

1-19-2017

# Bailey v. Peritus 1 Assets Management, LLC Appellant's Reply Brief Dckt. 44357

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IN THE SUPREME COURT OF THE STATE OF IDAHO

\* \* \* \* \*

SHAWN W. BAILEY,	)	
	)	
Plaintiff/Appellant,	)	Supreme Court
	)	Case No. 44357
v.	)	
	)	
PERITUS 1 ASSETS MANAGEMENT,	)	
LLC.,	)	
	)	
Defendant/Respondent,	)	
	)	
and	)	
	)	
AMERICAN MEDICAL FILE, INC., a	)	
California Corporation; RONALD J.	)	
HELLER, an individual; DAVID J.	)	
DESMOND, an individual; WILLIAM	)	
R. ESPINOSA, an individual,	)	
	)	
Defendants.	)	

\* \* \* \* \*

**APPELLANT'S REPLY BRIEF**

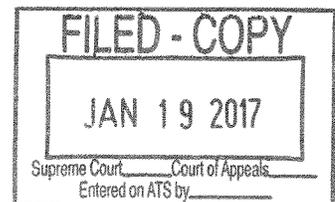
Appeal from the District Court of the Fourth Judicial District for Ada County  
Honorable Melissa Moody, District Judge, Presiding

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I.

**STATEMENT OF THE CASE**

**A. NATURE OF THE CASE**

This is a breach of contract dispute involving a written contract that was signed by Ronald J. Heller and David J. Desmond in their capacities as the President and Chief Operating Officer (respectively) of Peritus I Asset Management, LLC (hereinafter referred to as "Peritus"). They also signed in their capacity as Directors of American Medical File (hereinafter referred to as "AMF"). The contract is dated August 10, 2011, and was attached to both the initial complaint (R. 000009 – 20) and the proposed Amended Complaint (R. 000334 – 000351).

Peritus raised the affirmative defense of the Statute of Frauds. Interestingly, Peritus has taken the inconsistent position that Peritus was a guarantor but that the written contract was not specific enough to be enforceable as a guarantee.

Bailey contends the contract created a surety relationship instead of a guaranty and that Peritus is an original promisor. Therefore, the Statute of Frauds does not apply to this contract dispute. Peritus verbally and in writing agreed to be a joint obligor with AMF as evidenced by the signatures of Heller and Desmond in their capacities for both AMF and Peritus. The determination of whether the arrangement created a "surety" or "guaranty" relationship is dependent on objective criteria. The objective criteria proves this was a surety relationship.

**B. STATEMENT OF UNDISPUTED FACTS**

Peritus is an investment advisory company that is paid a fee for investment advice and for managing its clients' investments. In 2004 Peritus created the PGO Fund and invested \$6.45 million of its clients' money in AMF. The PGO Fund also provided AMF with a bridge loan. After AMF defaulted on the bridge loan the PGO Fund foreclosed and became the majority owner of AMF in 2006. (See Respondent's Brief, pp. 2 – 3.) On about March 10, 2006, Ronald J. Heller and David J. Desmond acting in their capacities as officers of Peritus and the PGO fund agreed to hire Bailey as a Vice President of AMF (R. 000348-49). Between 2008 and 2011 Peritus provided loans to AMF in the amount of approximately \$800,000.00 (Respondent's Brief, p. 4). Heller and Desmond each hold 1,500,000 shares of AMF stock. (Respondent's Brief, p. 5.) The fact Peritus was continuously funding AMF is objective evidence of a surety relationship. The fact Peritus was motivated to benefit Peritus is evidence of a surety relationship.

By late July or early August 2011 Bailey was owed \$95,000.00 in back pay and therefore quit. Peritus officers Heller and Desmond contacted Bailey and requested he return to work. Bailey told them he would not return to work until he received a written contract signed by Peritus in which Peritus was obligated to fund Bailey's salary at AMF. In response to that demand Bailey was provided a written contract which is signed by Heller and Desmond in their capacities as officers of Peritus. Bailey contends the contract was written by Heller and Desmond and therefore must be interpreted in

Bailey's favor in the event of ambiguity. The fact there was one contract signed by both AMF and Peritus is objective proof of a surety relationship.

The written contract does not mention the \$95,000.00 in back pay but it does provide for a salary of \$150,000.00 per year as the Chief Technology Officer of AMF and a severance package equal to two (2) years annual base salary. Bailey contends AMF/Peritus breached the contract by failing to pay his salary after January 1, 2012. Bailey claims salary damages of \$40,119.05 plus severance benefits of \$300,000.00 pursuant to the written contract signed by Desmond and Heller for Peritus and AMF (R. 000312-313.)

**C. COURSE OF PROCEEDINGS**

Peritus moved for summary judgment on the grounds Peritus was a "guarantor" and that the written contract did not contain guarantee language sufficient to satisfy the Statute of Frauds. Bailey responded and filed a motion to amend his complaint to clarify the claim that the promise of Peritus is an "original promise" per I.C. § 9-506(2). Therefore the Statute of Frauds does not apply. (See R. 000353.)

The District Court granted Peritus summary judgment "based on the Statute of Frauds." (R. 000388) The District Court denied the motion to amend on the basis "the amendment would be futile" and on the basis "the proposed Amended Complaint does not even allege facts that would support a theory that AMF somehow became Peritus' surety, as required to fit within [the] exception to the Statute of Frauds set forth in I.C. § 9-506(2). (R. 000401.)

The proposed Amended Complaint contained the following factual and legal allegations.

29. On or about August 10, 2011, Ron Heller and Dave Desmond prepared a written employment agreement which they signed in their capacity as officers of Peritus and Directors of AMF. Bailey signed the agreement and accepted the terms of the written contract along with the terms of the oral agreement set forth in Count One.

30. The written agreement is binding and enforceable against Peritus and it is not barred by the Statute of Frauds for numerous reasons. First, the agreement fully states in writing both Bailey's rights to payment of \$150,000.00 per year salary, benefits and 1,500,000 shares of AMF stock along with severance benefits of \$300,000.00. The contract sets forth Bailey's obligations fully. The agreement is signed by the parties to be charged, Peritus and AMF.

31. The written and contemporaneous oral agreements are not barred by the Statute of Frauds due to I.C. § 9-506(2). Given AMF's lack of revenues, Peritus agreed to be the primary obligor to provide capital to AMF to pay Bailey's salary and benefits including severance pay. Peritus had in the course of Bailey's employment since April 1, 2006, been the primary source of Bailey's compensation. Given the course of the dealings between Peritus and Bailey, the fact Peritus employees drafted the written contract and signed it, the only reasonable interpretation of the contract is that Peritus agreed to be the primary obligor to Bailey after August 2011. Peritus agreed to be responsible for Bailey's compensation because Peritus believed Bailey's services were necessary to make AMF profitable. Peritus expected to receive financial benefits from AMF including repayment of at least \$8,000,000.00 in loans, increased stock values for Peritus and its clients, as well as valuable stock owned by Peritus members.

32. Lastly, Bailey specifically advised Peritus representatives Desmond and Heller he would not return to work unless Peritus provided Bailey a written contract of employment whereby Peritus was obligated to Bailey for his compensation. Peritus drafted the contract which Bailey relied upon and therefore Peritus is estopped from claiming it is not bound by the contract Peritus drafted.

33. Between January 2, 2012, and March 15, 2013, Peritus failed to fund AMF with sufficient capital to pay Bailey his twice monthly paychecks. As of March 15, 2013, payments totaling \$40,119.05 were owed to Bailey. Peritus failed and refused to pay Bailey under the written contract as promised and therefore breached the contract. Given the substantial and material breach of contract, Bailey was relieved of his duty to perform under the contract including the duty to work or give notice of termination.

34. Bailey is entitled to damages of \$40,119.05 in back pay earned after August 10, 2011, severance benefits of \$300,000.00 and interest at the legal rate from the date due pursuant to I.C. § 28-22-104.

35. Bailey is entitled to an award of attorney fees pursuant to I.C. § 12-120 in an amount to be determined by the Court but not less than \$113,000.00.

(R. 000341 – 343).

## II.

### LEGAL ARGUMENT

#### A. INTRODUCTION

The initial complaint accurately reflected an extremely confusing factual scenario. The confusion stems from a revolving door of changing characters, evolving contracts, and key players serving in multiple capacities. As an example, Ron Heller's name appears on the initial Contract of Employment dated March 10, 2006, only in his capacities as the President of Peritus I Asset Management, LLC and as Managing Director of Peritus Global Opportunity Fund, LP. There were no signature lines for American Medical File. (R. 000351). As a precaution, Ron Heller was named in the complaint individually along with Peritus and American Medical File to cover the possibility Peritus or AMF asserted the defense that Heller did not have authority to

enter into the contract. In that event, Heller would indeed be individually liable. However, neither AMF nor Peritus has asserted that defense and it is waived. Many other potential claims have not been pursued in light of facts discovered after filing the lawsuit or facts that occurred after filing the lawsuit. For instance, AMF filed bankruptcy after the complaint was filed and has been discharged. Consequently, Bailey's theories and factual allegations have necessarily changed. What has not changed is that Bailey still asserts Peritus is liable for breach of the contract which is attached to both the initial complaint and the Amended Complaint and is signed by two Peritus officers, the President and Chief Operating Officer.

**B. PERITUS IS ATTEMPTING TO CONFUSE THE COURT REGARDING BAILEY'S RELIANCE ON I.C. § 9-506**

Peritus continues to make arguments assuming Bailey contends Peritus was a guarantor. This attempt to confuse the issues is disingenuous. Peritus is directed to Appellant's Brief, page 1. Bailey has at all times relied on I.C. § 9-506 – Original Obligation exception.

**A. NATURE OF THE CASE**

This is a breach of contract dispute primarily concerning the interpretation of the Statute of Frauds original obligation exception Idaho Code § 9-506(2) and the "Main Purpose Rule." Bailey contends the trial court erred when it found as a matter of law that the contractual arrangement was intended to be a guaranty. Bailey contends AMF and Peritus were joint debtors in a surety relationship.

Appellant's Brief, p. 1. (Emphasis added.)

Appellant's brief is extremely clear that Bailey is relying on the Original Obligation Rule set forth in I.C. § 9-506(2). See Heading C. I.C. § 9-506(2) Exception Applies. Appellant Brief, p. 18. See also lengthy discussion pages 20 – 26 under part C. 1. The Difference Between Surety and Guarantor. See also Bailey's Brief in Opposition to Summary Judgment. (R. 000281-284.)

Peritus wastes numerous pages in its brief pointing out that a guaranty and surety are mutually exclusive. What Peritus fails to acknowledge is that the agreement in Mickelsen Construction did in fact involve a guaranty as illustrated in the chart set forth in the next section of this brief. This Court's statement that: "An allegation of an agreement to guaranty a debt and an allegation of an agreement under section 9-506(2) are mutually exclusive" is correct. Bailey could but does not take inconsistent positions. The Court's statement: "A person cannot be both the principal debtor and the guarantor" is still also true. (See Mickelsen Construction v. Horrocks, 154 Idaho 396, 299 P.3d 203 at 210 – 11.) The objective criteria prove this was a surety relationship, not a guaranty.

**C. PERITUS AGREED TO ANSWER FOR THE OBLIGATION OF AMF**

Bailey agrees that Peritus was not a "guarantor" as that term is strictly interpreted and intended by the Idaho legislature. Bailey concedes the shareholders of AMF and creditors of AMF are not liable to Bailey as a result of those relationships. Bailey adamantly denies that only AMF is liable to Bailey as a result of his employment for

AMF. The contract at issue sits squarely within the Original Obligation exception set forth by the Idaho legislature as an exception to the Statute of Frauds.

I.C. § 9-506 Original obligations – Writing not needed. – A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:

2. Where the creditor parts with value, or enters into an obligation, in consideration of the obligations in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made, his surety.

An “Original Obligation” is very similar to a guarantee arrangement which must be in writing. In each arrangement there is one creditor and two obligors which are joint debtors. This fact is clear from the plain language of the two statutes.

I.C. § 9 – 505. Certain Agreements to be in writing. –

2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section 9 – 506, Idaho Code.

This section recognizes one obligor may agree to pay another obligors debt, as long as the agreement is in writing. There is nothing in the language of the statute that relieves one of the debtors from their obligation. Obviously, the express terms of a contract may substitute one debtor for another. But it is clear, the Statute of Frauds is silent in that regard. Further, the requirement for a written agreement has exceptions as indicated by the phrase, “except in the cases provided for in section 9-506, Idaho Code.” Bailey contends I.C. § 9-506(2) applies. That section provides:

I.C. § 9-506 Original obligations – Writing not needed. – A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:

2. Where the creditor parts with value, or enters into an obligation, in consideration of the obligations in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made, his surety.

The express terms of I.C. § 9-506(2) clearly encompass Bailey's contract with AMF and Peritus. Peritus made a promise both orally and in writing "to answer for the obligation of another" – AMF. AMF was the employer with the obligation to pay its employee, Bailey. Peritus agreed to "answer" for AMF's obligation. Peritus raised \$6.45 million through the "PGO Fund" which Peritus invested in AMF, a "bridge loan," and Peritus itself admits to loaning AMF \$800,000.00 between 2008 – 2011. (Respondents' Brief, pp. 2 – 4). The fact Peritus was continually funding AMF makes Peritus a surety, not a guarantor. A guarantor is only called upon to contribute funds long after a default has occurred and only if a default has occurred. The timing of the funding differentiates a surety from a guarantor. There is a factual dispute over the amount Peritus provided to AMF so that AMF could pay its \$40,000.00 per month overhead, but it is undisputed Peritus or its owners and clients capitalized AMF at all times. It was no accident Heller and Desmond signed both of Bailey's contracts. Heller, Desmond, and Peritus had a direct financial stake in the success of AMF. The fact Peritus was motivated to benefit itself is also a defining characteristic of an Original Promise as a surety.

When interpreting the legislature's intent as expressed in I.C. § 9-505 and I.C. § 9 – 506, it should be noted the statutes were originally passed in 1881. The use of terminology such as the word “surety” has likely changed. Therefore, it is helpful to consider the historical differences between the concepts of “guaranty” and “surety.” The “Main Purpose Rule” as explained by the U.S. Supreme Court in 1891 in Davis v. Patrick, 141 U.S. 479, 12 S. Ct. 58 (1891) and the Restatement of Contracts (Second) § 116 (1981) are more authoritative than Corpus Juris Secundum.

As noted by the 8<sup>th</sup> Circuit Court, there are distinctions between a guarantor and surety when interpreted in a strict sense. The guarantor is “secondary and collateral” while a surety is “original, primary, and direct.” See Howell v. Commissioner of Internal Revenue, 69 F.2d 447 (8<sup>th</sup> Cir. 1934). (Cited at length in Appellant's Brief.)

Perhaps the clearest method to illustrate the differences and similarities between a guarantor and surety arrangement is to compare and contrast the facts of this case which are clearly a “surety” arrangement with the facts of the Mickelsen Construction, Inc. v. Horrocks, 154 Idaho 396 (2013) case relied upon by Peritus and which the Idaho Supreme Court correctly determined was a “guaranty” arrangement.

## DIFFERENCES

<u>FACTOR</u>	<u>SURETY</u> (AMF/Peritus/Bailey)	<u>GUARANTY</u> (Horrocks/Accelerated Paving/ Mickelsen Construction)
1. Number of Contracts	1 employment contract	2 contracts – Mickelsen Construction – Accelerated Paving Construction Contract Horrocks check to Mickelsen Construction
2. Timing of Signatures Of Obligors	Same time	Different times Construction Contract Horrocks check <u>after</u> Construction complete
3. Signatures on Principal Contract	Both principal and surety	Only Accelerated Paving
4. Consideration	AMF and Peritus both want Bailey to help make AMF profitable	Horrocks – Gratuitous Accelerated – Construction Services
5. When Payment Due	Peritus continuously Providing capital 2006 – 2012	Horrocks only pays <u>after</u> Accelerated default

## SIMILARITY

1. Both debtors liable	AMF and Peritus Both liable to Bailey	If guaranty valid – Both Horrocks and Accelerated liable
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### D. AMENDMENT OF COMPLAINT

The original complaint filed by Bailey complied with Idaho's pleading rules.

Rule 8. General Rules of Pleading.

(a) Claim for relief. A pleading that states a claim for relief must contain:

- (1) A short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
- (2) A short and plain statement of the claim showing that the pleader is entitled to relief; and
- (3) A demand for the relief sought, which may include relief in the alternative or different types of relief.

\* \* \* \*

(d)(3) Inconsistent claims or defenses. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

I.R.C.P. 8 (Emphasis added.)

Section I of the original complaint is entitled "Parties, Jurisdiction, and Venue," contains eight separately numbered paragraphs and clearly complies with the requirement of a "short and plain statement of the grounds for the court's jurisdiction." Section II entitled "Background Facts" contains paragraphs 9 – 18 setting forth a chronology of the contractual dealings between Bailey, Peritus, AMF, and the individuals acting in their dual capacities for AMF and Peritus. (R. 000011 – 14.)

Section III entitled "Count One" – "Breach of Employment Agreement" contains paragraphs 19 – 25 and correctly sets forth the 2006 "oral employment contract" and its breach. (See paragraphs 19 – 21.) (R. 000014.) Paragraphs 22 – 24 set forth a

breach of contract claim for the written contract dated August 10, 2011. (R. 000014 – 15.) The written employment contract was attached as an exhibit to the complaint and incorporated by reference by paragraph 15 in the general allegations. (R. 000019 – 20.)

Rule 10. Form of Pleading.

(b) Adoption by reference, Exhibits. A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

I.R.C.P. 10(c). (Emphasis added.)

The complaint clearly apprised Peritus that it was being sued for breach of the written employment contract which it signed as well as the breach of the oral contract. Paragraph 10 of the complaint specifically alleges Bailey “began employment for AMF and Peritus April 1, 2006.” (R. 000012.)

The complaint also contains a prayer for relief requesting total contract damages of \$129,549.75 plus severance benefits of \$300,000.00, future lost income, interest on the liquidated sums pursuant to I.C. § 28-22-104, as well as attorney fees. The complaint clearly complies with the Idaho Rules of Civil Procedure.

In light of the Mickelson Construction decision, Bailey elected to follow the procedure recommended by the Supreme Court and specifically plead exceptions to the Statute of Frauds affirmative defense raised by Peritus. The proposed Amended Complaint attached to the Motion to Amend is very similar to the initial complaint, containing a Parties, Jurisdiction, and Venue Section I, Background Facts Section II, and prayer for relief. The new complaint has three counts. Count One is “Breach of

Oral Contract” and attaches a copy of an unsigned letter memorializing the contract from 2006. (R. 000240-41; 000348 – 49). The complaint clarified the claim for the breach of the 2006 contract is “abandoned” due to the change in circumstances that occurred subsequent to the initial complaint.

Count Two for Breach of Written agreement is similar to the initial complaint but clarifies the factual basis supporting the exception to the Statute of Frauds as provided in I.C. § 9-506(2). (R. 000341-343.) Bailey believes the Amended Complaint is unnecessary under Idaho’s Notice Pleading Rules. However, the Amended Complaint does fairly and accurately respond to the affirmative defense asserted by Peritus and clearly raises the Original Obligation/Main Purpose legal issues. In the event the Court requires a pleading in response to an affirmative defense raised in the Answer, the Court should allow Bailey’s Motion to Amend to reach the merits of this dispute. Technical rules of pleading are not desirable and are a waste of resources.

**E. BOTH PERITUS AND AMF AGREED TO BE OBLIGATED TO BAILEY**

Bailey testified he quit in late July 2011 because he was not receiving payment of his salary. When Heller and Desmond requested he return to work, Bailey refused to return unless and until he received a written contract signed by Peritus in which Peritus was obligated to fund his salary. In response, Desmond and Heller sent Bailey the written contract they signed which expressly references their capacity as officers of Peritus. (R. 000310, para. 23 – 24.)

Peritus asserts only an employer can be obligated to pay Bailey. However, Peritus cites no Idaho authority for their contention. Peritus cites no statutes in support of that novel legal concept. Peritus does not contend the contract with Peritus is illegal or for some other reason void as a matter of law.

The only authority cited by Peritus that Peritus cannot enter into a contract to be jointly liable to Bailey is a Texas Federal District Court case interpreting Maritime Law. In Jernigan v. Lay Barge Delta Five, 296 F. Supp. 127 (S.D. Tex. 1969), a marine diver attempted to hold the boat owners liable for wages when his employer refused to pay. This was not a contract claim. The diver claimed the boat owner was liable based on the Jones Act or the General Maritime Law.

Plaintiffs proceed on the theory that they are seamen as that term is defined by law and therefore entitled to be paid their wages by the owner of the vessel.

Jernigan v. Lay Barge Delta Five, 296 F. Sup. 127 at 127.

The Court went on to rule the statutes did not make the vessel owner liable for wages. That case does not address the issue of whether an interested party like Peritus can agree to pay AMF's debts. In Idaho there is no law prohibiting the freedom to contract.

**F. AGENTS OF ENTITIES ORDINARILY SHOULD NOTE THE CAPACITY IN WHICH THEY SIGN**

Ordinarily, when an agent of a business entity signs on behalf of the entity only, the agent should sign their name and the capacity in which they sign.

I.C. § 30-1-120 Requirements for Documents – Extrinsic Facts.

(7) The person executing the document shall sign it and state beneath or opposite his signature his name and the capacity in which he signs. The document may but need not contain a corporate seal, attestation, acknowledgement, or verification. I.C. § 30-1-120. (Emphasis added.)

The Idaho Entity Transactions Act has an identical provision specifying how agents sign documents for a business entity.

I.C. § 30-18-703 Requirements for Filing of Documents.

(f) The document must state the name and capacity of the person that signed it. The document may contain a corporate seal, attestation, acknowledgment, or verification. I.C. § 30-18-703(f).

Reading the statutes above, it is clear that after an agent signs his signature, it is the practice in Idaho to then state the “capacity” in which the agent signed. In this case it is clear that Heller and Desmond signed as officers of Peritus and as Directors of AMF.

**G. PERITUS AND AMF BREACHED RELIEVING BAILEY OF DUTY TO GIVE NOTICE**

Peritus contends it has no duty to pay severance pay because Bailey quit without giving notice. However, Bailey quit because AMF/Peritus failed to pay Bailey’s wages. Peritus owed Bailey \$40,119.00 for payments missed between January 1, 2012, and March 20, 2013. Their material breach of contract relieved Bailey of his duty to give notice of termination.

The more appropriate inquiry is whether Stravens’ failure to perform in a workmanlike manner was a “material breach” of the contract. If a breach of contract is material, the other party’s performance is excused.

J. P. Stravens Planning Assocs. V. City of Wallace, 129 Idaho 542, 545, 928 P.2d 46 at 49 (Idaho App. 1996).

### III.

#### CONCLUSION

AMF was a start-up company in 2001 which was only generating \$2,500.00 per month in revenue but had overhead expenses of about \$40,000.00 per month. Peritus provided funds to AMF to pay AMF's debts. In 2011 Bailey quit working for AMF because his salary had not been paid. Bailey agreed to return to work only after Peritus signed a written contract obligating Peritus to pay. After 2012 Bailey's salary was not paid in full and Bailey terminated his employment. Bailey filed suit against AMF and Peritus for breach of the contract.

The determination of whether the relationship between Bailey, Peritus, and AMF is a "guaranty" pursuant to I.C. § 9-505 which requires a complete written contract or a "surety" arrangement pursuant to I.C. § 9-506(2) which can be oral is dependent on objective criteria. The defining characteristic of a guaranty is that the third party obligor only pays after a default occurs. Under a surety relationship, the surety provides funds throughout the relationship. There is typically gratuitous or no consideration in a guaranty arrangement unlike a surety. There are usually separate contracts in a guaranty situation and typically only one contract in a surety. The objective criteria establish this was a surety relationship, not a guaranty. Judgment should be reversed and judgment entered in favor of Bailey for breach of contract against Peritus.

DATED this 18th day of January, 2017.

JEFFREY J. HEPWORTH, P.A.  
& ASSOCIATES

By   
Jeffrey J. Hepworth  
Attorneys for Plaintiff/Appellant

**CERTIFICATE OF SERVICE**

The undersigned, a resident attorney of the State of Idaho, with offices at 199 N. Capitol Blvd., Suite 501, Boise, Idaho, certifies that on the 18th day of January, 2017, he caused a true and correct copy of the APPELLANT REPLY BRIEF to be forwarded with all required charges prepaid, by the method(s) indicated below, to the following:

D. John Ashby  
Hawley, Troxell, Ennis  
& Hawley, LLP  
P.O. Box 1617  
Boise, ID 83701-1617

Hand Delivered	<u>  X  </u>
U.S. Mail	<u>      </u>
Fax	<u>      </u>
Fed. Express	<u>      </u>
ECF/Email	<u>      </u>

  
Jeffrey J. Hepworth