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Bailey v. Peritus 1 Assets Management, LLC Respondent's 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
 vs.)
)
 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; and WILLIAM R.)
 ESPINOSA, an individual,)
)
 Defendants.)
)

RESPONDENT'S BRIEF

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

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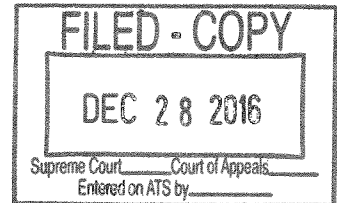


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I. STATEMENT OF THE CASE

A. Nature Of The Case

Plaintiff/Appellant Shawn Bailey (“Bailey”) was the President and CEO of American Medical File, Inc. (“AMF”), a now-bankrupt corporation. Bailey claims that Defendant/Respondent Peritus Asset Management, LLC (“Peritus”) -- one of many companies that loaned money to AMF -- promised to pay the wages Bailey earned while working for AMF. Bailey’s Complaint initially alleged that Defendant Peritus personally guaranteed his wages. However, Bailey has since admitted that there was no personal guarantee.

Bailey is distancing himself from the “personal guarantee” theory alleged in his Complaint in an attempt to escape the statute of frauds. Nevertheless, Bailey still alleges that Peritus promised to pay the wages Bailey earned while working for AMF. Such a claim falls squarely within the statute of frauds, which bars evidence of an alleged promise to pay debts of another absent a written memorandum identifying the debt, the primary obligor and a promise to pay the primary obligor’s debt. The District Court correctly granted summary judgment in favor of Peritus because Bailey cannot point to a written contract under which Peritus promised to pay the wages Bailey earned while working for AMF.

B. Statement Of Undisputed Facts¹

1. American Medical File, Inc.

¹ This statement of undisputed facts is taken almost entirely from Bailey’s deposition and exhibits used during Bailey’s deposition. It is essentially the same statement of undisputed facts presented to the District Court, to which Bailey offered no objection. As Bailey recognized in his Brief in Opposition to Defendant Peritus I Asset Management, LLC’s Motion for Summary Judgment, “[t]he underlying facts of this dispute are largely undisputed.” See R. 000288.

AMF was incorporated in the State of California on October 30, 2001, by Scot Anderson. *See* R. 000011 at ¶ 9; R. 000176. AMF did business as “OnFile” and was known as both “OnFile” and “American Medical File” and *See* R. 000073 (Bailey Depo., 21:20-25). AMF was in the business of providing medical records management software to hospitals, healthcare providers, insurance companies and individuals in exchange for fees. *See* R. 000100-101, 000195-211 (Bailey Depo, 129:16 - 130:13, Exh. 15).

2. Peritus I Asset Management, LLC

Peritus, a Delaware Limited Liability Company, is an investment advisory company that provides discretionary investment management services to investors. *See* R. 000010 at ¶ 3. Peritus advises clients on investment opportunities and is paid a fee for its advice and for managing client investments. *See* R. 000224 at ¶ 3.

3. The Peritus Global Opportunity Fund

AMF operated from 2001 through 2004 under the direction of its original founders without any involvement from Peritus. In 2004, a few of Peritus’ clients became interested in investing in AMF through a separate legal entity. The Peritus Global Opportunity Fund Limited Partnership (the “PGO Fund”) -- a Delaware limited partnership entity operating as a “hedge fund” -- was formed as a vehicle to invest in AMF and other opportunities. Numerous individuals and entities invested in the PGO Fund. *Id.* Between September 2004 and November 2006, the PGO Fund invested \$6.45 million in AMF in the form of secured promissory notes and warrants. The PGO Fund also provided AMF with a bridge loan secured by the original AMF founders’ shares in AMF. When AMF defaulted on the bridge financing in 2005, the PGO Fund

foreclosed on the security (the original founders' shares in AMF) and became the owner of the majority of AMF's shares. *Id.* at ¶¶ 4-5; R. 000086 (Bailey Depo. 73:4-20).

4. AMF Hires Shawn Bailey under an “Oral Employment Contract”

In approximately April of 2006, Bailey was hired as “Vice President of Product Development for AMF.” *See* R. 000012 at ¶ 10. Bailey alleges that he was hired “under an oral employment contract that was not put in writing and signed by the Defendants in order to perpetuate a fraud against Bailey.” *Id.* at ¶ 20. AMF paid Bailey a salary of \$110,000 per year and issued Bailey a W-2 every year reflecting his wages paid. *See* R. 000090 (Bailey Depo., 89:11 - 90:18).

5. Bailey Promoted to AMF CEO with Control over AMF’s Bank Accounts and Management of the Day to Day Operations of AMF

After working for AMF for approximately one year, the AMF Board of Directors voted to promote Bailey to be the President and CEO of AMF, as set forth in the April 12, 2007 meeting minutes written by Bailey. *See* R. 000181-185. As the President and CEO of AMF, Bailey ran the day-to-day operations of AMF and was one of just two signatories on AMF's bank accounts. *Id.*; R. 000093 (Bailey Depo., 101:20 - 102:13). On behalf of AMF, Bailey signed contracts with customers and vendors and he filed corporate documents on behalf of AMF with the California Secretary of State and Idaho Secretary of State. *Id.* at 102:18-21; R. 000186-188.

6. The PGO Fund Dissolves and Peritus Starts Making Bridge Loans

After investing millions of dollars in AMF through secured promissory notes, the PGO Fund decided to stop investing in AMF and dissolved, effective December 31, 2008. *See* R. 000087 (Bailey Depo., 75:12-25). Upon dissolving, the AMF shares held by the PGO fund were distributed on a pro-rated basis to each of the investors in the then-dissolved PGO fund. *Id.*

Like most start-up companies, American Medical File needed funding to pay its operating expenses to supplement its limited customer revenues. That funding came from a variety of sources. As set forth in the resume Bailey used to secure subsequent employment, Bailey wrote business and marketing plans with investment bankers to raise over \$2.3 million in capital for AMF. *See* R. 000087, 000174-175 (Bailey Depo., 77:11-22, Exh. 3). Some of that capital came in the form of stock purchases and other capital came in the form of loans. During Bailey's tenure as President of AMF, approximately ten separate investors purchased AMF shares in exchange for funds used to pay AMF's operating expenses. Those stock grants, along with all prior stock grants are reflected on AMF's stock ledger. *See* R. 000088, 000180 (Bailey Depo., 78:2-16, Exh. 10). That stock ledger reflects over 40 separate shareholders who contributed capital to AMF, along with a handful of key employees, including Bailey, who were granted shares in AMF in exchange for their services. *Id.* Bailey used the stock ledger to show the stock history of AMF to potential investors when he sought additional funding from investors. *Id.*

In addition to capital contributions in the form of stock purchases, AMF received loans from several sources. For example, the Inyo-Mono Title Company Profit Sharing plan ("Inyo-Mono") loaned AMF \$100,000 in in exchange for a promissory note signed by Bailey on behalf of AMF. *See* R. 000212. Bailey also obtained on behalf of AMF a \$10,000 loan from his own father. *See* R. 000222. Between 2008 and 2011, Peritus provided loans to AMF in the amount of approximately \$800,000. *See* R. 000095, 000192-194 (Bailey Depo., 107:8-21, Exh. 14).

The loans from Peritus, Inyo-Mono, Bailey's father and others are not reflected on AMF's stock ledger because they were loans, not stock purchases. As President of AMF, Bailey

tracked those loans, which are reflected in financial reports prepared by AMF's outside accountant. *See* R. 000095 (Bailey Depo., 108:22-109:3). As set forth in Board of Director minutes prepared by Bailey in 2009:

Shawn Bailey reported on the status of the current shareholder registry and capital structure of the company. Shawn reported that the capital structure [of] the company was made up of common stock shareholders, long-term notes secured by warrants and only 2 unsecured notes....

....Attached, please find the updated loan calculations in interest through December 31, 2009. Shawn also confirmed that all of this information has been updated in a companies [sic] books and is accurately reflected in all financial reports.

See R. 000189-191; R. 000229-252 (examples of AMF Financial statements and loan calculations reflecting loans from Peritus and others).

The same minutes also reflect a decision by the AMF Board of Directors to increase Bailey's compensation as CEO of AMF and grant him 1,500,000 shares in AMF Stock. *See* R. 000189-191. Bailey's 1,500,000 shares of AMF stock are listed in the stock ledger. *See* R. 0000180. The three other members of the AMF Board of Directors -- Ronald J. Heller ("Heller"), David J. Desmond ("Desmond") and William R. Espinosa ("Espinosa") -- each hold 1,500,000 shares in AMF as well. *Id.*

7. The Written AMF Employment Agreement

Bailey alleges that he was not paid all compensation owed to him under his original "Oral Employment Contract" and that, as of August 10, 2011, he was owed \$95,000 in back wages. *See* R. 000012 at ¶¶ 13-14. Bailey alleges that he threatened to quit in August of 2011 unless he was given a written employment contract and a promise that his back wages would be paid in full. *Id.* at ¶14. Accordingly, AMF provided Bailey with a "letter of employment with American

Medical File, Inc. (OnFile),” which Bailey signed on October 10, 2011 (the “AMF Employment Agreement”). *See* R. 000013, 000019-20. The AMF Employment Agreement outlines Bailey’s role as Chief Technology Officer of AMF and appoints Bailey as a “member of the Board of Directors of American Medical File to which you and [the CEO] will provide regular reports.” *Id.* Finally, the AMF Employment Agreement provides for an annual salary of \$150,000 and confirms that Bailey had been awarded “1,500,000 shares of stock in American Medical File, Inc.” *Id.*

At the time of the AMF Employment Agreement, the AMF Board of Directors consisted of four individuals: Heller, Desmond, Espinosa and Bailey. *See* R. 000099 (Bailey Depo., 122:2-17). The AMF Employment Agreement was signed by all three other members of the AMF Board of Directors. *See* R. 000019-20. The signature lines for Desmond and Heller reference their titles as members of the AMF Board of Directors and also note that they are Board Members of Peritus I Asset Management, LLC. However, the body of the AMF Employment Agreement does not state that Peritus was obligated to pay Bailey’s salary or otherwise make a single reference to Peritus. *Id.* In fact, Bailey admitted during his deposition that the AMF Employment Agreement does not provide that Peritus would pay his salary. *See* R. 000098 (Bailey Depo., 119:16-21). All wages paid to Bailey came in the form of a check from AMF. *Id.* at 89:11-18.

8. Bailey’s Resignation

Bailey stopped coming to work on March 17, 2013, and resigned shortly thereafter. *See* R. 000104 (Bailey Depo., 143:8 - 144:15); R. 000163 (Answer to Interrogatory No. 15). Bailey did not give 30 days’ notice of his resignation as required by the AMF Employment Agreement

to entitle him to any severance. *See* R. 000104 (Bailey Depo., 144:13-15); R. 000019-20. AMF asked Bailey to work for an additional 30 days, but Bailey refused. *Id.* at 144:4-15. AMF issued Bailey his final paycheck on March 27, 2013. *See* R. 000214.

9. Bailey Demand Letters Sent to AMF Only

A few days after resigning, Bailey hired an attorney, R. Wade Curtis, who sent a demand letter to AMF asserting that “American Medical File, Inc., aka ‘OnFile,’ has failed and refused to pay Shawn his by-monthly salary over the past many months...” *See* R. 000215-218. The letter demanded that AMF pay Bailey \$129,545.75 in back wages and \$300,000 in severance pay. The letter was sent to AMF only -- not Peritus -- and makes no mention of Peritus whatsoever. *Id.*

A few months later, Bailey hired a second law firm, Parsons Behle & Latimer, to represent him in his claims against AMF. That law firm sent a second demand letter to AMF only, which similarly asserted that “American Medical File, Inc., d/b/a ‘OnFile’ ... owes Mr. Bailey approximately \$130,000 (gross) in unpaid wages and \$300,000 in severance pay.” *See* R. 000219-220. Again, no mention was made of Peritus. *Id.*

C. Course Of Proceedings Below

1. The Complaint

Bailey filed his Complaint on October 30, 2014, asserting a “Breach of Employment Contract” cause of action claiming that Bailey is owed \$129,549.75 in wages and \$300,000 in severance. *See* R. 000009-20. Bailey’s Breach of Employment Contract action is asserted not only against AMF, but also against Peritus and the three other members of AMF’s Board of Directors -- Heller, Desmond and Espinosa. In support of liability against Peritus, Heller, Desmond and Espinosa, the Complaint asserts, first, that “Peritus is believed to be the primary

shareholder of AMF and is therefore liable for the debts of AMF.” *Id.* at ¶ 3. Second, the Complaint asserts that Peritus, Desmond, Heller and two unnamed individuals -- Tim Gramatovich and Bob Forgie -- orally agreed to “guarantee payment of Bailey’s salary and other compensation.” *Id.* at ¶ 11. Third, the Complaint asserts that Bailey was employed by all “Defendants,” i.e., AMF, Peritus and even the individual defendants. *Id.* at ¶ 20; *see also id.* at ¶10 (alleging that Bailey was employed by “AMF and Peritus”).

In addition to the Breach of Employment Contract cause of action, the Complaint asserts a tort claim for intentional infliction of emotional distress against Desmond, Heller and Espinosa, based on conduct allegedly committed by those members of the AMF Board of Directors. *Id.* at ¶¶ 26-31.

2. The Motion to Dismiss

Peritus and the individual defendants filed a Rule 12(b)(6) motion to dismiss Bailey’s claims for failure to state a claim against them. The individual defendants moved to dismiss the tort claims on grounds that an employee cannot assert intentional infliction of emotional distress claims arising out of workplace conduct by co-workers. In an attempt to obtain tort damages against the individual defendants, Bailey abandoned the assertion in his Complaint that he was employed by AMF and Peritus and asserted unambiguously that “AMF was Bailey’s only employer.” *See* R. 000029-44 (Memorandum in Response to Defendants’ Motion to Dismiss), p. 14; *see also id.* at p. 13 (“Again, Peritus and Heller were not Bailey’s employer”).

The District Court dismissed all claims against the individual defendants for failure to state a claim. *See* R. 000045-52. Specifically, the District Court dismissed Bailey’s claims for intentional infliction of emotional distress because the conduct alleged by Bailey was not

sufficiently extreme and outrageous to state a claim for intentional infliction of emotional distress. *Id.* The Court also dismissed Bailey's claims that the individual defendants personally guaranteed Bailey's salary because those claims are barred by the statute of frauds. *Id.* Bailey has not challenged that order on appeal. Accordingly, neither the tort claim nor any breach of contract claims against Desmond, Heller or Espinosa are at issue in this appeal.

3. AMF Bankruptcy

AMF filed bankruptcy on May 22, 2015. *See* R. 000004. Peritus lost all of the money it loaned to AMF -- as did more than 40 other individuals and entities that either loaned money to AMF (totaling over \$15,000,000) or bought AMF Stock. *See* R. 000103 at 138:5-13.

4. Peritus' Motion for Summary Judgment

As a result of the motion to dismiss and AMF's bankruptcy filing, the only remaining cause of action was Bailey's "Breach of Employment Contract" claim against Peritus. After the deadline for all discovery to be completed, Peritus moved for summary judgment on that claim on grounds that Bailey's allegation that Peritus agreed to pay the wages owed by AMF is barred by the statute of frauds. *See* R. 000253-276.

5. Bailey's Motion for Leave to Amend

After the discovery cut-off date, and after Peritus moved for summary judgment, Bailey moved for leave to amend his Complaint. *See* R. 000331-359. In that motion, Bailey acknowledged that his breach of contract claim, as alleged, could not satisfy the statute of frauds. *Id.* at 000355. In an attempt to cure that fatal defect, Bailey requested leave to file a proposed Amended Complaint that attempted to invoke the "original obligation" exception to the statute of frauds set forth in Idaho Code § 9-506(2). *Id.* at 000331-346.

The proposed Amended Complaint still alleges that Peritus is liable for the wages allegedly owed by AMF (R. 000342 at ¶ 31) and makes just a few substantive changes to the original Complaint. For example, it deletes the allegation in paragraph 11 of Bailey's original Complaint that Peritus agreed to "guarantee payment of Bailey's salary and other compensation." The proposed Amended Complaint replaces that allegation with a contradictory allegation that Peritus promised to "provide capital to AMF in order to pay the expenses incurred in the future." *Id.* at ¶ 13.

The proposed Amended Complaint further clarified Bailey's breach of contract claim against Peritus and separated that claim into two parts. First, it asserts a claim for "Breach of Oral Contract" based on Peritus' alleged oral promise to pay Bailey \$95,680.70 in back wages "at such time as AMF became profitable." *Id.* at ¶¶ 23-25. However, acknowledging that AMF filed bankruptcy and never became profitable, Bailey "abandoned" his claim for "Breach of Oral Contract." *Id.* at ¶ 27. Second, Bailey asserted a "Breach of Written Agreement Dated August 10, 2011," which is based entirely on the AMF Employment Agreement. *Id.* at ¶ 28-35. Specifically, Bailey contends that, in the written AMF Employment Agreement, Peritus agreed to "provide capital to AMF to pay Bailey's salary and benefits including severance pay." *Id.* at ¶ 31; *see also id.* at ¶ 13 (alleging that "Peritus was clearly the primary obligor to fund the development of AMF" because of promises to "provide capital to AMF in order to pay the expenses incurred in the future"). Bailey then alleges that Peritus breached that written contract when it "failed to fund AMF with sufficient capital to pay Bailey his twice monthly paychecks." *Id.* at ¶ 33.

6. The District Court's Orders

On June 14, 2016, the District Court issued an Order Granting Summary Judgment. *See* R. 00362-372. In that Order, the District Court held that Bailey's breach of contract claim is barred by the statute of frauds because the AMF Employment Agreement does not include any language that makes Peritus liable for Bailey's wages earned as an employee of AMF.

In a separate Order Denying Motion for Leave to Amend the Complaint, the District Court denied as futile Bailey's request to file his proposed Amended Complaint. *See* R. 000373-376. That decision was based on two separate grounds. First, a plaintiff cannot amend a deficient complaint by making new allegations that are "directly contradictory to the original allegation." *Id.* at 000375 (quoting *Elder v. Idaho-Washington N. R.R.*, 26 Idaho 209 (1914)). Second, Bailey's proposed Amended Complaint still did not 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 Idaho Code § 9-506(2). *Id.*

The District Court entered judgment in favor of Peritus and awarded costs and attorney fees to Peritus under Idaho Code § 12-120(3) in the amount of \$33,567.74. *See* R. 000380.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Whether Peritus is entitled to an award of attorneys' fees on appeal pursuant to Idaho Appellate Rule 40 and 41 and Idaho Code § 12-120(3).

III. STANDARD OF REVIEW

"When reviewing a motion for summary judgment, this Court uses the same standard employed by the trial court when deciding such a motion." *Stoddart v. Pocatello School Dist.* #25, 149 Idaho 679, 683 (2010). Summary judgment is proper "if the pleadings, depositions, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Id.*; I.R.C.P. 56(c). “If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review.” *See Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 307 (2007).

IV. ARGUMENT

A. The District Court Correctly Granted Summary Judgment in Favor of Peritus

The only claim at issue in this appeal is Bailey’s breach of contract claim against Peritus, which is based on an alleged breach of the AMF Employment Agreement. For the reasons set forth below, the District Court’s order granting summary judgment in favor of Peritus on that claim should be affirmed.

1. Bailey Concedes that Peritus was Never his Employer and did Not Guarantee Wages Allegedly Owed to Him by AMF

Bailey generally asserts the AMF Employment Agreement contractually obligates Peritus to pay the wages and severance allegedly earned by Bailey as an employee of AMF.² However, Bailey’s theories and his factual allegations have changed drastically since filing his Complaint.

First, Bailey’s Complaint initially alleged, in very specific terms, that Peritus, Desmond, Heller, Gramatovich and Forgie all agreed to personally guarantee Bailey’s wages during an April 12, 2007 meeting of the AMF Board of Directors:

On or about April 12, 2007, AMF had a Board of Directors meeting wherein it was determined by Desmond, Heller, Tim

² Peritus disputes that AMF owed Bailey the amounts claimed in his Complaint. Nevertheless, this appeal focuses solely on the legal question of whether Peritus can be held liable for any debts allegedly owed by AMF.

Gramatovich and Bob Forgie (as Directors of [AMF] and employees of Peritus) to hire Bailey as the CEO of AMF and to employ him on a written employment contract wherein **they personally and Peritus would guarantee payment of Bailey's salary** and other compensation.

R. 000012 at ¶ 11 (emphasis added).

Bailey has since disavowed that theory. In response to discovery requests, Bailey admitted that “[t]here was no guarantee from any individual or entity.” *See* R. 000162 (Answer to Interrogatory No. 12); *see also* R. 000092-93 (Bailey Depo., 96:4-6; 100:24 - 101:3) (admitting that Peritus did not promise to guarantee Bailey's wages).

Second, while Bailey's Complaint alleged that he was employed by “AMF and Peritus” (R. 000012 at ¶ 12), he has since admitted in response to Peritus' motion to dismiss that “AMF was Bailey's only employer.” *See* R. 000042; *see also* R. 000041 (“Again, Peritus and Heller were not Bailey's employer”).

Third, while Bailey's Complaint alleged that “Peritus is believed to be the primary shareholder of AMF and is therefore liable for the debts of AMF” (R. 000010 at ¶ 3), Bailey acknowledged during his deposition that Peritus does not own any stock in AMF and never has. *See* R. 000088, 000180 (Bailey Depo., 78:2-80:22; Exh. 10). As discussed below, these admissions significantly impact Bailey's breach of contract claim against Peritus.

2. Shareholders (Much Less Creditors) are Not Liable for the Alleged Debts of a Corporation

Bailey's Complaint offers the conclusory assertion that “Peritus is believed to be the primary shareholder of AMF and is therefore liable for the debts of AMF.” *See* R. 000010 at ¶ 3. As set forth above, however, Peritus simply is not and never has been a shareholder of AMF. At one point in time, the PGO Fund -- a now dissolved legal entity -- was AMF's largest

shareholder. However, that legal entity dissolved and all shares went to the limited partners of the PGO Fund individually. Peritus does not own any shares in AMF and never has. *See R. 000180*. Peritus is merely one of many creditors that has loaned money to AMF. *Id.*

Even if Peritus was a shareholder of AMF, shareholders of a corporation are not liable for the debts of corporation. Absent piercing of the corporate veil, which has never been alleged, “the stockholders of a corporation are not personally liable for corporate obligations.” *Davidson v. Beco Corp.*, 112 Idaho 560, 568-569 (Ct. App. 1986), partially overruled on other grounds, 114 Idaho 107 (1987). In any event, Bailey does not appear to assert on appeal that Peritus’ is liable to Bailey because of any alleged status as a shareholder.

3. Only Employers are Liable for an Employee’s Wages

Neither shareholders nor entities that loan funds to a corporation are liable for an employee’s wages. Rather, only employers are liable for an employee’s wages. *See I.C. §45-608* (“Employers shall pay all wages due to their employees....”). As one court has explained:

The duty to pay wages is an obligation that can only arise from the employer-employee relationship....Plaintiffs here were employed by Kline. Aquatic had no control over the manner in which the diving operations were conducted. It is clear that plaintiffs were not employees of Aquatic. There being no employer-employee relationship, Aquatic cannot owe them wages.

Jernigan v. Lay Barge Delta Five, 296 F. Supp. 127, 128-29 (S.D. Tex. 1969).

Bailey’s Complaint alleges that he was employed by both “AMF and Peritus.” However, Bailey disavowed that theory in an attempt to obtain tort damages against the individual defendants, and Bailey has since admitted that “AMF was Bailey’s only employer.” *See R. 000042*. Given the undisputed fact that AMF was Bailey’s only employer, AMF alone is legally responsible for Bailey’s wages absent some form of guarantee.

4. Bailey Has Conceded that Peritus did Not Guarantee His Wages

Even though Bailey's Complaint specifically alleged that Peritus guaranteed his wages, he has since disavowed that theory and admitted that "[t]here was no guarantee from any individual or entity." *See* R. 000162. While now disavowing any guarantee, Bailey still asserts that Peritus is somehow obligated to pay wages allegedly owed to him by AMF. *See* Appellant's Brief, p. 19 ("Peritus made a promise to answer for the obligation of AMF"). That claim is based entirely on the AMF Employment Agreement. *Id.*; *see also* R. 000341-343 (proposed Amended Complaint, ¶¶ 28-35). No matter how Bailey characterizes the alleged promise by Peritus to pay his wages earned as an employee of AMF -- i.e., a "guarantee," a "surety," or some other label -- such a claim falls squarely within the statute of frauds.

The statute of frauds requires that any alleged promise to pay the debt of another be in writing to be enforceable. Specifically, the statute of frauds provides:

In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:

. . . .

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.

I.C. § 9-505(2).

While no longer using the term "guarantee," Bailey's allegation that Peritus promised to pay wages Bailey earned as an employee of AMF still falls squarely within the statute of frauds as a "promise to answer for the debt, default or miscarriage of another." *Id.* An alleged contract that falls within the statute of frauds "is unenforceable if there is not a sufficient writing to

comply with the statute of frauds.” *Mickelsen Construction, Inc. v. Horrocks*, 154 Idaho 396, 401 (2013). “In order to render an oral contract falling within the scope of the statute of frauds enforceable by action, the memorandum thereof must state the contract with **such certainty that its essentials can be known from the memorandum itself**, or by a reference contained in it to some other writing, without recourse to parol proof to supply them.” *Id.* at 402 (emphasis added). “The memorandum which evidences the verbal agreement **must contain all the terms of that agreement**.” *Id.* (emphasis added). “Otherwise, it cannot be enforced at law or in equity.” *Id.*

As explained in *Mickelsen*, an alleged promise to pay the obligations of another must be contained in a written memorandum that (1) evidences an “intent by [a defendant] to be liable for the obligation of some other person or entity,” (2) “name[s] or identif[ies] the person or entity that is primarily liable”; and (3) “specif[ies] what obligation of that person or entity is allegedly being guaranteed.” *Id.* at 402 (concluding that a signed document did not satisfy the statute of frauds because it failed to meet these requirements).

The AMF Employment Agreement does not satisfy any of these requirements. Just like the insufficient written document in *Mickelsen*, the AMF Employment Agreement “does not show any intent by either of the Defendants to be liable for the obligation of some other person or entity.” *Id.* at 402. It “does not name or identify the person or entity that is primarily liable, and it does not specify what obligation of that person or entity is allegedly being guaranteed.” *Id.* And, “[t]here is nothing on the [AMF Employment Agreement] indicating that [Peritus] agreed to guaranty any obligation of [AMF] to [Bailey].” *Id.*

Regardless of how it is now characterized by Bailey, the AMF Employment Agreement simply does not state that Peritus will pay the wages Bailey allegedly owed to him by AMF. In fact, the body of the AMF Employment Agreement does not make a single reference to Peritus. Instead, it refers only to AMF. The very first line of the agreement states that it is “a letter of Employment with American Medical File, Inc. (OnFile).” *See* R. 000019. It then goes on to describe Bailey’s obligations to AMF, including his role as a “member of the Board of Directors of American Medical File to which you and [the CEO] will provide regular reports.” *Id.*

The most basic provision of the agreement alleged by Bailey -- that Peritus would pay the wages Bailey earned during his employment with AMF -- is nowhere to be found. Indeed, Bailey admitted in his deposition that there was no such agreement:

Q. Does this contract say who was going to pay your salary?

A. I think it talks about who I work for. It’s a letter of employment from American Medical File, but I don’t see -- I don’t remember any agreement on who was going to pay....

See R. 000098 (Bailey Depo., 119:16-21).

The AMF Employment Agreement simply does not satisfy the statute of frauds.³ In fact, Bailey does not contend that the AMF Employment Agreement satisfies the statute of frauds.

³ The Court may not look to parole evidence to support Bailey’s claim that Peritus promised to pay his wages. *See Mickelsen*, 154 Idaho at 402 (to satisfy the statute of frauds, “the memorandum thereof must state the contract with such certainty that its essentials can be known from the memorandum itself, or by a reference contained in it to some other writing, without recourse to parol proof to supply them”). Even if the Court were to look beyond the four corners of the AMF Employment Agreement, Bailey’s conduct unambiguously corroborates the fact that Peritus never agreed to pay his wages. Shortly after walking out on AMF, Bailey sent two demand letters (from two experienced lawyers) addressed only to AMF, asserting that “American Medical File, Inc.” owed Bailey wages and severance. *See* Bailey Depo., Exhs. 19-20. Neither letter makes any mention of Peritus even though Bailey knew AMF was over

Instead, he argues that the statute of frauds does not apply to the AMF Employment Agreement because that agreement creates an “original obligation” under Idaho Code § 9-506(2).

5. The District Court Correctly Rejected Bailey’s New “Original Obligation” Theory

In response to Peritus’ motion for summary judgment, Bailey disavowed the guarantee theory pled in his Complaint. Instead, he asserted for the first time that Peritus’ alleged promise to pay the wages Bailey earned as an employee of AMF falls within the “original obligation” exception to the statute of frauds as provided for in Idaho Code § 9-506(2). The District Court correctly rejected that argument for multiple reasons.

a) Bailey Cannot Rely on the Original Obligation Exception Because He Alleges that AMF Remained Liable for His Wages

Although now avoiding any “guarantee” terminology, Bailey still asserts that “Peritus made a promise to answer for the obligation of AMF.” *See* Appellant’s Brief, p. 19. As set forth in Idaho Code § 9-505(2), such a “promise to answer for the debt, default or miscarriage of another” must be contained in a written document that satisfies the statute of frauds “except in the cases provided for in section 9-506, Idaho Code.”

Idaho Code § 9-506(2) creates a narrow exception to the statute of frauds that applies only “[w]here 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.” Bailey’s new reliance on Idaho Code § 9-506(2) must be rejected as a matter of law for the reasons explained by the Idaho Supreme Court just a few years ago in *Mickelsen*

\$15,000,000 in debt.

Const., Inc. v. Horrocks, 154 Idaho 396 (2013). That case raised issues, arguments and a procedural posture almost identical to those presented here.

In *Mickelsen*, Accelerated Paving owed Mickelsen \$34,980. Mickelsen filed a lawsuit against Sunshine Secretarial Services and Lesa Horrock, individually, alleging specifically that they agreed to “guarantee” Accelerated Paving’s obligation to Mickelsen. When confronted with a statute of frauds defense, Mickelsen asserted that alleged promise to pay Accelerated Paving’s obligation was an “original obligation” under Idaho Code § 9-506(2). In granting summary judgment in favor of the defendants, the Court first noted that Mickelsen had not pled an “original obligation” claim under Idaho Code § 9-506(2), but instead pled a personal guarantee theory. *See id.* at 405 (“Because the complaint in the instant case only alleged a guaranty, it did not allege a claim under Idaho Code Section 9–506(2)...[T]he only issues considered on summary judgment are those raised by the pleadings.”).

Mickelsen’s allegation of a personal guarantee precluded him from relying on the “original obligation” exception in Idaho Code § 9-506(2) because “[a]n allegation of an agreement to guaranty a debt and an allegation of an agreement under section 9-506(2) are mutually exclusive.” *Id.* at 404. To be excepted from the statute of frauds under section 9-506(2), a defendant “would have had to agree to become ‘the principal debtor.’” *Id.* “One cannot be both the principal debtor who has defaulted and the guarantor who is secondarily liable in the event of such default.” *Id.*

In rejecting Mickelsen’s claim of an “original obligation” under Idaho Code § 9-506(2), the Court explained that its decision was not based just on a pleading technicality. Rather, the defendants could not be “original obligors” or “principal debtors” because Mickelsen had alleged

that Accelerated Paving was still liable for the original obligation, in addition to Sunshine Secretarial Services and Lesa Horrock. *Id.* at 405 (“[i]f under the alleged agreement the creditor contended that the original debtors were still liable, then the defendants could not have become the principal debtors, which was necessary for section 9-506(2) to apply.”); *see also Storer v. Heitfeld*, 19 Idaho 170 (1910) (if a plaintiff contends that the initial debtor is still “in any degree liable for the indebtedness,” the defendant cannot be considered an original obligor); *Magee v. Winn*, 52 Idaho 553 (1932) (a defendant cannot be an original obligor “if plaintiff held defendant’s sister still responsible to him,” and under such circumstances an alleged promise by the defendant to answer for his sister’s obligation is governed by the statute of frauds).

The District Court correctly granted summary judgment in favor of Peritus for the reasons set forth in *Mickelsen*. First, Bailey’s Complaint specifically alleges that Peritus agreed to “guarantee” wages owed by AMF, making it impossible for Peritus to also be the principal debtor. *See* R. 000012 at ¶ 11. Second, and more importantly, Peritus cannot be the “principal debtor” because Bailey affirmatively alleges that AMF remained obligated to pay the wages he earned as an employee of AMF. *See* R. 000284 (Bailey’s Brief in Opposition to Motion for Summary Judgment, acknowledging: “It is true that AMF was Bailey’s employer and was obligated to pay Bailey.”). Bailey’s paychecks came from AMF, not Peritus. *See* R. 000214. Indeed, Bailey sent AMF two demand letters shortly after the termination of his employment alleging that AMF owed him unpaid wages and severance, without so much as mentioning Peritus (R. 000215-220) and later suit against AMF to collect the obligation he now contends is owed by Peritus. *See* R. 000009.

The Court's analysis should stop here because Bailey's argument under Idaho Code § 5-906(2) is foreclosed as a matter of law under *Mickelsen*. However, summary judgment can be affirmed for the additional reasons as set forth below.

b) The AMF Employment Agreement does Not Support Bailey's New "Original Obligation" Theory

Bailey dedicates much of his brief to explaining the purported differences between a surety agreement and a guarantee agreement. He relies on Idaho Code § 9-506(2) to proclaim that "a surety contract, by statute, need not be in writing." *See* Appellant's Brief, p. 24. That assertion is simply incorrect. This case does not turn on some technical distinction between a "surety" and a "guarantee" agreement. In fact, those terms are often used interchangeably by Idaho courts to refer to any third party who has agreed to answer the debt of another. *See, e.g., McGill v. Idaho Bank & Trust Co.*, 102 Idaho 494, 497 (1981) (noting that "the words guarantor and surety" are often used interchangeably).

Surety agreements, just like other types of guarantees fall squarely within the statute of frauds and must be in writing to be enforceable. As explained in *Corpus Juris Secundum*:

As a general rule, under the statute of frauds, any special promise to answer for the debt, default, or miscarriage of another, in order to create a legal obligation, must be in writing or evidenced by a sufficient note or memorandum, and signed by the promisor or some other person lawfully authorized by the promisor. This provision of statute of frauds is commonly referred to as the "suretyship provision" or "surety provision." The provision requires written evidence when one person promises to pay the debt of another, because there is a temptation for a promisee, in a case where the real debtor has proved insolvent or unable to pay, to enlarge the scope of the promise, or to torture mere words of encouragement and confidence into an absolute promise.

37 C.J.S. Statute of Frauds § 8 (2016); *see also Emerson v. Slater*, 63 U.S. 28, 31-32 (1859) (“And, inasmuch as the contract declared on is that of a surety, it must be in writing, and *wholly* in writing [under the statute of frauds.]”); *Storer*, 19 Idaho 170, 113 P. 80, 81 (1910) (recognizing that an alleged contract under which defendants become either “guarantors or sureties” must comply with the statute of frauds).

Idaho Code § 9-506(2) does not except all surety agreements from the statute of frauds. To the contrary, Idaho Code § 9-506(2) creates a narrow exception to the statute of frauds that applies only “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.” As explained in *Mickelsen*, the narrow exception to the statute of frauds applies only where there is a “promise made by a third party [i.e., Peritus] which, by its terms or under the circumstances, makes the third party [Peritus] the principal debtor and the original debtor [AMF] the third party’s [Peritus] surety.” *Mickelsen*, 154 Idaho at 402. Thus, to fit within the exception, Bailey must establish that Peritus stepped into AMF’s shoes and agreed to pay Bailey’s salary as the principal debtor and that AMF agreed to act as Peritus’ surety, i.e., that AMF would pay Bailey only if Peritus failed to do so. Idaho Code § 9-506(2) is inapplicable because Bailey does not contend that AMF agreed to act as Peritus’ surety. Instead, he contends that Peritus agreed to act as a surety. *See* Appellants’ Brief, p. 17 (“Therefore, Peritus persuaded Bailey to continue working at AMF by acting as a surety in the transaction.”).

Moreover, Bailey’s proposed Amended Complaint is inconsistent with an “original obligation” theory. Bailey’s proposed Amended Complaint does not allege that Peritus promised to pay Bailey’s wages as the principal debtor and that AMF agreed to act as Peritus’ surety in the

event that Peritus failed to pay Bailey's wages. To the contrary, it alleges that Peritus promised to "provide capital to AMF to pay Bailey's salary and benefits including severance pay." *See* R. 000334-347 at ¶ 31; *see also id.* at ¶ 13 (alleging that "Peritus was clearly the primary obligor to fund the development of AMF" because of promises to "provide capital to AMF in order to pay the expenses incurred in the future"). Bailey then alleges that Peritus breached those promises when it "failed to fund AMF with sufficient capital to pay Bailey his twice monthly paychecks." *Id.* at ¶ 33.

Nor do the undisputed facts support a theory that Peritus agreed to pay Bailey's wages as the principal debtor and that AMF agreed to act as Peritus' surety in the event that Peritus failed to pay Bailey's wages. It is undisputed that all wages paid to Bailey -- both before and after execution of the AMF Employment Agreement -- came in the form of a check from AMF and that Peritus never paid a single dollar of Bailey's wages. *See* R. 000090 (Bailey Depo. at 89:11-18). Then, after suddenly quitting his job, Bailey sent demand letters to AMF without so much as mentioning Peritus. *See* R. 000215-220. Thus, neither Bailey, nor AMF, nor Peritus acted as if Peritus was the primary debtor responsible for paying Bailey's wages.

Most importantly, the AMF Employment Agreement -- the document on which Bailey exclusively relies -- simply does not establish a surety relationship or otherwise provide that Peritus will pay Bailey's wages. *See* R. 000019-20. The AMF Employment Agreement says nothing about Peritus agreeing to pay Bailey's wages as a primary debtor or AMF agreeing to act as Peritus' surety if Peritus failed to pay the wages. In fact, the body of the AMF Employment Agreement does not make a single reference to Peritus. Instead, it refers only to AMF, states that it is "a letter of Employment with American Medical File, Inc. (OnFile)," and then describes

Bailey's responsibilities as an AMF employee. *Id.* The most basic provision of Bailey's "original obligation" theory -- that Peritus would pay the wages Bailey earned during his employment with AMF -- is nowhere to be found. Indeed, Bailey admitted in his deposition that the AMF Employment Agreement says no such thing:

Q. Does this contract say who was going to pay your salary?

A. I think it talks about who I work for. It's a letter of employment from American Medical File, but I don't see -- I don't remember any agreement on who was going to pay....

See R. 000098 (Bailey Depo., 119:16-21).

Given that the AMF Employment Agreement contains no language obligating Peritus to pay the wages Bailey earned as an AMF Employee, it does not satisfy the exception set forth in Idaho Code § 9-506(2) or otherwise create an "original obligation." *See Indus. Inv. Corp. v. Rocca*, 100 Idaho 228, 233 (1979) ("A guarantor, like a surety, has been held to be a favorite of the law and his liability is not to be extended by implication beyond the express limits or terms of the instrument, or its plain intent."); *Gulf Chem. Employees Fed. Credit Union v. Williams*, 107 Idaho 890, 894 (Idaho Ct. App. 1984) (a promise to pay the debts of another "must be strictly construed and not extended beyond the express limits of the instruments creating them").

Rather than rely on any language in the AMF Employment Agreement, Bailey seems to claim that Peritus is liable for his AMF wages because the signature lines of two of the three individuals signing the AMF Employment Agreement on behalf of AMF referenced both their AMF and their Peritus titles. At the time of the AMF Employment Agreement, there were four individuals on AMF's Board of Directors -- Bailey, Heller, Desmond and Espinosa. Bailey could not sign his own employment agreement, so it was signed by the other three members of

the AMF Board of Directors. Each signature line references the signor's title as a member of the AMF Board of Director. Heller and Desmond's signature lines note that they also serve as directors of Peritus. *See* R. 000019-20.

Courts around the country have recognized that a mere signature on a contract does not create contractual liability when that signatory is not mentioned in the body of the contract. "The general rule supported by the courts is substantially to the effect that when the body of a contract purports to set out the names of the parties thereto and a person not named in the body of the contract signs the contract, and there is nothing in the contract to indicate that such person signed as a party, such person is not bound by the contract and hence is not liable thereunder." *Viacom Outdoor, Inc. v. Taouil*, 254 S.W.3d 234, 239-40 (Mo. Ct. App. 2008) (entering judgment in favor of a defendant because "the Agreement sets out the names of the parties in the body of the contract and [defendant]'s name does not appear" and "there is no language in the Agreement obligating [defendant]").

Again, the body of the AMF Employment Agreement makes no reference whatsoever to Peritus, much less an express promise on Peritus' part to pay the wages Bailey earned as an AMF employee. Accordingly, Bailey cannot rely upon the AMF Employment Agreement to argue that Peritus is liable for wages allegedly owed to him by AMF.

c) Bailey's Reliance on the "Main Purpose Rule" is Equally Unavailing

Bailey next relies on the "main purpose rule" to argue that Peritus' alleged promise to pay wages owed by AMF falls outside of the statute of frauds. As explained in *Treasure Valley Plumbing & Heating, Inc. v. Earth Res. Co.*, 115 Idaho 373, 378 (Ct. App. 1988), the "main purpose rule" is just another way of saying that under certain circumstances an oral promise may

be considered an “original obligation” because it is “original or independent from, and not merely collateral to, the agreement between the promisee and the third-party debtor.”⁴

In that case, Treasure Valley Plumbing had a contract with Mountain States Mineral Enterprises to install plumbing and a water supply system at a mine owned by Earth Resources. When Mountain States failed to pay Treasure Valley Plumbing, Treasure Valley Plumbing filed a mechanics lien on Earth Resources’ property. Earth Resources later made promises to pay Treasure Valley Plumbing to perform additional work involving repairs and removal of pipe damaged after installation. *Id.* at 378. After refusing to pay for that additional work, Earth Resources relied on the statute of frauds to defend its non-payment. Not surprisingly, the Court of Appeals found that Earth Resources’ promise was a new and original obligation supported by new consideration. Specifically, Earth Resources agreed to pay Treasure Valley Plumbing to redo work on a damaged stretch of pipe, which Treasure Valley was “not obligated to [do] under its original agreement” with Mountain States. *Id.* at 379. Earth Resources’ promise to pay Treasure Valley Plumbing for new work was an original obligation because it was “separate and apart from the original agreement between Mountain States and Treasure Valley,” which agreement “had been fully performed.” *Id.*

Treasure Valley Plumbing is easily distinguishable from the facts presented here. Bailey does not allege that Peritus made a promise “separate and apart from the original agreement” between Bailey and AMF, nor does he allege that the original agreement between Bailey and

⁴ The Idaho Supreme Court has never addressed, much less adopted, the so-called “main purpose rule.” It appears that *Treasure Valley Plumbing*, a Court of Appeals case, is the only reported Idaho decision addressing the concept.

AMF “had been fully performed.” Instead, Bailey simply alleges that “Peritus made a promise to answer for the obligation of AMF” -- i.e., to pay wages allegedly owed by Peritus. *See* Appellants’ Brief, p. 19. Thus, the alleged promise is not an original promise, but rather an alleged promise to answer for the debt of another, which falls squarely within the statute of frauds. Moreover, under *Mickelsen*, Peritus cannot be considered an “original promisor” because Bailey affirmatively alleges that AMF remained liable for Bailey’s wages and severance.

The so-called “main purpose rule” has no application in this case. Unlike all of the out-of-state authorities he cites, Bailey’s reliance on that theory is not based on an alleged oral promise that Peritus would pay wages owed to Bailey by AMF. Bailey specifically deleted those allegations in his proposed Amended Complaint and affirmatively “abandoned” any claim based on an alleged breach of an oral contract. *See* R. 000341 at ¶ 27. Instead, Bailey’s claim, which he now calls a “Breach of Written Agreement Dated August 10, 2011,” is based exclusively on the written AMF Employment Agreement. *Id.* at ¶¶ 28-35. Again, the written document simply does not state that Peritus would pay Bailey’s wages as an employee of AMF.

Bailey’s repeated changes to his theory show that he is grasping at straws. No matter how phrased -- as a guarantee agreement, surety agreement, original obligation or a written promise under the so-called “main purpose rule” -- the AMF Employment Agreement simply does not state that Peritus is obligated to pay Bailey’s wages. As Bailey admitted in his deposition, the AMF Employment Agreement makes no mention whatsoever of any obligation on the part of Peritus. *See* R. 000098 (Bailey Depo., 119:16-21). Indeed, even Bailey’s proposed Amended Complaint does not so allege. Instead, it alleges that “Peritus agreed to be

the primary obligor to provide capital to AMF to pay Bailey's salary" -- which, of course, the AMF Employment Agreement also does not say.

For each of the reasons set forth above, the District Court's order granting summary judgment should be affirmed.

6. The District Court Correctly Denied Bailey's Motion for Leave to Amend his Complaint

Pursuant to Idaho Rule of Civil Procedure 15, a party may amend its complaint after a responsive pleading has been filed only with leave of the Court. Although leave to amend is generally granted liberally, a court may deny leave to amend for reasons such as undue delay, undue prejudice, and futility of amendment. *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 871 (1999). On appeal, the Idaho Supreme Court reviews the District Court's denial of a motion to amend for abuse of discretion. *DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 753 (2014).

Here, Bailey filed his Complaint against his former employer, AMF, and Peritus on October 30, 2014. The Complaint alleges that AMF breached the AMF Employment Agreement by failing to pay Bailey certain wages and that Peritus breached an oral agreement to "guarantee payment of Bailey's salary and other compensation." *See* R. 000012 at ¶ 11.

AMF and Peritus filed answers to the Complaint, asserting that Bailey's claims were barred by the statute of frauds. *See* R. 000026. Peritus also filed a motion to dismiss under I.R.C.P. 12(b)(6) for failure to state a claim, relying in part on the statute of frauds. Bailey did not seek leave to amend his Complaint or otherwise raise Idaho Code § 9-506(2) at that time. Instead, he argued that the AMF Employment Agreement is a written "memorandum" that

satisfies the statute of frauds and that the statute of frauds should not be addressed on a motion to dismiss. *See* R. 000029-43.

Bailey sought to amend his Complaint on May 11, 2016, only after Peritus filed a motion for summary judgment and almost four months after the January 21, 2016, deadline for amending pleadings. The proposed Amended Complaint deleted Bailey's allegation that Peritus agreed to "guarantee payment of Bailey's salary and other compensation," and replaces that allegation with a contradictory allegation that Peritus agreed to "provide capital to AMF to pay Bailey's salary and benefits including severance pay." *See* R. 000342 at ¶ 31. Bailey further alleges that Peritus breached the AMF Employment Agreement when it "failed to fund AMF with sufficient capital to pay Bailey his twice monthly paychecks." *Id.* at ¶ 33.

The District Court correctly denied Bailey's motion to amend for two reasons. First, the proposed Amended Complaint is futile. To fix the fatal flaw in Bailey's case -- failure to satisfy the statute of frauds -- Bailey would have to point to a written contract satisfying the statute of frauds. He cannot because the AMF Employment Agreement simply does not provide that Peritus would pay the wages Bailey earned as an AMF employee. Alternatively, Bailey would have to establish, under Idaho Code § 9-506(2), that Peritus stepped into AMF's shoes and agreed to pay Bailey's salary as the principal debtor and AMF agreed to act as a surety if Peritus failed to do so. As explained above, Bailey's proposed Amended Complaint does not allege any such facts. Instead, it alleges that Peritus agreed to "provide capital to AMF to pay Bailey's salary and benefits including severance pay." *Id.* at ¶ 31. Even if the proposed Amended Complaint contained language that might fit within the exception, the amendment would still be futile because Bailey alleges that AMF continued to be liable for his wages. *See Mickelsen*, 154

Idaho at 405 (“[i]f under the alleged agreement the creditor contended that the original debtors were still liable, then the defendants could not have become the principal debtors, which was necessary for section 9-506(2) to apply.”). As the District Court concluded, “Because Plaintiff’s proposed Amended Complaint does not include language that would compel a different result on summary judgment, Plaintiff’s proposed Amended Complaint is futile.” *See* R. 000375.

Second, Bailey’s original Complaint alleges that Peritus guaranteed Bailey’s wages in the event that AMF did not pay those wages. *See* R. 000012 at ¶ 11. In order to create the relationship that would take the AMF Employment Agreement out of the statute of frauds under Idaho Code § 9-506(2), Peritus would have to agree to pay Bailey’s salary as the principal debtor and AMF would have to agree to pay Bailey if Peritus failed to do so -- the exact opposite of what Bailey’s original Complaint alleged. As the District Court correctly concluded, Bailey may not amend his complaint to assert such contradictory allegations. *See Elder v. Idaho-Washington N. R. R.*, 26 Idaho 209 (1914) (affirming denial of a motion to amend that would be “directly contradictory to the original allegation”); *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990) (leave to amend may be granted to allege “other facts consistent with the challenged pleading,” but not where the proposed amendment “contradict[s] any of the allegations of his original complaint”).

Finally, Bailey asks the Court to “reconsider the intent of ‘notice pleading.’” *See* Appellant’s Brief, p. 13. However, the District Court did not dismiss Bailey’s claim against Peritus for failure to allege sufficient facts to state a claim. Instead, the District Court correctly granted summary judgment because Bailey cannot point to a written agreement that satisfies the statute of frauds and because Bailey’s own Complaint (including allegations that AMF remains

liable for Bailey's wages) makes the original obligation exception to the statute of frauds inapplicable as a matter of law.

B. Peritus Is Entitled To An Award Of Attorneys' Fees On Appeal

The District Court entered judgment in favor of Peritus and awarded costs and attorney fees to Peritus under Idaho Code § 12-120(3) in the amount of \$33,567.74. *See* R. 000380. Bailey does not challenge that order on appeal. Peritus is entitled to an award of attorneys' fees on appeal pursuant to I.A.R. 40 and 41 and Idaho Code § 12-120(3) for the same reason it was entitled to an award of attorneys' fees at the district court level.

Bailey acknowledges that "this is a commercial transaction" and that "[t]he prevailing party shall be entitled to an award of attorney fees per I.C. § 12-120(3)." *See* Appellant's Brief, p. 9. Idaho Code § 12-120(3) requires an award of attorneys' fees to "the prevailing party in a civil action involving a commercial transaction" *Lamprecht v. Jordan, LLC*, 139 Idaho 182, 187, 75 P.3d 743, 748 (2003).

Bailey's Complaint alleged that Peritus breached the AMF Employment Agreement. "Actions brought for breach of an employment contract are considered commercial transactions, subject to the attorney fee provision of I.C. § 12-120(3)." *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 415 (2008). Further, "[w]here an action is one to recover in a commercial transaction, that claim triggers the application of Section 12-120(3) and the prevailing party may recover fees 'regardless of the proof that the commercial transaction did in fact occur.'" *Id.*; *see also O'Connor v. Harger Const., Inc.*, 145 Idaho 904 (2008) (prevailing defendant entitled to attorney fees upon establishing that alleged contract did not exist). Accordingly, the conclusion


that Bailey's breach of contract claim is barred by the statute of frauds entitles Peritus to an award of attorney fees on appeal pursuant to Idaho Code § 12-120(3).

V. CONCLUSION

For the forgoing reasons, Peritus respectfully asks the Court to affirm summary judgment in favor of Peritus and to award Peritus attorney fees on appeal.

DATED THIS 28th day of December, 2016.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

D. John Ashby
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of December, 2016, I caused to be served a true copy of the foregoing RESPONDENT'S BRIEF by the method indicated below, and addressed to each of the following:

Jeffrey J. Hepworth
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D. John Ashby