IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

J AND L FARMS, INC.,

Plaintiff/Appellee,

vs. Appeal No. 30020

JACKMAN FLORIDA WAGYU BEEF, LLC,

Defendant

and

FIRST BANK,

Defendant/Appellant.

Appeal from the Circuit Court, Fifth Judicial Circuit
Brown County, South Dakota
The Honorable Richard A. Sommers, Presiding

APPELLANT'S BRIEF

Order Granting Petition for Allowance of Appeal from
Intermediate Order filed on July 15, 2022.

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JURISDICTIONAL STATEMENT[1]

This is an appeal from the Order Denying Motion to Dismiss, entered on June 9, 2022, by the Honorable Richard A. Sommers, Fifth Judicial Circuit Court. SR at 89. Notice of Entry was served on June 9, 2022. SR at 90-91. Appellant's Petition for Intermediate Appeal was filed with this Court on June 16, 2022. This Court issued its Order Granting Petition for Allowance of Appeal from Intermediate Order on July 15, 2022. SR at 95-96. This Court has jurisdiction pursuant to SDCL 15-26A-3(6).

QUESTIONS PRESENTED

I. Whether the trial court erred in denying Appellant's Motion to Dismiss for Lack of Personal Jurisdiction.

The trial court found that it had personal jurisdiction over Appellant First Bank based solely on three guarantee letters addressed from Appellant First Bank to Appellee J and L Farms, Inc., there having been no other contacts between those parties.

Authority on Point: *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985); *Marschke v. Wratislaw*, 2007 S.D. 125, 743 N.W.2d 402; *Kustom Cycles, Inc. v. Bowyer*, 2014 S.D. 87, 857 N.W.2d 401; *Long John Silver's, Inc. v. DIWA III, Inc.*, 650 F.Supp.2d 612 (E.D. Ky. 2009).

[1] References to the Settled Record will be made as "SR at ___." References to the Motion to Dismiss hearing transcript will be made as "HT at ___."

STATEMENT OF THE CASE

This case involves unpaid purchases of cattle by Defendant Jackman Florida Wagyu Beef, LLC (hereinafter "Jackman") from Plaintiff/Appellee J and L Farms, Inc. (hereinafter "J and L Farms"). Appellant First Bank issued three letters guaranteeing payment of purchases by Jackman to J and L Farms. Jackman failed to pay for certain purchases, resulting in J and L Farms bringing suit against Jackman for payment and First Bank for enforcement of the letters. SR at 2-6. First Bank moved for dismissal based on lack of personal jurisdiction, which motion was heard in the Fifth Judicial Circuit before the Honorable Richard A. Sommers on May 31, 2022. The trial court denied the motion. SR at 89.

STATEMENT OF FACTS

J and L Farms sued First Bank alleging claims of Breach of Guaranty, Deceit, and Promissory Estoppel. SR at 2-6. According to the allegations of J and L Farms' Complaint, Jackman purchased certain cattle from J and L Farms, for which they failed to pay. *Id.* According to the Complaint allegations, First Bank issued two letters of guaranty to J and L Farms and have breached those letters by failing to make payment to J and L Farms. *Id.* The letters referenced in the Complaint were dated December 18, 2018, and January 8, 2019. SR at 7-8. As part of the proceedings on First Bank's Motion to Dismiss for Lack of Personal Jurisdiction, J and L Farms produced a third such letter, dated December 4, 2018. SR at 75.

First Bank is a Florida banking corporation with seven locations in Florida, and no locations outside Florida. SR at 42-44. First Bank is not authorized to transact business in any state other than Florida. *Id.* Joshua Whitehead of First Bank drafted and executed the letters addressed to J and L Farms. *Id.* The letters were drafted at the request of Jackman, First Bank's Florida-based customer. *Id.* Mr. Whitehead had no contact with J and L Farms, or anyone on its behalf, in relation to the drafting, issuance, or provision of the letters. *Id.* During the course of the Motion to Dismiss proceedings, J and L Farms brought forth no facts indicating that they had any contact with First Bank prior to or at the time the letters were issued. All of First Bank's communication regarding the letters was with representatives of their Florida-based customer, Jackman. *Id.* The letters were supplied to Jackman, not J and L Farms. *Id.* Jackman supplied the letters to J and L Farms. *Id.* No representative of First Bank was ever in South Dakota to discuss the business dealings between Jackman and J and L Farms. *Id.* Other than the letters at issue, First Bank and J and L Farms have had no other dealings. *Id.*

STANDARD OF REVIEW

The South Dakota Supreme Court has set forth the following standard of review on motions regarding a trial court's jurisdiction:

> "A motion to dismiss under SDCL 15-6-12(b)(2) 'is a challenge to the court's jurisdiction over the person and is a question of law that we review de novo.'" *Zhi Gang Zhang v. Rasmus*, 2019 S.D. 46, ¶ 17, 932 N.W.2d 153, 159 (quoting *Kustom Cycles, Inc. v. Bowyer*, 2014 S.D. 87, ¶ 8, 857 N.W.2d 401, 405). "We review a [circuit]

> court's determination regarding personal jurisdiction based on written submissions in the light most favorable to the nonmoving party." *Marschke v. Wratislaw*, 2007 S.D. 125, ¶ 9, 743 N.W.2d 402, 405 (citation omitted).

Davis v. Otten, 2022 S.D. 39, ¶ 9, 978 N.W.2d ----.

ARGUMENT AND AUTHORITIES

I. The trial court erred in denying First Bank's Motion to Dismiss for Lack of Personal Jurisdiction.

The trial court denied First Bank's Motion to Dismiss for Lack of Personal Jurisdiction. SR at 89. The trial court's Order Denying Motion to Dismiss simply denied the Motion without comment. SR at 89. At the hearing on the Motion, Judge Sommers stated simply that "I'm troubled by the fact that a bank could send these types of guarantees out and not expect to be hauled into court if they refuse to pay." HT at 14; SR at 114.

A. First Bank did not have sufficient minimum contacts with South Dakota for the trial court to assert jurisdiction.

In order for a South Dakota court to have personal jurisdiction over a nonresident defendant, two conditions must be met. "The first inquiry is whether the legislature granted the court jurisdiction pursuant to South Dakota's Long Arm Statute, SDCL 15-7-2." *Daktronics, Inc. v LBW Tech Co.*, 2007 S.D. 80, ¶ 4, 737 N.W.2d 413, 416. Second, the assertion of jurisdiction must "comport[] with federal due process requirements." *Id.* It has been held that "the legislature by enacting the 'long arm' statute intended to provide South Dakota residents with maximum protection of South Dakota courts from damages and injuries

occasioned them through the acts or omissions, both contractual and tortious, of a nonresident when that nonresident has had the necessary minimal contacts with the state to comply with federal due process." *Ventling v. Kraft*, 83 S.D. 465, 474, 161 N.W.2d 29, 34 (1968).

In considering whether the exercise of personal jurisdiction comports with the due process "minimum contacts" requirement, this Court uses a three-part test:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state, thus invoking the benefits and protections of its laws. Second, the cause of action must arise from [the] defendant's activities directed at the forum state. Finally, the acts of [the] defendant must have substantial connection with the forum state to make the exercise of jurisdiction over [the] defendant a reasonable one.

Marschke v. Wratislaw, 2007 S.D. 125, ¶ 15, 743 N.W.2d 402, 407.

The inquiry of whether a forum state "may assert specific jurisdiction over a nonresident defendant focuses on the relation among the defendant, the forum, and the litigation." *Walden v. Fiore*, 571 U.S. 277, 284, 134 S.Ct. 1115, 1121, 188 L.Ed.2d 12 (2014). "Some single or occasional acts related to the forum may not be sufficient to establish jurisdiction if their nature and quality and the circumstances of their commission create only an attenuated affiliation with the forum." *Denver Truck and Trailer Sales, Inc. v. Design and Bldg. Servs., Inc.*, 2002 S.D. 127, ¶ 21, 653 N.W.2d 88, 93. Thus, specific jurisdiction "frequently depends on physical contacts with the forum" and does not merely arise because of communication with a party who resides there. *See Marschke v. Wratislaw*, 2007 S.D. 125, ¶ 22, 743 N.W.2d at 409-410 (quoting *General Electric Co. v.*

Deutz AG, 270 F.3d 144 (3rd Cir. 2001)); *see also Porter v. Berall*, 293 F.3d 1073, 1076 (8th Cir. 2002) (contact by phone or mail is insufficient on its own to justify the assertion of personal jurisdiction).

Furthermore, "the existence of a contract with a nonresident party is not alone sufficient to establish minimum contacts." *Marschke*, 2007 S.D. 125, ¶ 19, 743 N.W.2d at 409. At minimum, "the defendant's activities must be purposefully directed toward the forum for personal jurisdiction to attach." *Frankenfeld v. Crompton Corp.*, 2005 S.D. 55, ¶ 11, 697 N.W.2d 378, 382. As the United States Supreme Court has observed, "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." *Walden v. Fiore*, 271 U.S. 277, 291, 134 S.Ct. 1115, 1126, 188 L.Ed.2d 12 (2014).

The requirement of minimum contacts assures that the exercise of personal jurisdiction does not "offend traditional notions of fair play and substantial justice." *Frankenfeld v. Crompton Corp.*, 2005 S.D. 55, ¶ 10, 697 N.W.2d at 382. Similarly, it prevents the non-resident defendant from being "haled into the forum solely as a result of random, fortuitous, or attenuated contacts." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985). "An important factor bearing upon reasonableness of asserting jurisdiction is to determine if defendant's conduct and connection with the forum state are such that he would have reasonably anticipated being brought into court here." *Miller v. Weber*, 546 N.W.2d 865, 867 (S.D. 1996).

In *Marschke v. Wratislaw*, a Montana car dealer listed a vehicle on eBay. A South Dakota resident contacted the dealer at least twice by phone to discuss the vehicle, resulting in an offer to purchase, which was accepted. The parties communicated by email to exchange details for the drafting of a purchase agreement. The South Dakota resident wired the purchase funds to the Montana dealer. The dealer mailed an unsigned purchase agreement to the South Dakota resident, which was signed in South Dakota and returned. The dealer referred the South Dakota resident to a motor carrier, with whom arrangements were made to deliver the vehicle to South Dakota. After determining that the car was not in the condition he expected, and failing to obtain satisfaction from the dealer, the South Dakota resident sued the Montana dealer in Pennington County.

In determining that jurisdiction did not exist over the Montana car dealer in South Dakota, our Supreme Court noted that "a contract with a nonresident party is not alone sufficient to establish minimum contacts." *Marschke*, 2007 S.D. 125, ¶ 19, 743 N.W.2d at 409. The Court instead analyzed whether "the sum total of the rest of [the dealer's] acts when added to the contract constitute sufficient minimum contacts." *Id.* The Court noted that "[s]pecific jurisdiction frequently depends on physical contacts with the forum. Actual presence during pre-contractual negotiations, performance, and resolution of post-contract difficulties is generally factored into the jurisdictional determination." *Marschke*, 2007 S.D. 125, ¶ 22, 743 N.W.2d at 410 (quoting *General Electric Co. v. Deutz AG*, 270 F.3d 144 (3rd Cir. 2001)). The Court noted that there was no long-term

relationship between the parties and that the dealer "had no physical contact with South Dakota before, during or after the period relevant to the sale." *Marschke*, 2007 SD 125, ¶ 24, 743 N.W.2d at 410.

The *Marschke* Court's analysis of physical contacts with the forum state was consistent with cases in other jurisdictions. *See Alaska Telecom v. Schafer*, 888 P.2d 1296 (Alaska 1995) (finding that minimum contacts existed where the Defendant, in addition to forming a contract with an Alaskan, solicited and negotiated the contract with the Alaskan entity, executed the contract in Alaska, performed a significant portion of his services in Alaska, mailed his invoices to Alaska, and was paid by checks drawn on an Alaskan bank); *Buxton v. Wyland Galleries of Hawaii*, 657 N.E.2d 708 (Ill.App.4th 1995) (finding minimum contacts not present in breach-of-contract action where Hawaii seller shipped painting purchased in Hawaii to residence of Illinois buyer and painting was destroyed in fire en route and emphasizing isolated transaction that grew out of negotiations and agreement that took place outside the forum).

In *Kustom Cycles, Inc. v. Bowyer*, 2014 S.D. 87, 857 N.W.2d 401, the parties agreed that Kustom Cycles, a South Dakota corporation, would customize a motorcycle for Bowyer. The parties met twice in person outside of South Dakota wherein the agreement was discussed. Bowyer purchased a motorcycle from a dealership in Minnesota, then contacted Kustom Cycles and requested that they transport it to South Dakota for customization. Kustom Cycles delivered the completed motorcycle to Bowyer at his home in North Carolina. Bowyer, not

satisfied with the motorcycle, returned it to South Dakota for additional modifications, after which it was again delivered to Bowyer in North Carolina. In the interim, Bowyer provided a number of services to Kustom Cycles, such as special access to a NASCAR race in Florida, where they met and spoke with Bowyer, as well as attending a photo-shoot, and granting Kustom Cycles permission to use his name and image for promotional materials. A dispute arose over Kustom Cycle's bill to Bowyer, and they brought suit in South Dakota.

In determining that jurisdiction did not exist over Bowyer, our Supreme Court noted that "[t]he United States Supreme Court has 'consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Kustom Cycles, Inc.*, 2014 S.D. 87, ¶ 12, 857 N.W.2d at 407-408 (quoting *Walden v. Fiore*, 571 U.S. 277, 284, 134 S.Ct 1115, 1122, 188 L.Ed.2d 12 (2014)). "Rather, it is essential in each case that there be some act by which the *defendant* purposefully avails *itself* of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 at 475, 105 S.Ct. at 2183). "[A] forum cannot assert personal jurisdiction over an absent, nonresident defendant simply because the defendant knew the plaintiff was a resident of the forum, or because the defendant knew the plaintiff's performance would occur in the forum." *Kustom Cycles, Inc.*, 2014 S.D. 87, ¶ 13, 857 N.W.2d at 408. "[T]he plaintiff cannot be the only link between the defendant and the forum." *Kustom Cycles,*

Inc., 2014 SD 87, ¶ 20, 857 N.W.2d at 410. The Court found that Bowyer's contacts with South Dakota did not meet the 'minimum contacts" required by the Due Process Clause.

First Bank's part in this matter can be stated very simply: a Florida bank, which has no presence in South Dakota, was asked by its Florida-based customer to draft the letters at issue, which First Bank did in Florida. They had no contact with the South Dakota-based Plaintiff at any point in that process. They supplied the letters to their Florida-based customer. The only "contact" they had with South Dakota in the process was that the letters were addressed to a South Dakota entity, thought they were not delivered to the South Dakota entity by First Bank. However, as stated in *Kustom Cycles*, "a forum cannot assert personal jurisdiction over an absent, nonresident defendant simply because the defendant knew the plaintiff was a resident of the forum, or because the defendant knew the plaintiff's performance would occur in the forum." *Kustom Cycles, Inc.*, 2014 S.D. 87, ¶ 13, 857 N.W.2d at 408.

Further, "it is essential in each case that there be some act by which the *defendant* purposefully avails *itself* of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 at 475, 105 S.Ct. 2174 at 2183, 85 L.Ed.2d 528). First Bank was not attempting to conduct any activities within South Dakota. Rather, by drafting the letters at issue they were working with their Florida-based client, who was attempting to do business with a South

Dakota entity. Likewise, there is no 'substantial connection' between First Bank and South Dakota. The 'contacts' that First Bank had with South Dakota in this matter certainly do not rise to the level of the contacts that were present in *Marschke* and *Kustom Cycles*, and which our Court found insufficient to create personal jurisdiction. The only connection is that the letters were written in Florida, given to a third party in Florida, who then gave the letters to a South Dakota entity (without any direction from First Bank). But "the plaintiff cannot be the only link between the defendant and the forum," *Kustom Cycles, Inc.*, 2014 S.D. 87, ¶ 20, 857 N.W.2d at 410, nor can a third party serve to create that link. *Walden*, 571 U.S. at 291, 134 S.Ct. at 1126 ("it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State."). As in *Marschke*, there was no long-term relationship between the parties, and First Bank "had no physical contact with South Dakota before, during or after the period relevant to the sale." *Marschke*, 2007 SD 125, ¶ 24, 743 N.W.2d at 410.

B. First Bank's letters alone are not sufficient to establish personal jurisdiction.

In arguing against the Motion to Dismiss, J and L Farms relied heavily on the idea of inducement – that the letters from First Bank were an inducement to do business with Jackman, and that said inducement should be considered with regard to whether personal jurisdiction could be established over First Bank. At the hearing on the Motion to Dismiss, J and L Farms' attorney argued:

> And I think a key factor here, too, is that . . . J and L Farms entered into this agreement with the understanding that these

> guarantees would be issued for each order. There is some level of inducement.
>
> I know First Bank wants to kind of dismiss that idea of the thought of inducement, but J and L Farms enters into this agreement with the thought that we're going to get paid if Jackman doesn't pay us.
>
> None of the cases like I just cited to, the three cases I discussed in the beginning of this argument, have any level - - there is some inducement here and there that they discussed, but not like this where there is future interactions that are going to take place, future orders that could take place where guarantees are going to be issued each – for each order. That just doesn't take place in these other cases.
>
> So I think the key factors we look to are . . . physical contacts are not necessary so long as the defendants' actions are purposefully directed towards the forum, a resident of the forum, and the inducement of J and L Farms to enter into this agreement because they knew they would get paid.

ST at 10-11; SR at 110-111.

First, outside the letters themselves, the only inducement and "future interactions" conveyed to J and L Farms came from Jackman. For their evidence that future interactions were contemplated, each with a guaranty from First Bank, J and L Farms points to an email, dated November 16, 2018, from Mark Hoegh, partner and general manager of Jackman. SR at 73-74. No such thing was ever communicated by First Bank to J and L Farms because, as set forth previously, there was no communication between First Bank and J and L Farms.

"The United States Supreme Court has 'consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Kustom Cycles, Inc.*, 2014 S.D. 87, ¶ 12, 857 N.W.2d at 407-408 (quoting *Walden v.*

Fiore, 571 U.S. 277, 284, 134 S.Ct 1115, 1121, 188 L.Ed.2d 12 (2014)). "[I]t is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." *Walden v. Fiore*, 571 U.S. 277, 291, 134 S.Ct. 1115, 1126, 188 L.Ed.2d 12 (2014). Other than the fact that the letters at issue were addressed to a South Dakota entity, although they were not delivered to the South Dakota entity by First Bank, there were no other contacts by First Bank with South Dakota. And there was no inducement by them other than the letters themselves.

Second, almost every guaranty involves some level of inducement. Elevating inducement to the position that J and L Farms argues would essentially grant personal jurisdiction over any guaranty, and that would not comport with due process as set forth in case law from multiple courts.

In *Long John Silver's, Inc. v. DIWA III, Inc.*, 650 F.Supp.2d 612 (E.D. Ky. 2009), the court considered whether it had personal jurisdiction over a Georgia resident who was a guarantor on both a franchise agreement and a sublease. The law used to analyze whether personal jurisdiction was appropriate was essentially identical to the three-part test used by this Court:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Id. at 620 (quoting *Southern Mach. Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968)). The court "assumed as true the Plaintiff's allegations that

[the Georgia guarantor] signed the guaranty on the same date that DIWA V executed the [franchise agreement] and that he did so as an inducement to Plaintiff to enter into the franchise agreement." *Id.*

The court noted that "[i]t is clear that this Court's personal jurisdiction over [the guarantor] cannot be established on the basis of the personal guaranties alone." *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985)) ("If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot.")[2]. In analyzing the three-part test, the court stated:

> In *Burger King*, the Court directed courts to consider "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing." 471 U.S. at 479, 105 S.Ct. 2174. In this case, there is no allegation that there were any negotiations between [the guarantor] and the Kentucky corporate plaintiff prior to the parties entering into the guaranty agreements. There is no allegation that [the guarantor] ever traveled to Kentucky regarding the two guaranties. Jurisdiction cannot be avoided simply because the defendant was never physically present in the forum state. *Burger King*, 471 U.S. at 476, 105 S.Ct. 2174. In this case, however, there is also no allegation that [the guarantor] ever had any communications with the Plaintiff in Kentucky regarding the two guaranties.
>
> As to contemplated future consequences and terms of the guaranty agreements, [the guarantor] agreed to "render any payment or performance required under Franchise Agreement upon demand if Franchisee fails or refuses punctually to do so." . . . He also agreed that "if Sublessee defaults in the performance of any of its obligation

[2] The same portion of the *Burger King* opinion was cited favorably by the South Dakota Supreme Court in *Marschke v. Wratislaw*, 2007 S.D. 125, ¶ 16, 743 N.W.2d 402, 408.

> under the Sublease, upon Sublessor's demand, Guarantors will perform Sublessee's obligations under the Sublease." . . . [The guarantor's] guaranty of the franchisee's obligations continued throughout the 15–year term of the Franchise Agreement. Likewise, Malik's guaranty of DIWA V's obligations under the Sublease continued throughout its 19–year term.
>
> Presumably, these obligations could require [the guarantor] to make payments to the Plaintiff in Kentucky. Nevertheless, the agreements did not require continuing payments by [the guarantor] to Kentucky. They only required that [the guarantor] make payments if DIWA V failed to do so. It was entirely possible under the terms of the agreements that [the guarantor] would never have any contact with Kentucky after signing the guaranties. In fact, that appears to have been the case. Going into the agreements, the parties did not contemplate regular contacts between [the guarantor] and the Kentucky corporate plaintiff. Instead, any contact between [the guarantor] and Kentucky would be random and would occur only if DIWA V failed to perform.

Id. at 620-621. The court found that "[i]n this case . . . [the guarantor's] sole contacts with Kentucky regarding the claims at issue in this action consist of entering into two agreements with a Kentucky corporation. These contacts alone are not sufficient to establish personal jurisdiction." *Id*. at 624.

In *Arkansas Rice Growers Co-op Assoc. v. Alchemy Industries, Inc.*, 797 F.2d 565 (8th Cir. 1986), the underlying transaction was the construction of a processing plant in Arkansas. Alchemy Industries, Inc., entered into a contract with an Arkansas corporation for the construction. Several Alchemy shareholders, who were residents of California, guaranteed the construction obligation. After the construction was completed, Alchemy defaulted and the Arkansas corporation sued Alchemy and the individual guarantors. The court upheld a judgment against

Alchemy but reversed the judgment against the guarantors and dismissed those claims for lack of personal jurisdiction. The court held that, "[t]he mere fact that the individual defendants guaranteed an obligation to an Arkansas corporation does not subject the guarantors to jurisdiction in Arkansas." *Id.* at 573.

In *Bond Leather Co. v. Q.T. Shoe Mfg. Co.*, 764 F.2d 928 (1st Cir. 1985), a nonresident guarantor guaranteed a loan to his brother's corporation, Q.T. Q.T. was a Massachusetts corporation engaged in the manufacture of shoes, and it purchased raw leather from Bond, another Massachusetts corporation. Q.T. went bankrupt and Bond filed suit against Q.T. and the guarantor. The court held that the creditor failed "to identify any contract rights created by the guaranty in [the guarantor] which could have been enforced in the Massachusetts courts and which could fairly be said to represent an intent by [the guarantor] to reap the benefits of Massachusetts law." *Id.* at 934. Moreover, the court stated that "absent any intent by [the guarantor] to exploit the local economy, as has been required not only in prior cases addressing jurisdiction over nonresident guarantors but more generally in cases upholding jurisdiction, we cannot say that [the guarantor], on the basis of its isolated acts, availed itself of the benefits of transacting business in Massachusetts and should reasonably have anticipated being haled into court there." *Id.* at 934–35.

Many other cases have determined that a guaranty alone is not sufficient to establish personal jurisdiction over a non-resident defendant. *See e.g. United Fed. Sav. Bank v. McLean*, 694 F.Supp. 529, 535 (C.D.Ill. 1988) (holding that being a

guarantor along with making payments in forum state is an insufficient basis to invoke personal jurisdiction); *Reverse Vending Assoc. v. Tomra Systems US, Inc.*, 655 F.Supp. 1122, 1127 (E.D.Pa. 1987)(holding that "a non-resident defendant's contract, in this case a guaranty, with a Pennsylvania business entity *alone* cannot automatically establish sufficient minimum contacts."); *Northern Trust Co. v. Randolph C. Dillon, Inc.*, 558 F.Supp. 1118, 1123 (N.D.Ill. 1983)(holding there was no personal jurisdiction over nonresident guarantor of equipment lease although payments were made to Illinois bank, the guaranty was accepted in Illinois, and it provided that it would be governed by Illinois law); *Liberty Leasing Co. v. Milky Way Stores, Inc.*, 352 F.Supp. 1210, 1211 (N.D.Ill. 1973)(holding no personal jurisdiction over nonresident guarantor); *Misco Leasing, Inc. v. Vaughn*, 450 F.2d 257, 260 (10th Cir. 1971)(holding that being a guarantor alone is an insufficient basis to invoke personal jurisdiction). *Edwards v. Geosource, Inc.*, 473 So.2d 36, 37 (Fla.Dist.Ct.App. 1985)("signing a promissory obligation, in and of itself, is insufficient contact to confer personal jurisdiction"); *Sibley v. Superior Court*, 546 P.2d 322, 325 (Cal. 1976)(holding that petitioner did not purposefully avail himself of the privilege of conducting business in California or of the benefits and protections of California laws where petitioner-guarantor had executed a guaranty in Florida guaranteeing payments to a California partnership), *cert. denied*, 429 U.S. 826, 97 S.Ct. 82, 50 L.Ed.2d 89 (1976); *accord United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E.2d 610, 616 (1979)("The mere *act* of signing [a guaranty in favor of a resident of the forum] or endorsement

does not in and of itself constitute a sufficient contact upon which to base in personam jurisdiction over a nonresident.").

These cases are consistent with South Dakota law, which states that "the existence of a contract with a nonresident party is not alone sufficient to establish minimum contacts." *Marschke v. Wratislaw*, 2007 S.D. 125, ¶ 19, 743 N.W.2d 402, 409. The letters at issue are the only contacts J and L Farms can point to between First Bank and South Dakota. There are no other facts available upon which to base personal jurisdiction in South Dakota. As set forth in the Affidavit of Joshua Whitehead of First Bank, the letters were drafted at the request of Jackman Florida Wagyu Beef, LLC, First Bank's Florida-based customer. *Id*. Mr. Whitehead had no contact with J and L Farms, or anyone on its behalf, in relation to the drafting, issuance, or provision of the letters. *Id*. All of First Bank's communication regarding the letters was with representatives of their Florida-based customer, Jackman. *Id*. The letters were supplied to Jackman, not J and L Farms. *Id*. First Bank's only connection to South Dakota is that the letters in question were addressed to a South Dakota entity. Basing jurisdiction on that fact alone would run afoul of the South Dakota Supreme Court's clear statement that "the existence of a contract with a nonresident party is not alone sufficient to establish minimum contacts." *Marschke v. Wratislaw*, 2007 S.D. 125, ¶ 19, 743 N.W.2d 402, 409.

CONCLUSION

The only contacts between First Bank and South Dakota were the letters at issue, which were supplied by First Bank to Jackman, First Bank's Florida-based customer. As set forth above, the letters do not establish the minimum contacts necessary for a South Dakota court to assert personal jurisdiction over First Bank. Therefore, First Bank respectfully requests that this Court reverse the circuit court's denial of its motion to dismiss and remand to the circuit court for entry of an order dismissing J and L Farms claims against First Bank.

REQUEST FOR ORAL ARGUMENT

Appellant hereby requests oral argument.

Dated this 29th day of August, 2022.

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CERTIFICATE OF COMPLIANCE

Justin M. Scott, attorney for Appellants, hereby certifies that the foregoing brief meets the requirements for proportionately spaced typeface in accordance with SDCL 15-26A-66(b) as follows:

a. Appellant's brief does not exceed 32 pages;

b. The body of Appellant's brief was typed in Times New Roman 13-point typeface, with foot notes being in 13 point typeface; and

c. Appellant's brief contains 4,882 words, 25,065 characters (no spaces), and 30,136 characters (with spaces), according to the word and character counting system in Microsoft Word for Microsoft 365 used by the undersigned.

Dated this 29th day of August, 2022.

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CERTIFICATE OF SERVICE

The undersigned, attorney for Appellant, First Bank, hereby certifies that on the 29th day of August, 2022, a copy of Appellant's Brief was sent by electronic mail to:

Mr. Jack H. Hieb
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and sent by first class mail, postage prepaid to:

Jackman Florida Wagyu Beef, LLC
PO Box 567
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Chris Soud, Registered Agent
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Labelle, FL 33935

and the original and 2 copies of the same were mailed by first class mail, postage prepaid, to the South Dakota Supreme Court, 500 East Capitol, Pierre, SD 57501.

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APPENDIX

STATE OF SOUTH DAKOTA) : SS.
COUNTY OF BROWN)

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

* *

J AND L FARMS, INC.,

Plaintiff,

-vs-

JACKMAN FLORIDA WAGYU BEEF, LLC; and FIRST BANK,

Defendant.

06 CIV 21-286

ORDER DENYING MOTION TO DISMISS

* *

Defendant First Bank's Motion to Dismiss for Lack of Personal Jurisdiction came before the Court, the Honorable Richard Sommers, presiding, on May 31, 2022 at 10:00 a.m. Plaintiff appeared through its counsel, Dominic King. Defendant First Bank appeared through its counsel, Justin Scott. The Court having read the materials submitted by the parties, having heard the arguments of counsel, and being fully advised regarding all issues relating to the Motion, now, therefore, it is hereby

ORDERED that Defendant First Bank's Motion to Dismiss is hereby DENIED.

6/9/2022 10:10:14 AM

BY THE COURT:

Circuit Court Judge

Attest:
Schmidt, Beth
Clerk/Deputy

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF BROWN) FIFTH JUDICIAL CIRCUIT

* *

J AND L FARMS, INC.,

Plaintiff,

vs.

JACKMAN FLORIDA WAGYU BEEF, LLC, and FIRST BANK,

Defendants.

06CIV21-286

MOTION TO DISMISS

* *

DATE & TIME: May 31, 2022
10:00 a.m.

BEFORE: THE HONORABLE RICHARD A. SOMMERS
CIRCUIT COURT JUDGE
Brown County Courthouse
Aberdeen, South Dakota, 57401

LOCATION: BROWN COUNTY CIRCUIT COURTROOM
BROWN COUNTY COURTHOUSE
Aberdeen, South Dakota

APPEARANCES: For the Plaintiff:

Mr. Dominic King
RICHARDSON, WYLY, WISE, SAUCK & HIEB
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PO Box 1030
Aberdeen, SD 57402

For the Defendants:

Mr. Justin Scott
BANTZ, GOSCH & CREMER
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PO Box 970
Aberdeen, SD 57402

that there would be a guarantee for each future shipment of cattle.

So we don't need to look towards any pre-contract negotiations or any -- you know, whether First Bank was located in the state or whether there is employees in the state. What we look to is First Bank's purposeful action of sending multiple guarantees to a South Dakota business with the thought that they were going to be on the hook if Jackman wasn't going to pay the bills.

And I think a key factor here, too, is that, you know, J and L Farms entered into this agreement with the understanding that these guarantees would be issued for each order. There is some level of inducement.

I know First Bank wants to kind of dismiss that idea of the thought of inducement, but J and L Farms enters into this agreement with the thought that we're going to get paid if Jackman doesn't pay us.

None of the cases like I just cited to, the three cases I discussed in the beginning of this argument, have any level -- there is some inducement here and there that they discussed, but not like this where there is future interactions that are going to take place, future orders that could take place where guarantees are going to be issued each -- for each order. That just doesn't take place in these other cases.

So I think the key factors we look to are, you know,

physical contacts are not necessary so long as the defendants' actions are purposefully directed towards the forum, a resident in the forum, and the inducement of J and L Farms to enter into this agreement because they knew that they would get paid.

As I said in our brief, for First Bank to think, you know, that we can issue these guarantees willy-nilly without the thought of being brought into the forum, to me, seems ludicrous; especially when there was going to be future interactions that were going to take place, future guarantees that were going to be issued for each order of cattle.

That's all I have at this moment.

THE COURT: Mr. Scott, final say.

MR. SCOTT: Yes, Your Honor. Mr. King talked a couple of times about how there were, you know, guaran -- there was understanding that a guarantee would be issued for any future order of cattle and the understanding that they would be paid for any future orders. That doesn't come from First Bank.

I mean, they have the email from Jackman in their affidavit that sets that forth. None of that came from First Bank. As we've said, J and L Farms never had any contact with First Bank other than receiving these letters.

So then that gets into *Kustom Cycles* in the fact that a third party -- you can't use a third party's contacts as the basis for personal jurisdiction over a party.

that stem from *Burger King*. I only found two jurisdictions that say a guarantee is good enough, and that's New York, which has a different statutory scheme; and Texas, which says if the guarantee has a choice of law forum then the guarantee on its own is enough.

In South Dakota we followed *Burger King* that says contracts, in and of themselves, aren't enough. That's all we have here, is the contracts. And I understand everything -- all the concerns the court raises about it, but I think to comply with due process there has to be more than these contracts. There had to have been some other contracts. And based on the fact that all we have is the contracts, I don't think the court has personal jurisdiction in this matter.

THE COURT: All right. Well, if there was ever a set of circumstances that called or cried out for the court to find jurisdiction, this is that case.

I'm troubled by the fact that a bank could send these types of guarantees out and not expect to be hauled into court if they refuse to pay it. I'm going to rule for plaintiff and not grant the Motion to Dismiss.

Mr. King, you can draft the appropriate findings and conclusions, but I'm denying the Motion to Dismiss.

Anything further today?

MR. SCOTT: No, Your Honor.

MR. KING: No, Your Honor.

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF BROWN	FIFTH JUDICIAL CIRCUIT
J AND L FARMS, INC., Plaintiff, vs. JACKMAN FLORIDA WAGYU BEEF, LLC, and FIRST BANK, Defendants.	06CIV21-000286 **AFFIDAVIT OF JOSHUA WHITEHEAD**

STATE OF FLORIDA)
SS
COUNTY OF LEE)

Joshua Whitehead, being first duly sworn on oath deposes and states as follows:

1. I am the Vice President, Commercial and Residential Loans, for First Bank, a banking corporation chartered under the laws of the State of Florida. I have been duly authorized by First Bank to make this Affidavit.

2. I was in charge of Jackman Florida Wagyu Beef, LLC's accounts with First Bank and am familiar with the same.

3. First Bank has seven locations in the State of Florida, and no locations outside the State of Florida.

4. First Bank is not authorized to transact business in any state other than Florida.

5. I drafted and signed the letter dated December 18, 2018 attached to Plaintiff's Complaint as Exhibit A.

6. I drafted the letter dated January 8, 2019 attached to Plaintiff's Complaint as Exhibit B.

EXHIBIT 1

7. I had no contact with J and L Farms, Inc., or anyone on its behalf, in relation to the drafting, issuance, or provision of the letters attached to Plaintiff's Complaint as Exhibits A and B.

8. In drafting the letters attached to Plaintiff's Complaint as Exhibits A and B, all of my communication was with representatives of Jackman Florida Wagyu Beef, LLC, specifically Justin Jackman and Mark Hoegh.

9. I supplied the letters attached to Plaintiff's Complaint as Exhibits A and B to our banking client, Jackman Florida Wagyu Beef, LLC, not to J and L Farms, Inc. J and L Farms, Inc. received the letters from Jackman Florida Wagyu Beef, LLC.

10. The letters were drafted at the request of our banking client, Jackman Florida Wagyu Beef, LLC, not at the request of J and L Farms, Inc.

11. Neither I nor anyone from First Bank had any communication with anyone from J and L Farms, Inc. regarding their business dealings with Jackman Florida Wagyu Beef, LLC at any time prior to issuance of the letters at issue or with regard to the issuance or provision of said letters.

12. Neither I nor anyone from First Bank was ever present in South Dakota in relation to Jackman Florida Wagyu Beef, LLC's business dealings with J and L Farms, Inc.

13. First Bank has had no business dealings with J and L Farms, Inc. outside the letters at issue in this matter.

14. All of First Bank's communication regarding issuance of the letters at issue was with Jackman Florida Wagyu Beef, LLC, a Florida limited liability company with its principal place of business in the State of Florida.

15. Neither I nor anyone at First Bank had any communication with anyone from J and L Farms, Inc. during the time frame in which the letters referenced herein were issued.

Joshua Whitehead
Vice President, Commercial & Residential Loans
First Bank
11741 Palm Beach Blvd., Ste. 100
Fort Myers, FL 33905

Subscribed and sworn to before me this 21 day of December, 2021.

(SEAL)

SANDRA SMITH
MY COMMISSION # HH 159997
EXPIRES: November 28, 2025
Bonded Thru Notary Public Underwriters

Notary Public

My Commission Expires: _____

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

J AND L FARMS, INC.,

Plaintiff/Appellee,

-vs-

JACKMAN FLORIDA WAGYU BEEF, LLC,

Defendant,

and

FIRST BANK,

Defendant/Appellant.

Appeal No. 30020

APPEAL FROM THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT
BROWN COUNTY, SOUTH DAKOTA

THE HONORABLE RICHARD A. SOMMERS,
CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

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J and L, Farms, Inc.

ORDER GRANTING PETITION FOR ALLOWANCE
OF APPEAL FROM INTERMEDIATE ORDER
FILED JULY 15, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITY:

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant First Bank shall be referred to as "First Bank." Appellee J and L Farms, Inc. will be referred to as "J and L Farms." Defendant Jackman Florida Wagyu Beef, LLC, will be referred to as "Jackman." Citations to the settled record shall appear as "SR" followed by the corresponding page number.

JURISDICTIONAL STATEMENT

J and L Farms agrees with First Bank's Jurisdictional Statement.

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT CORRECTLY DENIED FIRST BANK'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION.

The trial court found that it had personal jurisdiction over First Bank based on three separate guaranty letters directed from First Bank to J and L Farms, which pertained to three distinct cattle transactions.

State v. Am. Bankers Ins. Co., 374 N.W.2d 609 (S.D. 1985).

Quality Pork Int'l v. Rupari Food Servs., 267 Neb. 474, 675 N.W.2d 642 (2004).

Keelean v. Cent. Bank, 544 So.2d 153 (Ala. 1989).

SDCL 15-7-2.

STATEMENT OF THE CASE

First Bank issued three letters guarantying payment on three separate cattle purchases by Jackman. Jackman failed to pay on two of the cattle purchases, resulting in J and L Farms bringing suit against Jackman for payment and against First Bank for enforcement of the guaranties. (SR 2-6.) On January 27, 2022, First Bank filed a Motion to Dismiss for Lack of Personal Jurisdiction. (SR 31.) The Motion was heard in the Fifth Judicial Circuit before the Honorable Richard A. Sommers on May 31, 2022. (SR 55.) The trial court denied the motion. (SR 89.) First Bank petitioned this Court to allow an intermediate appeal, and this Court granted the request. (SR 95.)

STATEMENT OF FACTS

J and L Farms is a South Dakota limited liability company and Jackman is a Florida limited liability company. (SR 2, ¶ 1-2.) First Bank is a Florida-based bank. (SR 2, ¶ 3.)

Jackman first purchased cattle from J and L Farms in 2016. (SR 2, ¶ 4.) Until late 2018, Jackman promptly paid for all loads of cattle that J and L Farms shipped. (SR 2, ¶ 7.) Jackman's Partner and General Manager, Mark

Hoegh ("Hoegh"), stated in a November 16, 2018 that J and L Farms would receive "a bank guarantee from our banker in Florida for the payment" for subsequent transactions. (SR 73-74.) Jackman's bank, First Bank, issued guaranties three times - December 4, 2018, December 18, 2018, and January 8, 2019. (SR 7, 8, 75.) Hoegh emailed the guaranties directly to J and L Farms. (SR 43, ¶ 9).

Jackman failed to pay J and L Farms for the December 18, 2018 and January 8, 2019 cattle shipments. (SR 3, ¶ 17.) First Bank refused to make payments to J and L Farms despite the guaranties. (SR 3-4, ¶ 18.)

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DENIED FIRST BANK'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION.

Two conditions must be met to for a South Dakota court to have personal jurisdiction over a nonresident defendant: (1) the legislature must grant the court jurisdiction pursuant to South Dakota's Long Arm Statute; and (2) the assertion of jurisdiction must comport with federal due process requirements. Kustom Cycles, Inc. v. Bowyer, 2014 S.D. 87, ¶ 9, 857 N.W.2d 401, 406. South Dakota's Long Arm Statute is to be "construed broadly" when evaluating jurisdiction. Denver Truck & Trailer Sales v.

Design & Bldg. Servs., 2002 S.D. 127, ¶ 10, 653 N.W.2d 88, 91.

A. SOUTH DAKOTA'S LONG-ARM STATUTE GRANTED THE CIRCUIT COURT JURISDICTION.

First Bank does not challenge J and L Farms' satisfaction of South Dakota's Long Arm Statute. The Long Arm Statute undoubtedly granted the Circuit Court jurisdiction. SDCL 15-7-2 includes: "(1) The Transaction of any business within the state"; "(4) Contracting to insure any person, property, or risk located within this state at the time of contracting"; and "(14) The commission of any act, the basis of which is not inconsistent with the Constitution of this state or with the Constitution of the United States." SDCL 15-7-2 (1), (4), (14). Construing the Long Arm Statute broadly, SDCL 15-7-2(1),(4) or (14) would give South Dakota personal jurisdiction.

B. FEDERAL DUE PROCESS REQUIREMENTS ARE MET UNDER THE CIRCUMSTANCES OF THIS CASE.

The federal due process requirements stem from the Fourteenth Amendment to the United States Constitution, which states that no state shall "deprive any person of life, liberty, or property, without due process of law." Frankenfeld v. Crompton Corp., 2005 S.D. 55, ¶ 10, 697

N.W.2d 378, 382 (quoting U.S. Const. Amend. XIV, Section 1). Due process "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties or relations." Id. (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528 (1985) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 319, 66 S.Ct. 154, 160, 90 L.Ed. 95 (1945)) (internal quotations omitted).

Personal jurisdiction can either be general or case-specific. Kustom Cycles, 2014 S.D. 87, ¶ 10, 857 N.W.2d at 407. "Where the nonresident defendant does not have continuous contact with the forum, but only sporadic activity or an isolated act, a court is said to assert specific jurisdiction over him when it asserts such jurisdiction in relation to a cause of action arising out of the activity or act." Marschke v. Wratislaw, 2007 S.D. 125, ¶ 12, 743 N.W.2d 402, 406 (citing Int'l Shoe Co., 326 U.S. at 317, 66 S.Ct. at 159, 90 L.Ed. 95)(emphasis added). J and L Farms does not argue general jurisdiction, but specific jurisdiction.

The minimum contacts test determines whether specific personal jurisdiction comports with Fourteenth

Amendment due process. Frankenfeld, 2005 S.D. 55, ¶ 10, 697 N.W.2d at 382. There must be some act by which a defendant "purposely availed himself of the privilege of conducting activities within the forum, thereby invoking the benefits and protections of its laws." Marschke, 2007 S.D. 125, ¶ 14, 743 N.W.2d at 406 (citing Daktronics, Inc. v. LBW Tech Co., 2007 S.D. 80, ¶ 1, 737 N.W.2d 413, 416). This Court has applied a three-step analysis in determining whether a defendant has minimum contacts sufficient to give South Dakota personal jurisdiction over the defendant:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state, thus invoking the benefits and protections of its laws. Second, the cause of action must arise from [the] defendant's activities directed at the forum state. Finally, the acts of [the] defendant must have substantial connection with the forum state to make the exercise of jurisdiction over [the] defendant a reasonable one.

Kustom Cycles, 2014 S.D. 87, ¶ 10, 857 N.W.2d at 407 (quoting Marschke, 2007 S.D. 125, ¶ 15, 743 N.W.2d at 407) (alterations in original) (quoting Daktronics, 2007 S.D.

80, ¶ 6, 737 N.W.2d at 417). "[D]ue process requires that a non-resident defendant 'have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" Frankenfeld, 2005 S.D. 55, ¶ 10, 697 N.W.2d at 382 (quoting Int'l Shoe Co. v. Washington, 326 U.S. at 316, 66 S.Ct. at 158)(internal quotations omitted).

The purposeful availment requirement prevents haling a defendant solely for "random, fortuitous, or attenuated contacts." Id. (quoting Daktronics, 2007 S.D. 80, ¶ 5, 737 N.W.2d at 416). The defendant's "conduct and connection with the forum must be such that he could reasonably anticipate being hailed into a forum court." Id. (citing Daktronics, 2007 S.D. 80, ¶ 5, 737 N.W.2d at 417).

Physical contacts with the state are not necessary to establish purposeful availment. State v. Am. Bankers Ins. Co., 374 N.W.2d 609, 613 (S.D. 1985). "The United States Supreme Court has recognized the methods of modern business has obviated the need for physical presence within a state in which business is conducted." Id. (quoting Burger King, 471 U.S. at 476, 105 S.Ct. at 2184). "So long as a commercial actor's efforts are 'purposefully'

directed toward residents of another state," an absence of physical contacts will not defeat personal jurisdiction there. Id. (quoting Burger King, 471 U.S. at 476, 105 S.Ct. at 2184). The United States Supreme Court has stressed that those who contract with a citizen in another state may be subject to the laws of that state for the consequences of their activities. Denver Truck, 2002 S.D. 127, ¶ 24, 653 N.W.2d at 94 (citing Burger King, 471 U.S. at 473, 105 S.Ct. at 2182). An important factor bearing upon reasonableness of asserting jurisdiction is to determine if defendant's conduct and connection with the forum state are such that he would have reasonably anticipated being brought into court there. Klenz v. AVI Int'l, 2002 S.D. 72, ¶ 12, 647 N.W.2d 734, 737.

First Bank's actions undoubtedly satisfy the three-part minimum-contacts test. First, First Bank purposely availed itself of the forum by issuing the guaranties. Its actions were not "random, fortuitous, or attenuated," but rather were purposefully directed to a South Dakota business guaranteeing payment for another. Second, this action arose from the actions of First Bank directed at South Dakota - issuing guaranties for the benefit of a South Dakota business concerning the agreement

to purchase South Dakota cattle. Lastly, it is reasonable for South Dakota to exercise jurisdiction over First Bank. First Bank had "fair warning" it would be called before a South Dakota court when issuing guaranties for the benefit of a South Dakota business concerning South Dakota cattle. Burger King Corp. v. Rudzewicz, 471 U.S. at 472, 105 S.Ct. at 2182 (By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.")(internal citations omitted). According to South Dakota case law, physical contacts with the forum are unnecessary - an act purposefully directed towards a South Dakota resident suffices.

1. FIRST BANK HAD FAIR WARNING THAT A DEFAULT IN THE TRANSACTION COULD LEAD TO LITIGATION IN SOUTH DAKOTA.

Numerous courts have considered and rejected due process arguments similar to those made by First Bank. The common thread in these cases is that guarantors induced plaintiffs to take some actions in the forum state, which

the guarantors should have anticipated could later lead to actions in the forum state to enforce the guaranty.

In a case with similar circumstances, the Nebraska Supreme Court found that the Court of Appeals erred in holding that the defendant did not have sufficient minimum contacts with Nebraska to satisfy the due process requirements for the exercise of specific jurisdiction. Quality Pork Int'l v. Rupari Food Servs., 267 Neb. 474, 485, 675 N.W.2d 642, 652 (2004). Through an oral agreement, Rupari, a Florida corporation, agreed to pay for products from Quality Pork, a Nebraska corporation, that was to be shipped to Star Food Processing, Inc., a Texas food distributor. Id. at 477, 675 N.W.2d at 646. Midwest Brokerage, a Colorado corporation, arranged the oral agreement and placed three orders with Quality Pork for products to be shipped to Star Food Processing, Inc. Id. Rupari paid for the first two orders, but failed to pay for the third. Id. at 477, 675 N.W.2d at 647. Quality Pork sued Rupari to recover the cost of goods shipped under the third order.

Rupari never made any sales to or into the State of Nebraska, it was not a foreign corporation authorized to

do business in Nebraska, it did not have offices or property in Nebraska, and no Rupari officer or employee visited Nebraska during the course of their employment with Rupari. Id. at 478, 675 N.W.2d at 647. Rupari didn't even broker the deal with Quality Pork - Midwest Brokerage did. Id. Despite this, the Nebraska Supreme Court found the Court of Appeals erred in ordering the district court to remand with directions to dismiss. The Court specifically disagreed with the Court of Appeal's determination that Rupari's activities did not qualify as a purposeful availment for the requirements of specific personal jurisdiction. Id. at 484, 675 N.W.2d at 651. The Nebraska Supreme Court wrote that personal jurisdiction depends on whether the defendant's contacts with the forum state are "the result of unilateral acts performed by someone other than the defendant, or whether the defendant himself has acted in a manner which creates substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state." Id.

While Rupari did not contract with Quality Pork directly, the Court reasoned that Rupari's promise to pay "induced Quality Pork to ship products to Star [Food

Processing, Inc.]." Id. at 484, 675 N.W.2d at 651-652. Rupari purposefully conducted business with Quality Pork, and it "could reasonably anticipate that it might be sued in Nebraska if it failed to pay for products ordered from Quality Pork." Id. at 485, 675 N.W.2d at 652.

In another case from Nebraska, Lone Star Steakhouse & Saloon of Nebraska, Inc. ("Loan Star"), a Nebraska corporation, leased property in Omaha to operate a restaurant from Hand Cut Steaks Acquisitions, Inc. ("HCS"), an Arkansas corporation. Hand Cut Steaks Acquisitions, Inc. v. Lone Star Steakhouse & Saloon of Neb., Inc., 298 Neb. 705, 710, 905 N.W.2d 644, 653 (2018). Cactus L.L.C. ("Cactus"), a Delaware limited liability company doing business in Texas, was a subsidiary of Lone Star's parent company and guaranteed the performance of Lone Star's obligations under the lease. Id. The district court granted Cactus's motion to dismiss HCS's claim against it for lack of personal jurisdiction. Id. at 714, 905 N.W.2d at 655.

The Nebraska Supreme Court reversed the district court's decision, reasoning that the purpose of Cactus's guaranty was to induce HCS to enter into the lease agreement with Lone Star. Id. at 729, 905 N.W.2d at 664.

Cactus's guaranty was a way of reaching out "to induce a particular action within the forum state." Id. at 731, 905 N.W.2d at 665. Also, the Court reasoned that Nebraska had a significant interest in having a dispute concerning a guaranty to pay the lease of Nebraska property conducted in Nebraska courts. Id. The court wrote "[w]here a guarantor takes on obligations that are uniquely tied to and uniquely affect a particular location, it is not unreasonable for courts of that state to exercise personal jurisdiction over the guarantor in connection with claims arising from or related to those obligations." Id. at 732, 905 N.W.2d at 666.

Alabama's Supreme Court has also found that the issuance of a guaranty is sufficient for personal jurisdiction. In Keelean v. Cent. Bank, 544 So.2d 153, 154 (Ala. 1989), Holdco of Pinellas County, Inc. ("Holdco"), a Florida Corporation, executed and delivered to Central Bank of the South ("Central Bank"), an Alabama banking corporation, a promissory note with a principal amount of four million dollars. Id. The promissory note was guaranteed by several individuals, who were appellants in

the case. Id.[1] Holdco defaulted on the promissory note and Central Bank filed suit in Alabama against Holdco and the individual guarantors. Id. The individual guarantors were not part of the promissory note negotiations between Holdco and Central Bank. Id. The guarantors merely sent their guaranties to Central Bank. Id. They argued that Alabama lacked personal jurisdiction over them. Although the individuals guaranteed the loan, they received no direct benefits from the loan made by Central Bank to Holdco. Id. at 157.

Despite the arguably tenuous contacts between the guarantors and the Alabama forum, the Alabama Supreme Court found the guarantors had enough minimum contacts through the guaranties *alone* to justify personal jurisdiction. Id. at 158. According to the Alabama court, all the guarantors were aware they were guaranteeing payment of the debts and liabilities of a Florida corporation that was borrowing from an Alabama corporation. Id. at 157. "It is quite foreseeable that upon the default of that loan, they [the guarantors] would be held accountable on their contracts of

[1] The guaranties did contain forum selection clauses for Alabama. Keelean, 544 So.2d at 155. However, Alabama treats forum selection clauses as invalid and it did not factor into the Alabama Supreme Court's analysis.

guaranty in the State of Alabama." Id. The court wrote, "clearly the appellants/guarantors should have foreseen the effects of their contracts of guaranty in the State of Alabama in the event of default . . ." Id.

The Keelean court also applied the "fair warning" requirement as derived from Burger King Co. and wrote the following:

> "By requiring that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,' Shaffer v. Heitner, 433 U.S. 186, 218, 53 L.Ed.2d 683, 97 S.Ct. 2569 (1977) (Stevens, J., concurring in judgment), the Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit,' World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 62 L.Ed.2d 490, 100 [**13] S.Ct. 559 (1980).
>
> "Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair

warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774, 79 L.Ed.2d 790, 104 S.Ct. 1473 (1984), and the litigation results from alleged injuries that 'arise out of or relate to' those activities, Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408, 414, 80 L.Ed.2d 404, 104 S.Ct. 1868."

Id. at 157-158.

The Keelean court held that signing the guaranties was sufficient to create the "sufficient contact required by the 14th Amendment to the U.S. Constitution . . . so that the Alabama court has *in personam* jurisdiction." Id. at 158. Other courts have likewise found personal jurisdiction despite the only connection with a forum being a guaranty signed outside of the forum. See United States v. Rollinson, 629 F.Supp. 581, 587 (D.D.C. 1986) (finding personal jurisdiction over a defendant who executed a guaranty in Nevada, did not conduct or transact business in the District of Columbia, was not a resident during the transaction, has no property there, and had only visited in

the past to visit relatives); Panos Inv. Co. v. Dist. Court of Cty. of Larimer, 662 P.2d 180, 182-83 (Colo. 1983) ("It is not unreasonable to subject a guarantor to the jurisdiction of courts in the very state where an obligation is specifically payable when the makers fail to perform their obligations and the guarantee becomes operable" and "[i]t is only realistic to assume that the guarantees in those cases were important inducements to the extension of credit to a third party and that the guarantor knew it."); First Wyoming Bank v. Trans Mountain Sales & Leasing, Inc., 602 P.2d 1219 (Wyo. 1979) (holding nonresident guarantor of promissory note payable to Wyoming bank was subject to personal jurisdiction in Wyoming in action on the guarantee even though the guarantee was executed in Colorado).

Jurisdictions like Oregon have held that the execution of a guaranty to an Oregon entity by itself is insufficient to establish personal jurisdiction, but that there must be evidence that the guaranty played an "integral part in causing or promoting significant economic consequences in Oregon." Boehm & Co. v. Envtl. Concepts, 125 Or.App. 249, 253, 865 P.2d 413, 416 (1993). Oregon has also held that "reliance on a guaranty is a critical factor

in determining the reasonableness of asserting personal jurisdiction over a nonresident guarantor." Id. (citing White Stag Mfg. Co. v. Wind Surfing, Inc., 67 Or.App 459, 465, 679 P.2d 312 (1984)).

Other courts have also found the inducement of a party to contract due to the guaranty to pay by another as an important factor in evaluating personal jurisdiction over the non-resident party. See Hager v. Doubletree, 440 N.W.2d 603, 606-09 (Iowa 1989) (holding that nonresident personal guarantors of nonresident incorporated insurance agencies, who were principal officers in their companies and signed guaranty agreements to induce a resident corporation to do business with them, created substantial, ongoing connections between themselves and the State of Iowa, and were therefore subject to the jurisdiction of the State of Iowa); Kimball Int'l, Inc. v. Warmack, No. IP 88-460-C, 1989 U.S. Dist. LEXIS 2879, at *19 (S.D. Ind. Mar. 22, 1989) ("It simply cannot be said that the guarantors, having induced the Indiana corporation to extend credit to their California corporation, are being hailed into an Indiana forum on the basis of random, attenuated, or fortuitous contacts.").

Mark Hoegh's November 16, 2018 email promised

guaranties for future cattle transactions. (SR 72.) First Bank's conduct which followed reflected that promise. While First Bank itself did not agree that it would issue a guaranty for each cattle purchase Jackman made in the future, it is undisputed that, on the heels of Hoegh's email, First Bank sent three separate guaranties for three separate cattle orders on December 4, 2018, December 18, 2018, and January 8, 2019. (SR 7, 8, 75.) Unquestionably, these guaranties were prepared to induce J and L Farms to move forward with the shipment of cattle at Jackman's request.

2. FIRST BANK'S CITED AUTHORITY IS DISTINGUISHABLE.

First Bank cites two South Dakota cases it believes are similar this case. Marschke differs from the case before this court in a number of ways. First, the contract in Marschke was signed in South Dakota, but nothing else connected the contracting party with South Dakota. The plaintiff and buyer, Marschke, initiated the purchase of the vehicle. As this court wrote, "we . . .find it pertinent that Marschke initiated the telephone calls and negotiations leading to the . . . purchase . . ." Id. at ¶ 24, 743 N.W.2d at 410. Conversely, First Bank issued

the guaranties **to** J and L Farms. First Bank purposefully directed the guaranties to J and L Farms concerning cattle located in South Dakota.

Second, the vehicle in Marschke was being sold on eBay - a website where anyone in the United State can bid on items sold. This Court equated the use of the Internet to sell the vehicle to posting in a national print publication. Id. at ¶ 18, 743 N.W.2d at 408 (citing Ochs v. Nelson, 538 N.W.2d 527 (S.D. 1995)). First Bank's actions were not remotely similar to selling something on eBay. It purposefully issued multiple guaranties to a South Dakota business, knowing full well it would be on the hook if Jackman did not pay. There is nothing attenuated about First Bank's actions. Last, and most importantly, there was no inducement on the part of the plaintiff in Marschke. J and L Farms were more willing to do business with Jackman because they were guaranteed to be paid for their cattle. There is no equivalent in Marschke.

First Bank emphasizes Marschke's discussion of specific jurisdiction depending on physical contacts with the forum, specifically "[a]ctual presence during pre-contractual negotiations, performance, and resolution of post-contract difficulties is generally factored into

the jurisdictional determination." Id. at ¶ 22, 743 N.W.2d at 410 (citing GE v. Deutz AG, 270 F.3d 144, 150-151 (3rd Cir. 2001)). This analysis seems applicable to contracts between two parties concerning the purchase of a product or providing of a service, not to guaranties issued for the benefit of another. As noted, physical contacts with the state are not necessary to establish purposeful availment. Am. Bankers Ins. Co., 374 N.W.2d at 613.

First Bank also relies on Kustom Cycles. Much like the criticism of Marschke, Kustom Cycles does not involve the issuing of a guaranty of payment to another party. There was no inducement for the other party to act. There was no act that could constitute "purposeful availment" in Kustom.

First Bank also discusses three cases from various jurisdictions. Each is factually distinct from the case before this Court.

In Bond Leather Co. v. Q.T. Shoe Mfg. Co., 764 F.2d 928 (1st Cir. 1985), the First Circuit wrote "[w]e have held that the fact that a nonresident enters into a single commercial contract with a resident of the forum state is not necessarily sufficient to meet the constitutional minimum for jurisdiction." Id. at 933. Bond Leather

involved an isolated act, not a series of guaranties intended to induce repeated shipments of cattle from South Dakota.

Similarly, Ark. Rice Growers Coop. Assoc. v. Alchemy Indus., Inc., 797 F.2d 565, 571 (8th Cir. 1986), involves a party requiring assurances from the other through guaranties. Arkansas Rice Growers Cooperative Association, d/b/a Riceland Foods ("Riceland") entered into a contract with Alchemy Industries to provide a factory to Riceland. Id. As part of the contract, Riceland required the following: "Alchemy shall provide to Riceland financial assurances either in the form of personal guarantees satisfactory to Riceland or in the form of a line of credit from a bank or other financial institution . . ." Id. at 571. Like Bond, the guaranty was not intended to induce a specific action in the forum state, but was merely a box Alchemy needed to check in the contract required by Riceland. It involved one guaranty from each of 22 different individuals. Id. As the court writes, "[W]e have found no case in which a court has asserted jurisdiction over a nonresident guarantor merely because the guarantor is a passive investor in the corporation whose debt the guarantor assures." Id. at 574. In other

words, the general guaranties in Ark. Rice Growers were not tied to specific transactions in the forum state, as is the case here.

Similarly, Long John Silver's, Inc. v. Diwa III, Inc., 650 F.Supp.2d 612 (E.D. Ky. 2009), involves a Georgia resident who signed two personal guaranties - one under the Franchise Agreement with Plaintiff Long John Silvers and the second under a sublease agreement with the same Franchisor. Both personal guaranties were standard practice with franchising agreements. While the language of the guaranties included derivations of the word inducement, like Ark. Rice Growers, the guaranties merely acted as boxes to be checked by the Franchisee. Id. They were not meant to induce specific transactions, like they were in this case.

This Court rejects "any talismanic jurisdiction formulas; 'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.'" Marschke, 2007 S.D. 125, ¶ 15 n.6, 743 N.W.2d at 407 (quoting Burger King Corp., 471 US at 485-86, 105 S.Ct at 2189, 85 L.Ed.2d 528 (citation omitted)). Here, a Florida Bank provided guaranties not once, not twice, but three separate times

for three separate cattle transactions. The correspondence in the record portrays that First Bank's guaranties were to back the cattle transactions going forward. (SR 73-74.)

"So long as a commercial actor's efforts are 'purposefully' directed toward residents of another state," an absence of physical contacts will not defeat personal jurisdiction there. Am. Bankers Ins., 374 N.W.2d at 613. (quoting Burger King, 471 U.S. at 476, 105 S.Ct. at 2184). First Bank, on three separate occasions, purposefully directed guaranties toward J and L Farms. These guaranties were not part of a standard franchise or contractual agreement, but were separately provided by First Bank for three distinct transactions with a South Dakota business. First Bank had fair warning that such acts directed toward a South Dakota business would subject it to a South Dakota Court's jurisdiction in the event those transactions went awry. Burger King Corp., 471 U.S. at 472, 105 S. Ct. at 2182.

CONCLUSION

The Circuit Court correctly found personal jurisdiction over First Bank due to the three guaranty letters it furnished, which were purposefully directed at J and L Farms with the intent to induce J and L Farms to ship

cattle from South Dakota. First Bank had fair warning that a dispute arising out of those cattle transactions could land it in a South Dakota court. J and L Farms respectfully requests that this Court affirm the denial of First Bank's motion to dismiss for lack of personal jurisdiction.

Respectfully submitted this 13th day of October, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 22 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Courier New (12 pt.) and contains 4,697 words. The word processing software used to prepare this Brief is Word Perfect.

Dated this 13th day of October, 2022.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellee J and L Farms, Inc., hereby certifies that on the 13th day of October, 2022, a true and correct copy of **APPELLEE'S BRIEF** was served and filed via the Odyssey file and serve system on:

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and the original and one copy of **APPELLEE'S BRIEF** were mailed by first-class mail, postage prepaid, to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in Word Perfect format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 13th day of October, 2022.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

J AND L FARMS, INC.,

Plaintiff/Appellee,

vs. Appeal No. 30020

JACKMAN FLORIDA WAGYU BEEF, LLC,

Defendant,

and

FIRST BANK,

Defendant/Appellant.

Appeal from the Circuit Court, Fifth Judicial Circuit
Brown County, South Dakota
The Honorable Richard A. Sommers, Presiding

APPELLANT'S REPLY BRIEF

Order Granting Petition for Allowance of Appeal from
Intermediate Order filed on July 15, 2022.

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ARGUMENT AND AUTHORITIES

I. The trial court erred in denying First Bank's Motion to Dismiss for Lack of Personal Jurisdiction.

First Bank respectfully offers this *Appellant's Reply Brief* in response to *Appellee's Brief*. In this brief, First Bank shall be referred to as "First Bank." J and L Farms, Inc. shall be referred to as "J and L Farms." Jackman Florida Wagyu Beef, LLC shall be referred to as "Jackman." References to the settled record are cited as "SR" followed by the appropriate page number.

A. Application of South Dakota's Long-Arm Statute.

First Bank does not challenge the applicability of the Long Arm Statute, SDCL § 15-7-2. The Long Arm Statute grants jurisdiction for "[t]he commission of any act, the basis of which is not inconsistent with the Constitution of this state or with the Constitution of the United States." SDCL § 15-7-2(14). "[T]he legislature by enacting the 'long arm' statute intended to provide South Dakota residents with maximum protection of South Dakota courts from damages and injuries occasioned them through the acts or omissions, both contractual and tortious, of a nonresident when that nonresident has had the necessary minimal contacts with the state to comply with federal due process." *Ventling v. Kraft*, 83 S.D. 465, 474, 161 N.W.2d 29, 34 (1968). Therefore, First Bank does not challenge that the Long Arm Statute would encompass this matter, rather the pertinent inquiry is whether the assertion of jurisdiction in this matter comports with due process requirements.

B. The authority cited by J and L Farms is distinguishable.

J and L Farms discusses at length two Nebraska cases, *Quality Pork International v. Rupari Food Services, Inc.*, 267 Neb. 474, 675 N.W.2d 642 (2004) and *Hand Cut Steaks Acquisitions, Inc. v. Lone Star Steakhouse & Saloon of Nebraska, Inc.*, 298 Neb. 705, 905 N.W.2d 644 (2018). Those cases are distinguishable from the present matter.

First, in *Quality Pork* the agreement was more than a guarantee of payment. As set forth in that opinion:

> [I]n November 1999, Midwest [Brokerage] arranged an oral contract between Quality Pork and Rupari. Quality Pork agreed to again do business with Star [Food Processing, Inc.] only because Rupari agreed to pay for all products that Star ordered from Quality Pork. Under the terms of the contract, Midwest placed orders with Quality Pork for Star, the orders were delivered to Star, and Rupari was sent the invoices for the orders.

Quality Pork, 267 Neb. At 477, 675 N.W.2d at 647. Rupari did not simply guarantee payment in the event another party defaulted, rather they agreed to be primarily responsible for the invoices. This was done specifically to "induce[] Quality Pork to ship products to Star" as "Quality Pork had previously ceased doing business with Star because of its poor credit." *Quality Pork*, 267 Neb. at 484, 675 N.W.2d at 651. The oral contract in *Quality Pork* was different in kind and quality than the letters at issue in this case. Rupari agreed to become primarily responsible for Quality Pork's invoices, which is not the case here.

Next, in *Hand Cut Steaks*, a case involving a guaranty of a lease agreement involving Nebraska real estate, the Nebraska court based its finding of personal jurisdiction on four factors:

> 1) "[T]he guaranty and lease expressly acknowledged . . . the purpose of [the] guaranty was to induce HCS to enter into the agreement with Lone Star[.]" *Hand Cut Steaks*, 298 Neb. at 729, 905 N.W.2d at 664.
>
> 2) "Nebraska has a significant interest in having the dispute over this guaranty of the lease of Nebraska property adjudicated in Nebraska courts." *Hand Cut Steaks*, 298 Neb. at 731, 905 N.W.2d at 665.
>
> 3) "Cactus guaranteed the performance of Lone Star's obligations under the lease, which obligations were governed by Nebraska law pursuant to the lease's choice of law provision." *Hand Cut Steaks*, 298 Neb. at 733, 905 N.W.2d at 666.
>
> 4) "[T]he fact that Cactus was a named insured on the insurance policy covering the property and the Lone Star business is a relevant, though less significant, contact with Nebraska." *Hand Cut Steaks*, 298 Neb. at 734, 905 N.W.2d at 667.

Once again, the contacts in *Hand Cut Steaks* were different in kind and quality.

In *Hand Cut Steaks*, it was specifically relevant that the matter involved Nebraska real estate, which is obviously unique to Nebraska. As J and L Farms notes in its brief, the *Hand Cut Steaks* court wrote "[w]here a guarantor takes on obligations that are uniquely tied to and uniquely affect a particular location, it is not unreasonable for courts of that state to exercise personal jurisdiction over the guarantor in connection with claims arising from or related to those obligations." *Hand Cut Steaks*, 298 Neb. at 732, 905 N.W.2d at 666. At the trial court level, J and L Farms attempted to apply this analysis to the facts of this case by stating that

South Dakota has a significant interest in litigating matters involving agriculture and chattels located in the state. They have, apparently, abandoned that argument at this point, or at least only assert it by implication. However, it goes without saying that Nebraska real estate is unique to Nebraska, while agriculture and cattle are not unique to South Dakota. As the *Hand Cut Steaks* court noted, "[w]hile a guaranty of a personal debt generally bears no intrinsic connection to any particular location, a guaranty to pay and perform a tenant's obligations under a lease of real property uniquely affects the state in which the premises are located." *Hand Cut Steaks*, 298 Neb. at 732, 905 N.W.2d at 666.

J and L Farms next turns to *Keelean v. Central Bank of the South*, 544 So.2d 153 (Ala. 1989). J and L Farms cites *Keelean* for the proposition that the signing of a guaranty is sufficient contact to satisfy due process requirements. *Keelean* set forth different factors than are used in South Dakota to determine jurisdiction:

> A two fold analysis is used in this state in determining whether personal jurisdiction exists over a nonresident defendant:
>
> 1) the determination of whether it is foreseeable to that nonresident defendant that he will be sued in this state; and
>
> 2) the determination of the degree of contact that the nonresident defendant has with this state.

Keelean, 544 So.2d 153, 156-57. The *Keelean* court focused almost entirely on foreseeability, which itself does not seem to comport with due process precedent. As the Eighth Circuit has noted, "'foreseeability' alone has never been a sufficient

benchmark for personal jurisdiction under the Due Process Clause." *Bell Paper Box, Inc. v. Trans Western Polymers, Inc.*, 53 F.3d 920, 922, (8th Cir. 1995) (quoting *World–Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 295, 100 S.Ct. 559, 566, 62 L.Ed.2d 490 (1980); *Scullin Steel Co. v. National Ry. Utilization Corp.*, 676 F.2d 309, 313 n. 5 (8th Cir.1982)). But, just as importantly, the holding in *Keelean* would not pass muster under South Dakota law. *Keelean* does not discuss any contacts that the guarantors had with Alabama other than the signing of the guarantees. *Keelean* held that "the signing of the guarantees was sufficient to create the sufficient contact required by the 14th Amendment to the U.S. Constitution[.]" *Keelean,* 544 So.2d at 158. On the other hand, this Court has clearly stated that "a contract with a nonresident party is not alone sufficient to establish minimum contacts." *Marschke v. Wratislaw*, 2007 S.D. 125, ¶ 19, 743 N.W.2d 402, 409. Therefore, as the guarantees were apparently the only contacts in *Keelean,* the holding therein would not be consistent with South Dakota law.

Most of the remainder of the authority cited by J and L Farms involves loan guarantees where there was close identity between the borrower and the guarantor. In *United States v. Rollinson*, 629 F.Supp. 581 (D.D.C. 1986), the court noted that the guarantor was the father of the president of the borrowing entity. In *Panos Inv. Co. v. District Court In and For Larimer County*, 662 P.2d 180 (Colo. 1983), while the court did not specifically rely on the close identity of the parties in its analysis, it was noted that the guarantors were all partners of Panos Inv. Co. In *First Wyoming Bank, N.A., Rawlins v. Trans Mountain Sales & Leasing, Inc.*, 602

P.2d 1219 (Wyo. 1979), the guarantors were the president of the borrower corporation and his wife. In *Boehm & Company v. Environmental Concepts, Inc.*, 125 Or.App. 249, 865 P.2d 413 (1993), the guarantor was the parent corporation of the borrower. In *Kimball International Inc. v. Warmack*, 1989 WL 432179 (S.D. Ind. 1989), the guarantors were major stockholders of the borrowing entity and also included the corporate president and secretary. In *Hager v. Doubletree*, 440 N.W.2d 603 (Iowa 1989), the guarantors were the principal officers of their respective companies. There is no such close identity of Jackman and First Bank in this matter.

Of note, *Kimball International* cites favorably to both *Bond Leather Co., Inc. v. Q.T. Shoe Mfg. Co., Inc.*, 764 F.2d 928 (1st Cir. 1985) and *Arkansas Rice Growers v. Alchemy Industries, Inc.*, 797 F.2d 565 (8th Cir. 1986), discussed in more detail in Appellant's Brief, for the proposition that personal jurisdiction is inappropriate over a guarantor, based on a guaranty alone, where the guarantor does not have close identity with the primary obligor or is otherwise removed from the underlying contract. The *Kimball* court noted that "there are a number of cases involving the precise scenario here where officers or large shareholders of a company have signed personal guaranties to answer for the firm's debts in order to induce another entity to deal with their company." *Kimball International, Inc.*, 1989 WL 432179 at 4. That situation does not exist here as it does in much of the authority cited by J and L Farms. There is no evidence in this matter that Jackman and First Bank had other than an arms-length bank and customer relationship.

C. First Bank's guaranty letters alone are not sufficient to establish personal jurisdiction.

The only contacts between J and L Farms and First Bank were the letters in question. While those letters were addressed to J and L Farms, they were drafted at the request of Jackman, First Bank's Florida-based customer, and provided to Jackman. SR at 42-44. Jackman supplied the letters to J and L Farms. *Id.* No communication was had between J and L Farms and First Bank regarding the drafting, issuance, or provision of the letters. *Id.* Other than providing the letters to Jackman, addressed to J and L Farms, First Bank had no other dealings with J and L Farms. *Id.*

J and L Farms states that "[t]he correspondence in the record portrays that First Bank's guaranties were to back the cattle transactions going forward." *Appellee's Brief* at 20. However, the correspondence they reference is an email between Mark Hoegh, partner and general manager of Jackman, and Kurtis Larson of J and L Farms. SR 73-74. First Bank is not included anywhere in the correspondence, and it is never addressed to them. In fact, First Bank is not even referenced by name, rather it simply refers to "our banker in Florida." *Id.* There is no communication from First Bank purporting to "back the cattle transactions going forward." J and L Farms goes too far in trying to shoehorn the three letters into a continuing obligation or promise on First Bank's part. No such promise can be traced to First Bank. The total sum of First Bank's contacts with J and L Farms are the three letters, sent over the course of about a month, and nothing more.

The majority of J and L Farms argument is built on the idea of inducement – that the letters induced J and L Farms to transact business with Jackman and, therefore, when First Bank addressed their letters to a South Dakota entity, it was foreseeable and they had "fair warning" that they could be haled into court here. Almost every guaranty involves some level of inducement. Elevating inducement to the position that J and L Farms argues would essentially grant personal jurisdiction over any guarantor, regardless of what other contacts they have with the forum. Such a result would not comport with due process requirements as set forth by this Court.

This Court has clearly stated, following United States Supreme Court precedent, that "a contract with a nonresident party is not alone sufficient to establish minimum contacts." *Marschke v. Wratislaw*, 2007 S.D. 125, ¶ 19, 743 N.W.2d 402, 409 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 105 S.Ct. 2174, 2185, 85 L.Ed.2d 528 (1985)). *Marschke* continued, "[t]hus . . . we must determine if the sum total of the rest of Wratislaw's acts when added to the contract constitute sufficient minimum contacts." *Id.* In this instance, there are no other acts to consider. There are only the guaranty letters and no further acts upon which to base personal jurisdiction. Therefore, the trial court erred in denying First Bank's Motion to Dismiss.

CONCLUSION

The only contacts between First Bank and South Dakota were the guaranty letters at issue. Under South Dakota law, the letters do not establish the minimum contacts necessary for a South Dakota court to assert personal jurisdiction over First Bank. Therefore, First Bank respectfully requests that this Court reverse the circuit court's denial of its motion to dismiss and remand to the circuit court for entry of an order dismissing J and L Farms' claims against First Bank.

Dated this 10th day of November, 2022.

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CERTIFICATE OF COMPLIANCE

Justin M. Scott, attorney for Appellants, hereby certifies that the foregoing brief meets the requirements for proportionately spaced typeface in accordance with SDCL 15-26A-66(b) as follows:

a. Appellant's brief does not exceed 20 pages;

b. The body of Appellant's brief was typed in Times New Roman 13-point typeface, with foot notes being in 13-point typeface; and

c. Appellant's brief contains 2,280 words, 11,389 characters (no spaces), and 13,783 characters (with spaces), according to the word and character counting system in Microsoft Word for Microsoft 365 used by the undersigned.

Dated this 10th day of November, 2022.

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The undersigned, attorney for Appellant, First Bank, hereby certifies that on the 10th day of November, 2022, a true and correct copy of **Appellant's Reply Brief** was filed electronically with the South Dakota Clerk of the Supreme Court through the Odyssey File & Serve and email notification was sent to:

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