under the Rental Agreement. There is no limitation whatsoever as to Kluver's liability under the Guaranty." App. 55 at ¶ 44. As set forth above, the district court's findings are clearly supported by a preponderance of the evidence as a basis for its conclusion as to the validity of the Guaranty and Kluver's liability thereunder.

V. The district court did not err in determining the extent of Kluver's liability under the Guaranty.

A. Kluver is liable for all amounts due and owing from Renewable Resources to Titan under the Guaranty.

[¶37] Kluver and Little Knife assert that the district court erred in determining the extent of Kluver's liability under the Guaranty and argue, in summary fashion, that to the extent there is uncertainty in the Guaranty, any such uncertainty should be resolved in Kluver's favor and that the handwritten notation of $15,000 as the requested credit limit should control. *See* Appellant's Brief at ¶ 52. Kluver and Little Knife also contend, in summary fashion, that no evidence was presented which establishes that Kluver was informed as to the extent of his liability under the Guaranty. *Id*. at 53.

[¶38] Written contracts are construed to give effect to the parties' mutual intention when the contract was formed, and if possible, the writing alone determines the parties' intent. *Myaer*, 2012 ND 21, ¶ 10, 812 N.W.2d 345 (citations omitted). *See also* N.D.C.C. §§ 9-07-02 and 9-07-03. "Words in a contract are construed in their ordinary and popular sense, unless they are used by the parties in a technical sense, or unless a special meaning is given to them by usage." *Myaer*, 2012 ND 21, ¶ 10, 812 N.W.2d 345 (citations omitted). The Guaranty executed by Kluver clearly states that Kluver, as guarantor, "unconditionally, absolutely and irrevocably guarantees the prompt and full payment and performance *of all Applicant's obligations* under the agreement establishing the Account (the "Agreement"), and further agrees, in the event of any default under the Agreement, *to pay the total balance due* on the Account upon demand...The payment obligations of the Guarantor are the direct, primary, and *continuing* obligations of the Guarantor…and not merely a guaranty of collection." App. 64 (emphasis added). Furthermore, Kluver, as guarantor, "hereby waives notice of any modifications, amendments, or extensions of the Agreement, and of Applicant's non-performance or breach of the Agreement." *Id*. As the North Dakota Supreme Court noted in *Porter*, 167 N.W.2d at 532, a guarantee of payment is absolute and liability is triggered by the principal obligor's failure to pay. Furthermore, "[a] 'continuing guaranty' means a guaranty relating to a future liability of the principal under successive transactions which either continue the liability or from time to time renew it after it has been satisfied." N.D. Cent. Code § 22-01-01.

[¶39] The district court specifically found that "[t]he Guaranty executed by Kluver unconditionally, absolutely, and irrevocably guarantees the prompt and full payment

and performance of all of Renewable Resources' obligations under the Rental Agreement." App. 49 at ¶ 9. The district court also found that "[t]he Guaranty further waives notice of any modifications, amendments, or extensions of the Agreement, and of Renewable Resources' non-performance or breach of the Agreement." *Id*. at ¶ 10. On the basis of the findings of the district court, which findings were supported by a preponderance of the evidence presented at trial, the district court concluded, as a matter of law, that "[p]ursuant to the plain, express terms of the Guaranty, Kluver is liable for *all* of the obligations of Renewable Resources under the Rental Agreement. There is no limitation whatsoever as to Kluver's liability under the Guaranty." App. 55 at ¶ 44. The district court also concluded that, "[t]he Guaranty, like the guaranty in *Wallwork Lease & Rental Co., Inc. v. Decker*, 336 N.W.2d 356 (N.D. 1983), is an absolute and continuing guaranty of payment." App. 55 at ¶ 45. Kluver and Little Knife's conclusory statements challenging the district court's findings and conclusions are insufficient to demonstrate any error by the district court.

B. The handwritten notation to the Credit Application does not limit Kluver's liability under the Guaranty.

[¶40] The preponderance of the evidence clearly establishes that the requested credit limit of $15,000 had no bearing whatsoever as to the credit extended to Renewable Resources under the Rental Agreement and Credit Application, or to Kluver's liability under the Guaranty. As set forth by Brandon Messer's testimony, the initial amount approved by the Credit Application had nothing to do with Kluver's total liability under the Guaranty, and Kluver's liability is in no way limited. (Trans. 1/23:22-25; 1/24:1-10; 1/82:23-25; 1/83:1-2).

> Attorney Johnson: From Titan's perspective, what is the purpose of the credit limit?
>
> Brandon Messer: It's a – kind of a guideline to set a customer's – where they're, like I said, where they're safe with renting a certain amount. Once a customer's balance goes over a credit limit, they will no longer allow part sales, services sales, any rentals out the door, without approval from a manager just so that the managers are aware that this account has exceeded the current credit limit.

(Trans. 1/84:24-25; 1/85:1-7).

[¶41] Neither the Rental Agreement nor the Credit Application state that the requested credit limit will not be exceeded, or that the guarantor's liability is limited to a specific sum. (Index No. 202 Case No. 09-2017-CV-3746); App. 64. *See also* (Trans. 1/24:19-25; 1/25:1). Pursuant to the plain, express terms of the Guaranty, Kluver is liable for *all* of the obligations of Renewable Resources under the Rental Agreement. App. 64. There are no limitations whatsoever as to Kluver's liability under the Guaranty. *Id*. Additionally, as Brandon Messer testified, the credit limit is routinely exceeded on accounts with Titan. (Trans. 1/24:11-12; 1/78:17-25; 1/79:1-5). Furthermore, during trial, Kluver admitted that he was provided an opportunity to review the Credit Application as well as the terms of the Guaranty, and that he did not question the meaning of the $15,000 requested credit limit, nor did he question (or object to) the terms of the Guaranty itself, despite the fact that he had an opportunity to do so before signing. (Trans. 1/79:21-25; 1/80:1-8; 2/40:19-20; 2/41:12-18).

> Attorney Cailao: Okay. So, it appears that Mr. Messer communicated to Courtney [Kluver] the reason that Titan was requesting a personal guaranty; is that correct?
>
> Shawn Kluver: Yes.

> Attorney Cailao: And it's my understanding that Cournty [Kluver] reported directly to you; correct?
>
> Shawn Kluver: Yes, but I'm not copied on any of these emails.
>
> Attorney Cailao: Right. And I understand that. But your testimony if I recall, is that you did not seek out signature to the personal guaranty from one of the primary business owners; is that correct?
>
> Shawn Kluver: Correct.
>
> Attorney Cailao: You either signed that yourself or you directed that to be signed; correct?
>
> Shawn Kluver: I guess so.
>
> Attorney Cailao: And again, I just want to be clear, no one prevented you from reading the guaranty before you directed that it be signed or that it was signed; correct?
>
> Shawn Kluver: Correct.
>
> Attorney Cailao: And you didn't question the terms, including the requested credit limit; correct?
>
> Shawn Kluver: No. I guess I just don't recall any of it. I'm not copied on any of it, so -- I guess I don't know.
>
> Attorney Cailao: But you must have discussed the guaranty with your daughter; correct? If you directed her to sign it?
>
> Shawn Kluver: I don't recall, but I'm guessing she wouldn't do it without me authorizing it.

(Trans. 2/65:16-25; 2/66:1-17).

[¶42] Having been in the business of thermal treatment since 2000, Kluver acknowledged that he is familiar with what a personal guaranty is and that he may have – or likely – executed personal guarantees in the past. (Trans. 2/41:22-25; 2/42:1-10). Additionally, even if Kluver did not read the terms of the Guaranty, he acknowledged at trial that he had the opportunity to do so, and was not prevented from doing so by anyone. (Trans. 2/40:19-20). "Failure to read a document before signing does not

excuse ignorance of its contents unless the party shows that 'he was prevented from reading it by fraud, artifice, or design ...' (citation omitted)." *Wallwork Lease & Rental Co., Inc. v. Decker*, 336 N.W.2d 356, 357 n.1 (N.D. 1983) (quoting *Pioneer Credit Co. v. Medalen*, 326 N.W.2d 717, 719 (N.D.1982)).

C. Kluver waived notice of any modification, amendment, or extension of the Rental Agreement pursuant to the express terms of the Guaranty.

[¶43] Kluver's argument that any balance owing under the Rental Agreement exceeding the $15,000 requested credit limit noted on the Credit Application exonerates his liablity for any amount above and beyond $15,000 fails as a mater of law and under the plain and express terms of the Guaranty. N.D. Cent. Code 22-01-05 provides as follows:

> A guarantor is exonerated, except insofar as the guarantor may be indemnified by the principal, if, by any act of the creditor *without the consent of the guarantor*:
>
> 1. The original obligation of the principal is altered in any respect; or
>
> 2. The remedies or rights of the creditor against the principal in respect thereto are impaired or suspended in any manner.

(emphasis added). Here, the district court correctly found and concluded that consent of Kluver as the guarantor was expressly provided, as the Guaranty signed by Kluver states, in part, as follows:

> The Guarantor hereby waives notice of any modification, amendments, or extensions of the Agreement, and of Applicant's non-performance or breach of the Agreement. The payment obligations of the Guarantor are the direct, primary and continuing obligations of the Guarantor and Guarantor's heirs, successors and assigns, and not merely a guaranty of collection.

(App. 64).

[¶44] Kluver waived notice of any modification, amendment, or extension of the Rental Agreement pursuant to the express terms of the Guaranty, and Kluver's argument that he cannot be understood to have consented to changes in his obligations which were never communicated to him is contrary to the preponderance of the evidence presented at trial. At no point has Kluver alleged that he signed the Guaranty based on the assumption that his liability would be limited to $15,000. To the contrary, Kluver argues that he either: (a) does not recall signing the Guaranty; or (b) directed another to sign the Guaranty on his behalf. (Trans. 2/66:6-13; 2/33:13-15). Nevertheless, under the express terms of the Guaranty, Kluver is liable to Titan for the full balance of Renewable's judgment debt. *See* N.D.C.C. § 9-07-02 ("The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity"). *See also* App. 64. The district court's conclusion as to the same is fully supported by the greater weight of the evidence presented at trial.

[¶45] North Dakota case law is also clear that Kluver is liable for *all* amounts due under the Rental Agreement, pursuant to the express terms of the Guaranty. In *Wallwork Lease & Rental Co., Inc. v. Decker*, 336 N.W.2d 356 (N.D. 1983), an action was brought against a guarantor under an agreement guaranteeing the lease of equipment by a company in which the guarantor's husband was president. After experiencing financial difficulty and defaulting on the lease, the lessor/president and lessee agreed to the sale of the leased equipment and installment payments by the lessor/president to the lessee. *Id*. at 357. The guarantor did not know of or participate in these discussions. *Id.* at 357-58. After the lessor/president failed to make the installment payments due, the lessee contacted the guarantor to inform her that she

remained responsible under the terms of the original lease. *Id*. at 358. The trial court concluded that the alterations of the original obligation underlying the personal guaranty exonerated the guarantor of any liability on the guaranty pursuant to N.D. Cent. Code § 22-01-15 and granted the guarantor's motion for summary judgment. *Id*.

[¶46] In reversing the trial court's grant of summary judgment, the *Decker* Court noted:

> The contract of a guarantor is a separate contract. *Bank of Kirkwood Plaza v. Mueller*, 294 N.W.2d 640, 643 (N.D.1980). As a guarantor, one must answer for the consequences of the principal's default. *State Bank of Burleigh County v. Porter*, 167 N.W.2d 527, 533 (N.D.1969). *See also* § 22–01–01(1), NDCC. The guarantor is liable to the guarantee immediately upon default of the principal. Section 22–01–10, NDCC. If, however, the creditor alters "in any respect" the original obligation of the principal without the consent of the guarantor, the guarantor is deemed "exonerated," § 22–01–15, NDCC, unless the guarantor waived his right to object to any subsequent alteration.

Wallwork Lease & Rental Co., Inc., 336 N.W.2d at 358. The *Decker* Court noted that the guaranty at issue was an absolute guaranty, that liability became fixed upon default of the debtor, and, in addition:

> the guaranty explicitly provides that Kathy's liability "shall not be affected by ... modification of the Lease terms." In effect, Kathy guaranteed all of Black's lease payments to Wallwork, regardless of subsequent modifications of the terms of the lease. By signing the guaranty, Kathy waived her right to object to subsequent alterations or modifications of the lease, and her right to claim exoneration under § 22–01–15, NDCC. Therefore, § 22–01–15, NDCC does not exonerate Kathy from her obligation to Wallwork. *See First Nat. Bank & Trust Co. of Bismarck v. Hart*, 267 N.W.2d 561, 565 (N.D.1978) (guarantor held liable on guaranty when guarantor agreed to unconditionally guarantee prompt payment of notes without notice of indebtedness due or of renewal or extension of notes, even though note sued upon was not the first in a series of notes).

Wallwork Lease & Rental Co., Inc., 336 N.W.2d at 358–59. Finding that the lessee's separate agreement with the lessor did not affect the guarantor's liability, the *Decker* Court held that "[t]he guaranty, by its terms, extended to the original lease agreement and continued until performance of Black's was complete. Kathy remained liable on the guaranty when Black's failed to perform according to the terms of the lease." *Wallwork Lease & Rental Co., Inc.*, 336 N.W.2d at 359. As such, the *Decker* Court held that the trial court had incorrectly applied N.D. Cent. Code § 22-01-15 and the entry of summary judgment was inappropriate. *Id*.

[¶47] The Guaranty executed by Kluver in this case, like the guaranty in *Decker*, is an absolute and continuing guaranty of payment. And, as in *Decker*, Kluver specifically waived notice of any modifications, amendments, or extensions of the Rental Agreement, and of Renewable Resources' non-performance or breach of the Rental Agreement. Even assuming, for sake of argument, that the debt balance due and owing to Titan surpassing the requested credit limit noted on the Credit Application constituted an extension or modification of the terms of the Rental Agreement and/or Credit Application, Kluver remains liable for all amounts due and owing from Renewable Resources to Titan under the Guaranty, as a result of Kluver's waiver of notice and Renewable Resources' failure to perform under the terms of the Rental Agreement. *See, e.g., Wallwork Lease & Rental Co., Inc.*, 336 N.W.2d at 359.

D. Kluver waived notice of any modification, amendment, or extension of the Rental Agreement by his conduct.

[¶48] Kluver also waived notice as to any modification or extension of the Rental Agreement by his own conduct and admissions. As established by the testimony at trial,

the Leased Equipment was obtained by Renewable Resources pursuant to the Rental Agreement under Kluver's direction. (Index No. 202 Case No. 09-2017-CV-3746). *See also* (Trans. 2/38:14-17). Kluver was aware of the balance accruing for use of the Leased Equipment. (Trans. 2/42:11-17). *See also* Index Nos. 206-209 Case No. 09-2017-CV-3746. By Kluver's own admission at trial, he was kept apprised of the balance accruing under the Rental Agreement by Courtney Kluver, and was in communication with Brandon Messer regarding the same. (Trans. 2/42:11-25; 2/43:1-5). At no time did he object to the invoices generated by Titan and sent to Renewable Resources, the balance accruing under the Rental Agreement, or the fact that payments were not being made. *Id*. Furthermore, as established by Brandon Messer's testimony, Kluver never objected after the balance due under the Rental Agreement exceeded $15,000. (Trans. 1/27:17-21).

[¶49] Jeff Bennett, with Renewable Resources, testified that he met with Kluver in September of 2017 to discuss Renewable Resources' Rental Agreement with Titan, the amounts due under the Rental Agreement, and to inquire why no payments had been made by Renewable Resources towards the amounts outstanding under the Rental Agreement. (Trans. 1/156:17-21). Jeff Bennett also testified that Kluver would have been aware of the balance accruing under the Rental Agreement. (Trans. 1/133:4-6). At trial, Kluver acknowledged that this meeting with Jeff Bennett had occurred, and that Kluver was aware both: (a) of the amounts due to Titan under the Rental Agreement; and (b) that no payments were being made to Titan. (Trans. 2/42:18-25; 2/43:1-5). Kluver also acknowledged that he did not – even at that time – object either to the

amounts due under the Rental Agreement or to the fact that no payments were being made to Titan. *Id*.

[¶50] The district court's determination as to the extent of Kluver's liability under the express terms of the Guaranty is clearly supported by the preponderance of the evidence presented at trial, and Kluver and Little Knife have failed to identify any facts sufficient to challenge the district court's findings and subsequent conclusions of law as to the same.

CONCLUSION

[¶51] The district court did not err in finding that the Rental Agreement, Credit Application and Guaranty were commercially reasonable. A preponderance of the evidence clearly support the district court's conclusion that the subject contracts, including the Guaranty, are neither procedurally nor substantively unconscionable, or that the formation of the Rental Agreement and subsequent extension of credit under the Credit Application involved unfair surprise, inequality of bargaining power, or oppression.

[¶52] The district court did not err in finding Kluver liable under the Guaranty and there is no dispute that Titan is entitled to payment from Kluver by virtue of Kluver's position as a guarantor of the obligations of Renewable Resources under the guaranty of payment Kluver executed in connection with the Rental Agreement and Credit Application.

[¶53] The district court did not err in determining the extent of Kluver's liability under the Guaranty, having found that Kluver is liable for *all* of the obligations of Renewable Resources under the Rental Agreement. Furthermore, Kluver waived notice of any

modification, amendment, or extension of the Rental Agreement pursuant to the express terms of the Guaranty, as well as by his conduct.

[¶54] For the aforementioned reasons, Titan respectfully requests that this Court affirm the district court's order and judgment in its entirety.

Dated this 12th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 37 pages.

Dated this 12th day of June, 2020.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Titan Machinery, Inc., Plaintiff/Appellee, vs. Renewable Resources, LLC, Defendant and Third-Party Plaintiff/Appellee. vs. Shawn Kluver and Little Knife Disposal, LLC, Third-Party Defendants/Appellants.	**SUPREME COURT NO. 20200021** Cass County No. 09-2017-CV-3746
Titan Machinery, Inc., Plaintiff/Appellee, vs. Shawn Kluver, Defendant and Third-Party Plaintiff/Appellant. vs. Renewable Resources, LLC, Third-Party Defendants/Appellee.	Cass County No. 09-2019-CV-274

ON APPEAL FROM JUDGMENT DATED JANUARY 23, 2020
STATE OF NORTH DAKOTA
CASS COUNTY
THE HONORABLE JUDGE TRISTAN VAN DE STREEK

ORAL ARGUMENT REQUESTED

CERTIFICATE OF SERVICE

[¶1] I hereby certify that on June 12, 2020, the following document:

APPELLEE TITAN MACHINERY INC.'S BRIEF

was served via electronic email on the following:

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Dated this 12th day of June, 2020.

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