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IN THE SUPREME COURT OF THE STATE OF IDAHO

KAREN L. SAVAGE, Plaintiff-Appellant, v. SCANDIT INC., Defendant-Respondent.	Supreme Court Docket No: 45143 Valley County No.: CV-2016-290-C

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho
In and For the County of Valley

Honorable Jason D. Scott, District Judge, Presiding

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

A. Response to Respondent's Statement of Facts...2

III. DISCUSSION 5

A. The Court Incorrectly Dismissed Savage's Wage Claim 5

1. The Wage Claim Act Applies to Wages and Expressly Defines Commissions as Such When, as Is Alleged to be the Case Here, the Commissions are Compensation for Labor and Services Rendered by an Employee..5

2. Employers Are Free to Define by Contract When a Commission/Wage is "Due," Including When a Commission Must be Paid, But Once That Criteria is Met, any Recoupment or Clawback is a Deduction from Wages Already Due and Paid. 10

3. Under the CCP, a Commission/Wage is Due Upon Booking...................14

4. The CCP Cannot be Characterized as Simply Providing for a Prepayment Against Future Commissions Due or Providing for Simply an Advance and Therefore Not Wages...16

5. Conditions Subsequent Analysis is Applicable. 20

6. "Arithmetically Ascertainable" is Indeed the Test for When Wages in the Form of a Commission May Become Due Under Idaho Code § 45-608. 24

7. Whether Amazon Made a Payment is Not a Condition Precedent to the Commission Being Due Under the CCP or Idaho Code § 45-608...27

B. A Legally Cognizable Claim Was Made That an Achievement Bonus was Due in the Month That it Was Earned. 29

C. The District Court Improperly Denied Savage's Motion for Leave to Amend..32

D. Scandit's Discussion of Whether the Amazon Agreement was Allegedly Actually Booked Under the Guise of Talking About its Payment of the Entire Amount of the Commission Shortly After the Complaint was Filed is an Attempt to Improperly Argue Evidence Not Adduced on the Motion to Dismiss...34

E. The Recent *Nettleton* Decision Should Be Applied To Reverse the District Judge's Decision to Dismiss the Complaint. 34

F. Attorneys' Fees on Appeal..37

IV. CONCLUSION..39

TABLE OF AUTHORITIES

Cases

B. J. Carney & Co. v. Murphy, 68 Idaho 376, 195 P.2d 339 (1948) 16
Bakker v. Thunder Spring-Wareham, LLC, 141 Idaho 185, 108 P.3d 332 (2005) 10, 11, 27, 28
Bilow v. Preco, Inc., 132 Idaho 23, 966 P.2d 23 (1998) 6, 7
Boesel v. Swaptree, Inc., 31 Mass.L.Rptr. 55, 2013 WL 7083258 (S.Ct. of Mass., Suffolk County, 2013) 29, 30
Gay v. Cty. Comm'rs of Bonneville Cty., 103 Idaho 626, 651 P.2d 560 (Ct. App. 1982) 36
Gress v. Fabcon, Inc., 826 N.E.2d 1 (Ind. Ct. App. 2005) 17, 18, 19
Harris v. Investor's Bus. Daily, Inc., 41 Cal. Rptr. 3d 108 (Cal. Ct. App. 2006) 18, 24
In re Denby Stores, Inc., 86 B.R. 768 (Bankr. S.D.N.Y. 1988) 13
Kaylac v. Canyon County, 119 Idaho 650, 809 P.2d 511 (Ct. App. 1991) 8
Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co., 153 Idaho 716, 291 P.3d 399 (2012) 20, 21
Lincoln Land Co., LLC v. LP Broadband, Inc., No. 44612, 2017 WL 6568768 (Idaho Dec. 26, 2017) 38
Lockwood Graders of Idaho, Inc. v. Neibaur, 80 Idaho 123, 326 P.2d 675 (1958) 16
Meschino v. Frazier Industrial Company, 2016 WL 4083342 (U.S.D.Ct. Mass. 2016) 24, 25, 26
Moore v. Omnicare, Inc., 141 Idaho 809, 118 P.3d 141 (2005) 6, 7, 24, 27
Morangelli v. Chemed Corp., 922 F. Supp. 2d 278 (U.S.D.C. E.D.N.Y. 2013) 17, 19, 20
Morton Buildings, Inc. v. Department of Human Resources, 10 Kan.App.2d 197, 695 P.2d 450 (1985) 22
Neal v. Idaho Forest Indus., Inc., 107 Idaho 681, 691 P.2d 1296 (Ct.App. 1984) 24, 27
Nettleton v. Canyon Outdoor Media, LLC, No. 44416, 2017 WL 6521897 .... 2, 7, 8, 34, 35, 36
Nguyen v. Wells Fargo Bank, 2016 WL 5390245 (N.D. Cal. Sept. 26, 2016) 9, 17
Palmer v. Brown, 752 P.2d 685 (Kan. 1988) 22
Paolini v. Albertson's Inc., 143 Idaho 547, 149 P.3d 822 (2006) 30
Peabody v. Time Warner Cable, Inc., 59 Cal. 4th 662, 328 P.3d 1028 (2014) 9, 17
Pocatello Hosp., LLC v. Quail Ridge Med. Investor, LLC, 156 Idaho 709, 330 P.3d 1067 (2014) 35
Polk v. Larrabee, 135 Idaho 303, 17 P.3d 247 (2000) 8, 17, 24, 25, 27

Prime Mortgage USA, Inc. v. Nichols, 885 N.E.2d 628 (Ind. Ct. App. 2008)............................. 19
Rangen, Inc. v. Idaho Trout Farms, Inc., 104 Idaho 284, 658 P.2d 955 (1983).......................... 36
Smith v. Idaho Peterbilt, Inc., 106 Idaho 846, 683 P.2d 882 (Ct. App. 1984).................... 8, 18, 25
Smith v. MCI Telecommunications Corp., 755 F. Supp. 354 (D. Kan. 1990) 21, 22, 23
Steinhebel v. Los Angeles Times Commc'ns, 126 Cal. App. 4th 696 (2005) 17, 18
Weinzirl v. Wells Group, Inc., 677 P.2d 1004 (Kan. 1984) 22
Weir v. Anaconda Co., 773 F.2d 1073 (10th Cir.1985) 22
Whitlock v. Haney Seed Co., 114 Idaho 628, 759 P.2d 919 (Ct. App. 1988) 7

Statutes

29 U.S.C. § 206(a)(1).. 10
Idaho Code § 12-121... 37, 38
Idaho Code § 28-1-303(a).. 35
Idaho Code § 28-2-208 36
Idaho Code § 44–1502 10
Idaho Code § 45-601(7) 5, 6, 9, 10, 27
Idaho Code § 45-608.. 5, 10, 11, 12, 24, 27
Idaho Code § 45-608(1) 6, 9, 12
Idaho Code § 45-608(2).. 4, 6, 12
Idaho Code § 45-609(1) 12
Idaho Code § 45-615.. 6
Idaho Code § 45-615(2) 6, 8, 9, 25, 37
Indiana Code § 22-2-5-1 19
K.S.A. 44-315(a)... 21
Wage Claim Act... 1, 5, 6, 10, 14, 15, 27, 38

Other Authorities

20 Am.Jur.2d, Counterclaim, Recoupment & Setoff, § 16 (1965) 13
3 J. Moore, Moore’s Federal Practice ¶ 13.02 (2 ed. 1985).. 13
Corpus Juris Secundum... 21

Rules

I.A.R. 40(f)... 37
I.A.R. 41(d) 37
I.R.C.P. 54.. 38

I. INTRODUCTION

Respondent Scandit, Inc. ("Scandit") fails to give any reason to sustain the District Judge's granting of Scandit's Motion to Dismiss. Scandit misstates the factual record by implying that the word "prepaid" modifies the duty to pay 100% of the commission upon booking and by claiming that the commission contract requires payment from the customer to be received prior to 100% of the respective commission being due. Scandit

- ignores the plain mean of the Idaho Statute that defines "commissions" as a form of "wages";
- attempts to overlay California and other cases that lack a statutory definition of "commissions" as "wages" unlike Idaho statutory law and thus engages in unnecessary wrangling over whether this commission under Idaho is a wage (clearly it is);
- ignores Idaho wage claim statutory law that speaks in terms of the amount "due" or "due and owing" as the key event justifying a wage claim in favor of a pinched and narrow contractual definition of "earned" (describing recoupment or claw-back, types of forfeitures in the nature of a condition subsequent);
- fails to explain why the condition precedent/condition subsequent (forfeiture) common law analysis should not apply to determine when a commission wage is "due" or "due and owing" under the Idaho Wage Claim Act statutes; and
- ignores language of the contract that plainly says the commission here was to be paid, i.e., was "due" or "due and owing", upon booking of revenue from the sale.

Further, a recent decision of this Court on December 21, 2017, *Nettleton v. Canyon Outdoor Media, LLC*, No. 44416, 2017 WL 6521897, at *4 (not released for publication in the Permanent Law Reports) while this case was pending on appeal concerns pattern and practice and course of performance as amending the parties' compensation agreement. Remand for the District Court to consider these allegations and aspect of the Complaint in this case in light of the new decision is appropriate. This District Judge's decision granting the motion to dismiss and denying leave to amend should be reversed and the case remanded.

II. STATEMENT OF FACTS

A. RESPONSE TO RESPONDENT'S STATEMENT OF FACTS.

Scandit misstates the language of the Commission Compensation Plan ("CCP") in a misleading fashion, falsely implying (a) that the key language in the CCP states that the commission will be "prepaid" and (b) that actual payment by the customer is a condition that must occur before payment is due. Scandit in its Statement of Facts accurately characterizes the CCP as providing "for commissions based on the monetary value of legally binding contracts and purchase orders secured with new and existing customers in Savage's territory."[1] However, by going on to state as a fact that the "CCP provides that anticipated commissions will be 'prepaid' as 'soon as reasonably practical following booking of the order, and no later than thirty days of the end of the month during which the transaction has been booked,"[2] Scandit misstates the language of the contract. The specific sentence at issue is improperly parsed by Scandit with

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[1] Respondent's Brief at p. 3.
[2] Respondent's Brief at p. 4.

quotations to make it look like it is a single sentence that uses the word "prepaid." However, the real CCP sentence described does not use the word "prepaid," but actually says:

> 100% of the respective commission will be **paid** as soon as reasonably practicable following the booking of the Order, and ideally no later than within 30 days of the end of the month during which the transaction has been booked.[3]

It is a mischaracterization and a misleading of the Court to imply, as Scandit does by use of quotations around the word "prepaid," that that the sentence described in the CCP actually uses the word "prepaid." A misstatement that is made especially egregious by the fact that central to this case is whether the respective commission at issue was "wages due" to be paid to the employee.

Also misleading is Scandit's attempt to set up a strawman argument and then tip it over by claiming that "conspicuously absent from Savage's Complaint, however, is any allegation that Scandit received payment from Amazon – the critical event that must occur before any commission is 'earned' under the CCP."[4] Scandit is oddly grabbing part of the language of the conditions subsequent from the CCP and ignoring the key "criteria" for the commission is "to be paid", i.e., the actual language of CCP cited by Scandit says:

> Commissions shall become **earned** (i.e., **not subject to recoupment or "claw-back"** by Employer) only upon (a) recognition of revenue by Scandit according to its then current revenue recognition policies, and (b) actual receipt of payment from the customer.[5]

[3] R. at 18 (emphasis in bold added).
[4] Respondent's Brief at 4-5.
[5] R. at 18 (emphasis in bold added)..

But this language requiring "actual receipt of payment" is not found in the "criteria" that are laid out in the sentence following the "100% of the respective commission will be paid" sentence, namely that "[i]n order for a closed transaction to be formally booked and the commission **to be paid**, the following criteria need to be fulfilled to the reasonable satisfaction of Scandit: [listing criteria related to booking, none of which include actual receipt of payment]."[6] Compliance with all those criteria is indeed alleged in the Complaint and thus taken as true for purposes of evaluating a Motion to Dismiss. Further, the Complaint alleges that the commission/wage was not paid on the date it was due in that either:

a. it was not paid within 15 days of September 30, 2016, as required by Idaho Code § 45-608(2); or

b. it was not paid within 30 days of the last day of the month in which the order had been booked as had been the case with prior commission payments under the CCP and the pattern and practice and course of performance between Scandit and Savage.[7]

In other words, under the CCP, "100% of the respective commission" compensation for labor and service was agreed to be paid on booking, and it was either (a) due by statute no later than 15 days of the end of the pay period in which it became due under the CCP; or (b) due by contract within 30 days of the last day of the month in which the order had been booked under the CCP.

[6] R. at 18 (emphasis in bold added).

[7] R. at 8 (paragraph 30).

III. DISCUSSION

A. THE COURT INCORRECTLY DISMISSED SAVAGE'S WAGE CLAIM

1. The Wage Claim Act Applies to Wages and Expressly Defines Commissions as Such When, as Is Alleged to be the Case Here, the Commissions are Compensation for Labor and Services Rendered by an Employee.

It goes without saying that the Wage Claim Act only applies to wages earned by employees and requires that "[employers] shall pay **all wages due** to their employees at least once a month during a calendar month, on regular paydays designated in advance by their employers." Idaho Code § 45-608 (emphasis added). The Idaho statute unambiguously defines "commissions" that are compensation for labor or services as "wages" when it says "wages means compensation for labor or services rendered by an employee, whether the amount is determined by time, task, piece or **commission** basis." Idaho Code § 45-601(7) (emphasis added). There is no dispute in this case that the commission was to compensate for labor or services, and therefore was "wages" per Idaho Code § 45-601(7). Indeed, the CCP is fully titled as the "2016 Commission Compensation Plan . . . Senior Sales Executive Karen Savage ("Employee")" and says that it is "intended to reward the following achievements [by Employee]: Generating significant license revenues . . . and closing sales transactions that can be recorded as revenue consistent with Scandit's Revenue Recognition."[8] The Complaint alleges that the commission and bonus at issue "constitute a wage pursuant to Idaho Code § 45-601(7) in that they were 'compensation for labor or services rendered by an employee on a time, task, piece or commission basis.'" Thus, the dispute in this case is not whether "wages" are

[8] R. at 16.

involved—as clearly wages as defined by statute are involved—but rather whether those wages (a) were not paid when "due" (Idaho Code § 45-608(1) and (2)), (b) were not paid at a time a jury could find they were "due and owing" (§ 45-615(2)), and/or (c) were not "paid" at the time the CCP requires they be "paid," i.e., upon booking.

Because Scandit has saddled itself with a California law-based contract in the form of the CCP, it is now attempting to shoehorn California cases and law regarding whether a commission qualifies as a wage by virtue of being earned under California law into Idaho cases that have struggled with whether disparate non-commission items, items not listed in the same fashion as "commissions" under I.C. § 45-601(7) expressly as "wages." *See* Scandit's citation of *Bilow v. Preco, Inc.*, 132 Idaho 23, 966 P.2d 23 (1998)(involving whether "deferral account" was wages), and *Moore v. Omnicare, Inc.*, 141 Idaho 809, 118 P.3d 141 (2005)(involving whether money due as a function of liquidated damages provision in executive employment agreement was wages).[9] Scandit cites these cases for the proposition that "all forms of compensation must be "earned" before they become "wages" for purposes of the Wage Claim Act."[10]

These cases (a) do not say that; and (b) do not involve a commission that is defined by statute as a wage. If indeed Idaho law required that an amount be "due" or "earned" before it can be called a wage, then why does the definition of wages in I.C. § 45-601(7) include no requirement that the compensation first be "due." Why does the language in § 45-615 speak in terms of "unpaid wages found due and owing"? And why does § 45-608(1) speak in terms of

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[9] Respondent's Brief at 9.
[10] Respondent's Brief at 9.

"Employers shall pay all wages due" and does not speak in terms of "earned" but merely says when wages are "due," they must be paid? If the scheme was indeed that any form of compensation must be earned before it can be considered wages under the act, then there would be no point to so word these statutes.

Both the *Bilow* and *Moore* cases cite to *Whitlock v. Haney Seed Co.*, 114 Idaho 628, 759 P.2d 919 (Ct. App. 1988), which actually enumerates two characteristics of "wages" as (1) "compensation earned in increments as services are performed" or (2) "compensation paid in direct consideration of services rendered." *Id.* at 634, 759 P.2d at 925. Interestingly, the *Moore* decision does not include the words "earn" or "earned" even once, but does say "[t]he definition of 'wage' includes any **ascertainable unpaid commissions** . . . ." *Id. at* 819, 118 P.3d at 151 (citations omitted)(emphasis added). Thus, neither of those cases precisely equates "earned" to being the absolute touchstone of whether a commission is indeed a wage. The case that those two cases cite does cite to the obvious definition of "wage" as including unpaid commissions. *Cf. Nettleton v. Canyon Outdoor Media, LLC,* No. 44416, 2017 WL 6521897, at *4 (Idaho Dec. 21, 2017)(not released for publication in the permanent law reports)(referring to payment of "commission wages" over and over in discussing whether issue of fact existed that such wages were due). Again, there does not seem to be a dispute here that this commission was in the nature of "compensation for services rendered" and therefore a "wage"; the dispute is centered on when the particular commission became "due and owing," a point at which a jury could easily find was upon the booking of the revenue associated with the sale resulting in the commission.

In *Polk v. Larrabee,* 135 Idaho 303, 17 P.3d 247 (2000), the employer argued—in a manner very similar to Scandit's argument in the present case—that "due to the nature of commission sales, the actual amount of wages due to the Polks on the day they resigned could not have been known. [The employer] claims that since some of the [sales of mobile] homes did not close, it would have actually overpaid the Polks if it had paid the amount the Polks had demanded." *Id.* The *Polk* court characterized this as an argument that commissions were "not ascertainable," and rejected the same, focusing in on Idaho Code § 45-615(2) and its instruction to base the amount of a wage claim judgment on the "unpaid wages **found** due and owing" to hold that "the amount of damages was due" at the time of demand "as found by the trier of fact." *Id.* at 309, 17 P.3d at 253 (emphasis added).[11]

In the very recent case of *Nettleton v. Canyon Outdoor Media, LLC,* No. 44416, 2017 WL 6521897, at *4 (Idaho Dec. 21, 2017)(not released for publication in the permanent law reports), this Court discussed "commission wages" as part of an employee's compensation, and considered whether a genuine issue of material fact existed over counts in a complaint by the employee "that he was owed commission wages **due** on contracts he procured before his resignation." *Id.* (emphasis added). The *Nettleton* opinion never considered that a commission could not be "wages" unless "earned." In fact, the *Nettleton* opinion never used the words "earn" or "earned" even once.

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[11] *Polk* cited with approval *Smith v. Idaho Peterbilt, Inc.*, 106 Idaho 846, 683 P.2d 882 (Ct. App. 1984) ("[T]he question [for the trier of fact] merely [was] was a sum due, and if so, how much," despite parties' dispute as the exact amount of percentage rate of commissions at termination); and *Kaylac v. Canyon County*, 119 Idaho 650, 652, 809 P.2d 511, 513 (Ct. App. 1991) (rejecting argument that amount of wages due in cumulative personal leave to deputy sheriff was not "ascertainable until the conclusion of the grievance process"). *Polk,* 17 P.3d at 253.

California, unlike Idaho, actually uses the word "earned" in its statutory equivalent of I.C. § 45-608(1) (first sentence). Thus, it is not surprising that California's Supreme Court, citing this "earned" statutory language, has recognized that "commissions are not earned or owed until agreed-upon conditions have been satisfied." *Nguyen v. Wells Fargo Bank*, 2016 WL 5390245, at *11 (N.D. Cal. Sept. 26, 2016)(citing holding of *Peabody v. Time Warner Cable, Inc.*, 59 Cal. 4th 662, 668, 328 P.3d 1028, 1032 (2014)). This is the earned-in-order-to-be-deemed-wages test that Scandit is attempting to forcibly graft onto Idaho's express statutory language regarding "commissions," "due" and "due and owing"[12]; the test that simply does not fit Idaho law. The commission here clearly was a "wage" by statutory definition. The issue simply is, under a motion to dismiss standard, has it been sufficiently alleged that that commission wages were "due" on booking the sale. Scandit concedes that "for purposes of a motion to dismiss and appellate review of the District Court's dismissal . . . , the Court considers Savage's non-conclusory and well-pled factual allegations to be true."[13]

[12]*See* Idaho Code §§ 45-601(7), 608(1) (first sentence), and 615(2). Scandit argues that the reference in Idaho Code § 45-608(1) (second sentence) to an employer "depositing wages due or to become due or an advance of wages to be earned in a [bank account] of the employee's choice" somehow equates "earned" with "due." Savage posits that the reference to "become due" and "advance of wages" highlights, in fact, that the Idaho Legislature is aware of a subtle difference in connotation between "due" and/or "earned," chose to use both words in that one sentence regarding deposit of wages or of money to become wages into the employee's bank account, but only to use "due" or "due and owing" elsewhere in the Wage Claim Act, not "earned," when discussing the point at which wages must be paid. California, however, in its statutory scheme used "earned" and recognized that "commissions are not earned or owed until agreed-upon conditions have been satisfied." *Supra.*

[13] Respondent's Brief at n. 1, p. 3.

2. Employers Are Free to Define by Contract When a Commission/Wage is "Due," Including When a Commission Must be Paid, But Once That Criteria is Met, any Recoupment or Clawback is a Deduction from Wages Already Due and Paid.

Contrary to Scandit's argument, the court in *Bakker v. Thunder Spring-Wareham, LLC,* 141 Idaho 185, 189, 108 P.3d 332, 336 (2005), was not struggling with whether a commission had to be "earned" to be a wage.[14] The issue in *Bakker* was whether the employee had any right to the commission/wage being due/earned at that point in time. The district court below had "concluded that the contract was unambiguous and required that Bakker be employed at close of escrow in order to be paid the commission." *Bakker,* 141 Idaho at 189, 108 P.3d at 336. The argument in *Bakker* was whether public policy prohibited contracting for when a commission/wage became due. The court's holding clearly was focused on allowing freedom of contract to establish the time under Idaho Code § 45-608 when a commission/wage became due:

> Under federal and state law, an employee must be paid a minimum of $5.15 for all hours worked. 29 U.S.C. § 206(a)(1); I.C. § 44–1502. As expressed in Idaho law, an employee might find himself paid on a time, task, piece or commission basis. I.C. § 45-601(7) ("Wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece or commission basis.). Under I.C. § 45–608, an employer is required to adhere to a schedule paying its employees at least once a month. In conjunction, these laws require an employer only to pay a minimum wage for all hours worked and to pay employees at least monthly. Beyond that, the Wage Claim Act does not place any limitations on the ability of the employer and employee to contract for the terms of the employee's compensation.

Thus, when Scandit argues that *Bakker* stands for the proposition that "when a commission becomes 'earned' such that it is a 'wage' under the wage claim act is determined by

[14] Respondent's Brief at 9 and 10.

contract," Scandit is misinterpreting the holding in that case and the clearly expressed language of Idaho statute.[15] Why? Because Scandit wants to shoehorn this case into a number of California law cases which struggled with whether a commission was indeed a wage under California law and use the "earned" test. Idaho law, statutorily and *Bakker*, was not laboring under that deficiency. Idaho law defines commissions as wages. The answer and ruling of *Bakker* applied in this context, is succinctly that employers and employees may by contract establish when a commission/wage is "due" for purposes of Idaho Code § 45-608. Indeed, hidden in Scandit's argument is a quote to *Bakker* as holding "employers are free to 'contract for the terms of compensation regarding when wages are earned and/or **due**.'"[16] *Bakker*, in conjunction with Idaho Code § 45-608, is the real central issue of this case, namely under the CCP, is this commission, undisputedly a wage, due on the booking of the Amazon sale? The contract can unambiguously be read that way, or if a juror could so find in the event of an ambiguity in any material language to that point, then the district judge's decision was in error and must be reversed.

There is language in *Bakker* that has application here, namely that employers and employees can "contract for the terms of compensation regarding when wages are earned and/or due, **as long as relevant law is respected**." *Id. at* 190, 108 P.3d at 337 (emphasis added). In this case, "100% of the respective commission will be **paid** as soon as reasonably practicable

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[15] See also Respondent's Brief at 11 (Scandit cites *Bakker* as "holding that Plaintiff has not 'earned' her commission under the plain language of her contract and therefore had no 'unpaid wages' and thus no claim under the Wage Claim Act").

[16] Respondent's Brief at 10 (quoting *Bakker*) (emphasis added to *Bakker* language).

following the booking of the Order." That language however creates a time certain to pay an ascertainable commission wage because it falls within Idaho Code Section 45-608(2). That section, working in conjunction with Section 45-608(1) to require that once a wage becomes due during a particular pay period, it must be paid in full within 15 days of the end of that pay period:

> (1) Employers shall pay all wages due to their employees at least once during each calendar month, on regular paydays designated in advance by the employer, in lawful money of the United States . . .
>
> (2) The end of the pay period for which payment is made on a regular payday shall be not more than fifteen (15) days before such regular payday . . . .

Idaho Code Section 45-608. Other Idaho law provides that an employer may not "withhold or divert any portion of an employee's wages unless . . . the employer has a written authorization from the employee for deductions for a lawful purpose." Idaho Code § 45-609(1). So, if an employer says that a commission wage will be paid at a certain point by contract, the law that must be respected includes payment of that amount within fifteen days of the end of the pay period within which that amount became due, and that any future deductions from that amount must only be made with written authorization.

In addition to saying 100% of the commission will be paid upon booking of revenue, the CCP here narrowly defines "earned," saying "[c]ommission shall become **earned** (i.e., not subject to recoupment or "claw-back" by Employer) only upon [revenue recognition and actual payment]."[17] The next sentence of the CCP goes on to say that if "one or both of these conditions

[17] R. at 18 (emphasis added).

fail to occur, the **paid** but unearned commissions must be returned to Scandit by Employee." [18] "Recoupment" is "a common law doctrine which arose as an equitable rule of joinder to avoid the necessity of bringing separate actions for two claims. It permits a defendant to defend against the plaintiff by asserting a countervailing claim that arose out of the 'same transaction.'" *In re Denby Stores, Inc.*, 86 B.R. 768, 781 (Bankr. S.D.N.Y. 1988) (*citing* 3 J. Moore, *Moore's Federal Practice* ¶ 13.02 at 1313 (2 ed. 1985); 20 Am.Jur.2d, Counterclaim, Recoupment & Setoff, §§ 16–18 (1965)). Likewise, "claw back" too sounds like taking something back that has already been ascertained and paid, a countervailing charge back or a "reversal." The CCP at § V is titled "COMMISSION PAYMENT REVERSALS" and speaks in terms of "**revers[ing]** prior commissions that have been "prepaid" and also says that "commissions . . . will be **recalculated** and recovered accordingly." (Emphasis added.) Again, this wording implies an amount that initially was "ascertainable," and previously "due and owing" under Idaho law. "Recalculate" implies that it was already calculated once and due, i.e., already "ascertainable" and due and paid.[19] Even the timing for any necessary adjustment to the paycheck for "recoupment or

[18] R. at 18 (emphasis added).

[19] Scandit puts undue emphasis on the sporadic use of the word "prepaid" in the contract. See, e.g., Respondent's Brief at 4. But such reference also is easily reconcilable as used as simply meaning "previously paid", i.e., the commission that was due and previously paid, which now is subject to recoupment or claw-back as a condition subsequent has occurred. For example, this seems to be the sense that it is used in the contract when it is indicated "therefore, should one or both of these conditions fail to occur, the paid but unearned commissions must be returned to Scandit by Employee per Section V below. Employee's obligation to return any prepaid but unearned commission survives any termination of the Employee's engagement with Scandit, and Employee agrees that such amounts may be deducted from Employee's final paycheck . . . ." R. at 18. The oddity of the position advocated by Scandit under the contract that the commission is not wages until "earned" is made even more absurd by the fact that there technically would be no wages comprising commissions until the final paycheck of the employee's career, as that is the only point that Scandit has written in its right to deduct from paycheck wages to "return a prepaid but unearned commission". R. at 18.

clawback" under the CCP is deferred until it is "deducted from Employee's final paycheck."[20] Again, sounding like the undoing of wages that were already due.

Thus, the employer's choice of wording in the CCP to set forth that "100% of respective commission will be paid [upon booking]" had consequences under the relevant law. The limited definition of "earned" as used under the CCP does not supplant the 100% of commission due language. The CCP's limited definition of "earned" does not accord with "due" as used under Idaho law to mean ascertainable and owing and cannot override the directive of the law that when commission wages are due they must be paid within a certain time of the end of the pay period when they became due and the only deductions from that point forward for wages have to be authorized in writing by the employee.

3. Under the CCP, a Commission/Wage is Due Upon Booking.

Scandit argues that the CCP in this case "defines exactly when commissions are 'earned' and therefore become wages under the Wage Claim Act" and that the CCP provides that "Commissions shall become earned (i.e., not subject to recoupment or 'claw-back' by [Scandit]) only upon . . . actual receipt of payment from the customer."[21] Appellant Savage's Complaint would not have been filed and no confusion or ambiguity or argument introduced, had Scandit stopped its CCP contract there and not gone on, as it did, to include the following language immediately thereafter:

> Therefore, should one or both of these conditions fail to occur, the paid but unearned commissions must be returned to Scandit by

[20] R. at 18.
[21] Respondents Brief at 10, citing R. at 18, Section IV.

> Employee per Section V below. Employee's obligation to return any prepaid but unearned commission survives any termination of the Employee's engagement with Scandit, and Employee agrees that such amounts may be deducted from Employee's final paycheck including severance payments, if any.
>
> **100% of the respective commission will be paid** as soon as reasonably practicable following the booking of the Order, and ideally no later than within 30 days of the end of the month during which the transaction has been booked. In order for a closed transaction to be formally booked and the commission **to be paid**, the following criteria need to be fulfilled to the reasonable satisfaction of Scandit:
>
> [listing criteria relating to booking an order, not including "actual receipt of payment from the customer"]
>
> If there are any contingencies (e.g., exit clauses) in the arrangement with the customer, Scandit reserves the right not to **book the sale** and withhold commission until the contingency has expired.
>
> Scandit reserves the right to withhold the respective sales commission until all the above tasks are complete [apparently referring to the above criteria for booking].[22]

Thus, Scandit is in error when it argues that there is no ambiguity under the CCP because Scandit had not yet been paid by Amazon, "no commission had become 'earned' and the amount claimed by Scandit [sic "Savage"] was not a 'wage due' under the Wage Claim Act."[23] The common sense import of the above bolded language within Section IV could lead a reasonable person to believe that payment of the commission/wage by contract under the CCP was due upon booking of the revenue from the associated sale.

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[22] R. at 18, Section IV (emphasis in bold added).

[23] Respondent's Brief at 11.

4. The CCP Cannot be Characterized as Simply Providing for a Prepayment Against Future Commissions Due or Providing for Simply an Advance and Therefore Not Wages.

Scandit attempts to characterize the CCP as "at all times distinguish[ing] between when Scandit will pre-pay (i.e., advance) commission payments and when such commission payments in fact become earned."[24] First, the word "advance" never appears within the CCP.[25] Scandit's use of the phrase "at all times" treats the CCP as if the "100% of the respective commission will be paid as soon as reasonably practicable following the booking" and associated language cited in the Opening Brief[26] was not included in the contract. To say 100% of the respective commission will be paid is not an instance of merely providing for pre-payment "at all times." To say that "Scandit reserves the right not to book the sale and withhold commission" is not an instance of at all times providing merely for pre-payment or advancement. To say "Scandit reserves the right to withhold the respective sales commission until all of the above tasks [relating to booking] are complete" is not maintaining that the payment required to be made upon booking is merely a pre-payment or advance of the commission. On the contrary, that contractual language is providing that payment of the commission is due upon booking. Indeed, undoubtedly to Scandit's chagrin at this point, there is not one mention of the word "advance" in the entire contract. How easy would it have been for Scandit simply to leave out the "100% of the respective commission will be paid [upon booking]" language and instead say, for example

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[24] Respondent's Brief at 11.

[25] Under Idaho law, "the word 'advance', as ordinarily used, implies a loan." *B. J. Carney & Co. v. Murphy*, 68 Idaho 376, 382, 195 P.2d 339, 342 (1948) (case criticized on other grounds, *Lockwood Graders of Idaho, Inc. v. Neibaur*, 80 Idaho 123, 127, 326 P.2d 675, 676 (1958)).

[26] See R. at 18 and Opening Brief at pp. 24-25.

"an amount equal to 100% of the respective commission may be advanced, at the discretion of Scandit, upon booking"?

Once having set up the fiction that the CCP merely provides for an advance, not that wages are indeed due, Scandit trots out the argument based on California case law that an advance of a commission is not a wage because it has not yet been "earned." It cites the case of *Steinhebel v. Los Angeles Times Commc'ns,* 126 Cal. App. 4th 696, 704-06 (2005); *Gress v. Fabcon, Inc*., 826 N.E.2d 1, 2 (Ind. Ct. App. 2005); *Morangelli v. Chemed Corp*., 922 F. Supp. 2d 278 (U.S.D.C. E.D.N.Y. 2013).[27]

Steinhebel is distinguishable because, as noted previously,[28] under California law, the statutory definition utilizes the word "earned" not due, and the California Supreme Court's resulting holding that "commissions are not earned or owed until agreed-upon conditions have been satisfied." *Nguyen v. Wells Fargo Bank*, 2016 WL 5390245, at *11 (N.D. Cal. Sept. 26, 2016)(citing holding of *Peabody v. Time Warner Cable, Inc.*, 59 Cal. 4th 662, 668, 328 P.3d 1028, 1032 (2014)). As argued in Savage's Opening Brief,[29] an "advance" is materially different from the situation where an employee has the present contractual right, without any condition precedent, to payment of the commission. That amount is "due". This is the case even if the commission once ascertained and paid is subject to a condition subsequent or forfeiture. *Steinhebel* also flies in the face of *Polk v. Larrabee*, 135 Idaho 303, 311, 17 P.3d 247, 255 (2000)("[the employer] will not be allowed to escape the wage claim penalty by claiming that the

[27] Respondent's Brief at 12, also citing other cases that require commission to be earned before it is wages.
[28] *See supra* at Section III.A.1
[29] Opening Brief at p. 22-23.

amount was unascertainable prior to trial" because the jury is charged to find what is due and owing). *Smith v. Idaho Peterbilt, Inc.*, 106 Idaho 846, 683 P.2d 882 (Ct. App. 1984) (despite the parties' dispute as to "the exact amount of the percentage rate of commission" at termination, the question for the trier of fact was, "was a sum due, and if so, how much."). The CCP here and the language of "100% of the respective commission will be paid as soon as reasonably practicable following the booking" clearly sets forth that a commission/wage is due upon booking. The language relied upon by Scandit for its "advance" argument is really in the nature of a condition subsequent. As explained in Savage's Opening Brief, another California case, *Harris v. Investor's Bus. Daily, Inc.*, 41 Cal. Rptr. 3d 108, 118 (Cal. Ct. App. 2006), distinguishes *Steinhebel* by virtue of contractual language which "suggested that the points [upon which the commission was based] were earned [i.e., "due"] at the time of the sale, not at some designated point in the future."[30]

The *Gress v. Fabcon, Inc.*, 826 N.E.2d 1, 2 (Ind. Ct. App. 2005), case is also distinguishable on the basis that it does not come from a state where commissions are defined by statute to constitute wages. The *Gress* court actually relied upon its perception that the commission in question was not related to the employee's labor, but to factors outside of his control and therefore could not be wages. *Gress* in this respect was later severely criticized in

[30] Savage's Opening Brief at p. 23-24. Again, Scandit cannot narrowly define "earned" in words of condition subsequent (clawback-recoupment) and expect that to override Idaho law that wages must be paid when "due and owing." That is akin to the parties to a sale of a cow re-labeling the item sold as a "goat" and demanding that no brand inspection occur because that is for the sale of "cows".

Prime Mortgage USA, Inc. v. Nichols, 885 N.E.2d 628 (Ind. Ct. App. 2008), wherein the court indicated plaintiff's claim in that case:

> Nichols's compensation seems analogous to a commission, except for the fact that her pay was linked not exclusively to her own work, but to the overall success of [her employer]. [Citation omitted.] In *Gress v. Fabcon, Inc.* [citation omitted], this court held that sales commissions, payable on a monthly basis based on the prior month's accounting, and "based upon the profitability of the salesperson's individual projects," were not "wages" within the meaning of the Wage Payment Statute. The court noted that under Indiana Code section § 22-2-5-1, employers must pay their employees "at least semi-monthly or biweekly," and that "payment shall be made for all wages earned to a date not more than ten (10) days prior to the date of payment." Id. at 3. In concluding the commissions were not "wages," the court found highly relevant that "because of the length of time involved in determining the final commission, it was simply impossible for [the employer] to know what [the employee] was owed with ten days." Id.
>
> However*, Gress conflicts with previous decisions holding that commissions are "wages" under the Wage Payment Statute.* [Citing five previous cases.] *Gress* did not attempt to distinguish or purport to disagree with any of these cases, and out of these previous cases cited only *Wank* [740 N.E. 2d 908, 912 (Ind. Ct. App. 2000)] in support of an unrelated statement.

Prime Mortgage USA, Inc. v. Nichols, 855 N.E.2d at 665 (emphasis added).

Morangelli v. Chemed Corp., 922 F. Supp. 2d 278 (U.S.D.C. E.D.N.Y. 2013), is cited by Scandit for the proposition that under the laws of nine states, "advances" are not "wages" and therefore a claim for unauthorized deductions from "wages" would not stand for recalculation of certain commissions earned by Roto-Rooter employees. This case is likewise distinguishable. Scandit ignores the fact that the *Morangelli* court found the employer had reserved a right and effectively amended the contract to define the prior payment of commissions as an advance. In that case, specifically, the issue was whether (a) after an amount for the commission had been calculated based on a Roto-Rooter technician's work at a particular job, and (b) if later warranty

work caused that commission to be paid to the person who had to do the warranty work and deducted from what had previously been paid out to the original technician, if (c) that was an illegal deduction from a wage of the original technician. The language of the contract at issue in *Morangelli* provided that "commissions are based upon the amounts collected or billed (authorized) depending on the type of work done, LESS ... *any special charges for each job such as insurance surcharges that the company may deem necessary and may impose from time to time*." *Id.* at 296 (emphasis added to original contract language by *Morangelli* court). This is distinguishable from the situation at hand. The CCP here does not allow an employer's ongoing amendment of the obligation to pay the commission for whatever "special charges" Scandit may deem necessary and may impose from time to time. There is simply no such modification or qualification—i.e., no condition precedent--to the "100% of the respective commission will be paid [upon booking]" language in this CCP.

5. Conditions Subsequent Analysis is Applicable.

Scandit argues that "this case does not turn on some distinction between an 'advance' and a 'commission subject to a condition subsequent'" and that no case mentioned by Savage so much as mentions the concept of a condition subsequent.[31] However, Scandit does note an Idaho definition of a condition subsequent from the case of *Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716,725,291 P.3d 399, 408 (2012).

[31] Respondent's Brief at 14.

First, *Lakeland* cites to Corpus Juris Secundum on Contracts for that definition. Second, the language that Scandit glaringly omits from the middle of the quotation Scandit takes from *Lakeland* is as follows:

> A condition subsequent presumes a valid contract and refers to a future event, **which divests a preexisting contractual liability.**

Lakeland, 153 Idaho at 725, 291 P.3d at 408 (emphasis added). This language cited in *Lakeland* and omitted from Scandit's brief, would seem to fit exactly to the situation here where the CCP was a valid contract with a preexisting contractual liability arising under the "100% of the respective commission will be paid [upon booking]" language. That preexisting liability could then be divested, i.e., subject to recoupment or claw-back, upon a condition subsequent occurring.[32]

Second, the fact that condition subsequent analysis is routinely applied to wage claims can be demonstrated by a Westlaw search of "All State & Federal" cases for "'condition subsequent" /s wage" and the resulting 36 cases. The law of the state of Kansas is particularly apt here because in its wage claim act, Kansas specifically provides that any "condition subsequent" which imposes a forfeiture of earned wages is a violation of the Kansas wage claims act. *See, e.g.*, *Smith v. MCI Telecommunications Corp.,* 755 F. Supp. 354, 360 (D. Kan. 1990) (citing to K.S.A. 44-315(a)). Thus, there is a body of law discussing when an after-the-fact condition of defeasance as to all or a portion of a wage previously due is a condition subsequent. Kansas courts have defined a condition precedent under the Kansas wage statutes as:

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[32] R. at 18, Section IV.

> something that is agreed must happen or be performed before a right can occur to enforce the main contract. It is one without the performance of which the contract entered into between the parties cannot be enforced. A condition precedent requires the performance of some act or happening of some event after the terms of the contract, including the condition precedent, have been agreed on before the contract shall take effect. *Weinzirl*, supra, 677 P.2d at 1008.

Smith, 755 F.Supp. at 360, n. 4 (citing *Weinzirl v. Wells Group,* Inc., 677 P.2d 1004, 1008 (Kan. 1984)). In the *Smith* case, the plaintiff was a sales person for MCI who claimed that she had not been paid a proper commission pursuant to her written compensation plan, just like Savage in the present case. Put succinctly, the court stated:

> [A]lthough Kansas law permits an employer to impose a condition precedent on its obligation to pay an employee wages, once an employee's right to earned wages becomes absolute, a condition subsequent cannot impose a forfeiture. *Weir v. Anaconda Co*., 773 F.2d 1073, 1084 (10th Cir.1985) (applying Kansas law) (citations omitted). In determining whether a wage is earned, a court's task is "one of deciding whether the documents drafted by the employer place a condition precedent on entitlement to the [wage] or whether they attempt to impose a forfeiture." *Id., quoting Morton Buildings, Inc. v. Department of Human Resources*, 10 Kan.App.2d 197, 695 P.2d 450, 453 (1985).[33]

Id. at 356. In ruling for the employee, the court rejected MCI's contention that the commissions did not achieve the status of earned wages until the customer had used the service for a billing period and the amount of the usage was determined and billed and the usage of the service was sufficient to satisfy as a "qualifying sale." However, the court found that MCI could "point to no

[33] In *Palmer v. Brown*, 752 P.2d 685 (Kan. 1988), the Kansas Supreme Court overruled a statement in *Morton* relating to whether a prior case called *Murphy* by the Kansas Supreme Court was limited to actions in which the employee was discharged for filing a worker's compensation claim. This overruling has nothing to do with the holdings for which *Morton* is cited herein.

provision in the contract which defines commissions in this manner. Instead, the contract expressly provides that commissions are earned upon *sales* and that the amount of commissions is to be determined *based upon* the first month's billings." Id. at 360 (emphasis in original).

Although obviously in *Smith*, the court was focused on language which used the word "earned" that contract did not narrowly define "earned" in language of forfeiture as does the CCP here. The "100% of the respective commission will be paid [upon booking]" language suffices in exactly the same way under the CCP in the present case to establish the point the commission became "due" under the CCP. After that point, the definition of "earned" under the contract speaks in terms of a claw-back or recoupment, both types of forfeitures, both of which meet the test laid out in *Smith* and under associated Kansas law of a condition subsequent. Idaho does not have the prohibition against such conditions subsequent divesting an employee of wages, nevertheless that does not change the fact that the test for whether something is a condition subsequent or a condition precedent to a wage is just as valid and persuasive in the instant case. As the *Smith* court found, the employees at issue "became vested with the right to receive undetermined scheduled commissions, as earned wages, at the time they sold MCI service. The fact that the various scheduled payments could not be calculated until several months after service was sold does not impair this vested right." *Id.* Likewise, the CCP in the present case says that "100% of the respective commission will be paid [upon booking]." Everything after those wages were due in terms of a recoupment or a claw-back is a condition subsequent.

6. **"Arithmetically Ascertainable" is Indeed the Test for When Wages in the Form of a Commission May Become Due Under Idaho Code § 45-608.**

Scandit argues that the Idaho cases cited by Savage stand only for the proposition that whether an alleged commission is "ascertainable" is only a preliminary issue in the determination of whether a commission has become earned, not the deciding factor.[34] Clearly, the definition of "wage" includes any ascertainable unpaid commissions. *Moore v. Omnicare, Inc.*, 141 Idaho 809, 819 P.3d 141, 151 (2005), citing *Polk v. Larrabee*, 135 Idaho 303, 309, 17 P.3d 247, 253 (2000); *Neal v. Idaho Forest Indus., Inc.*, 107 Idaho 681, 683, 691 P.2d 1296, 1298 (Ct.App. 1984). With respect to *Polk v. Larrabee*, 135 Idaho 303, 17 P.3d 247 (2000), Scandit claims that the contract there did not contain any conditions that had to occur before the employee would be deemed to have earned a commission on the sold houses. All that Savage has argued is that is that when a wage commission is both (1) ascertainable and (2) due and owing, an employee has a cognizable claim under Idaho Code § 45-608, and that "earned" is not a magical prerequisite to commissions becoming "wages" under the Act.[35]

A commission that is subject to a claw-back is ascertainable and if the parties' agreement says it must be paid, then it is a wage that is due. *Cf. Meschino v. Frazier Industrial Company*, 2016 WL 4083342 at § 1 (U.S.D.Ct. Mass. 2016); *Harris v. Investor's Business Daily, Inc.,* 41 Cal.Rptr.3d 108, 118 (Cal. App. 2006).

Polk v. Larrabee, 135 Idaho 303, 17 P.3d 247 (2000), contrary to Scandit's argument, is entirely on point here. As Scandit is arguing here that these conditions subsequent will prevent

[34] Respondent's brief at 15.
[35] Opening Brief of Appellant Savage at pp. 15-16.

the ascertainability of the commission at the time that the revenue is booked per the contract, so too in *Polk v. Larrabee* was the employer arguing that "since some of the homes did not close, it would have actually overpaid the Polks if it had paid the amount the Polks had demanded [because some of the sales might not close]." The *Polk* court soundly rejected this, saying "[the employer] will not be allowed to escape the wage claim penalty by claiming that the amount was unascertainable prior to trial." *Id.* at 311, 17 P.3d at 255. The court emphasized that the trier of fact—based on the language of Idaho Code § 45-615(2) directing the jury to determine the amount of the wage claim based on the amount of "unpaid wages found due and owing"—was charged to determine the amount due under the language of the contract. Here, the CCP provides a basis for the jury to do that, i.e. "100% of the respective commission will be paid [upon booking]." Here, just as in *Polk*, the question for the trier of fact is, upon booking of the Amazon sale "was a sum due, and if so, how much?" *Id.* at 309, 17 P.3d at 253 (citing *Smith v. Idaho Peterbilt, Inc.*, 106 Idaho 846, 683 P.2d 882 (Ct.App. 1984)). The Complaint, as plead, alleges facts that allow the trier of fact to answer that a sum was due and to state the amount due.

Scandit also attempts to bring the *Meschino v. Frazier Industrial Company*, 216 WL 4083342 (D. Mass. August 1, 2016), case into supporting its position, when it clearly does not.[36] Scandit cites language from another aspect of the *Meschino* decision. But the argument in *Meschino* that Frazier won on was related to the alleged impropriety of his employer taking deductions from his eligible commissions to recover losses incurred on failure to pay on other projects he was involved in. In a manner similar to the condition subsequent analysis under the

[36] Respondent's Brief at 16.

Kansas wage claim statute above, the Massachusetts Supreme Court interpreted their wage claim statute "as banning any arrangement that would deduct or withhold payment of earned wages, even where the employee has given his assent." *Meschino*, 216 WL 4083342 * 4. As noted in Savage's Opening Brief, the *Meschino* court held that words in the parties' contract to the effect that a "[c]ommission will be paid out at 50% of the commission payable in the first eligible period once the customer pays 50% or more of the order" effectively vested the right to the commission and that a future deduction would be in violation of the court-imposed prohibition on the same. The court noted that the employer had every ability to change this result by inserting into the agreement the phrase "against the aggregate commission due at the end of the quarter" but it hadn't done that and thus the commission had become due before the point of the deduction. *Id.*

This is exactly the case with the CCP language here that "100% of the respective commission will be paid [upon booking]." The 100% paid language in this case is completely analogous to the "once the customer pays 50% or more of the order" language in the *Meschino* case. They are both the key condition precedents that cause the right to payment of the ascertainable commission to vest. Anything that happens after that point is in the nature of a condition of defeasance, a condition subsequent, but does not change the fact that at the earlier point in time the commission was (1) ascertainable, and (2) due.

7. Whether Amazon Made a Payment is Not a Condition Precedent to the Commission Being Due Under the CCP or Idaho Code § 45-608.

Under the guise of again saying that whether a commission is "earned" is the touchstone of whether that commission comprises a "wage" under Idaho law,[37] Scandit cites *Bakker v. Thunder Spring-Wareham, LLC,* 141 Idaho 185, 108 P.3d 332 (2005), as a case in which "the Idaho Supreme Court [allegedly] held . . . all forms of compensation must be 'earned' before they become 'wages' and the parties can define by contract when a commission is 'earned' for purposes of the Wage Claim Act."[38] With all due respect to Scandit, that is not what is found on page 190 of the *Bakker* decision or anywhere else. Indeed, that page says of the court decision interpreting the Wage Claim Act "This statement also does not dictate a clear public policy that employers and employees cannot contract for the terms of compensation regarding when wages are earned and/or due, as long as relevant law is respected." *Id.* at 190, 108 P.3d at 337. Why would that sentence use "wages are earned" if compensation had to be earned before it could be considered wages? Further, the use of "earned and/or due" also implies that the court is simply equating earned with due under Idaho Code § 45-608, not using "earned" in the narrow sense employed in the CCP as not subject to recoupment or claw-back, not using "earned" in the sense California and other law advanced by Scandit being some sort of litmus test that must be positive before a commission is deemed to be wages. Under Idaho Code § 45-601(7), which defines wages as "compensation for labor or services rendered by an employee, whether the amount is determined by time, task, piece or commission basis," it is

[37] Which it is not, rather the test is simply whether the amount is ascertainable and due and owing. See, e.g. *Moore v. Omnicare, Inc.,* 141 Idaho 809, 819, 118 P.3d 141, 151 (2005); *Polk v. Larrabee*, 135 Idaho 303, 309, 17 P.3d 247, 253 (2000); and *Neal v. Idaho Forest Indus., Inc.*, 107 Idaho 681, 683, 691 P.2d 1296, 1298 (Ct.App. 1984).
[38] Respondent's Brief at 17, citing *Bakker* at 141 Idaho at 190.

possible there could be a dispute as to whether a commission that was paid to an employee conditioned on business activities or otherwise that had nothing to do with the employee's labor or services could be construed as wages for labor or services rendered by that employee. That is not the case here. There is no test in Idaho that commissions have to be "earned" prior to being deemed wages. In *Bakker*, the District Court's conclusion that the contract was ambiguous and required that the employee be employed at the close of escrow in order to be paid the commission on the sale carried the day. But that was only a conclusion that the contract did not make the commission "earned/due" until that condition precedent, i.e., employment on the date of close of escrow, had been satisfied. In contrast to the CCP in the present case, which provides that "100% of the respective commission will be paid [upon booking]."

Scandit attempts to argue that the CCP must be read as a whole and that Savage is taking the quote out of context. But Savage is not focused just on those three words, but on several paragraphs in the CCP that describe what must occur for booking and describe the commission as being due. It is Scandit who tries to put a twist on "prepaid" as meaning in advance, when what it really means is that a commission has been already paid and there are conditions of defeasance, i.e., recoupment or claw-back conditions, that may require a deduction from that commission. It stretches the contract as a whole beyond all recognition to say that it unambiguously provides for simply an advance of the commission amount upon booking.[39] The CCP says the "commission" in its entirety, i.e., 100%, is due at that point. Accordingly, the

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[39] Opening Brief at pp. 24-25.

District Court acted improperly to grant the Motion to Dismiss and its decision and its decision should be reversed.

B. A LEGALLY COGNIZABLE CLAIM WAS MADE THAT AN ACHIEVEMENT BONUS WAS DUE IN THE MONTH THAT IT WAS EARNED.

The CCP at Section IV.E. provides for an "Annual Quota Achievement Bonus" stating:

> Employee will **earn** a bonus of USD 36,000 if the combined ACV [annual contract value] of renewals and Orders equals CHF 641,001 or more.

(Emphasis added.) Clearly this bonus provision lacks the wordiness of the commission provision. It does strike Savage as ironic that Scandit argues *ad nauseum* that the employer, by contract, gets to define when a commission is "earned" before it gains the dignity of being a wage. However, now that Scandit has said, unequivocally, employee will **earn a bonus** of USD 36,000 upon a milestone in renewals and orders equaling CHF [francs] 641,001, the district court found that even if that figure is achieved in the middle of the year, the employee must nevertheless wait until the end of the calendar year until that amount is "earned." The one case that Scandit cites for its proposition that any invocation of the word "annual" automatically means payment at year end is the Massachusetts Superior Court case of *Boesel v. Swaptree, Inc.*, 31 Mass.L.Rptr. 55, 2013 WL 7083258 (S.Ct. of Mass., Suffolk County, 2013). However, that case is entirely distinguishable in that the language at issue made no reference whatsoever to any milestone that had to be achieved in order to "earn" the annual bonus. Rather, unlike the CCP in the present case, the language in that case simply stated "[d]uring the Term, Executive shall be [sic] receive an 'annual bonus' of $25,000 per year." In other words, existing in your employment for a year was the only possible condition precedent to earning the annual bonus

because that contract stated no other possible condition precedent. Incidentally too, that contract also provided for a time that that bonus shall be paid, i.e., saying that the annual bonus, along with another bonus "shall each be payable at the same time as such bonuses for [another executive officer] was payable." *Id.* at 2013 WL 7083258, at *2. Further, instrumental to the court's holding in *Boesel* was the fact that that date "was after the calendar year ended, February 15, 2011", the date for payment. *Id.* Of special note to the language here in the CCP, the *Boesel* court said:

> Reading the contract as a whole, it is clear the parties knew how to express an intention for the Annual Bonus to be earned ratably throughout the year. Where such an intention was not expressed, the only reasonable inference is that the parties did not have the annual bonus earned other than by completion of employment for the year.

Boesel, 2013 WL 7083258, at *5. Applying this reasoning to the CCP, there is a "ratable" milestone that determines when the bonus is earned, i.e., achieving the quota amount of CHF 641,001, which could have even occurred in January. In this case, that milestone occurred in September. Just as noted in *Paolini v. Albertson's Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006), this "annual bonus based upon net profits [became] . . . due during a specific calendar month and [was] covered by the statute." *Id*. The definitions of annual offered by Scandit do nothing but allude to the fact that annual covers a period of one year, which could be a calendar year or 12 months. They do not speak to the situation where the definition of the bonus, as it does here, includes a milestone that triggers the earning of the bonus. The absurd results that Scandit alleges as being threatened by such an arrangement can be easily dealt with by

employers who retain full control to revise and draft their annual compensation employment agreements. For example, in this case, all Scandit had to do in the 2016 Compensation Agreement would be to modify the word "earned" by saying that the bonus in question was not earned or due until the end of the calendar year and would not be payable until that point.[40] The failure to do so created the situation where Savage asks, in a reasonable manner, that she be given what was promised under the contract, i.e., that her achievement bonus be paid because she reached the requisite milestone of sales.

With respect to the District Court's reversal analysis, Scandit does not allege that it argued it before the Court below, but confirms by its silence on the point that the District Court brought it up *sua sponte*, after oral argument which is improper.[41] Scandit attempts nevertheless to argue that the District Court was right in its analysis in this respect, saying that Scandit did reserve the right to reverse all quota credit and pre-paid commission corresponding to a portion of the order which remains uncollected for over 60 days from the due date. However, Section V. of the CCP, which Scandit cites for this proposition, does not say that. Rather, the language cited by Scandit is under a heading which refers only to reversing "commissions", not to reversing bonuses. In other words, that language has a heading and introduction that says:

> As discussed in Section IV, in the event Scandit does not recognize the revenue on an Order under generally accepted accounting principles (as applied by Scandit) or does not receive payment from the customer per the terms of the Order, any **prepaid**

[40] And also not tie the word "earned" to a strict definition rooted in clawback and recoupment, i.e., language of forfeiture and condition subsequent.
[41] Respondent's Brief at 22.

> **commissions will be reversed** as described below: [list follows, including the quota language described by Scandit].[42]

Scandit has pointed out many times the contract must be read as a whole and language in isolation must not be raised up to the detriment of other language. Here, the introduction makes it clear that the reference to adjustment of the quota is solely for the purpose of reducing a commission. There is no reference to reducing the quota. ACV as used in the relevant provision is only defined at one location in the CCP. Further, the term "ACV" is never directly tied into any language that would later reduce that ACV for purposes of the Achievement Bonus. Rather, ACV is part of the calculation by which a quota is determined or leveled out for multi-year deals elsewhere in the contract. But the correlation between the ACV reference in the Achievement Bonus and any later recoupment or claw back of a bonus (as opposed to a commission) is never made clear. Consequently, "annual contract value" can mean simply a total of the amount of contracted sales booked as the same are booked. In this case, that milestone was achieved in September of 2016. In other words, under the language of the CCP, the annual quota achievement bonus seems to be hanging out there by itself independently and not tied to any other calculation of quota, commission or otherwise under the contract. Thus, the District Judge was in error to dismiss this Complaint.

C. THE DISTRICT COURT IMPROPERLY DENIED SAVAGE'S MOTION FOR LEAVE TO AMEND

Scandit claims that "Savage points to no act by Scandit demonstrating an unequivocal intent to waive the CCP's requirement that Scandit receive payment from Amazon before any

[42] R. at 20.

commission is 'earned.'"[43] This misses the mark for two reasons. First, as discussed above, it is sufficient to allege that Scandit indicated that the commission had been booked. But even if it had to be alleged that the Amazon commission had actually been paid by the customer, the proposed Amended Complaint included an averment that "(i) conversations between Savage and the Scandit Vice President of Sales during the months of September and October 2016 wherein he stated words to the effect that Savage had fulfilled all obligations to earn the Amazon Commission and that the Amazon Commission was due and would be paid, and/or by (ii) statements by Scandit's chief executive officer Samuel Mueller to Savage including, without limitation, statements in [the email attached to the Complaint]."[44] The averment, especially with respect to the Vice President of Sales' comments, taken as true as it must at this stage in the proceedings, more than sufficiently make out grounds to render the amendment valid rather than futile, thus it was error not to allow it. The statements by the Vice President of Sales would constitute a false representation or a concealment of material fact if indeed full payment was the requirement. Further, it would create an inconsistent position as well.

Accordingly, it was error not to grant leave to file the proposed Amended Complaint.

[43] Respondent's Brief at 24.
[44] R. at 98-99.

D. SCANDIT'S DISCUSSION OF WHETHER THE AMAZON AGREEMENT WAS ALLEGEDLY ACTUALLY BOOKED UNDER THE GUISE OF TALKING ABOUT ITS PAYMENT OF THE ENTIRE AMOUNT OF THE COMMISSION SHORTLY AFTER THE COMPLAINT WAS FILED IS AN ATTEMPT TO IMPROPERLY ARGUE EVIDENCE NOT ADDUCED ON THE MOTION TO DISMISS.

It goes without saying that a motion to dismiss decision involves crediting the well plead allegations in the Complaint at face value. At this early stage of the lawsuit under a motion to dismiss standard, it is taken as undisputed that the commission was booked by Scandit in exactly the manner that Savage alleges in her existing Complaint or that any conditions precedent to the commission being due were waived. Scandit stated to the judge that the commission had been paid during oral argument on this matter.[45] At the conclusion of this section in its appellate brief, Scandit decries that there will be dire consequences if this Court rules in favor of Savage's position. As with the prior times that Scandit has raised this false cry of alarm, the answer is that Scandit can simply amend and change the language of its contracts on a go forward basis to clearly provide that the commission is not yet due, that monies are simply an advance in the nature of a loan against future commissions due. The failure to do so previously resulted in a reasonable expectation in the mind of Savage that 100% of her commission would be indeed be "due" on booking, and one that justice requires that this Court demand that Scandit fulfill.

E. THE RECENT *NETTLETON* DECISION SHOULD BE APPLIED TO REVERSE THE DISTRICT JUDGE'S DECISION TO DISMISS THE COMPLAINT.

Additionally, since the original appellate brief was filed in this case, the case of *Nettleton v. Canyon Outdoor Media, LLC,* No. 44416, 2017 WL 6521897, at *4 (Idaho Dec. 21, 2017)(not

[45] T. at 16:9-17:-3.

released for publication in the permanent law reports) was decided. There, this Court recently considered summary judgment in favor of the employee seeking commission wages and reversed and remanded because there was a genuine issue of material fact regarding a course of performance or dealing that may have modified the written agreement:

> As a preliminary matter, our statutes indicate that, if anything, the Snake River Dental contract should be characterized as a "course of performance" because the conduct in dispute occurred after or under the agreement. See*, e.g.*, I.C. § 28-1-303(a), (b) (Uniform Commercial Code provisions distinguishing course of performance and course of dealing). Regardless of the characterization, however, a course of performance or dealing is generally established through a pattern of conduct between the parties such as repeated occasions of performance or previous transactions. *Id.*; *see also Pocatello Hosp., LLC v. Quail Ridge Med. Investor, LLC*, 156 Idaho 709, 721, 330 P.3d 1067, 1079 (2014). Thus, it does not follow that the Snake River Dental contract alone can be used as dispositive proof of Nettleton's entitlement to the commission wages.

Nettleton v. Canyon Outdoor Media, LLC, No. 44416, 2017 WL 6521897, at *4 (Idaho Dec. 21, 2017)(Not released for publication in the Permanent Law Reports)

The original Complaint included similar language to those facts cited as creating a material issue of fact in *Nettleton* that the commission was not paid on the date that it was due because of the "pattern and practice and course of performance between Scandit and Savage."[46] It was error for the district judge not to credit this language and instead rely entirely upon the language of the CCP and to dismiss the Complaint.

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[46] R. at 98-99 (at para. 30.b).

Savage submits that this issue was subsumed within the issues stated on appeal, including the general issue of "whether the District Court erred in determining under a motion to dismiss standard that the amount Savage claimed due and owing as a Commission was not wages . . . ."[47] The issue of conversations with Scandit's employee was also raised in the section of the brief on the motion to amend.[48] Further, "course of performance" can be used to show a modification as a waiver of a contractual condition, and waiver was argued here. *Rangen, Inc. v. Idaho Trout Farms, Inc.,* 104 Idaho 284, 658 P.2d 955 (1983) (quoting I.C. § 28-2-208).

But even if this issue is not before the Court on appeal, prior to the announcement of *Nettleton*, the *Nettleton* decision does announce a new rule in that it is the first Idaho case to apply a course of performance pattern of conduct analysis to vary a written compensation agreement regarding payment of wages, including a commission. And that decision found that the course of performance created a material issue of fact precluding summary judgment despite the express language of the compensation agreement. Obviously, the District Judge did not have the advantage of this guidance to apply to the allegations of the Complaint, nor did Savage have the benefit of the case to list the issues on appeal. *Nettleton* should be applied to this case as this case was pending on appeal when that rule was announced. *Gay v. Cty. Comm'rs of Bonneville Cty.*, 103 Idaho 626, 630, 651 P.2d 560, 564 (Ct. App. 1982) (using modified prospectivity, the "pipeline approach," to effect of change in rule of law and applying new rule to similar cases in the appellate system "pipeline" when the new rule of law was announced).

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[47] See, e.g., R. at 164 and Opening Brief at pp. 7-10.

[48] Opening Brief at p. 35.

F. ATTORNEYS' FEES ON APPEAL

If Savage prevails on this appeal, based on Idaho Code Section 45-615(2), "[a]ny judgment rendered by a court of competent jurisdiction for the plaintiff in a suit filed pursuant to this section may include all costs and attorney's fees reasonably incurred in connection with the proceedings." Contrary to Scandit's argument, there is not a requirement that be the "final" judgment in this case. The statute simply says in any "judgment . . . for the plaintiff." The Idaho Appellate Rules provide for the district court to enter a judgment for such costs and fees on appeal as instructed by the remittitur:

> **(f) Clerk to Insert Costs in Remittitur.** The Clerk of the Supreme Court shall prepare an itemized statement of costs taxed in the Supreme Court and insert the same in the remittitur. If the remittitur has been issued *before* the final determination of costs, or any amendment thereto, an itemized statement of costs allowed shall be forwarded by the Clerk of the Supreme Court to the district court or administrative agency as soon as it is available and shall then be added to the judgment or order. The payment of costs on appeal shall be enforced in the district court or administrative agency.

I.A.R. 40(f) (see also I.A.R. 41(d)). If the Court disagrees with this analysis, the Court should at the very least indicate that if Savage ultimately receives final judgment in her favor on this case, she would be entitled to an award of attorneys' fees, including the attorneys' fees incurred on this appeal.

On the other hand, if this Court finds persuasive the position advanced by Scandit, attorneys' fees on the basis of Idaho Code § 12-121 are not appropriate. Scandit's primary argument for this is that "the law in Idaho is well settled that an employee has no claim for 'wages' unless and until the alleged wages are 'earned' under the terms of the employment

agreement." Scandit's interpretation ignores the plain language of the statute in terms of "due," and the definition of "wages" as including a commission. Also, no prior Idaho case has applied the condition precedent forfeiture analysis to commission claims as wage claims. These are but a few of the novel issues that were raised in this case in good faith. If this Court makes such a pronouncement in this case in the context of commissions, it will be the first time that these points are clarified under Idaho law. Savage respectfully submits that she has made substantial and compelling arguments to the contrary and an award of attorneys' fees under the standard of frivolousness as set forth in Idaho Code § 12-121 would be wholly inappropriate, and what's more would serve to chill the progression of the Wage Claim Act law and the Court interpretation of the same. It would have the effect of discouraging employees, who usually lack the resources of the employers and their ever-changing contractual language, to challenge whatever the employers may wish to impose.

A final argument against the imposition of fees under Section 12-121 is that under the new language enacted last year, the judge must find that "the case" was "brought, pursued or defended frivolously, unreasonably or without foundation." This appears to mean the entire case, not just one aspect of the case. *Accord Lincoln Land Co., LLC v. LP Broadband, Inc.*, No. 44612, 2017 WL 6568768, at *8 (Idaho Dec. 26, 2017) ("[a]ttorney fees are not appropriate under I.C. Section 12-121 and I.R.C.P. 54 unless all claims brought . . . are frivolous and without foundation.") (opinion not released for publication) (citation omitted). Scandit has offered no argument that the claim with respect to the Achievement Bonus was frivolous and thus has not argued "the case" in its entirety is frivolous.

IV. CONCLUSION

For each of the foregoing reasons and the reasons set forth in Savage's Opening Brief, the District Court's orders granting Scandit's Motion to Dismiss and denying Plaintiffs' Motion to Amend Complaint should be reversed and remanded for further proceedings and the Court should award Plaintiff her reasonable attorneys' fees and costs incurred in bringing this appeal.

DATED this 12th day of January, 2018.

THOMAS E. DVORAK
Givens Pursley LLP

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2018, I caused to be served a true and correct copy of the foregoing document to the persons listed below by the method indicated:

John Ashby HAWLEY TROXELL ENNIS & HAWLEY LLP 877 W. Main Street P.O. Box 1617 Boise, ID 83701-1617 jashby@hawleytroxell.com	___ Hand Delivery ___ Facsimile ___ Overnight Courier X U.S. Mail ___ Electronic Mail

Thomas E. Dvorak