

7-13-2017

Savage v. Scandit, Inc. Clerk's Record Dckt. 45143

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IN THE DISTRICT COURT OF THE 4TH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR VALLEY COUNTY (IN THE (PUBLIC UTILITIES COMMISSION)
(INDUSTRIAL COMMISSION) OF THE STATE OF IDAHO)

KAREN L. SAVAGE,)
) SUPREME COURT NO. **45143**
Plaintiff/ Respondent,)
) Dist. Court No. CV-2016-290-C
-vs-)
)
SCANDIT INC,)
)
Defendant/Appellant.)
)

CLERK’S RECORD ON APPEAL

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

Thomas Dvorak
PO Box 2720
Boise, ID 83701
ATTORNEY FOR APPELLATE

John D Ashby
PO Box 1617
Boise, ID 83701
ATTORNEY FOR RESPONDENT

Karen L. Savage vs. Scandit Inc

Date	Event	User	Description	Judge
11/1/2016	NCOC	CWHITE	New Case Filed - Other Claims	Jason Scott
	APER	CWHITE	Plaintiff: Savage, Karen L Appearance Thomas E. Dvorak	Jason Scott
		CWHITE	Filing: AA- All initial civil case filings in District Court of any type not listed in categories E, F and H(1) Paid by: Dvorak, Thomas E. (attorney for Savage, Karen L) Receipt number: 0005253 Dated: 11/1/2016 Amount: \$221.00 (Credit card) For: Savage, Karen L (plaintiff)	Jason Scott
		CWHITE	Filing: Technology Cost - CC Paid by: Dvorak, Thomas E. (attorney for Savage, Karen L) Receipt number: 0005253 Dated: 11/1/2016 Amount: \$3.00 (Credit card) For: Savage, Karen L (plaintiff)	Jason Scott
	COMP	CWHITE	Verified Complaint For Collection Of A Wage Claim Under Idaho Code 45-601, Et Seq Demand For jury Trial Filed	Jason Scott
	SMIS	CWHITE	Summons Issued	Jason Scott
	DOSI	CWHITE	Summons: Document Service Issued: on 11/1/2016 to Scandit Inc; Assigned to Private Server. Service Fee of \$0.00.	Jason Scott
11/23/2016	NOAP	CWHITE	Notice Of Appearance	Jason Scott
	APER	CWHITE	Defendant: Scandit Inc Appearance D John Ashby	Jason Scott
11/30/2016		CWHITE	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Ashby, D John (attorney for Scandit Inc) Receipt number: 0005595 Dated: 11/30/2016 Amount: \$136.00 (Check) For: Scandit Inc (defendant)	Jason Scott
12/13/2016	ANSW	CWHITE	Answer To Complaint And Demand For Jury Trial	Jason Scott
	MOTN	CWHITE	Motion To Dismiss Wage Claim	Jason Scott
	MEMO	CWHITE	Memorandum In Support Of Motion To Dismiss Wage Claim	Jason Scott
	MISC	CWHITE	Declaration Of Samuel Mueller	Jason Scott
12/19/2016	HRSC	CWHITE	Hearing Scheduled (Tentatively Scheduled 02/06/2017 02:00 PM)	Jason Scott
12/20/2016	NOTH	HON	Notice Of Hearing	Jason Scott
1/23/2017	MEMO	CWHITE	Memorandum In Support Of Motion For Leave To File First Amended Verified Complaint	Jason Scott
1/24/2017	MOTN	CWHITE	Motion For Leave To File First Amended Verified Complaint	Jason Scott
1/30/2017	MEMO	CWHITE	Memorandum In Opposition To Motion To Dismiss	Jason Scott

Karen L Savage vs. Scandit Inc

Date	Code	User		Judge
1/30/2017	MEMO	CWHITE	Memorandum In Opposition To Plaintiff's Motion For Leave To File First Amended Verified Complaint	Jason Scott
2/2/2017	MEMO	HON	Reply Memorandum In Support Of Motion To Dismiss Wage Claim	Jason Scott
2/7/2017	HRHD	GKNAPP	Hearing result for Motion to Dismiss scheduled on 02/06/2017 02:00 PM: Hearing Held	Jason Scott
2/16/2017	MEMO	CWHITE	Memorandum Decision And Order Granting Defendant's Motion To Dismiss And Denying Plaintiff's Motion To Amend	Jason Scott
3/15/2017	STIP	CWHITE	Stipulation Re Final Judgment	Jason Scott
3/28/2017	ORDR	CWHITE	Preliminary Order On Stipulation Re Final Judgment	Jason Scott
4/11/2017	STIP	HON	Supplemental Stipulation RE Final Judgment	Jason Scott
4/17/2017	JDMT	CWHITE	Judgment	Jason Scott
	STAT	CWHITE	STATUS CHANGED: Closed pending clerk action	Jason Scott
	CRIS	CWHITE	Civil Disposition entered for: Scandit Inc, Defendant; Savage, Karen L, Plaintiff. Filing date: 4/17/2017	Jason Scott
5/26/2017	NOTA	MELLIS	NOTICE OF APPEAL	Jason Scott
		MELLIS	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Givens Pursley LLP Receipt number: 0001987 Dated: 5/26/2017 Amount: \$129.00 (Transfer) For: Savage, Karen L (plaintiff)	Jason Scott
5/30/2017	CCOA	GKNAPP	Clerk's Certificate Of Appeal	Jason Scott

DOUGLAS A. MILLER, CLERK
By [Signature] Deputy

NOV 01 2016

Case No. _____ Inst. No. _____
Filed _____ A.M. 3:40 P.M.

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13412357_1 (12948-3)

Attorneys for Karen Savage

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT FOR THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

KAREN L. SAVAGE,

Plaintiff,

v.

SCANDIT INC.,

Defendant(s).

Case No. CN-2016-290-C

**VERIFIED COMPLAINT FOR
COLLECTION OF A WAGE CLAIM
UNDER IDAHO CODE § 45-601, ET
SEQ.**

DEMAND FOR JURY TRIAL

COMES NOW, Plaintiff, Karen L. Savage (hereinafter "Savage") by and through her attorneys of record, Givens Pursley LLP, and for cause of action against Defendant, pleads, alleges and complains as follows:

PARTIES, VENUE AND JURISDICTION

1. Savage is a resident of Idaho County, Idaho, and an employee of Defendant Scandit Inc.
2. Defendant Scandit Inc. (hereinafter "Scandit") is a Delaware corporation which sought and received a certificate of authority to transact business in the state of Idaho on September 17, 2014.

3. Venue is proper before this Court pursuant to Idaho Code § 5-404, as the Defendant Scandit does not reside in the state of Idaho pursuant to the meaning of Idaho Code § 5-404 in that it does not have a principal place of business within the state of Idaho.

4. This is an action for collection of a wage claim under Idaho Code §§ 45-601, *et seq.*

5. This Court has original jurisdiction as provided by Idaho Code § 1-705 and § 45-615.

COMMON ALLEGATIONS

6. Scandit is an enterprise mobility and data capture company that specializes in barcode scanning applications for business that include healthcare, logistics, manufacturing and retail industries. Scandit's services and products allow its customers to rapidly build, deploy and manage mobile apps for smartphones, tablets and wearable devices, all for a lower total cost of ownership than traditional, dedicated devices.

7. Approximately two years ago, Savage began working for Scandit as a Senior Sales Executive.

8. For the year 2016, and specifically for the time period of January 1, 2016 through December 31, 2016, Scandit provided the 2016 Commission Compensation Plan (the "CCP") in the form attached hereto as Exhibit "A" to Savage.

9. Savage executed and returned the CCP.

10. Under the CCP, Scandit had promised to Savage that:

IV. COMMISSIONS

...

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.

...

1. Scandit License Fee . . .

Scandit will pay commissions based on the amount of Scandit licenses sold (net amount to Scandit) to new and existing customers for each Order booked during the period of this Plan.

See CCP, at p. 3, Section IV.

13. The CCP went on to provide for an alleged claw-back provision to the effect that:

Commission 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.

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.

See CCP, at p. 3, Section IV.

14. The CCP also provides for an “Annual Quota Achievement Bonus” that says “Employee will earn a bonus of USD [\$]36,000.00 if the combined ACV of renewals and Orders equals CHF 641,001” (the “Achievement Bonus”). See CCP, at p. 5, Section IV.E.

15. Savage took action in reasonable reliance upon the CCP.

16. Specifically, through Savage’s efforts, a Master Software License Agreement was signed effective as of September 27, 2016 between Amazon Services LLC, a Nevada limited liability company, and Scandit Inc. (the “Amazon Agreement”).

17. The Amazon Agreement was booked during late September 2016 by Scandit.

18. During late September 2016 or October 2016, 100% of the respective commission from the Amazon Agreement became due and owing to Savage under the CCP based on the booking of the Amazon Agreement by Scandit (the “Amazon Commission”).

19. Savage performed all conditions precedent to the Amazon Commission becoming due and owing to her under the CCP and applicable law.

20. For several weeks after the Amazon Commission was booked, Savage received no word as to when the Amazon Commission due and owing would be paid, or the amount of said commission.

21. On October 28, 2016, Scandit's CEO, Samuel Mueller, at 11:41:39 AM MDT, sent an email to Savage regarding the commission. A true and correct copy of the email is attached hereto as Exhibit "B".

22. In the email, Mueller acknowledged the total amount of the commission to be \$390,234.

23. However, Mueller without authorization proposed taking \$30,000 of the commission and distributing it to "involved members engineering/ops team, to be paid at end of the year as a special bonus and independent from" Savage's Amazon Commission payment.

24. As to the remaining \$360,234 of the Amazon Commission due, Mueller announced a plan to pay that amount to Savage over four years because of "the size and long duration of the [Amazon] deal, from and [*sic*, "an"] accounting and liquidity management perspective we have to expect considerable risk that Amazon might find a way to not pay one of the (annual) fees and back out of the contract at a later time, in which case we would have to reverse any previous commission payment and claw back previously paid commission."

25. On October 31, 2016, on the regular payday, only a \$5,000.00 "AMAZON (Symbolic 1st payment)" was made to Savage with respect to the Amazon Commission.

26. The remainder of the total Amazon Commission due of \$385,234 has not been paid and remains unpaid as of the date of filing of this Complaint (the "Commission Due").

27. Further, by means of the Amazon Commission, Savage earned her Achievement Bonus in September 2016, and said Achievement Bonus has not yet been paid either and remains unpaid and due and owing as of the date of the filing of this Complaint (the “Achievement Bonus Due”).

COUNT 1

Wage Claim Under Idaho Code § 45-615

28. The foregoing paragraphs are hereby incorporated by this reference and restated as if set forth in full.

29. The Commission Due and Achievement Bonus Due 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” (hereinafter collectively “Wages Due”).

30. The Wages Due were not paid on the date they were due in that either
- a. they were not paid within 15 days of September 30, 2016, which was the end of the pay period for which such wages were due, as required by Idaho Code § 45-608(2); or
 - b. they were 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.

31. Scandit’s failure to pay the Wages Due when the same were due constituted a violation of Idaho law and of the parties’ CCP.

32. As a direct and proximate cause of Scandit’s breach of law and of the CCP agreement, Savage has and will suffer damages resulting in a wage claim as described in Idaho Code § 45-601(6), with said damages more particularly described in the subsequent paragraph.

33. Pursuant to Count 1, Savage is entitled to judgment that:

- a. Scandit has breached the employment agreement and is liable for the Wages Due in the amount of \$385,234 plus \$36,000, totaling \$421,234, and that under Idaho Code § 45-615(2) as a penalty for not timely paying said wages when due, Savage is entitled to recover three (3) times the amount of Wages Due, in other words, the amount of the Wages Due tripled under Idaho Code § 45-615(2) and the amount awardable to Savage, is \$1,263,702;
- b. interest is due on the amount of the Wages Due at 12% per annum as allowed by Idaho Code § 28-22-104(1) for money after the same becomes due from and after October 15, 2016 at the per diem rate of \$138.488 per day for every day thereafter, for a total amount due in interest as of November 1, 2016 of \$2,215.80; and
- c. under Idaho Code § 45-615(2), Savage is also entitled to recover her costs and attorneys' fees as more particularly described in the attorneys' fees and costs section below.

COUNT 2

Declaratory Judgment

34. The foregoing paragraphs are hereby incorporated by this reference and restated as if set forth in full.

35. Idaho Code § 10-1202 provides that “[a]ny person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise,

may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.”

36. Idaho Code § 10-1201 provides for “Declaratory Judgments” and goes on to state that “[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.”

37. Idaho Code § 10-1205 provides that “[t]he enumeration in Sections 10-1202, 10-1203 and 10-1204, does not limit or restrict the exercise of the general powers conferred in Section 10-1201, in any proceedings where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.”

38. Idaho Code § 10-1208 provides that “[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper.”

39. Savage has the following disputes with Scandit:

- a. whether Idaho Code § 45-608(2) requires that any commission due or the Achievement Bonus be paid within 15 days of the pay period in which the commission or Achievement Bonus was compensation for services performed during that period;
- b. whether in light of Idaho Code § 45-601, et. seq., and other applicable law, the claw-back provisions of the CCP impermissibly attempt to allow the commission once due and paid as wages to be clawed back;
- c. whether in light of Idaho § 45-601, et. seq, and its premising a wage claim on compensation “due,” the attempt to define commissions as being “earned” in the CCP is impermissibly being based on a condition subsequent occurring after 100% of the commission is due to be paid, and

thus is an impermissible attempt to deny a wage due to the employee and is unenforceable;

- d. whether in light of Idaho Code § 45-601, *et. seq.*, and other applicable law, the claw-back provisions of the CCP and the provisions for pay back of a portion of commission previously paid and due upon termination are unconscionable or against public policy or otherwise unenforceable;
- e. whether on the basis of a fiduciary duty owed by virtue of entering into the CCP for a commission based payment, the attempt not to pay the commission immediately but to pay it over time is a breach of said fiduciary duty; and
- f. whether the CCP as it exists, or as modified by applicable law, has been breached by the failure to pay the Amazon Commission and Achievement Bonus when due.

40. Savage is entitled to a declaratory judgment decreeing and declaring that all of the forgoing propositions are answered in the affirmative and to such other monetary and injunctive and other further relief as may be appropriate and may flow from said declaration in the interest of justice.

COUNT 3

Contract Claim For Commission Due

41. The foregoing paragraphs are hereby incorporated by this reference and restated as if set forth in full.

42. Count 3 is plead in the alternative to Counts 1 and 2 and only in the event that the Court finds the relief sought in both such counts to not be appropriate.

43. The Commission Due is an amount due by the agreement of the parties and all conditions precedent to its payment to the Plaintiff Savage have been satisfied.

44. The failure of Scandit to pay the Commission Due to Savage amounts to a breach of the agreement of the parties.

45. Pursuant to Count 3, Savage is entitled to judgment that:

- a. Scandit has breached the employment agreement and is liable for the Commission Due and Achievement Bonus in the amount of \$421,234;
- b. interest is due on the amount of the Commission Due at 12% per annum as allowed by Idaho Code § 28-22-104(1) for money after the same becomes due from and after October 15, 2016 at the per diem rate of \$138.488 per day for every day thereafter, for a total amount due in interest as of November 1, 2016 of \$2,215.80; and
- c. that under Idaho Code § 12-120(3) and 12-121, Savage is also entitled to recover her costs and attorneys' fees as more particularly described in the attorneys' fees and costs section below.

ATTORNEYS' FEES AND COSTS

46. Savage has retained the services of Givens Pursley LLP, and is entitled to an award of attorneys' fees and costs under Idaho Code §§ 12-120(3), 12-121, 45-615(2) and Rule 54 of the Idaho Rules of Civil Procedure. In the event of a judgment by default, Savage claims attorneys' fees and costs in the amount of \$5,000, or in such other and further amount as may be proven at the appropriate time in the proceedings.

DEMAND FOR JURY TRIAL

47. Savage demands a trial by jury of no less than twelve (12) persons on all triable issues pursuant to Idaho Rule of Civil Procedure 38(b).

PRAYER FOR RELIEF

WHEREFORE, Savage prays this Court enter the following relief:

1. For judgment in favor of Plaintiff and against Defendant on all counts of the foregoing Complaint;
2. For judgment for the specific relief sought in each such count;
3. For costs and attorneys' in the amount of \$5,000 in the event of a judgment by default or in such other and further amounts as may be proven at the appropriate time in the proceedings for and on the basis as set forth in the body of this Complaint and incorporated herein by reference; and
4. For such other and further relief as the Court may deem appropriate in the premises.

DATED this 15 day of November, 2016.

GIVENS PURSLEY LLP



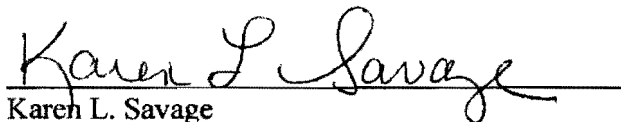
Thomas E. Dvorak
Attorneys for Karen L. Savage

VERIFICATION

STATE OF IDAHO)
) ss.
County of Idaho)

Karen L. Savage, in accordance with Idaho Rules of Civil Procedure 11(c), (d) and Idaho Code Section 9-1406, and to the same effect as having been first duly sworn, state and declare as follows: I am the Plaintiff herein, I have read the foregoing Verified Complaint for Collection of a Wage Claim Under Idaho Code § 45-601, *et seq*, know the contents thereof, and believe the contents thereof to be true and correct to the best of my knowledge and belief. I certify and declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 1 day of November, 2016.



Karen L. Savage

Exhibit A

Exhibit A

2016 COMMISSION COMPENSATION PLAN
(January 1, 2016 through December 31, 2016)**Senior Sales Executive****KAREN SAVAGE ("EMPLOYEE")****PLAN OBJECTIVES**

This Plan is intended to reward the following achievements:

- Generating significant license revenues for Scandit from new and existing customers
- Closing sales transactions that can be recorded as revenue consistent with Scandit's Revenue Recognition Policy, and timely collection of receivables.

I. ANNUAL TARGET EARNINGS (Plan Currency: USD)

- A. **Base Salary:** USD 101,000 p.a.
- B. **Target Commission, New Business:** USD 94,000, being the combined amount for Q1, Q2, Q3 and Q4 2016, as described in this plan
- C. **Target Commissions, Renewals of customer contracts:** USD 6,000 as listed in Appendix A)
- E. **Quarterly Monthly Recurring Revenue (MRR) achievement Bonus:** USD 4,000 (as listed in Appendix A)
- F. **Annual ACV & Renewals Achievement Bonus:** USD 36,000
- G. **On Target Earnings:** USD 241,000 p.a.

II. QUOTA**New Business Quota**

For the period of this plan, Employee's New Business Quota shall be **CHF 713,700 ("Individual Quota")**. The Quota represents the total guaranteed monetary value of new legally binding contracts and purchase orders, together, ("Orders") secured with new and existing customers in Employee's territory, where the Employee had significant involvement and the Order was executed between Scandit and the customer during the relevant period. Achievement of the New Business Quota is determined by the total guaranteed and calculated monetary value ("TCV") of the Orders secured during the relevant period and comparing this to the Quota. For multi-year Orders, quota credit and commissions are determined following the instructions outlined in Section III. For the avoidance of doubt, renewals of contracts with existing customers are not included in the New Business Quota and do not attract Quota credit.

Renewal Quota

For the period of this plan, Employee's Renewal Quota is **CHF 165,201 ("Individual Renewal Quota")**.

III. CALCULATION OF QUOTA CREDIT

On the one hand, steady MRR growth and increasing Annual Contract Value ("ACV") are key towards exceeding the company's key financial objective of CHF 4M in Annual Recurring Revenue ("ARR") for the year 2016. On the other hand, multi-year deals positively contribute to the future growth of our business. To combine these two aspects, the following calculation method for multi-year deals will be applied to determine quota credit and commissions under the 2016 Commission Compensation Plan:

Multi-Year Subscription Agreements

Quota credit and commission payments for all subscription deals with a contract duration of more than one year ("TCV") is calculated based on the ACV multiplier ("Multiplier") below as follows: $TCV' := TCV / Duration_{[in\ years]} * Multiplier$

# years	ACV Multiplier
1	1.00
2	2.00
3	2.80
4	3.30

For example, a three-year deal for a TCV of CHF 60,000 will yield quota credit and commission payments for CHF 56,000 ($TCV' := CHF\ 60,000 / 3 \times 2.80$).

Deals with a duration of more than 4 years will be treated like 4-year deals.

To determine quota credit of a deal that includes a ramp up of annual fees during the term of the contract, the multiplier must be applied based on the length of the contract. For example, a three-year deal for a TCV of CHF 64,000 (1st year fees CHF 12,500, 2nd year fees CHF 23,500 and 3rd year fees CHF 28,000) will yield quota credit and commission payments for CHF 58,400 ($TCV' := CHF\ 12,500 \times 1 + CHF\ 23,500 \times 1 + CHF\ 28,000 \times 0.8$).

Perpetual Deals

Perpetual deals are financially equivalent to and treated as 4-year subscriptions. Hence, to determine quota credit and commissions of a perpetual deal, first the ACV of the deal is calculated by dividing its TCV by a factor of four. In a next step, the TCV' of the perpetual deal is calculated by multiplying the ACV using an ACV multiplier of 2.80 (per the table above). For example, a perpetual deal with a TCV of CHF 100,000 will yield quota credit and commissions of CHF 82,500 ($TCV' := CHF\ 100,000 / 4 \times 3.30$).

If annual Maintenance and Support ("M&S") fees are included, the calculation of the total TCV' value must be done separately for the perpetual deal and for M&S fees. For the perpetual deal the applicable ACV multiplier remains at 3.30 (as mentioned above). For the M&S quota credit, the ACV is calculated by dividing its TCV by the number of years for which the maintenance fees have been committed and multiplying it using the ACV multiplier corresponding to the length of the contract. For instance, a perpetual deal for an upfront value of CHF 60,000 with an annual maintenance fee of CHF 5,000 committed for 5 years will lead to a quota credit of CHF 66,000 (total $TCV' := [(60,000 / 4 \times 3.30) + (25,000 / 5 \times 3.30)]$).

IV. COMMISSIONS

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.

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 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:

- i. Contract, schedules and other associated documentation need to be valid and fully executed by authorized signatories of Scandit and the customer.
- ii. Contract needs to be scanned and filed as defined by Scandit finance.
- iii. All information about the transaction needs to be up to date in particular the Account, Contact and Opportunity fields in Salesforce.com as well as information related to products, lead source, amount, contact type and duration, closing date, stage, reporting category, plus any additional information such as customer contact details, industry and use case.
- iv. All billing information has been agreed with the customer, including obtaining any PO number or other administrative tasks required in order to effect payment.
- v. In the reasonable opinion of Scandit, revenue will be recognized from the Order and it is more likely than not that payment will be received from the customer as per the agreed Order.
- vi. Employee needs to complete and sign a commission claim form and have it countersigned by Scandit's CEO.

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.

A. Items Eligible for Commissions

1. Scandit License Fee (part of TCV)

Scandit will pay commissions based on the amount of Scandit licenses sold (net amount to Scandit) to new and existing customers for each Order booked during the period of this Plan. Scandit License Fee applies to all standard Scandit branded products, which are available to all customers and listed on current and official price list for the applicable territory. Scandit has the right to deduct partner margin/referral and extraordinary cost of sales (e.g. lawyers, unpaid proof-of-concept, free training or services) from the license amount before calculating commissions.

2. Contractually committed Maintenance and Support Fees (part of TCV)

Scandit will pay commissions based on the contractually guaranteed M&S fee for Scandit products sold (net amount to Scandit) for each Scandit license deal booked during the period of this Plan.

3. Other Licensing and Price models (approval needed)

Orders priced below list price or Orders based on any pricing model or structure other than those defined in the current official price list, require prior approval from Scandit's CEO in order to be included in TCV'.

4. Growth in Fees paid by Existing Customers

Scandit will pay commissions on the growth in fees paid by existing customers above and beyond what was paid by the customer in the preceding 12 (twelve) month period.

5. Platform and Solutions deals (e.g. App Solutions and Flow platform)

Orders closed for these two new product lines (net fees only, minus fees for partners, etc.) will attract Quota credit at 1.25x the calculated TCV' for Orders lower than 30,000 CHF and Quota credit at 1.50x the calculated TCV' for Orders equal or higher than 30,000 CHF.

Contractually committed Professional Service fees (PS) are not included in the Quota and do not attract Quota credit.

B. Commission Rates on TCV' for New Business (Individual and Team Quota)

Individual commission rates on TCV' for Scandit License Fees and Maintenance & Support Fees (excluding renewals) are as follows:

Quota Achievement		Commission in %	
from	to	Effective rate multiplier	Commission rate
0%	50%	50%	6.6%
51%	75%	113%	14.8%
76%	100%	200%	26.3%
101%	200%	205%	27.0%
201%	up	220%	28.9%

The date the Order becomes binding will determine the period in which the TCV' will be allocated for Quota credit purposes. Where the revenue associated with a single Order would move employee from one percentage band into the next higher band, commissions on the portion of the Order revenue falling into each band will be paid at the corresponding percentage for that band.

C. Commission on Renewals

The renewal of customer contracts listed in Appendix A will attract commission at a flat rate of 3.6% provided the renewal value of the individual customer contracts renewed is at least equivalent to the values listed in Appendix A, totaling CHF 165,201 for the period Q1 - Q4 2016. If the customer renews for a lower amount, no commission will be due.

D. Quarterly Monthly Recurring Revenue (MRR) Achievement Bonus

Employee will earn a quarterly bonus if the company achieves its quarterly MRR goals as listed in Appendix A. The annual bonus amount is predefined and split into 4 equal quarterly amounts. Determination and calculation of the achievement are listed in Appendix A.

E. Annual Quota Achievement Bonus

Employee will earn a bonus of USD 36,000 if the combined ACV of renewals and Orders equals CHF 641,001 or more.

F. Case

Case deals are eligible for a separate commission on top of the annual OTE (On-Target Earnings) and don't attract Quota credit. The commission is equivalent to a fixed rate of 5% of the net recognized revenues. The net recognized revenue is calculated by subtracting estimated or actual cost of goods sold, discounts, replacements and referral fees from gross revenue.

G. Churn

Employee is also responsible for retention of existing customers in his territory as defined by Scandit and listed in Appendix A.

Any ACV lost due to the non-renewal of an existing customer, may be compensated by new ACV at a ratio of 1:1.

V. COMMISSION PAYMENT REVERSALS

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 commissions will be reversed as described below:

- Employee is accountable for any cancellation or termination of an Order, whether by the customer or Scandit, or other reduction in expected revenue, to the extent Employee has been prepaid Commissions on such revenue.
- If a receivable remains uncollected for over 60 days from the due date, Scandit reserves the right to reverse all Quota credit and prepaid commission corresponding to the portion of the Order for which payment has not been received.
- Scandit reserves the right to calculate the amount of any reversal of pre-paid commission using the rates that applied at the time the commission was paid.
- All commissions described in this Plan are subject to the claw-back policies described in this section and will be recalculated and recovered accordingly.
- Employee must refund to Scandit any reversal amount within 30 days of written notice from Scandit.

Scandit reserves the right to pursue all means necessary to collect prepaid commissions that for any of the reasons listed above must be reversed and repaid to Scandit. In addition, Scandit reserves the right at any time to reverse any commission payments that were overpaid or otherwise paid in error to Employee.

VI. SALES CONCESSIONS / DISCOUNTS

The value of all price reductions, reduced service fees or other forms of concession given to a customer shall be deducted from the applicable revenue prior to the computation of any commission.

Scandit will not give Quota credit or pay commission on Orders that contain any discount or other non-standard terms offered to a customer without prior written approval of Scandit's CEO or inconsistent with Scandit's current sales approval matrix and other such policies in effect when the Order was executed.

VII. SALES SPLITS / HOLDOUTS

Revenues generated from a single Order may be allocated among several sales team members whose efforts each contributed in a significant way to the closing of the sale, or where there is an overlap of territories, industry groups or assigned accounts. The sum of all allocated revenues flowing from a single Order cannot exceed the original revenue amount from that Order (no double booking). Splits are first being negotiated between the Account Executives (AEs) involved. If they do not find a solution the respective VPs or Directors will try to find one. If this fails the CEO will make a decision. In case of an agreed split each involved AE will get Quota relief and commission paid based on the part of the order allocated to him/her.

VIII. CHANGES TO PLAN

This Plan supersedes all previous commission plans between Scandit and Employee. This Plan, and any assigned quotas, territories, accounts or commission rates are subject to change at any time in Scandit's sole discretion without prior written notice.

IX. PERFORMANCE REVIEW

Your performance will be reviewed regularly. If you are not achieving full Quota, or if your performance is otherwise deemed less than fully satisfactory, Scandit retains the right to take remedial or other appropriate action, up to and including termination of your contract.

X. LEAVES OF ABSENCE

No adjustments will be made to Quota or commission rates in the event you go on a leave of absence.

XI. TERMINATION OF EMPLOYMENT CONTRACT

In the event your contract with Scandit is terminated, Scandit will pay you commissions for Orders booked by Scandit prior to the last day of your contractual relationship with Scandit, per the normal commission payment cycle. Scandit will not pay commissions after your termination date on any Orders for which revenue has not been recognized on the date of your termination or on any payments made by customers after the termination date.

As discussed in Section IV, Scandit's policy is to prepay commissions prior to the associated revenue being recognized. At the time of termination, any previously paid commissions for which revenue has not been recognized, and any commissions previously paid on Orders that Scandit deems in its sole discretion to be at risk, will be reversed and must be promptly refunded to Scandit, along with any recoverable draw balance.

XII. NO GUARANTEE OF EMPLOYMENT

Nothing in this Plan shall be construed to create or imply the creation of any employment contract between you and Scandit, nor shall it be construed in any way as a promise or guarantee of continued employment for any specific period of time. Your employment with Scandit is governed by the terms and conditions of your employment agreement between

you and Scandit AG and may be terminated by you or Scandit at any time for any reason as defined in the employment agreement between you and Scandit.

XIII. APPROVAL / ACCEPTANCE

Your signature below certifies that you have read and understand this Plan and that you accept all provisions herein. Scandit must receive a signed copy of this Plan and your monthly commissions claim form in order for commissions to be paid.

XIV. TERRITORY AND ELIGIBLE ACCOUNTS

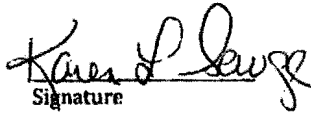
Scandit's CEO will define your Territory. Territories for Scandit may operate across several different dimensions, including geography, size of account, whether an account is a new or existing account, industry vertical and other factors or can be focused on one dimension. Your territory may change one or more times during the period covered by this Plan. Changes will be communicated to you in writing.

Your Territory as of 1.1.2016 is the following:

WA, MT, ID, WY, CO, OK, KS, NE, SD, ND, MN, IA, MO, IL, WI, MI, IN

For territories outside of USA and Canada, please refer to the document "Territory Assignments" on C:\Drive\Marketing and Sales\Sales\Sales Admin and Playbook\Territory Assignments.

I have read and understand this Plan, and I accept all of its provisions and agree to fully abide by all of their terms:


Signature

Karen Savage
Print Name

5/6/16
Date

APPENDIX A: 2016 Commission Compensation Plan Data

Karen Savage 2016 Variable Incentive Plan
Draft 2016-04-01

Summary Package	CHF	USD
Salary	100'740	101'000
On Target Commission, new business	50'765	51'000
On Target Commission, renewals	5'885	6'000
On Target Quarterly MRR Achievement Bonus	3'990	4'000
Annual Quota Achievement Bonus	39'910	40'000
Target OTE	200'300	201'000
Individual ACV Quota, new business	470'000	470'000
Individual TCY Quota, new business	713'700	713'680
Individual Renewal Quota	165'200	165'610
Total Quota, CHF	1'308'900	1'309'290

2 Annual Quota and Commission Targets
All amounts in CHF

No. of agents addressed	2015		2016		Commission %		Commission in CHF	
	TCY added		Quota Achievement		Division Rate	Commission Rate	Max. Incentive	Commission
	2015	2016	Target	2016				
to 50%	0	300'000	0%	50%	50%	6.0%	25'000	25'000
50% - 75%	350'000	500'000	50%	75%	11.5%	14.0%	25'000	40'500
75% - 100%	500'000	700'000	75%	100%	20.0%	26.0%	45'000	91'000
100% - 200%	713'700	1'400'000	101%	200%	20.0%	27.0%	76'100	172'475
200% onwards	1'427'000	un-capped	201%	4%	20.0%	28.0%		
	Quota New Business	1'177'000					Target commission	175'000

3 2016 Renewals (Q1 - Q4)

Company	Date	ACV in CHF
Opal	20-Jan	2'302
Imperial Solutions	6-Feb	6'940
3iVention	12-Feb	2'302
Intelsify	15-Feb	2'402
Intelsify Fictet	7-Apr	4'038
Soft Ltd. by AAA Discountings	16-Mar	2'689
ALZ	18-Mar	1'445
Multiscreen International, Inc.	23-Mar	1'927
AIM	27-Mar	1'445
Convey Systems, LLC	6-Apr	2'302
Starbelle International of America Inc.	12-Apr	1'445
Reed an	18-Jun	1'445
FinStack System	18-Jul	1'445
Alkove, Inc	27-Jul	5'783
Indus Marketing Solutions	14-Aug	2'302
Keylum Engineering & Services	23-Aug	2'690
Allyps	30-Aug	40'552
The Home Depot	1-Sep	6'904
Shedder Specialists, Inc.	24-Sep	4'574
Douglas Specialists, Inc.	23-Sep	2'402
Imperial Solutions SAS	5-Oct	2'302
Multiscreen	22-Oct	1'445
Reed an	9-Nov	2'302
TAAG GENETICS (USA)	1-Dec	2'302
FinStack Systems	2-Dec	1'927
Multiscreen	3-Dec	3'854
ALZ	13-Dec	4'800
Cariboo	18-Dec	2'000
FinStack Systems (US)	18-Dec	2'300
Veritas	21-Dec	27'268
Veritas, Inc. (Midwest Markets)	21-Dec	2'304
Total commission %		3.6%
On target commission, payable to CAP		3'990

4 Quarterly MRR Target

Quarter	MRR Quota	Quarterly Commission in CHF
Q1 2015	160'221	588
Q2 2015	160'000	588
Q3 2015	230'000	888
Q4 2015	230'000	888
On target commission, MRR in CHF		2'792

To determine the achievement of the quarterly MRR target, the calculation of the MRR assumes:

- Purchase deals: Treated as a 4-year subscription
 - Subscription deals: First year ACV divided by 12
 - Professional Services: Not part of MRR calculation
- All MRR figures are set with respect to effective to December 2015 MRR of CHF 160'221. Any changes of starting MRR or MRR definition shall be reflected in MRR target accordingly

5 Annual ACV & Renewals Quota Achievement Bonus

Employee is eligible to a bonus of CHF 35'910 if the combined ACV of renewals and Orders equals CHF 641'001 or more.

6 The following foreign exchange rates will apply for the calculation of Quota credit, renewal and MRR values:

Currency	FX Rate for 1 CHF
EURO	1.0250
USD	0.9975
GBP	1.5000
CHF	1.0000

Signed and Agreed by the Employee

Karen P. Savage 5/9/16
Karen Savage, Employee Date

Exhibit B

Exhibit B

From: Samuel Mueller <samuel@scandit.com>
Subject: Amazon
Date: October 28, 2016 at 11:41:39 AM MDT
To: Karen Savage <karen@scandit.com>
Cc: Justin Corbell <justin@scandit.com>, emilio@scandit.com

Hi Karen,

In preparation for our conversation regarding Amazon later today, please find below our suggestion on how to handle your commission from securing Amazon deal:

- (1) **Commission amount** (assuming a carve out of CHF 30k for the involved members engineering/ops team, to be paid at end of the year as special bonus and independent from your commission, which you had suggested to Justin):

AMAZON

in CHF (final numbers in USD)	Karen (situation per end of August)				Calc. Base	Com. Rate	Commission	Carve out for team	Net Commission
	New TCV'	Total New TCV'	Annual Quota	% Achieved					
Before Amazon	184,249	184,249	713,700	26%					
Amazon (multiplier: 3.3)	172,601	356,850	713,700	24%	172,601	6.6%	11,392		
Amazon (multiplier: 3.3)	178,425	535,275	713,700	25%	178,425	14.8%	26,407		
Amazon (multiplier: 3.3)	178,425	713,700	713,700	25%	178,425	26.3%	46,926		
Amazon (multiplier: 3.3)	713,700	1,427,400	713,700	100%	713,700	27.0%	192,699		
Amazon (multiplier: 3.3)	390,349	1,817,749	713,700	55%	390,349	28.9%	112,811		
Total Amazon Impact	1,633,500				1,633,500		390,234	30,000	360,234

- (2) **Payout of the commission over time** (approx. CHF 360,234):

Given the size and long duration of the deal, from an accounting and liquidity management perspective we have to expect considerable risk that Amazon might find a way to not pay one of the (annual) fees and back out of the contract at a later time, in which case we would have to reverse any previous commission payment and claw back previously paid commission. Again, given the amount of the payment this could be challenging, which is why we would normally have to break up the payment into 5 equal annual installments of approx. CHF 72k / year, to be paid once the annual payments from Amazon have been received, plus any other commissions and bonuses that you may be eligible for (i.e. CHF 36,000 of ACV achievement commission, CHF 3,000 of MRR achievement commission, approx. CHF 6k of renewal commission, etc. this year).

Instead of proceeding with the annual installments as outlined above and in order to give you the benefit of actually feeling the big impact of the commissions from this awesome deal more strongly, we would instead suggest to payout the entire amount over the course of 4 (instead of 5 years) and to structure the actual installments weighted by the multi-year multiplier (while still maintaining the claw back option of course), which would result in the following payout scheme:

Suggested payout:	Application of TCV' multiplier on commission payment over 4 years		
	CHF 109,162	2016	payment
	CHF 109,162	2017	payment
	CHF 87,330	2018	payment
	CHF 54,581	2019	payment
			Claw back clause (in case Amazon fails to pay any of the annual payments)
	CHF 360,234		

In other words, for the current year you would look at approx. the following total compensation:

	OTE	Actual Comp
Salary	101,000	101,000
On Target Commission, new business	94,000	172,218
On Target Commission, renewals	6,000	6,000
On Target Quarterly MRR Achievement Bonus	4,000	3,000
Annual Quota Achievement Bonus	36,000	36,000
Earned salary and commissions 2016	241,000	318,218

Where the CHF 172,218 in commissions for new business would be roughly broken down as follows:

12,471	YTD Commissions
109,162	Amazon netto (after carve out)
<u>50,585</u>	Forecasted Commissions
172,218	

A side benefit of paying out the commission in annual installments is that it will break the tax impact and will approximately save you CHF 25k in tax payments compared to the taxation of the full amount.

000027

(3) Timing:

We would suggest to go ahead to pay out the first tranche of your commission as soon as possible after closing of our funding round and at any rate no later than December. The remaining payments would be due annually over 4 years (per the above schedule) as soon as we have obtained the respective PO for the yearly payment respectively.

Apologies for not getting around to write this up before today. I hope you still have enough time to review and this helps you better understand our suggestion and we can have a good discussion later on.

In case you feel you'd need a little more time to think and digest, let me know and we can also push our call to Monday.

I look forward to speaking later and hope the above suggestion is in about in line with your expectations.

Sam

—
||||| ||||| ||||| ||||| |||||
Dr. Samuel Mueller
CEO and co-founder
Scandit

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+1 415 528 50 50

samuel@scandit.com
@scandit | www.scandit.com
||||| ||||| ||||| ||||| |||||

Thomas E. Dvorak (Idaho State Bar ID# 5043)
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601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300
13412373_1 (12948-3)

Attorneys for Karen Savage

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT FOR THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

KAREN L. SAVAGE,

Plaintiff,

v.

SCANDIT INC.,

Defendant(s).

Case No. CV-2016-290-C

SUMMONS

TO: SCANDIT INC.

NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF.
THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE
UNLESS YOU RESPOND WITHIN 21 DAYS. READ THE INFORMATION BELOW.

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above-designated court within 21 days after service of this Summons on you. If you fail to so respond, the court may enter judgment against you as demanded by the Plaintiff in the Complaint.

A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named court.

DATED This 1st day of November, 2016.

CLERK OF COURT
Douglas A. Miller

By Caroline White
Deputy

DOUGLAS A. MILLER, CLERK

By _____ Deputy

NOV 23 2016

Case No. _____ Inst. No. _____

Filed _____ A.M. 5:00 P.M.

D. John Ashby, ISB No. 7228
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5200
Email: jashby@hawleytroxell.com

Attorneys for Defendant Scandit Inc.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY


KAREN L. SAVAGE,	)	Case No. CV-2016-290-C
)	
Plaintiff,	)	NOTICE OF APPEARANCE
)	
vs.)	
)	
SCANDIT INC.,)	
)	
Defendant.)	
)	

TO: PLAINTIFF ABOVE NAMED, AND HER ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that D. John Ashby, a member of the firm of Hawley Troxell
Ennis & Hawley LLP, P.O. Box 1617, Boise, Idaho 83701, hereby enters an appearance as
Attorney of Record for Defendant Scandit Inc.

DATED THIS 22nd day of November, 2016.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 


D. John Ashby, ISB No. 7228
Attorneys for Defendant Scandit Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of November, 2016, I caused to be served a true copy of the foregoing NOTICE OF APPEARANCE by the method indicated below, and addressed to each of the following:

Thomas E. Dvorak
GIVENS PURSLEY LLP
601 West Bannock Street
PO Box 2720
Boise, ID 83701-2720
[Attorneys for Plaintiff]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy



D. John Ashby

ORIGINAL

DOUGLAS A. MILLER, CLERK
By [Signature] Deputy

DEC 13 2016

Case No. _____ Inst. No. _____
Filed _____ A.M. 4:00 P.M.

D. John Ashby, ISB No. 7228
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5200
Email: jashby@hawleytroxell.com

Attorneys for Defendant Scandit Inc.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

KAREN L. SAVAGE,	)	Case No. CV-2016-290-C
Plaintiff,	)	ANSWER TO COMPLAINT AND
vs.	)	DEMAND FOR JURY TRIAL
SCANDIT INC.,)	
Defendant.)	

Defendant Scandit Inc. ("Defendant"), by way of answer to Plaintiff's Complaint and Demand for Jury Trial ("Complaint"), denies each and every allegation contained therein unless expressly admitted, as follows:

PARTIES, VENUE, AND JURISDICTION

1. Answering paragraph 1 of Plaintiff's Complaint, Defendant admits that it employs Plaintiff. Defendant lacks sufficient knowledge to admit or deny the remaining allegations in paragraph 1 and therefore denies the same.

2. Answering paragraph 2 of Plaintiff's Complaint, Defendant admits that it is a Delaware corporation and that it is authorized to do business in the State of Idaho.

3. Answering paragraph 3 of Plaintiff's Complaint, Defendant asserts that the allegations set forth therein state a legal conclusion to which no response is required.

4. Answering paragraph 4 of Plaintiff's Complaint, Defendant asserts that the allegations set forth therein state a legal conclusion to which no response is required.

5. Answering paragraph 5 of Plaintiff's Complaint, Defendant asserts that the allegations set forth therein state a legal conclusion to which no response is required.

COMMON ALLEGATIONS

6. Answering paragraph 6 of Plaintiff's Complaint, Defendant admits the allegations set forth therein.

7. Answering paragraph 7 of Plaintiff's Complaint, Defendant admits the allegations set forth therein.

8. Answering paragraph 8 of Plaintiff's Complaint, Defendant admits that it provided to Plaintiff a 2016 Commission Compensation Plan (the "CCP"), which document speaks for itself.

9. Answering paragraph 9 of Plaintiff's Complaint, Defendant admits the allegations set forth therein.

10. Answering paragraph 10 of Plaintiff's Complaint, Defendant admits that it provided to Plaintiff the CCP, which document speaks for itself.

11. There is no paragraph 11 in the Complaint.

12. There is no paragraph 12 in the Complaint.

13. Answering paragraph 13 of Plaintiff's Complaint, Defendant admits that it provided to Plaintiff the CCP, which document speaks for itself.

14. Answering paragraph 14 of Plaintiff's Complaint, Defendant admits that it provided to Plaintiff the CCP, which document speaks for itself.

15. Answering paragraph 15 of Plaintiff's Complaint, Defendant lacks sufficient knowledge to admit or deny the allegations set forth therein and therefore denies the same.

16. Answering paragraph 16 of Plaintiff's Complaint, Defendant admits that Defendant and Amazon Services LLC ("Amazon") signed a Master Software License Agreement (the "Amazon Agreement"), which document speaks for itself.

17. Answering paragraph 17 of Plaintiff's Complaint, Defendant denies the allegations set forth therein.

18. Answering paragraph 18 of Plaintiff's Complaint, Defendant denies the allegations set forth therein.

19. Answering paragraph 19 of Plaintiff's Complaint, Defendant denies the allegations set forth therein.

20. Answering paragraph 20 of Plaintiff's Complaint, Defendant denies the allegations set forth therein.

21. Answering paragraph 21 of Plaintiff's Complaint, Defendant admits its CEO sent Plaintiff an e-mail on or around October 28, 2016, which document speaks for itself.

22. Answering paragraph 22 of Plaintiff's Complaint, Defendant admits its CEO sent Plaintiff an e-mail on or around October 28, 2016, which document speaks for itself.

23. Answering paragraph 23 of Plaintiff's Complaint, Defendant admits its CEO sent Plaintiff an e-mail on or around October 28, 2016, which document speaks for itself.

24. Answering paragraph 24 of Plaintiff's Complaint, Defendant admits its CEO sent Plaintiff an e-mail on or around October 28, 2016, which document speaks for itself.

25. Answering paragraph 25 of Plaintiff's Complaint, Defendant admits it paid Plaintiff \$5,000.00 on October 31, 2016.

26. Answering paragraph 26 of Plaintiff's Complaint, Defendant denies the allegations set forth therein.

27. Answering paragraph 27 of Plaintiff's Complaint, Defendant denies the allegations set forth therein.

**COUNT ONE
WAGE CLAIM UNDER IDAHO CODE § 45-615**

28. Defendant need not answer paragraph 28 of Plaintiff's Complaint because it has filed a motion to dismiss Count One under I.R.C.P. 12(b)(6). To the extent an answer is required, Defendant realleges and incorporates herein by reference its answers to paragraphs 1 through 27 of Plaintiff's Complaint.

29. Defendant need not answer paragraph 29 of Plaintiff's Complaint because it has filed a motion to dismiss Count One under I.R.C.P. 12(b)(6). To the extent an answer is required, Defendant denies the allegations set forth therein.

30. Defendant need not answer paragraph 30 of Plaintiff's Complaint because it has filed a motion to dismiss Count One under I.R.C.P. 12(b)(6). To the extent an answer is required, Defendant denies the allegations set forth therein.

31. Defendant need not answer paragraph 31 of Plaintiff's Complaint because it has filed a motion to dismiss Count One under I.R.C.P. 12(b)(6). To the extent an answer is required, Defendant denies the allegations set forth therein.

32. Defendant need not answer paragraph 31 of Plaintiff's Complaint because it has filed a motion to dismiss Count One under I.R.C.P. 12(b)(6). To the extent an answer is required, Defendant denies the allegations set forth therein.

33. Defendant need not answer paragraph 32 of Plaintiff's Complaint because it has filed a motion to dismiss Count One under I.R.C.P. 12(b)(6). To the extent an answer is required, Defendant denies the allegations set forth therein.

**COUNT TWO
DECLARATORY JUDGMENT**

34. Answering paragraph 34 of Plaintiff's Complaint, Defendant realleges and incorporates herein by reference its answers to paragraphs 1 through 33 of Plaintiff's Complaint.

35. Answering paragraph 35 of Plaintiff's Complaint, Defendant asserts that the allegations set for therein state a legal conclusion to which no response is required.

36. Answering paragraph 36 of Plaintiff's Complaint, Defendant asserts that the allegations set for therein state a legal conclusion to which no response is required.

37. Answering paragraph 37 of Plaintiff's Complaint, Defendant asserts that the allegations set for therein state a legal conclusion to which no response is required.

38. Answering paragraph 38 of Plaintiff's Complaint, Defendant asserts that the allegations set for therein state a legal conclusion to which no response is required.

39. Answering paragraph 39 of Plaintiff's Complaint, Defendant denies the allegations set forth therein.

40. Answering paragraph 40 of Plaintiff's Complaint, Defendant denies the allegations set forth therein.

**COUNT THREE
CONTRACT CLAIM FOR COMMISSION DUE**

41. Answering paragraph 41 of Plaintiff's Complaint, Defendant realleges and incorporates herein by reference its answers to paragraphs 1 through 40 of Plaintiff's Complaint.

42. Answering paragraph 42 of Plaintiff's Complaint, Defendant asserts that the allegations set forth therein do not state an allegation against Defendant to which a response is required.

43. Answering paragraph 43 of Plaintiff's Complaint, Defendant denies the allegations set forth therein.

44. Answering paragraph 44 of Plaintiff's Complaint, Defendant denies the allegations set forth therein.

45. Answering paragraph 45 of Plaintiff's Complaint, Defendant denies the allegations set forth therein.

ATTORNEYS' FEES AND COSTS

46. Answering paragraph 46 of Plaintiff's Complaint, Defendant denies the allegations set forth therein.

PRAYER FOR RELIEF

Defendant denies that Plaintiff is entitled to any of the relief for which she prays in her Complaint.

DEFENSES

The following defenses are not stated separately as to each claim for relief or allegation of Plaintiff. Nevertheless, the following defenses are applicable, where appropriate, to any and all of Plaintiff's claims for relief. In addition, Defendant, in asserting the following defenses, does not admit that the burden of proving the allegations or denials contained in the defenses is upon Defendant but, to the contrary, asserts that by reason of denials and/or by reason of relevant statutory and judicial authority, the burden of proving the facts relevant to many of the defenses and/or the burden of proving the inverse of the allegations contained in many of the defenses is upon Plaintiff. Moreover, Defendant does not admit, in asserting any defense, any responsibility or liability of Defendant but, to the contrary, specifically denies any and all allegations of responsibility and liability in Plaintiff's Complaint.

FIRST DEFENSE

Plaintiff's Complaint, and each and every claim for relief stated therein, fails to state a claim for relief against Defendant.

SECOND DEFENSE

Plaintiff's claims are barred, in whole or in part, because conditions precedent stated in the contract regarding commissions have not occurred.

THIRD DEFENSE

Plaintiff's declaratory judgment action does not state a judiciable controversy.

FOURTH DEFENSE

Plaintiff's claims are barred, in whole or in part, as moot because of Defendant's payments to Plaintiff.

FIFTH DEFENSE

Plaintiff's claims are barred, in whole or in part, for failure to allege that she has complied with the terms of the contract between the parties.

SIXTH DEFENSE

Plaintiff's claims are barred, in whole or in part, for frustration of purpose as to the contract between the parties.

SEVENTH DEFENSE

Plaintiff's claims are barred by the doctrine of waiver, estoppel, laches, and/or other equitable defenses.

EIGHTH DEFENSE

Count One of Plaintiff's Complaint is barred, in whole or in part, because Plaintiff has not earned any wages, as defined in the Idaho Claims for Wages Act, that have not been timely paid.

RULE 11 STATEMENT

Defendant has considered and believes it may have additional defenses to Plaintiff's claims but does not have enough information at this time to assert any such additional defenses under Rule 11 of the Idaho Rules of Civil Procedure. Defendant does not intend to waive any such defenses and specifically asserts its intention to amend this Answer if, after research and discovery, facts come to light giving rise to such additional defenses.

WHEREFORE, Defendant seeks the following relief:

1. An order dismissing with prejudice each and every claim for relief against Defendant and for a judgment thereon in favor of Defendant and against Plaintiff;

2. All costs and attorney fees incurred by Defendant in defending this action, awardable pursuant to applicable rule, statute, or contract provision; and

3. Such other and further relief as the Court deems just and necessary.

DATED THIS 12th day of December, 2016.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

D. John Ashby, ISB No. 7228
Attorneys for Defendant Scandit Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December, 2016, I caused to be served a true copy of the foregoing ANSWER TO COMPLAINT AND DEMAND FOR JURY TRIAL by the method indicated below, and addressed to each of the following:

Thomas E. Dvorak
GIVENS PURSLEY LLP
601 West Bannock Street
PO Box 2720
Boise, ID 83701-2720
[Attorneys for Plaintiff]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy



D. John Ashby

ORIGINAL

DOUGLAS A. MILLER, CLERK
By [Signature] Deputy

DEC 13 2016

Case No. _____ Inst. No. _____
Filed _____ A.M. 5:00 P.M.

D. John Ashby, ISB No. 7228
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877 Main Street, Suite 1000
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Email: jashby@hawleytroxell.com

Attorneys for Defendant Scandit Inc.


IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

KAREN L. SAVAGE,)	
	)	Case No. CV-2016-290-C
Plaintiff,)	
	)	MOTION TO DISMISS WAGE CLAIM
vs.)	
)	
SCANDIT INC.,)	
)	
Defendant.)	
<hr style="width: 40%; margin-left: 0;"/>		

Pursuant to Rule 12(b)(6) of the Idaho Rules of Civil Procedure, Defendant Scandit Inc. ("Scandit") hereby moves to dismiss with prejudice Count One of Plaintiff's Complaint, which is a wage claim under the Idaho Claims for Wages Act. This motion is supported by the accompanying Memorandum in Support of Motion to Dismiss Wage Claim and the Declaration of Samuel Mueller, filed concurrently herewith.

DATED THIS 12th day of December, 2016.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 


~~D. John Ashby~~, ISB No. 7228
Attorneys for Defendant Scandit Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December, 2016, I caused to be served a true copy of the foregoing MOTION TO DISMISS WAGE CLAIM by the method indicated below, and addressed to each of the following:

Thomas E. Dvorak
GIVENS PURSLEY LLP
601 West Bannock Street
PO Box 2720
Boise, ID 83701-2720
[Attorneys for Plaintiff]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy: 208.388.1300



~~D. John Ashby~~

DOUGLAS A. MILLER, CLERK
By _____ Deputy

DEC 13 2016

Case No. _____ Inst. No. _____
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ORIGINAL

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Attorneys for Defendant Scandit Inc.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

KAREN L. SAVAGE,)	
	)	Case No. CV-2016-290-C
Plaintiff,)	
	)	MEMORANDUM IN SUPPORT OF
vs.	)	MOTION TO DISMISS WAGE CLAIM
)	
SCANDIT INC.,)	
)	
Defendant.)	

I. INTRODUCTION

This is a frivolous lawsuit that contains a wage claim that must, as a matter of law, be dismissed. Plaintiff Karen L. Savage (“Plaintiff”) is a current sales employee of Defendant Scandit Inc. (“Scandit”). In addition to receiving an annualized base salary of \$101,000, Plaintiff is a participant in a generous Commission Compensation Plan (“CCP”) that provides for commissions on Plaintiff’s licensing of Scandit software to customers. Under the CCP, commissions do not become “earned” until Scandit receives payment from the customer and

recognizes the revenue. However, the CCP provides that Scandit will pre-pay (*i.e.*, advance) “unearned commissions” within approximately 30 days after the end of the month in which a sale has, pursuant to criteria detailed in the CCP, been formally booked. As made clear in the CCP, such pre-payments remain at all times subject to Scandit’s right to claw-back amounts that were prepaid but never earned.

On September 27, 2016, Scandit and Amazon entered into a five-year Master Software License Agreement¹ (the “Amazon Agreement”), which requires Amazon to pay to Scandit an annual licensing fee in each of the next five years, unless Amazon exercises certain rights to terminate its software order under an exit clause. If Amazon pays its annual licensing fees over the next five years, Plaintiff, who worked on the Amazon account, stands to earn commission totaling approximately \$400,000 (the “Commission Potential”). However, under the express terms of the CCP, the commission only becomes “earned” upon Scandit’s receipt of payments from Amazon and subsequent recognition of the revenue.

On November 1, 2016, in an attempt to secure an undue windfall, Plaintiff filed a Complaint against Scandit asserting that she was not only entitled to the Commission Potential

¹ Although Plaintiff’s Complaint does not attach a copy of the Amazon Agreement, the Complaint expressly references the Amazon Agreement as triggering an alleged entitlement to a commission on the sale made to Amazon. *See* Complaint at ¶¶ 16-19. Accordingly, the Court may consider the Amazon Agreement and related documents in connection with a Rule 12(b)(6) motion, even though not attached to the Complaint. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (“[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference”). A copy of the Amazon Agreement and accompanying Software Order No. 1 are attached as Exhibits A and B to the Declaration of Dr. Samuel Mueller, filed concurrently herewith (“Mueller Decl.”).

(and a \$36,000 annual bonus) following execution of the Amazon Agreement, but also, in a perversion of the Idaho Claims for Wages Act, treble damages on such amounts. In short, on the 32nd day following the month in which the Amazon Agreement was signed, and *despite Scandit not having received even an initial payment* from Amazon, Plaintiff filed a wage claim seeking to turn her \$400,000 of commission potential *over a five-year period* into an immediate judgment of more than \$1,200,000. This she cannot do as a matter of law.

Under the Idaho Claims for Wages Act, no claim for unpaid wages (and therefore no potential for treble damages) exists unless and until a wage is “earned,” and – as Idaho law makes clear – a commission wage is not earned until the contingencies established in an employer’s contract have been satisfied. Here, the CCP explicitly provides that “commissions shall become **earned**...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.” Plaintiff’s Complaint does not (nor could it) allege that Scandit had received any payment from Amazon. Accordingly, because no amount of Plaintiff’s Commission Potential had become earned under the terms of the CCP, Plaintiff was not due any wages and she therefore lacks a claim for unpaid wages under the Idaho Claims for Wages Act.² Plaintiff’s wage claim, set forth in Count 1 of her Complaint, must therefore be dismissed with prejudice under I.R.C.P. 12(b)(6) for failure to state a claim.

² Plaintiff also lacks a viable claim under the Idaho Claims for Wages Act that she was due a \$36,000 bonus, as the CCP makes clear that this \$36,000 bonus potential is an *annual* bonus which – by such term – means that it does not and cannot become earned until year end.

II. BACKGROUND

A. Factual Background³

Scandit is an enterprise mobility and data capture company that specializes in barcode scanning applications for businesses. *See* Complaint, ¶ 6. Scandit sells software and other products and services that allow its customers to rapidly build, deploy and manage mobile applications for smartphones, tablets and wearable devices. *Id.* Scandit hired Plaintiff approximately two years ago as a Senior Sales Executive. *Id.* at ¶ 7.

Plaintiff's compensation terms are described in the CCP, which governs Plaintiff's compensation for the period from "January 1, 2016 through December 31, 2016." *Id.* at ¶ 8, Exh. A. As set forth in the CCP, Scandit pays Plaintiff an annualized salary of \$101,000. *Id.* In addition to that salary, the CCP provides for additional potential compensation in the form of bonuses and commissions. For example, the CCP provides for an "Annual Quota Achievement Bonus" of \$36,000 "if the combined ['Annual Contract Value'] of renewals and Orders equals CHF 641,001⁴ or more." *See* Complaint, Exh. A at § IV.E.

The CCP also provides for commissions based on the monetary value of legally binding contracts and purchase orders secured with new and existing customers in Plaintiff's territory.

³ For purposes of this Motion to Dismiss, the Court must consider Plaintiff's well-pled factual allegations to be true. This recitation of Plaintiff's allegations should not be construed as an admission that any of Plaintiff's factual allegations are true.

⁴ Some of the monetary values in the CCP are referenced in Swiss Francs ("CHF"). As set forth in the CCP, the foreign exchange rate between United States Dollars ("USD") and CHF is 0.9975 to 1. All references to currency in this memorandum are to United States Dollars unless otherwise specified.

Id. at §§ II., IV. The calculation of commissions is determined by a formula based on Plaintiff's annual "New Business Quota." *See id.* at §§ II., III, IV.B.

As set forth in the CCP, the **earning** of commissions and the pre-payment of **unearned** commissions are governed by two key concepts. First, the CCP expressly provides that no commissions become earned until Scandit receives payment from the customer and recognizes the revenue: "Commissions shall become **earned** (i.e., not subject to recoupment or 'claw-back' by [Scandit]) only upon ... actual receipt of payment from the customer." *Id.* at § IV (emphasis in original).

Second, although commissions do not become "earned" until Scandit receives actual payment from the customer and recognizes the revenue, the CCP provides that anticipated commission amounts will generally be "prepaid" 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." *Id.* The CCP then sets forth seven requirements that must be fulfilled before Scandit considers an order to be "formally booked" such that a not-yet-earned commission will be prepaid. *Id.* at §IV.

As the CCP repeatedly emphasizes, however, both in the "Commissions" Section and again in a "Commission Payment Reversals" Section, "prepaid but **unearned** commission" must be returned to Scandit. *Id.* (emphasis added). "As discussed in Section IV, in the event Scandit does not recognize the revenue on an Order under generally accepted accounting principles...or does not receive payment from the customer per the terms of the Order, any prepaid commissions will be reversed as described below." *Id.* at §V.

In her Complaint, Plaintiff makes two factual assertions upon which her wage claim rests: (1) “[T]hrough [Plaintiff’s] efforts, a Master Software License Agreement was signed effective as of September 27, 2016 between Amazon Services LLC, a Nevada limited liability company, and Scandit Inc. (the ‘Amazon Agreement’), and (ii) ‘The Amazon Agreement was booked during late September 2016 by Scandit.’” *See* Complaint, ¶¶ 16-19. Plaintiff relies on these two facts to then assert that “[Plaintiff] performed all conditions precedent to the Amazon Commission becoming due and owing to her under the CCP and applicable law.” *Id.* The problem with this argument, and ultimately the fatal flaw of Plaintiff’s wage claim, is that even if both of these factual assertions were true (as must be assumed in a Motion to Dismiss), the fact that the Amazon Agreement was entered into and “booked” during late September 2016 does not render Plaintiff’s commission “earned” under the express terms of the CCP. Commissions do not become earned under the CCP unless and until Scandit has received payment from the customer and recognized the revenue. There is no assertion in the Complaint (nor could Plaintiff truthfully assert) that Scandit had received any payment from Amazon or recognized any revenue as a result of the Amazon Agreement. Accordingly, because Scandit had not received any payment from Amazon or recognized any revenue from Amazon, the Plaintiff’s Commission Potential did not become earned under the terms of the CCP and Plaintiff therefore cannot maintain a claim under the Idaho Claims for Wages Act.

III. MOTION TO DISMISS STANDARD

A motion to dismiss under I.R.C.P. 12(b)(6) tests the legal sufficiency of a claim. “In order to withstand a motion to dismiss, the nonmoving party must allege all essential elements of the claims presented.” *Johnson v. Boundary Sch. Dist. # 101*, 138 Idaho 331, 334 (2003). If the

plaintiff can prove no set of facts upon which the court could grant relief, the complaint should be dismissed. *Id.* “Although the non-movant is entitled to have his factual assertions treated as true . . . , this privilege does not extend to the conclusions of law the non-movant hopes the court to draw from those facts.” *Owsley v. Idaho Indus. Comm’n*, 141 Idaho 129, 136 (2005) (citing cases for the proposition that “the Court is not obligated to assume that a plaintiff’s legal conclusions or arguments are also true.”). “[T]he question then is whether the non-movant has alleged sufficient facts in support of his claim which, if true, would entitle him to relief.” *Id.*

IV. ARGUMENT

A. Plaintiff’s Wage Claim Must be Dismissed for Failure to State a Claim

Plaintiff’s cause of action for unpaid wages under the Idaho Claims for Wages Act must be dismissed for failure to state a claim because Plaintiff did not earn the disputed wages and they therefore were not wages due under the Idaho Claims for Wages Act.

1. Compensation Must be “Earned” Before it is a “Wage”

Idaho Code Section 45-608 provides that “[e]mployers shall pay all wages due to their employees at least once during each calendar month, on regular paydays designated in advance by the employers.” Idaho Code Section 45-601(7) in turn defines “wages” as “compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece or commission basis.”

Crucially, the Idaho Supreme Court has consistently held that all forms of compensation must be “earned” before they become “wages” for purposes of the Idaho Claims for Wages Act. *See Bilow v. Preco, Inc.*, 132 Idaho 23, 29 (1998) (“Wages, as defined by *Whitlock*, constitute ‘compensation **earned** in increments as services are performed.’”) (emphasis added). Thus, a

claim for compensation that has not yet been earned, but rather may be earned in the future, is not a claim for “wages” under the Idaho Claims for Wages Act. *See Moore v. Omnicare, Inc.*, 141 Idaho 809, 819–20 (2005) (explaining that “claims for future wages do not fall within the purview of the mandatory trebling statute”).

2. Employers may Define by Contract when Commissions Become Earned

The question of when commission becomes “earned” such that it is a “wage” under the Idaho Claims for Wages Act is determined by contract. In *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185 (2005), the Idaho Supreme Court held that an employer is free to define contractually when a commission is “earned” for purposes of the Idaho Claims for Wages Act. In that case, an employee who sold resort property units signed a commission agreement providing that sales commissions would be earned only upon successful closing of escrow on units sold while the employee remained employed by the employer. *Id.* at 188. After termination of her employment, the employee filed a complaint under the Idaho Claims for Wages Act, asserting a claim for commissions allegedly due for the sale of units on which the employee started the sales process, but that did not close escrow until after her employment had been terminated. *Id.*

The employee in *Bakker* attempted to rely on the common law rule that “a broker earned a commission when he procured a buyer ‘ready, willing and able’ to purchase property according to the seller’s terms.” *Id.* at 190. The Idaho Supreme Court rejected that argument, holding that it was the parties’ agreement -- and not common law -- that controlled when a commission became “earned” and thus a “wage” under the Idaho Claims for Wages Act. *Id.* Specifically, the Court held that employers are free to “contract for the terms of compensation regarding when

wages are earned and/or due.” *Id.* Because under the terms of the commission agreement the employee in *Bakker* had not “earned” a commission at the time her employment was terminated, the employee had no claim for unpaid wages under the Idaho Claims for Wages Act. *Id.*

3. Under the CCP, Commissions are not “Earned” until Payment is Received and Revenue is Recognized from a Customer

Plaintiff, like the employee in *Bakker*, lacks a wage claim because the Potential Commission was not earned under the terms of the CCP and therefore was not a wage due under the Idaho Claims for Wages Act. Plaintiff’s commission-based wage claim is based on the erroneous assumption that she earned a commission on the Amazon Order at the time Scandit and Amazon entered into the Amazon Agreement and the deal was “booked”. *See* Complaint, ¶¶ 16-18. However, the CCP makes clear that “Commissions shall become **earned** (i.e., not subject to recoupment or “claw-back” by [Scandit] *only upon* (a) recognition of revenue...and (b) actual receipt of payment from the customer.” *Id.* at § IV. (Emphasis added.) Because Scandit had not been paid by Amazon and had therefore not recognized any revenue from Amazon, the Potential Commission had not become earned and the amount therefore was not a wage due under the Idaho Claims for Wages Act.

4. Pre-paid Commissions are Not Wages

The fact that the CCP provides for prepayment of **unearned** commissions does not change this result. The CCP goes through great lengths to make clear that the commissions “pre-paid” after an order has been booked are not “earned” commissions. To this end, the CCP expressly states that (i) “paid but unearned commissions must be returned to Scandit,” and (ii) “[e]mployee’s obligation to return any prepaid but unearned commission survives any termination of the Employee’s engagement with Scandit,” and (iii) “in the event Scandit does not

recognize the revenue on an Order...or does not receive payment from the customer per the terms of the Order, any prepaid commissions will be reversed.” See Complaint, Exh. A at ¶¶ IV, V. The CCP at all times distinguishes between when Scandit will pre-pay (i.e., advance) commission payments and when such commission payments in fact become earned. This distinction is critical, and precludes a finding that prepaid commissions are “wages” due.

In fact, courts around the country have recognized that advances are not “wages” under similar state wage acts. For example, the California Court of Appeals has explained:

The essence of an advance is that at the time of payment the employer cannot determine whether the commission will eventually be earned because a condition to the employee’s right to the commission has yet to occur or its occurrence as yet is otherwise unascertainable. An advance, therefore, by definition is not a wage because all conditions for performance have not been satisfied.

Steinhebel v. Los Angeles Times Commc'ns, 126 Cal. App. 4th 696, 704-06 (2005); see also *Gress v. Fabcon, Inc.*, 826 N.E.2d 1, 2 (Ind. Ct. App. 2005) (commission payments in the form of “unearned advance payment for jobs shipped but not completed” do not constitute “wages” under the Indiana Wage Payment Statute where the company policy is to advance unearned commissions once a project is shipped but that a final commission based on profitability of the company is not earned until the project is completed and determined to be profitable).

Indeed, the Idaho Claims for Wages Act expressly recognizes the distinction between wages that have already been earned and an “advance of wages” that have not yet been earned, permitting employers to advance unearned wages. Idaho Code Section 45-608, in the sentence immediately following that under which Plaintiff brings her claim, provides that employers may deposit “wages due or to become due or an **advance of wages to be earned**” in an employee’s

bank account. *Id.* (emphasis added). Idaho law therefore explicitly recognizes that advances are not wages. The CCP ultimately does precisely what Idaho Code Section 45-608 authorizes -- it provides for an advance of wages that have not yet been earned.⁵

5. Plaintiff Cannot Maintain a Wage Claim Because No Commissions Were Due as Wages

Plaintiff cannot, as a matter of law, maintain her cause of action under the Idaho Claims for Wages Act because Scandit was never in violation of such Act. There is no assertion in the Complaint (nor could Plaintiff truthfully assert) that Scandit had received payment from Amazon. Thus, the Commission Potential was not earned, no “wages” were therefore due, and Plaintiff has no right to recover for a violation of the Act. Accordingly, Plaintiff’s wage claim should be dismissed for failure to state a claim. *See Owsley*, 141 Idaho at 136 (2005) (dismissal is appropriate if the plaintiff has not “alleged sufficient facts in support of his claim which, if true, would entitle him to relief”).

6. Plaintiff Lacks a Wage Claim for the Annual Quota Achievement Bonus

Finally, Plaintiff cannot maintain a wage claim for the “Annual Quota Achievement Bonus” of \$36,000. Such bonus is, as set forth in Section IV(E) of the CCP, an *annual* bonus

⁵ This distinction between wages and an advance of wages to be earned is similarly recognized in Idaho Code Section 45-609, which provides that an employer may not “withhold or divert any portion of an employee’s wages.” Despite that prohibition on the unauthorized withholding of wages, the Idaho Department of Labor explains on its website that employers are allowed to withhold advances from future paychecks: “Employers may not withhold any portion of an employee’s wages unless required to by state or federal law or if the employer has written authorization to make deductions from an employee’s paycheck If an employer provides proof of an advance or draw against an employee’s future wages, the employer can withhold the entire amount of that advance or draw from any future paycheck. <https://labor.idaho.gov/dnn/idl/Businesses/IdahoLaborLaws/LaborLawsFAQ.aspx?AspxAutoDetectCookieSupport=1> (last visited Nov. 8, 2016) (emphasis added).


which, by its very nature, is earned on an *annual* basis (not immediately upon the occurrence of a contingency). Plaintiff's assertion otherwise is disingenuous.

V. CONCLUSION

For the foregoing reasons, Scandit respectfully requests that this Court dismiss Plaintiff's cause of action under the Idaho Claims for Wages Act with prejudice for failure to state a claim.

DATED THIS 12th day of December, 2016.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

D. John Ashby, ISB No. 7228
Attorneys for Defendant Scandit Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December, 2016, I caused to be served a true copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DISMISS WAGE CLAIM by the method indicated below, and addressed to each of the following:

Thomas E. Dvorak
GIVENS PURSLEY LLP
601 West Bannock Street
PO Box 2720
Boise, ID 83701-2720
[Attorneys for Plaintiff]

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~~D. John Ashby~~

DOUGLAS A MILLER, CLERK
By: *[Signature]* Deputy

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Attorneys for Defendant Scandit Inc.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

KAREN L. SAVAGE,
 Plaintiff,

vs.

SCANDIT INC.,
 Defendant.

Case No. CV-2016-290-C

DECLARATION OF SAMUEL
MUELLER

Samuel Mueller, after first being duly sworn upon oath, deposes and says:

1. I am the CEO of Defendant Scandit, Inc. ("Scandit"). I make this affidavit based on my own personal knowledge and based on my review of business records kept in the ordinary course of Scandit's business. I am competent to testify about the matters set forth herein.

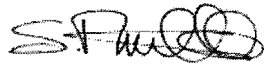
2. Attached hereto as Exhibits A is a true and accurate copy of the Master Software License Agreement (the "Amazon Agreement") referenced by Plaintiff Karen L. Savage ("Ms.

Savage”) in paragraph 16 of her Complaint. The Amazon Agreement was signed by Scandit and Amazon Services LLC (“Amazon”) on September 27, 2016.

3. Attached hereto as Exhibit B is a true and accurate copy of the Software Order No. 1. (“Software Order No. 1”) referenced in Section I of the Amazon Agreement and executed by Scandit and Amazon concurrently with the Amazon Agreement on September 27, 2016.

I certify under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

DATED this 11th day of December, 2016.




Samuel Mueller

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December, 2016, I caused to be served a true copy of the foregoing DECLARATION OF SAMUEL MUELLER by the method indicated below, and addressed to each of the following:

Thomas E. Dvorak
GIVENS PURSLEY LLP
601 West Bannock Street
PO Box 2720
Boise, ID 83701-2720
[Attorneys for Plaintiff]

- U.S. Mail, Postage Prepaid
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- Overnight Mail
- E-mail
- Telecopy: 208.388.1300



D. John Ashby

EXHIBIT A

MASTER SOFTWARE LICENSE AGREEMENT

This Software License Agreement (this “**Agreement**”) is effective as of September 27, 2016 (the “**Effective Date**”) between Amazon Services LLC a Amazon Services LLC a Nevada limited liability company (“**Amazon**”), and Scandit Inc. a Delaware corporation (“**Licensor**”).

In consideration of the mutual promises contained in this Agreement, Amazon and Licensor hereby agree as follows:

Section 1. Definitions

The following terms (whether used in the singular or plural) are used in this Agreement with the respective meanings set forth below. Capitalized terms used in this Agreement and not defined below have the meanings set forth elsewhere in this Agreement.

“**Affiliate**” means, with respect to either party, any entity that directly or indirectly controls, is controlled by or is under common control with such party. For the purposes of the foregoing, “control” means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of an entity whether through the ownership of voting securities or otherwise;

“**Amazon Furnished Materials**” means any content, information, materials and items provided by Amazon to Licensor, including, without limitation, any trademarks, advertisements, links, text, images, audio, video and other copyrightable materials, as well as software, tools, technologies and other functional items. Amazon hereby grants to Licensor during the term of this Agreement and subject to all terms and conditions of this Agreement a limited, non-exclusive, non-transferable, non-sublicensable, revocable license to reproduce and use any Amazon Furnished Materials provided or made accessible by Amazon to Licensor solely as necessary for Licensor to perform the Implementation Services and any support services in accordance with this Agreement.

“**Business Day**” means 9am to 5pm CET, Monday to Friday (excluding public holidays in Switzerland).

“**Business Hours**” means those hours within a Business Day.

“**Documentation**” means all manuals, instructions, specifications, notes and other documents and materials, whether in electronic or paper form, relating to the use, operation or maintenance of the Software, together with all enhancements, modifications and amendments to those documents that Licensor is obligated to, or otherwise does, furnish to Amazon under this Agreement.

“**Escrow Agent**” means Iron Mountain Intellectual Property Management, Inc. or any other third party mutually agreed to in writing by Amazon and Licensor (which approval will not be unreasonably withheld) to act as the escrow agent under the Escrow Agreement.

“**Escrow Agreement**” means an escrow agreement substantially in the form attached as Exhibit C.

“**Initial Order Term**” has the meaning attributed to that term in Section 4.5 below.

“**Proprietary Right**” means any patent, copyright, trademark, service mark, mask work, trade secret or other intellectual property or proprietary right.

“**Public Software**” means any software, documentation or other material that contains, or is derived (in whole or in part) from, any software, documentation or other material that is distributed as free software, open source software (e.g., Linux) or similar licensing or distribution models, including, but not limited to software, documentation or other material licensed or distributed under any of the following licenses or distribution models,

EXHIBIT A

or licenses or distribution models similar to any of the following: (i) GNU's General Public License (GPL), Lesser/Library GPL (LGPL), or Free Documentation License, (ii) The Artistic License (e.g., PERL), (iii) the Mozilla Public License, (iv) the Netscape Public License, (v) the Sun Community Source License (SCSL), (vi) the Sun Industry Standards License (SISL), (vii) the BSD License, (viii) the Apache License and (ix) the Boost Software License (DLib Libraries).

"Renewal Order Term" has the meaning attributed to that term in Section 4.5 below.

"Software" means the computer programs listed in a Software Order, in machine readable, object code form, together with all enhancements, upgrades, updates, bug fixes, and other modifications and amendments to those computer programs that Licensor furnishes to Amazon under this Agreement as part of the Support Services.

"Software Order" means an order for Software and Support Services executed by the parties based on the sample form attached as Exhibit A.

"Software Order Term" has the meaning attributed to that term in Section 4.5 below.

"Source Code" means the human-readable language form of the software code that comprises (in object code form) the Software, as such software code was prepared and written by the programmer(s) who developed the applicable Software, together with any build tools (e.g., compilers, linkers and other related tools), compile/link scripts, logic diagrams, program comments, installation scripts and other documentation and tools necessary for an ordinarily skilled programmer to understand and be able to address errors in or create ports, updates or other modifications to such software code, or to recompile the same into fully functioning object code of the applicable Software.

"Support Services" has the meaning attributed to that term in Section 10 below.

Section 2. Software Orders

Licensor will provide all Software ordered by Amazon in accordance with the terms and conditions of this Agreement and the applicable Software Order(s). Any Amazon Affiliate can enter into Software Orders under this Agreement and will become a party to this Agreement with respect to the applicable Software Order upon signing such Software Order. If an Affiliate enters into a Software Order, all references to Amazon in this Agreement will be deemed to be references to the Affiliate that enters into the Software Order. Any Amazon Affiliate using Software under a Software Order will become a party to this Agreement upon signing the Software Order, and such use is a separate obligation of the Amazon entities or entity that execute(s) the Software Order and no other Amazon entity has any obligation under that Software Order. Amazon makes no promises or representations whatsoever as to the amount of business Licensor can expect at any time under this Agreement. Any conflict between the terms of this Agreement and any Software Order will be resolved in favor of this Agreement, unless the Software Order explicitly states that the Software Order intends to modify the conflicting terms as applicable to that Software Order, in which case, the terms of the Software Order will control.

Section 3. License

3.1 License Grant. Licensor hereby grants to Amazon the licenses granted under any Software Order for the Software Order Term and in accordance with the license terms set out in such Software Order and this Agreement. For the purposes of Section 365(n) of Title 11, United States Code, all rights and licenses granted to Amazon under this Section 3 will be deemed to be licenses of rights to "intellectual property" as defined under Section 101(35A) of Title 11, United States Code. For the avoidance of doubt, the foregoing license grants include a license under any current and future patents owned or licensable by Licensor only to the extent necessary: (a) for Amazon and its Affiliates to exercise any license right granted by Licensor for the Software herein; and (b) to combine the Software with any Amazon Product as defined in a Software Order in accordance with such Software Order and this Agreement.

3.2 Reproduction. Amazon may reproduce the Software and Documentation as needed, provided that (a) such reproduction is made solely in connection with Amazon's and its Affiliates' rights with respect to the Software or Documentation as described in this Agreement, the Software Order and subject to the Scope (as defined in the Software Order), and (b) all such reproductions include all copyright or similar proprietary notices contained in the items being reproduced.

Section 4. Term & Termination

4.1 Agreement Term. The term of this Agreement begins on the Effective Date and, unless terminated earlier pursuant to this Agreement, continues for a period of one year; except that the terms of this Agreement will survive and apply to any Software Orders outstanding as of the effective date of termination ("**Initial Term**"). Upon expiration of the Initial Term, this Agreement will automatically renew on a year to year basis until either party gives 90 days prior written notice of termination, provided, however, the terms of this Agreement will apply to any Software Order in effect as of the date of termination.

4.2 Termination for Cause. Except as provided in Section 4.3, either Amazon or Licensor may terminate a Software Order, if the other party materially breaches the applicable Software Order and does not cure the breach within 30 days following its receipt of written notice of the breach from the nonbreaching party.

4.3 Termination of License. Licensor may not terminate the licenses granted under a Software Order except upon the occurrence of a material breach of this Agreement by Amazon that (a) is not cured within 30 days after Amazon receives written notice from Licensor of the breach, and (b) is of such a nature that Licensor cannot reasonably be made whole through an award of monetary damages.

4.4 Termination of Use. Promptly following the termination of any license pursuant to Sections 4.2 or 4.5 or any Software Order: (i) Amazon will discontinue use of the Software subject to the termination and destroy or return to Licensor all copies of the Software and return to Licensor all Confidential Information of Licensor, unless and to the extent that such Confidential Information (excluding Software and any other licensed product) has been incorporated into Amazon Confidential Information; (ii) where the Software Order is terminated by Amazon in accordance with Section 4.2 above, Licensor shall refund to Amazon all prepaid fees for the period covering the remainder of the Software Order Term after the date of termination ; and (iii) where the Software Order is terminated by Licensor in accordance with Section 4.2 above, Amazon shall pay any unpaid amounts including those covering the remainder of the Software Order Term. In no event will any such termination relieve Amazon of its obligations to pay any fees payable to Licensor under any other Software Orders which are not terminated.

4.5 Term and Termination of Support Services and Software Orders. Termination of one Software Order shall not impact a license granted in accordance with any other Software Order which has not been terminated. The term of each Software Order begins on the Order Effective Date and unless terminated earlier pursuant to this Agreement, continues for the initial period set out in Software Order ("**Initial Order Term**"). Thereafter each individual Software Order will automatically renew for additional 12 month periods ("**Renewal Order Term(s)**") until either party gives 30 days written notice of termination to take effect at the end of the relevant Initial Order Term or Renewal Order Term. The Initial Order Term together with any Renewal Order Terms, (the "**Software Order Term**"). The Support Services shall run concurrently with the Software Order Term unless otherwise stated in the applicable Software Order.

4.6 Survival. Sections 4 (Term and Termination), 5 (Ownership Rights), 8 (Indemnification), 9 (Escrow), 12 (Confidential Information) and 13 (Miscellaneous) and to the extent any perpetual license is granted under a Software Order (together with all other provisions of this Agreement (including any Software Order) that may reasonably be interpreted or construed as surviving termination) will survive the termination of this Agreement.

Section 5. Ownership Rights

There are no implied licenses under the terms of this Agreement and subject to the licenses granted under this Agreement, Licensor (or its Affiliates or licensors) will retain all Proprietary Rights that it may have in the Software and Documentation. Except as specifically permitted by law or in connection with Amazon's exercise of its rights under Sections 3 and 9, Amazon shall not sublicense, rent, lease, modify, adapt, translate, prepare derivative works from, decompile, reverse engineer, disassemble, attempt to derive Source Code from or otherwise alter the Software or parts thereof. No person or entity other than the parties to this agreement (and their successors or assigns) shall have any rights or remedies under this Section 5 except that Licensor may enforce the Proprietary Rights of its Affiliates and/or licensors for an on behalf of such Affiliates and/or licensors in the event of an infringement by Amazon of such Proprietary Rights of its Affiliates and/or licensors.

Section 6. Payment Terms and Taxes

6.1 Invoice and Payment. In connection with the license of the Software under this Agreement and related Support Services, Amazon will pay the fees and charges set forth in the applicable Software Order. Licensor will submit invoices to Amazon for Software licensed and Support Services that Licensor provides hereunder, such invoices to contain sufficient detail (including where Support Services fees are not included in the Software license fees, the separate itemization of Software license fees, Support Services fees and any other fees under the Agreement) to allow Amazon to determine the accuracy of the amount(s) billed. Except as may otherwise be provided in a Software Order, Amazon will pay Licensor the amount properly due and payable under each invoice within 45 days of the date of invoice.

6.2 Taxes. Licensor may charge and Amazon will pay applicable US, state or local sales or use taxes or value added taxes that Licensor is legally obligated to charge ("Taxes"). Such Taxes will be stated on the original invoice that Licensor provides to Amazon and Licensor's invoices state such Taxes separately and meet the appropriate tax requirements for a valid tax invoice. Amazon may provide Licensor an exemption certificate acceptable to the relevant taxing authority, in which case, Licensor shall not collect the Taxes covered by such certificate. Licensor will be responsible for all other taxes or fees arising (including interest and penalties) from transactions and the documentation of transactions under this Agreement. Amazon may deduct or withhold any taxes that Amazon may be legally obligated to deduct or withhold from any amounts payable to Licensor under this Agreement, and payment to Licensor as reduced by such deductions or withholdings will constitute full payment and settlement to Licensor of amounts payable under this Agreement. Throughout the term of this Agreement, Licensor will provide Amazon with any forms, documents, or certifications as may be required for Amazon to satisfy any information reporting or withholding tax obligations with respect to any payments under this Agreement.

6.3 Suspension. Licensor reserves the right to suspend Amazon's access to and use of the Software and Support Services if any undisputed amount owed by Amazon under this Agreement is 45 or more days overdue. Licensor will notify Amazon in writing at least 10 days prior to any suspension.

Section 7. Warranties

7.1 Performance Warranty. Licensor represents, warrants and covenants to Amazon that (a) the Software and Documentation will be free from material programming and other errors and from defects in materials and workmanship, and (b) the Software will materially conform, for a period of 180 days following installation ("**Warranty Period**"), to the applicable performance capabilities, characteristics, hardware and software compatibility and other descriptions and standards set forth in the Documentation when used in

accordance with the Documentation and this Agreement. Licensor further represents, warrants and covenants that any Support Services provided hereunder will be performed with due skill and care and in accordance with accepted industry practice. Should a breach of the representation, warranties or covenants provided in Section 7.1 (a) and (b) occur, Licensor, at no charge to Amazon, will either (i) promptly repair or replace the affected Software and Documentation or (ii) if Licensor cannot reasonably repair or replace the affected Software, Licensor will terminate Amazon's use of such Software (and the applicable Support Services) and refund to Amazon all prepaid fees for such Software for the period of the Software Order Term after the date of termination. The corrected Software and Documentation will be subject to an additional warranty period of 180 days from the date of re-installation of the Software.

7.2 Other Warranties. Licensor represents, warrants and covenants to Amazon that (a) the Software and Documentation (and Amazon's exercise of its rights hereunder with respect to the Software and Documentation) do not and will not infringe upon, violate or misappropriate any Proprietary Right of any third party, (b) Licensor has the right to grant to Amazon all rights granted under this Agreement, free and clear of any and all agreements, liens, adverse claims, encumbrances or other interests of any third party, and Licensor has not previously and will not grant any rights in the Software or Documentation to any such third party that are inconsistent with the rights granted to Amazon herein, (c) the Software does not and will not contain any copy protection, automatic shut-down, lockout, "time bomb" or similar mechanisms that could interfere with Amazon's exercise of its rights hereunder, except for the license management mechanism which may be used if agreed under a Software Order; (d) Licensor will use all reasonable efforts to prevent the introduction of, and shall not knowingly introduce, any viruses, "trojan horses" or other harmful code into the Software and (e) (i) except as disclosed on Schedule 1 hereto, no Public Software was or is used in connection with the development of any Software or Documentation, (ii) except as disclosed on Schedule 1 hereto, no Public Software was or is incorporated in whole or in part, or has been distributed, in whole or in part, in conjunction with the Software or Documentation, and (iii) the Software and Documentation are not subject to any license or other terms that require that other software or documentation incorporating or used with the Software or Documentation be disclosed or distributed in Source Code form, be licensed for the purpose of making derivative works, or be redistributable at no charge.

7.3 Limitation. EXCEPT AS OTHERWISE STATED IN THIS AGREEMENT, LICENSOR MAKES NO WARRANTIES (EXPRESS OR IMPLIED) WITH RESPECT TO THE PERFORMANCE OF THE SOFTWARE, INCLUDING WITHOUT LIMITATION IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

Section 8. Indemnification

8.1 Indemnification.

8.1.1 Licensor will defend, Amazon and its Affiliates, and each of their directors, officers, employees and agents (collectively, the "**Indemnified Parties**"), from and against any and all claims, action or proceeding (each a "**Claim**") brought by any third party based upon: (a) actual or alleged infringement, violation or misappropriation of any third-party Proprietary Right by the Software or Documentation, or (b) any actual or alleged violation of law, gross negligence, willful misconduct, or fraud of Licensor and will indemnify the Indemnified Parties against, any losses, liabilities, damages and expenses awarded against the Indemnified Parties by a court of competent jurisdiction or agreed upon in a court approved settlement arising from a Claim; provided that the Indemnified Parties: (i) provide Licensor with prompt written notice of a Claim; (ii) grants Licensor sole control of the defense and settlement of any Claims, subject to Licensor using counsel reasonably satisfactory to the Indemnified Parties to defend each Claim, subject to section 8.1.2 below; (iii) cooperate with and provide all reasonable information (at Licensor's cost) to Licensor in the defense; (iv) do not admit liability and refrain from entering into any settlement of such Claims without Licensor's prior written consent, not to be unreasonably withheld; and (v) use all commercially reasonable efforts to mitigate any loss, damage or costs related to the Claim. Licensor will at all times keep the Indemnified Parties advised of the status of each Claim and the defense of such Claim. Any Indemnified Party may participate in the defense at its own expense.

8.1.2 If at any time any Indemnified Party reasonably determines that any handling of any Claim by Licensor (or the refusal by Licensor to handle any such Claim in accordance with Licensor's obligation under section 8.1.1 above) will materially adversely affect that Indemnified Party, that Indemnified Party may by serving 10 day's prior written notice to the Indemnifying Party take control of the defense of the Claim at such Indemnified Party's expense, and in such event such Indemnified Party and its counsel will proceed diligently and in good faith with such defense. In such case Licensor shall reimburse such Indemnifying Party in respect of any reasonable attorney's fees due and payable by such Indemnifying Party in respect of such defense.

8.1.3 Licensor will not enter into any settlement without the Indemnified Parties' prior written consent, which may not be unreasonably withheld, unless such settlement (a) includes the release of the Indemnified Parties from all liability arising from or relating to any such Claim; and (b) is solely monetary in nature and does not include a statement as to, or an admission of fault, culpability or failure to act by or on behalf of the Indemnified Parties or otherwise would adversely affect the Indemnified Parties. Licensor's duty to defend is independent of its duty to indemnify.

8.2 Infringement Remedy. If all or any part of the Software or Documentation is held, or Licensor determines that it could be held, to infringe, violate or misappropriate any third-party Proprietary Right, Licensor at no cost to Amazon (and without limiting any of Licensor's obligations under Section 8.1) will either (a) procure for Amazon the right to continue using the Software or Documentation in accordance with the rights under this Agreement, (b) replace the item with a reasonable replacement (including with respect to functionality, interoperability with other software and systems, and levels of security and performance set out in the Documentation; collectively, a "**Replacement Item**") that does not infringe, wrongfully use or misappropriate any third-party Proprietary Right, or (c) modify the item so that it is a Replacement Item that no longer infringes, wrongfully uses or misappropriates any third-party Proprietary Right. If Licensor is unable to successfully accomplish any of the actions described above after promptly using its reasonable efforts to accomplish each of them, Licensor will, without limiting any other rights or remedies available to Amazon hereunder, (i) terminate Licensor's use of such affected Software and (ii) refund to Amazon upon written request all prepaid amounts paid by Amazon hereunder in connection with the affected Software (and all related Support Services) for the period of the applicable Software Order Term after the date of termination of Amazon's use of such Software .

8.3 Limitation. Licensor's obligations under Sections 8.1 and 8.2 will not apply to the extent the Software or Documentation infringes, violates or misappropriates any third-party Proprietary Right solely as a result of (a) modifications made by Amazon or its Affiliates other than as contemplated by the Documentation or expressly authorized in writing by Licensor or its agents, or (b) Amazon's use of the Software other than as contemplated by the applicable Documentation, this Agreement, the Software Order or as expressly authorized in writing by Licensor or its agents; provided that such infringement, wrongful use or misappropriation would not have occurred absent such modification or use or (c) Amazon's use of the Software after the end of the applicable Software Order Term or its use of a version of the Software that is no longer current and the alleged infringement would not have been avoided by using the latest version which Licensor made available to Amazon.

Section 9. Escrow of Source Code

9.1 Escrow. If an escrow is required under a Software Order, and the parties will duly execute and deliver the Escrow Agreement promptly following the execution of the applicable Software Order, and Licensor will deliver to the Escrow Agent a complete master, reproducible copy of all Source Code relating to the applicable Software. Licensor promptly will update the Source Code in escrow to reflect all revisions, modifications and enhancements to such Software that are provided to Amazon hereunder. The parties will use reasonable commercial efforts to execute the applicable Escrow Agreement and deliver the Source Code to Escrow Agent within 60 days after the execution of the Software Order (or within such other time period as agreed under a Software Order). In the event that the Source Code is not delivered to the Escrow Agent within the timeframe in the Software Order, then Amazon shall be entitled to suspend any payment obligations which would normally have accrued under that Software Order and may terminate the Software Order by written notice and

have no further payment obligation with respect to such Software or any Support Services under that Software Order (and, if Amazon has previously paid any sums in respect thereof, to the extent such sums relate to a period after the termination date, Licensor will refund all such sums to Amazon within 15 days after such termination); provided, however, that such period may be extended by agreement of the parties.

9.2 Release of Source Code. The Source Code placed in escrow will be delivered to Amazon for use in accordance with its rights under this Agreement upon occurrence of the release conditions contained in the applicable Escrow Agreement (each, a “**Release Condition**”), such release conditions may include the following:

- (a) Licensor’s failure to remedy within a commercially reasonable timeframe any material breach of warranty in accordance with Section 7;
- (b) Licensor’s ceases to operate the line of its business which relates to the Software;
- (c) Licensor becomes or is declared insolvent or bankrupt, is the subject of any proceeding related to its liquidation or insolvency (voluntary or involuntary) which is not dismissed in 60 days, or makes an assignment for the benefit of creditors; or
- (d) Joint express written instructions to the Escrow Agent from the parties.

9.3 License; Ownership. Licensor hereby grants and agrees to grant to Amazon for the applicable Software Order Term a non-exclusive, non-transferable, non-sublicensable, royalty-free, license to install, operate and use the Software in accordance with the applicable license rights and Scope of use as set out in this Agreement and the applicable Software Order, following the occurrence of any Release Condition, and also to exercise all of the foregoing rights in and to the Source Code upon its delivery to Amazon, all solely in connection with Amazon’s and its contractors’ use, maintenance and support of the Software for the duration of the applicable Software Order Term, save that Amazon may sublicense the foregoing rights only to those third-party developers who perform development services for Amazon and its Affiliates solely as necessary for such third-party developers to perform development services for Amazon and its Affiliates in respect of the Software and provided that Amazon shall be responsible and liable for such third parties breach of the terms of the Agreement and the applicable Software Order

Section 10. Maintenance, Training and Support

Licensor will provide to Amazon the maintenance, training (if any) and support services described on Exhibit B (collectively, the “**Support Services**”) for any Software licensed under a Software Order and in accordance with the support level ordered by Amazon as indicated in the applicable Software Order and further described in Exhibit B. In consideration for Support Services rendered, Amazon will pay the fees and charges set forth in the applicable Software Order.

Section 11. Intentionally Deleted.

Section 12. Confidential Information

Licensor will comply with the terms of any nondisclosure agreement between Licensor and Amazon (or Amazon’s affiliates) (the “**Nondisclosure Agreement**”).

Section 13. Miscellaneous

13.1 LIMITATION OF LIABILITY.

13.1.1 NIETHER PARTY WILL BE LIABLE FOR ANY INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES OR FOR LOST PROFITS, LOST REVENUE, LOST DATA OR LOSS

OF GOOD WILL ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT (WHETHER OR NOT SUCH LOSSES OR DAMAGES ARE FORSEEABLE).

13.1.2 SUBJECT TO SECTION 13.1.3, EACH PARTY'S LIABILITY ARISING FROM THIS AGREEMENT, WHETHER IN CONTRACT OR TORT OR OTHERWISE, WILL NOT EXCEED ONE AND A HALF TIMES (1.5X) THE AGGREGATE AMOUNT OF ALL FEES AND CHARGES PAID OR PAYABLE BY AMAZON UNDER THIS AGREEMENT DURING THE 12 MONTH PERIOD OF THE TERM IN WHICH THE CLAIM ARISES.

13.1.3 THE LIMITS SET OUT ABOVE IN SECTION 13.1.2 SHALL NOT APPLY IN RESPECT OF THE INDEMNITIES PROVIDED IN SECTION 8.1 OR WITH RESPECT TO A BREACH BY EITHER PARTY OF ANY CONFIDENTIALITY OBLIGATIONS OWED TO THE OTHER.

13.2 Restricted Use; Export. Any Software provided to the U.S. Government pursuant to solicitations issued on or after December 1, 1995 is provided with the commercial rights and restrictions described in this Agreement. All Software provided to the U.S. Government pursuant to solicitations issued before December 1, 1995 is provided with RESTRICTED RIGHTS as provided for in subdivision (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013 and the Rights in Data-General clause at FAR 52.227-14, as applicable. Use, duplication or disclosure by the governments of any other countries is subject to the restrictions of similar applicable laws. Amazon will not export any Software or other technical data furnished to it hereunder in any manner contrary to the export regulations of the United States.

13.3 Publicity. Except as otherwise agreed in the applicable Software Order, Licensor will not issue any press releases, make any other disclosures regarding this Agreement or its terms or the nature or existence of any relationship between the parties, or use Amazon's trademarks, trade names or other proprietary marks in any manner in connection with this Agreement without Amazon's prior written consent.

13.4 Assignment. Neither party may assign any of its rights or obligations under this Agreement without the prior written consent of the other party, except that either party may assign any of its rights and obligations under this Agreement without consent: (a) to any Affiliate; and (b) in connection with any merger, consolidation, reorganization, sale of all or substantially all of its related assets or similar transaction.

13.5 Notices. Any notice or other communication under this Agreement given by any party to the other party will be in writing and, to be effective, must be delivered by registered letter, receipted commercial courier, or electronically receipted facsimile transmission (acknowledged in like manner by the intended recipient) at its address specified in the signature page to this Agreement. Either party may from time to time change the addresses or individuals specified in this section by giving the other party notice of such change in accordance with this section.

13.6 Waiver; Remedies. A waiver of any breach or default under this Agreement will not constitute a waiver of any other or subsequent breach or default. The failure of either party to enforce any term of this Agreement will not constitute a waiver of such party's rights to subsequently enforce the term. The remedies specified in this Agreement are in addition to any other remedies that may be available at law or in equity.

13.7 Setoff. Notwithstanding any other provision of this Agreement, Amazon may delay or withhold payment of any sums due and payable to Licensor in accordance with a Software Order, in whole or in part in respect of any invoice which is the subject of a bona fide dispute until such dispute is resolved, on account of any failure of Licensor to perform a material obligation in accordance with this Agreement or that Software Order

13.8 Relationship of the Parties. Licensor will perform under this Agreement as an independent contractor, and this Agreement will not be construed to create a partnership, joint venture, agency, employment, or any other relationship between Amazon and Licensor. Licensor will not represent itself to be an employee,

representative, or agent of Amazon. Licensor will have no authority to enter into any agreement on Amazon's behalf or in Amazon's name or otherwise bind Amazon to any agreement or obligation.

13.9 Severability; Entire Agreement. If any term of this Agreement is held to be invalid, such invalidity will not affect the remaining terms. This Agreement, including the attached exhibits and all Software Orders, together with the Nondisclosure Agreement, represents the entire agreement between the parties with respect to the subject matter hereof and supersedes any previous or contemporaneous oral or written agreements regarding such subject matter. Any modification of this Agreement must be in writing and signed by a duly authorized agent of each party. This Agreement may be executed by facsimile and in counterparts, which together will constitute one and the same agreement.**13.10 Governing Law.** This Agreement will be governed by the laws of the State of New York without reference to rules governing choice of law. The parties hereby irrevocably consent to the exclusive jurisdiction and venue of the federal and state courts located in New York, New York with respect to any claims, suits or proceedings arising out of or in connection with this Agreement or the transactions contemplated hereby, and Licensor agrees not to commence or prosecute any such claim, suit or proceeding other than in the aforementioned courts.

13.11 Precedence of Documents. This Agreement contemplates a variety of communications between the parties in connection with the delivery of the Software and associated services, including the possibility of communications made on forms of Amazon or Licensor (e.g., invoices, purchase orders or other Amazon or Licensor documents). Any terms and conditions contained in those communications that are inconsistent with the terms of this Agreement are null and void.

[Signature Page Follows.]

This Agreement is signed by duly authorized representatives of the parties and is effective as of the Effective Date.

Amazon:

Amazon Services LLC

By: DocuSigned by: Dave Glick

Name: David Glick

Title: vp, Operations Technology

Date Signed: September 27, 2016

Address:
410 Terry Avenue North
Seattle, WA 98108-5210
Attention: General Counsel
Facsimile: 206-834-7010

Licensor:

Scandit Inc.

By: DocuSigned by: Samuel Mueller

Name: Sam Mueller

Title: CEO

Date Signed: September 27, 2016

Address:
535 Mission Street
San Francisco, CA 94150
Attention: Sam Mueller



Exhibit A

SAMPLE SOFTWARE ORDER

This Software Order No. ____ (this “**Software Order**”), between [Insert], and [Insert], a [Insert] corporation (“**Licensor**”), is effective as of [Insert] (the “**Order Effective Date**”), and adopts and incorporates by reference the terms and conditions of the Master Software License Agreement (the “**Agreement**”), between Amazon and Licensor, with an effective date as of _____, 20__ . Transactions performed under this Software Order will be conducted in accordance with and be subject to the terms and conditions of this Software Order and the Agreement. Each capitalized term used but not defined in this Software Order has the meaning set forth in the Agreement.

1. Definitions.

- (a) “**Amazon Product**” means any software applications (see Scope) (1) developed, owned, licensed, distributed, or offered by or for Amazon or its Affiliates (2) which is used on a Device by Authorized Users (see Scope) and (3) which integrates the Software in accordance with the Scope
- (b) “**Device**” means any [handheld wireless computing device, including, without limitation, any mobile phone, smartphone, tablet computer, computing device, personal digital assistant, enterprise digital assistant, ruggedized devices, or other portable electronic device now known or hereafter developed that is owned or operated by Amazon or its Affiliates and their employees, contractors, or other workforce members.][*Amend to reflect authorized devices*]
- (c) [“**Enterprise App Store**” means a private app store used by Amazon for distributing Amazon Products to Amazon staff, employees, consultants or other related parties (as set out in the Scope table) for internal, non-public use.]
- (d) “**Public App Stores**” means the Amazon App store or other public App Stores such as the Apple iTunes store or the Google Play store.]
- (e) “**Scope**” means the limitations, as set out in the table below within which the Software may be accessed and used by Amazon.

[insert Scope of use table – to include limitations such as authorized users, territory, number and type of devices, type of applications, license exclusions and assumptions]

2. **Software to be Licensed.** For purposes of this Software Order, the licensed Software is Licensor’s [Insert].

3. License Grants.

3.1. **Support Order Term:** The Initial Order Term shall commence on the Order Effective Date and shall continue for the period of [_____] years] and thereafter may be renewed in accordance with clause 4.5 of the Agreement.

3.2. **Software.** Licensor hereby grants to Amazon [and its Affiliates] for the Software Order Term, a [worldwide] non-exclusive, non-transferable, non-sublicensable (except as permitted under subsection (c) below), royalty-free, fully paid-up, and irrevocable (except as set forth in Section 4 of the Agreement) license, under all applicable Proprietary Rights subject to and in accordance with the Scope, this Software Order and the Agreement to: (a) install, operate, and use the Software (1) for development purposes in order to integrate the Software into the Amazon Product, and (2) for purposes of supporting and maintaining the Amazon Products; (b) distribute, Software as contained in or combined with, any Amazon Products; and (c) sublicense the foregoing rights granted in the Software only to those third-party developers who perform development services for Amazon and its Affiliates solely as necessary for such third party developers to perform development services for Amazon and its Affiliates in respect of the Software and provided that Amazon shall be responsible and liable for such third party developers’ breach of the terms and conditions of the Agreement and this Software Order.

3.3. **Documentation.** Licensor hereby grants to Amazon for the Software Order Term, a non-exclusive, non-transferable, non-sublicensable (except as permitted under subsection (b) below), royalty-free, fully paid-up,

and irrevocable (except as set forth in clause 4 of the Agreement) license, under all applicable Proprietary Rights, to (a) reproduce and use the Documentation for Amazon's internal purposes in respect of Amazon's use of the Software in accordance with this Software Order and the Agreement; and (b) sublicense the foregoing rights only to those third party developers who perform development services for Amazon and its Affiliates solely as necessary for such third party developers to perform development services for Amazon and its Affiliates in respect of the Software and provided that Amazon shall be responsible and liable for such third parties breach of the terms of the Agreement and this Software Order.

3.3 Branding. Amazon agrees to use commercially reasonable efforts to include, within ninety (90) days of being provided, Licensor's most recent text and logo ("**Branding**") in the scan screens of all versions of Amazon's Product and on all supported platforms at all times in accordance with logo usage guidelines provided by Licensor. The Branding must be visible in the scan screen at all times and must not be covered with any other graphical elements or information.

3.4 Amazon Responsibilities. Amazon (a) will use the Software only in accordance with the Documentation and applicable laws and government regulations, (b) is responsible for the design, functionality, look-and-feel, support, upgrade and maintenance of any and all aspects of Amazon Products, including without limitation the integration of the Software, according to any Scope or other usage or integration requirements provided by Us, (c) shall not share the app keys provided by Licensor to activate the Software ("App Key"), the Software, or any of its parts with any third party for any reason except third party providers developing the Amazon Product for Amazon, in which case Amazon shall ensure that such third party providers are bound by the terms of this Agreement and this Software Order, (d) use a unique App Key for each of the Amazon Products, and (e) integrate the latest version of the Software into the Amazon Product with its next major release, unless there are reproducible speed, accuracy or stability issues with the latest version of the Software. If there are such issues, Amazon will make Licensor aware of this promptly via email to support@scandit.com.

3.4. Audit rights. To enable Licensor to ensure Amazon's use of the Software is in accordance with the Scope, this Software Order and the Agreement, Amazon shall (i) provide documentation detailing its internal distribution and monitoring process to obtain new App Keys and for the distribution of the Software for review and approval by Licensor; and (ii) upon Licensor's reasonable request, provide evidence of Amazon's use of the Software in compliance with the Scope within 20 days of a such request, which shall include relevant Enterprise App Store and mobile device management reports, Amazon application screen shots and descriptions and audit logs of those persons within Amazon who download the Software along with name and title of such persons, save that Licensor may only make such request once during each year of the Software Order Term except where Licensor reasonably believes that Amazon is not using the Software in accordance with the Scope. In such case, Amazon shall permit Licensor to audit Amazon's use of the Software solely in order to ensure compliance with terms of this Software Order and the Agreement. Such audit may be conducted at Licensor's expense, and this right shall be exercised with reasonable prior notice, in such a manner as not to interfere substantially with Amazon's normal conduct of business. In the event an audit reveals that Amazon's use of the Software is in excess of the limitations set out in the Scope, notwithstanding any other rights and remedies of Licensor, Amazon shall pay to Licensor the applicable license fees for such excess use. The parties shall in good faith negotiate the additional license fees payable by Amazon within 10 days of the date the audit reveals such excess use. In the event the parties have not agreed on such license fees payable upon expiry of such 10 day period, the then current price list of Licensor shall apply for such excess use. Licensor shall invoice Amazon for such additional license fees payable upon the earlier of the date the parties agree upon the additional license fees payable or the date of expiry of the 10 day period.

4 [Delivery and Acceptance. [Include a form of acceptance procedure if applicable to the software license being purchased and as agreed by the parties]

(a) [Amazon will have 10 days from the Order Effective Date to test and inspect the Software and Documentation ("**Inspection Period**") to determine whether the Software complies with the Documentation and whether the Software and Documentation are free from errors and defects. If Amazon determines that any Software or Documentation does not so comply or contains any such errors or defects, Amazon shall immediately notify Licensor with in such Inspection Period and Licensor shall remedy the

noncompliance or defects in accordance with the warranty remedy provided in Section 7.1 of the Agreement.]

5 Support Services Term.

- (a) [Licensor will provide the Support Services for the Software beginning on the Order Effective Date and continuing for the Software Order Term]

OR

- (b) [Licensor will offer Support Services for the Software beginning on the Order Effective Date and continuing for a period of three years (“Initial Support Term”). Amazon may, in its sole discretion, elect to receive Support Services for the Software. If Amazon elects to receive Support Services, Licensor will provide the Support Services for the entirety of the remaining Initial Support Term or Renewal Support Term, as applicable.
- (c) Upon expiration of the Initial Support Term, or any subsequent renewal term, the Support Services will automatically renew for an additional 12 month period (each such period, a “Renewal Support Term”), unless either Amazon gives Licensor 30 days written notice of termination prior to the end of the Initial Support Term or Renewal Support Term, or Licensor gives Amazon 90 days written notice of termination prior to the end of the Initial Support Term or Renewal Support Term.]

6 License [and Support] Fee. Amazon will pay Licensor a annual subscription fee of \$[Insert] to license the Software [and receive related support for such Software] (the “License Fee”), payable by Amazon for each 12 month period of the Initial Order Term and any Renewal Term, pursuant to the terms of Section 6 of the Agreement.

7 Support Fee.

- (a) The fees for the Support Services for the Software, are included in the License Fee.

OR

- (b) If Amazon elects to purchase Support Services for the Software, Amazon will pay Licensor \$[Insert] per month for the Support Services (the “Support Fee”), payable by Amazon pursuant to the terms of Section 6 of the Agreement.
- (c) The cost for any annual Support Fees shall be fixed for Initial Support Term / Initial Order Term. Thereafter, unless otherwise agreed by the parties, Licensor may increase the Support Fee annually upon notice to Amazon, provided, however, that the Support Fee for any Renewal Term shall increase by no more than the lesser of the following amounts over the annual Support Fee paid for the preceding annual period: (1) 3%; and (2) the percentage change in the value of the PPI Index over the previous calendar year (“PPI Index”, as used herein, means the most recently published Producer Price Index for Electronic Computers and Computer Equipment, commodity code 115, as it appears in the *PPI Detailed Report* as published by the U.S. Department of Labor, Bureau of Labor Statistics).

8 Invoice Schedule. Licensor will invoice Amazon for the annual License Fee on or after the Order Effective Date and thereafter on each anniversary of the Order Effective Date for the duration of the Software Order Term. *[Include Support fee invoicing details if applicable].*

9 Additional Representations and Warranties. Licensor represents and warrants that to Licensor’s knowledge, as at the Order Effective Date there are no third parties claiming any Proprietary Rights that are reasonably likely to restrain or prohibit Amazon from using the Software as contemplated in this Software Order.

10 Implementation Services Required. [No]

11 Escrow Required. [Yes/No]

This Software Order is entered into as of the Order Effective Date.

[AMAZON]

SCANDIT INC

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date Signed: _____

Date Signed: _____



Exhibit B**Maintenance, Training and Support Services****The Support Services are as follows:***Updates and Upgrades:*

If Amazon elects to purchase Support Services for Software licensed under a Software Order, Licensor will provide Support Services for such Software for the duration of the Software Order Term in accordance with the support level for the software purchased as indicated in the applicable Software Order ("**Support Level**"). Promptly upon the general commercial release thereof, Licensor will provide to Amazon, any and all patches, enhancements, updates, upgrades of the Software that Licensor makes generally commercially available to its customers for the Software ("**Updates**"); Licensor will continue to support such previous releases or versions of the Software for the period set out in the applicable Support Level.

Availability and Contacts and Support Levels offered:

Licensor will make technical support available to Amazon in accordance with the Support Level purchased by Amazon. The Support Levels available for purchase are set out in the table below. Licensor's support personnel will provide Amazon with remote assistance as to the use and operation of the Software and accept reports of bugs, defects or errors (collectively, "**Errors**") in the Software. Licensor will ensure that each of its personnel performing any Support Services are experienced, knowledgeable and qualified in the use, maintenance and support of the Software.

Support Levels:

The Support Levels offered by Licensor for purchase by Amazon are set out below:

Support	Basic	Medium	Premium
Performance Improvements as available	Yes	Yes	Yes
Maintenance updates as available	Yes	Yes	Yes
On-line documentation as available	Yes	Yes	Yes
E-Mail support	Yes	Yes	Yes
Phone support	No	No	Yes
Support hours	Business Hours	Business Hours	24/5 (weekdays only and excluding public holidays in Switzerland)
Response times	3 Business Days	2 Business Days	Response times set out in the Error Correction for Premium Support Level Section below

Support old releases	3 months	6 months	12 months
----------------------	----------	----------	-----------

Contact information for technical support is as follows:

Toll-Free Telephone Number:

Facsimile:

E-Mail:

Voice Mail:

Pager:

Provided that at least one number or address is at all times available for each means of contact, Licensor may change any of the foregoing contact information from time to time by delivery of not less than thirty (30) days' prior written notice to Amazon.

Error Correction for Premium Support Level:

In the event that Amazon has purchased the "Premium" Support Level only, where Amazon reports to Licensor any Error in the Software (the Severity Level to be reasonably determined by Licensor, acting in good faith), Licensor shall respond to such reports as follows:

Severity Level 1 Problem:

"**Severity Level 1 Problem**" is an emergency condition which makes the use or continued use of any one or more functions of the Software impossible. The condition requires an immediate solution that is not already available to Amazon. Licensor will respond to an Amazon report of a Severity Level 1 Problem within 4 hours of receipt of the problem report and immediately thereafter use its best efforts (including by diligently and continuously performing such services as may be necessary) to: (a) promptly replicate and verify the reported problem; (b) arrive at a fix (or workaround reasonably acceptable to Amazon) as promptly as possible; and (c) provide Amazon with the final form of the fix ("**Final Fix**") or work-around promptly after the fix or workaround has been developed (and, if a work-around is provided, the Final Fix shall be provided as promptly as possible thereafter).

Severity Level 2 Problem:

"**Severity Level 2 Problem**" is, other than any Severity Level 1 Problem, any condition which makes the use or continued use of any one or more functions of the Software difficult and which Amazon cannot reasonably circumvent or avoid on a temporary basis without the expenditure of significant time or effort. Licensor will respond to an Amazon call reporting a Severity Level 2 Problem within 6 hours of receipt of the problem report and immediately thereafter use its best efforts (including by diligently and continuously performing such services as may be necessary) to: (a) promptly replicate and verify the reported problem; (b) arrive at a fix (or workaround reasonably acceptable to Amazon) as promptly as possible; and (c) provide Amazon with the Final Fix or work-around promptly after the Final Fix or work-around has been developed (and, if a work-around is provided, the Final Fix shall be provided as promptly as possible thereafter).

Severity Level 3 Problem:

"**Severity Level 3 Problem**" is, other than any Severity Level 1 Problem or Severity Level 2 Problem, any limited problem condition which is not critical in that no loss of data occurs and which Amazon can reasonably circumvent or avoid on a temporary basis without the expenditure of significant time or effort. Licensor will respond to an Amazon call reporting a Severity Level 3 Problem within 1 business day following receipt of the problem report, and immediately thereafter diligently perform, during normal

business hours, such services as may be necessary to: (a) promptly begin work on error identification and verification; (b) provide Amazon with a fix (or work-around reasonably acceptable to Amazon) as promptly as possible; and (c) provide Amazon with a Final Fix or work-around promptly after the fix or work-around has been developed (and, if a work-around is provided, the Final Fix shall be provided as promptly as possible thereafter).

Severity Level 4 Problem

“Severity Level 4 Problem” is a minor problem condition or Documentation error which Amazon can easily circumvent or avoid and which does not qualify as a Severity Level 1 Problem, Severity Level 2 Problem or Severity Level 3 Problem. Licensor will respond to an Amazon call reporting a Severity Level 4 Problem within 1 business day of receipt of the a Severity Level 4 report, thereafter begin work on error identification and verification or functionality or workaround design within 5 days of receipt of the report, and provide Amazon with a Final Fix in the next version of the Software.

Exhibit C

**DEPOSITOR ACCEPTANCE FORM FOR
MASTER PREFERRED AGREEMENT**

Beneficiary Company Number 24206

Depositor, Preferred Beneficiary and Iron Mountain Intellectual Property Management, Inc., formerly known as DSI Technology Escrow Services ("IMIPM"), hereby acknowledge that _____ is the Depositor referred to in the Master Preferred Escrow Agreement ("Agreement") effective _____, 20____ with IMIPM as the escrow agent and Amazon Corporate LLC as the Preferred Beneficiary. Depositor hereby agrees to be bound by all provisions of such Agreement.

Deposit Account Number _____

SERVICE Check box(es) to order service	SERVICE DESCRIPTION-MASTER THREE PARTY ESCROW AGREEMENT - BENEFICIARY	ONE-TIME FEES	ANNUAL FEES	PAYING PARTY Check box to identify the Paying Party
<input checked="" type="checkbox"/> Additional Deposit Account and Beneficiary enrollment	Iron Mountain will set up one additional deposit account to manage and administrate access to new Deposit Material that will be securely stored in controlled media vaults in accordance with the service description above and the Agreement that governs the Initial Deposit Account. Iron Mountain will fulfill a Work Request to add a new Beneficiary to an escrow deposit account in accordance with the service description above and the Agreement.		\$1,700	<input type="checkbox"/> Depositor -OR <input checked="" type="checkbox"/> Beneficiary
<input checked="" type="checkbox"/> File List Verification Report	Iron Mountain will fulfill a Work Request to provide a File Listing Report, which includes a deposit media readability analysis, a file listing, a file classification table, virus scan outputs, and assurance of completed deposit questionnaire. A final report will be sent to the Paying Party regarding the Deposit Material to ensure consistency between Depositor's representations (i.e., Exhibit B and Deposit Questionnaire) and stored Deposit Material. Deposit must be provided on CD, DVD-R, or deposited by sFTP.	\$2,500	N/A	<input type="checkbox"/> Depositor-OR <input checked="" type="checkbox"/> Beneficiary
<input checked="" type="checkbox"/> Add Deposit Tracking Notification	At least semi-annually, Iron Mountain will send an update reminder to Depositor. Thereafter, Beneficiary will be notified of last deposit.	N/A	\$375	<input type="checkbox"/> Depositor -OR - <input checked="" type="checkbox"/> Beneficiary

Notices and communications to Depositor should be addressed to:

Invoices should be addressed to:

Company Name: _____
Address: _____

Designated Contact: _____
Telephone: _____
Facsimile: _____
E-mail: _____

Contact: _____

P.O.#, if required: _____



Depositor

Amazon Corporate LLC
Preferred Beneficiary

By: _____
Name: _____
Title: _____
Date: _____

By: _____
Name: _____
Title: _____
Date: _____

Iron Mountain Intellectual Property Management, Inc.

By: _____
Name: _____
Title: _____
Date: _____



SCHEDULE 1

Approved Public Software:

Library	License
JSONCPP	Public Domain/MIT
Zxing	Apache 2.0 (no attribution required)
ARM mBed TLS	TLS Apache 2.0 (no attribution required)
DLib	Boost



EXHIBIT B

SOFTWARE ORDER NO. 1

This Software Order No. 1 (this “Software Order”), between [Insert], and Scandit Inc., a Delaware corporation (“Licensor”), is effective as of June 30, 2016 (the “Order Effective Date”), and adopts and incorporates by reference the terms and conditions of the Master Software License Agreement (the “Agreement”), between Amazon and Licensor, with an effective date as of June 30, 2016. Transactions performed under this Software Order will be conducted in accordance with and be subject to the terms and conditions of this Software Order and the Agreement. Each capitalized term used but not defined in this Software Order has the meaning set forth in the Agreement.

1. Definitions.

- (a) “Amazon Product” means any B2E (see Scope table definition) software application (1) developed owned, licensed, distributed, or offered by or for Amazon or its Affiliates, (2) used on a Device operated by Authorized Users (defined herein) in connection with Amazon’s customer fulfillment and delivery operations, and (3) which integrates the Software licensed under this Software Order or which accesses the Software via a Java-based intent mechanism.
- (b) “Authorized Users” means Amazon’s and its Affiliates’ employees, contractors, agents, and other third-parties using Amazon Product in connection with Amazon’s customer fulfillment and delivery operations.
- (c) “App Key” means the app key which is provided by Licensor to activate the Software in accordance with the process set out in section 4.4 below.
- (d) “Device” means any handheld wireless computing device, including, without limitation, any mobile phone, smartphone, tablet computer, computing device, personal digital assistant, enterprise digital assistant, ruggedized devices, or other portable electronic device now known or hereafter developed (other than iOS and Windows devices) that is owned or operated by Amazon or its Affiliates and their Authorized Users .
- (e) **Enterprise App Store:** a private app store used by Amazon for distributing Amazon Products to Amazon permitted staff, employees, consultants or other related parties (as set out in the Scope table) for internal, non-public use.
- (f) **Public App Store:** the Amazon Appstore or other public App Stores such as the Apple iTunes store or the Google Play store
- (g) “Scope” means the limitations, as set out in the table below within which the Software may be accessed and used by Amazon:

Number and type of Allowed Applications	Active Devices	Mobile Platforms	Territory	Distribution	Symbologies	License/Feature Exclusions
Unlimited Amazon apps for Authorized User for package handling in fulfillment centers or for delivery	Unlimited	Android	Worldwide	Via Enterprise App Store or where applicable the Public App Store*	Symbologies included are Code 25, Code 39, Code 128, EAN-8, EAN-13, EAN-128, DataBar, Interleaved 2 of 5, UPC-A, UPC-E, Codabar, Aztec, DataMatrix, MaxiCode, MSI Plessey,	1. iOS and Windows platforms and support 2. Optical Character Recognition (OCR) 3. Multi-scan functionality 4. Applications for Consumers (B2C)



					QR and PDF-417	5. Use case specific exclusions: Document Scanning and Tracking (e.g. HR), IT Asset Tracking, Inventory Management (for Level I FC Associates) and other applications related to scanner replacement (B2E)
--	--	--	--	--	----------------	--

*The Amazon Product may be distributed through the Public App Store only in the case of use of the Amazon Product by Amazon Authorized Users and provided that the Amazon Products shall not at any time be offered for sale to and use by consumers.

2. Software to be Licensed. For purposes of this Software Order the licensed Software is:

- (i) Licensor’s customized “non-communicating” version of the Scandit Barcode Scanner SDK which will not transmit or communicate any usage data to Licensor; and
- (ii) an .apk application package developed by Licensor for Amazon’s use of the Software with Amazon Products within the Scope via a Java based intent mechanism. Licensor will provide the source code only for such .apk to Amazon. The Support Services will not be provided for the .apk application package.

3. Software Order Term. The Initial Order Term shall commence on the Order Effective Date and shall continue for a period of five (5) years and thereafter may be renewed in accordance with clause 4.5 of the Agreement.

4. License Grants.

4.1. Software. Licensor hereby grants to Amazon and its Affiliates for the Software Order Term a worldwide, non-exclusive, non-transferable, non-sublicensable (except as permitted in subsection (c) below), royalty-free, fully paid-up, and irrevocable (except as set forth in Section 4 of the Agreement) license, under all applicable Proprietary Rights, subject to and in accordance with the Scope, this Software Order and the Agreement, to: (a) install, operate, and use the Software (1) for development purposes in order to integrate the Software into the Amazon Product, including without limitation modification and adaptation of any .apk to allow communication between an intent and the Software and (2) for purposes of supporting and maintaining the Amazon Products; (b) distribute, the Software as integrated in Amazon Products; and (c) sublicense the foregoing rights granted in the Software only to those third-party developers who perform development services for Amazon and its Affiliates and solely as necessary for such third party developers to perform such development services for Amazon and its Affiliates in respect of the Software and Amazon Products; provided that Amazon shall be responsible and liable for such third party developers’ breach of the terms and conditions of the Agreement and this Software Order in connection with such third party developer’s performance of the development services for Amazon and its Affiliates..

4.2. Documentation. Licensor hereby grants to Amazon for the Software Order Term a worldwide, non-exclusive, non-transferable, non-sublicensable (except as permitted in subsection (b) below), royalty-free, fully paid-up, , and irrevocable license (except as set forth in Section 4 of the Agreement), under all applicable Proprietary Rights, to (a) reproduce and use the Documentation for Amazon’s internal purposes in respect of Amazon’s use of the Software in accordance with this Software Order and the Agreement; and (b) sublicense the foregoing



rights only to those third-party developers who perform development services for Amazon and its Affiliates solely as necessary for such third-party developers to perform development services for Amazon and its Affiliates in respect of the Software and provided that Amazon shall be responsible and liable for such third parties breach of the terms of the Agreement and this Software Order.

- 4.3. Ownership of Developments and Amazon Products.** Licensor acknowledges and agrees that Amazon will own and reserve all right, title and interest in and to any Amazon Products (including any improvements thereto), but excluding the Software and Documentation, including without limitation, all Proprietary Rights in or to the Amazon Products (excluding the Software and Documentation). No license to any Amazon Product, Amazon confidential information, or any Proprietary Rights in or to any of the foregoing is granted to Licensor under this Agreement. Except for the limited license granted herein, Licensor owns and reserves all rights, title and interest in and to the Software and Documentation, including without limitation, all Proprietary Rights in or to the Software and Documentation.
- 4.4. App Key Process.** Due to Amazon purchasing the “non-communicating” version of the Software, Amazon is required to and shall follow and comply with the following App Key process for each new (internally approved) Amazon Product which shall integrate the Software or which shall access the Software via a Java-based intent mechanism. Amazon shall:
- 4.4.1. log into Licensor’s web account with Amazon enterprise account credentials (as notified by Licensor to Amazon);
 - 4.4.2. in the online interface, click generate “new app key”, enter the new Amazon Product package name and a brief description of what the Amazon Product does as well as a screenshot of the Amazon Product (optional);
 - 4.4.3. copy the package name-specific App Key generated for the Initial Order Term or any Renewal Term and add it to new Amazon Product;
 - 4.4.4. download the latest version of Software (optional) and include it in new Amazon Product; and
 - 4.4.5. ensure to upgrade all Amazon Products with a new App Key prior to the expiry of the Initial Order Term or any Renewal Terms.
- 4.5. Branding.** Amazon agrees to use commercially reasonable efforts to include, within ninety (90) days of being provided, Licensor’s most recent text and logo (“**Branding**”) in the scan screen of all versions of Amazon’s Product and on all supported platforms at all times in accordance with logo usage guidelines provided by Licensor. The Branding must be visible in the scan screen at all times and must not be covered with any other graphical elements or information. Licensor hereby grants Amazon a license to use such Branding solely and strictly in accordance with this section 4.4.
- 4.6. Amazon Responsibilities.** Amazon (a) will use the Software only in accordance with the Documentation and applicable laws and government regulations, (b) is responsible for the design, functionality, look-and-feel, support, upgrade and maintenance of any and all aspects of Amazon Products, including without limitation the integration of the Software, according to the Scope or other usage or integration requirements provided by Supplier, (c) shall not share the app keys provided by Licensor to activate the Software or any of its parts with anyone who is not an Authorized User or any other third party for any reason except third party providers developing the Amazon Product for Amazon, in which case Amazon shall ensure such third parties are bound by the terms of this Agreement and this Software Order, (d) use a unique App Key for each of the Amazon Products, and (e) integrate the latest version of the Software into the Amazon Product with its next major release, unless there are reproducible speed, accuracy or stability issues with the latest version of the Software; provided, however, that Amazon shall have no obligation to integrate any new versions during the period starting September 1 and ending December 31 of any calendar year (save in the event of a new version released by Licensor in accordance with section 8.2 of the Agreement). If there are such issues, Amazon will make Licensor aware of this promptly via email to support@scandit.com.
- 4.7. Audit rights.** To enable Licensor to ensure Amazon’s use of the Software is in accordance with the Scope, this Software Order and the Agreement, Amazon shall (i) provide documentation detailing its internal distribution

and monitoring process to obtain new App Keys and for the distribution of the Software for review and approval by Licensor; and (ii) upon Licensor's reasonable request, provide reports detailing Amazon's use of the Software in compliance with the Scope within 40 days of a such request, which shall include relevant Enterprise App Store and mobile device management reports and descriptions and audit logs of those persons within Amazon who download the Software along with name and title of such persons, save that Licensor may only make such request once during each year of the Software Order Term except where an audit reveals that Amazon is not using the Software in accordance with the Scope. Any audit shall be solely in order to ensure compliance with terms of this Software Order and the Agreement. Audits will be performed at Licensor's expense, and this right shall be exercised with reasonable prior notice, in such a manner as not to interfere substantially with Amazon's normal conduct of business. In the event an audit reveals that Amazon's use of the Software is in excess of the limitations set out in the Scope, notwithstanding any other rights and remedies of Licensor, Amazon shall pay to Licensor the applicable license fees for such excess use. The parties shall in good faith negotiate the additional license fees payable by Amazon. Licensor agrees that no audits will be conducted between September 1 and December 31 of a calendar year, except where the previous audit has found Amazon to be using the Software otherwise than in accordance with the Scope, Software Order and Agreement.

5. Delivery and Acceptance.

(a) Amazon will have 10 days from delivery to Amazon by making the Software available to download and providing notice of the same to Amazon to test and inspect the Software and Documentation, which delivery shall be deemed to occur on the Order Effective Date if delivered prior to that date ("**Inspection Period**") to determine whether the Software complies with the Documentation and whether the Software and Documentation are free from errors and defects. If Amazon determines that any Software or Documentation does not so comply or contains any such errors or defects, Amazon shall notify Licensor within such Inspection Period and Licensor shall remedy the noncompliance or defects in accordance with the warranty remedy provided in Section 7.1 of the Agreement.

6. Support Services Term.

Licensor will provide the Support Services in accordance with the Support Level purchased by Amazon as described in Schedule 1 hereto for the Software (but excluding the .apk application package) beginning on the Order Effective Date and continuing for the duration of Software Order Term

- 7. License and Support Fee.** Amazon will pay Licensor an annual license fee of \$495,000 to license the Software and receive support for such Software (the "**License and Support Fee**"), payable by Amazon pursuant to the terms of Section 6 of the Agreement. Licensor agrees that the License and Support Fee will not increase for a term of 5 years, beginning on the Order Effective Date.
- 8. Invoice Schedule.** Licensor will invoice Amazon for the first annual License and Support Fee on or after the Order Effective Date and for each annual License and Support Fee thereafter on each year anniversary of the Order Effective Date for the duration of the Software License Term. All invoices are payable in accordance with Section 6 of the Agreement.
- 9. Additional Representations and Warranties.** Licensor represents and warrants that to Licensor's knowledge, as at the Order Effective Date, there are no third parties claiming any Proprietary Rights that are reasonably likely to restrain or prohibit Amazon from using the Software as contemplated in this Software Order.
- 10. Implementation Services Required.** No.
- 11. Escrow Required.** Yes.

This Software Order is entered into as of the Order Effective Date.

AMAZON SERVICES LLC

SCANDIT INC.

By: DocuSigned by:
Dave Glick
5780D448F346451...

By: DocuSigned by:
Samuel Mueller
786DFD1298A5454...

Name: Dave Glick

Name: Samuel Mueller

Title: Vp, Operations Technology

Title: CEO

Date Signed: September 27, 2016

Date Signed: September 27, 2016



SCHEDULE 1
Support Services

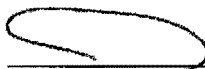
Support	Basic (as customized for this particular Software Order)
Performance Improvements as available	Yes
Maintenance updates as available	Yes
On-line documentation as available	Yes
E-Mail support	Yes
Phone support	No
Support hours	Business Hours
Response times	4 Business Hours
Support old releases	3 months



DATED THIS 20th day of December, 2016.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By



~~D. John Ashby~~, ISB No. 7228
Attorneys for Defendant Scandit Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of December, 2016, I caused to be served a true copy of the foregoing NOTICE OF HEARING by the method indicated below, and addressed to each of the following:

Thomas E. Dvorak
GIVENS PURSLEY LLP
601 West Bannock Street
PO Box 2720
Boise, ID 83701-2720
[Attorneys for Plaintiff]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail: ted@givenspursley.com
- Telecopy: 208.388.1300



D. John Ashby

DOUGLAS A. MILLER, CLERK
By [Signature] Deputy

JAN 24 2017

Case No. _____ Inst. No. _____
Filed _____ A.M. 5:00 P.M.

Thomas E. Dvorak (JSB ID# 5043)
GIVENS PURSLEY LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300
13528796_I (12948-3)

Attorneys for Karen Savage

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT FOR THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

KAREN L. SAVAGE,

Plaintiff,

v.

SCANDIT INC.,

Defendant(s).

Case No. CV-2016-290-C

**MOTION FOR LEAVE TO FILE
FIRST AMENDED VERIFIED
COMPLAINT**

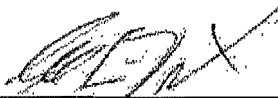
COMES NOW, Plaintiff, Karen L. Savage (hereinafter "Savage") by and through her attorneys of record, Givens Pursley LLP, and respectfully moves this Court, pursuant to Rule 15(a) of the Idaho Rules of Civil Procedure, for the entry of an order allowing Savage leave to file an Amended Complaint. A true and correct copy of Savage's proposed First Amended Verified Complaint is attached hereto as Exhibit "A" and incorporated by reference as if set forth in full, and shows the proposed changes in redline format.

This Motion is supported by Savage's Memorandum in Support of Motion for Leave to Amend filed contemporaneously herewith, together with the pleadings and documents heretofore

filed and lodged in this matter and such pleadings and documents as may be hereafter filed and lodged.

DATED this 23rd day of January, 2017.

GIVENS PURSLEY LLP



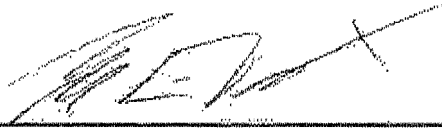
Thomas E. Dvorak
Attorneys for Karen L. Savage

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2017, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

D. John Ashby
Hawley Troxell Ennis & Hawley LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617

- Hand Delivery
- Facsimile
- Overnight Courier
- U.S. Mail



Thomas E. Dvorak

Exhibit A

Exhibit A

Thomas E. Dvorak (ISB ID# 5943)
GIVENS PURSLEY LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300
13412377_1 (12948-3)

Attorneys for Karen Savage

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT FOR THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

KAREN L. SAVAGE,

Plaintiff,

v.

SCANDIT INC,

Defendant(s).

Case No. CV-2016-290-C

**AMENDED VERIFIED
COMPLAINT FOR COLLECTION
OF A WAGE CLAIM UNDER
IDAHO CODE § 45-601, ET SEQ.**

DEMAND FOR JURY TRIAL

COMES NOW, Plaintiff, Karen L. Savage (hereinafter "Savage") by and through her attorneys of record, Givens Pursley LLP, and for cause of action against Defendant, pleads, alleges and complains as follows:

PARTIES, VENUE AND JURISDICTION

1. Savage is a resident of Idaho County, Idaho, and an employee of Defendant Scandit Inc.
2. Defendant Scandit Inc. (hereinafter "Scandit") is a Delaware corporation which sought and received a certificate of authority to transact business in the state of Idaho on September 17, 2014.

3. Venue is proper before this Court pursuant to Idaho Code § 5-404, as the Defendant Scandit does not reside in the state of Idaho pursuant to the meaning of Idaho Code § 5-404 in that it does not have a principal place of business within the state of Idaho.
4. This is an action for collection of a wage claim under Idaho Code §§ 45-601, et seq.
5. This Court has original jurisdiction as provided by Idaho Code § 1-705 and § 45-615.

COMMON ALLEGATIONS

6. Scandit is an enterprise mobility and data capture company that specializes in barcode scanning applications for business that include healthcare, logistics, manufacturing and retail industries. Scandit's services and products allow its customers to rapidly build, deploy and manage mobile apps for smartphones, tablets and wearable devices, all for a lower total cost of ownership than traditional, dedicated devices.
7. Approximately two years ago, Savage began working for Scandit as a Senior Sales Executive.
8. For the year 2016, and specifically for the time period of January 1, 2016 through December 31, 2016, Scandit provided the 2016 Commission Compensation Plan (the "CCP") in the form attached hereto as Exhibit "A" to Savage.
9. Savage executed and returned the CCP.
10. Under the CCP, Scandit had promised to Savage that:

IV. COMMISSIONS

100% of the respective commission will be paid as soon as reasonably practicable following the booking of the Order, and

AMENDED VERIFIED COMPLAINT - 1

AMENDED VERIFIED COMPLAINT - 2

ideally no later than within 30 days of the end of the month during which the transaction has been booked.

1. Scandit License Fee . . .

Scandit will pay commissions based on the amount of Scandit licenses sold (net amount to Scandit) to new and existing customers for each Order booked during the period of this Plan.

See CCP, at p. 3, Section IV.

13.11. The CCP went on to provide for an alleged claw-back provision to the effect that:

Commission 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.

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.

See CCP, at p. 3, Section IV.

14.12. The CCP also provides for an "Annual Quota Achievement Bonus" that says "Employee will earn a bonus of USD [S]36,000.00 if the combined ACV of renewals and Orders equals CHF 641,001" (the "Achievement Bonus"). See CCP, at p. 5, Section IV.E.

15.13. Savage took action in reasonable reliance upon the CCP.

16.14. Specifically, through Savage's efforts, a Master Software License Agreement was signed effective as of September 27, 2016 between Amazon Services LLC, a Nevada limited liability company, and Scandit Inc. (the "Amazon Agreement").

17.15. The Amazon Agreement was booked during late September 2016 by Scandit.

AMENDED VERIFIED COMPLAINT - 3

18.16. During late September 2016 or October 2016, 100% of the respective commission from the Amazon Agreement became due and owing to Savage under the CCP based on the booking of the Amazon Agreement by Scandit (the "Amazon Commission").

17. Savage performed all conditions precedent to the Amazon Commission becoming due and owing to her under the CCP and applicable law and all such applicable conditions precedent have occurred or were performed or were satisfied, either

a. By in fact occurring, being performed or being satisfied; or

b. Alternatively, by said conditions precedent being waived or excused by Scandit by means of (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 said email that Mueller was making a "suggestion on how to handle your commission from securing the Amazon deal," a calculation of the "commission amount" and otherwise discussing the impact of the "commissions from this awesome deal" with her as if they were due and owing, and Savage reasonably relied upon such statements to her detriment; or

c. Alternatively, by operation of the doctrine of equitable estoppel, in that the statements described previously in this paragraph constituted misrepresentations that Savage reasonably relied upon to her detriment; or

d. Alternatively, by operation of the doctrine of quasi estoppel, in that Scandit by means of such statements described previously in this paragraph, gained some advantage for itself or produced some disadvantage to Savage or induced Savage to change her position, and it would be unconscionable to allow Scandit to maintain that the condition precedents were not satisfied.

19.18. For several weeks after the Amazon Commission was booked, Savage received no word as to when the Amazon Commission due and owing would be paid, or the amount of said commission.

AMENDED VERIFIED COMPLAINT - 4

21-19. On October 28, 2016, Scandit's CEO, Samuel Mueller, at 11:41:39 AM MDT, sent an email to Savage regarding the commission. A true and correct copy of the email is attached hereto as Exhibit "B".

22-20. In the email, Mueller acknowledged the total amount of the commission to be CHF \$390,234. "CHF" is the abbreviation for "Confederatio Helvetica Franc", the common abbreviation for a Swiss Franc.

21. As of September 27, 2016, the Date that the Amazon Agreement was executed, the exchange rate was one Swiss Franc equals 1.02888 United States Dollars.

22-22. However, Mueller without authorization proposed taking CHF \$30,000 of the commission and distributing it to "involved members engineering/ops team, to be paid at end of the year as a special bonus and independent from" Savage's Amazon Commission payment.

24-23. As to the remaining CHF \$360,234 of the Amazon Commission due, Mueller announced a plan to pay that amount to Savage over four years because of "the size and long duration of the [Amazon] deal, from and [sic, "an"] accounting and liquidity management perspective we have to expect considerable risk that Amazon might find a way to not pay one of the (annual) fees and back out of the contract at a later time, in which case we would have to reverse any previous commission payment and claw back previously paid commission."

25-24. On October 31, 2016, on the regular payday, only a \$5,000.00 "AMAZON (Symbolic 1st payment)" was made to Savage with respect to the Amazon Commission.

26-25. The remainder of the total Amazon Commission due of \$385,234 has not been paid in part or in full as of the date of the filing of the original Complaint in this action and remains unpaid in full as of the date of filing of this Amended Complaint (the "Commission Due").

AMENDED VERIFIED COMPLAINT - 5

26. Further, by means of the Amazon Commission, Savage earned her Achievement Bonus in September 2016, and said Achievement Bonus has not yet been paid in part or in full as of the date of the filing of the Original Complaint in this action and remains unpaid and due and owing as of the date of the filing of this Complaint (the "Achievement Bonus Due").

27. Savage has complied with any and all applicable terms of any and all contracts between the parties.

COUNT 1

Wage Claim Under Idaho Code § 45-615

28. The foregoing paragraphs are hereby incorporated by this reference and restated as if set forth in full.

29. The Commission Due and Achievement Bonus Due 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" (hereinafter collectively "Wages Due").

30. The Wages Due were not paid on the date they were due in that either

- a. they were not paid within 15 days of September 30, 2016, which was the end of the pay period for which such wages were due, as required by Idaho Code § 45-603(2); or
- b. they were 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; or
- c. they were not paid as required by Idaho Code § 45-608(2) or the time set forth under the CCP after they became due, said amounts becoming due at that point in time because of an intentional or an express or an implied waiver of any and all conditions precedent to said payments becoming due at that time had occurred on the part of Scandit; or
- b-d. they were not paid as required by Idaho Code § 45-608(2) or the time set forth under the CCP after they became due, said amounts becoming due at that point in time because of the operation of equitable estoppel or quasi estoppel.

AMENDED VERIFIED COMPLAINT - 6

31. Scandit's failure to pay the Wages Due when the same were due constituted a violation of Idaho law and of the parties' CCP.

32. As a direct and proximate cause of Scandit's breach of law and of the CCP agreement, Savage has and will suffer damages resulting in a wage claim as described in Idaho Code § 45-601(6), with said damages more particularly described in the subsequent paragraph.

33. Pursuant to Count 1, Savage is entitled to judgment that:

- a. Scandit has breached the employment agreement and is liable for the Wages Due in the amount of ~~\$283,234.53~~ ^{\$396,503.95}¹ plus \$36,000,² totaling ~~\$412,503.95~~ ^{\$432,503.95}^{2,3,4}, and that under Idaho Code § 45-615(2) as a penalty for not timely paying said wages when due, Savage is entitled to recover three (3) times the amount of Wages Due, in other words, the amount of the Wages Due tripled under Idaho Code § 45-615(2) and the amount awardable to Savage, is ~~\$1,297,511.89~~ ^{\$1,297,511.89}⁵;
- b. interest is due on the amount of the Wages Due still outstanding at 12% per annum as allowed by Idaho Code § 28-22-104(1) for money after the same becomes due from and after October 15, 2016 ~~at the per diem rate of \$138.488 per day for every day thereafter until the same is paid, for a total amount due in interest as of November 1, 2016 of \$2,215.80;~~
- c. under Idaho Code § 45-615(2), Savage is also entitled to recover her costs and attorneys' fees as more particularly described in the attorneys' fees and costs section below.

COUNT 2

Declaratory Judgment

34. The foregoing paragraphs are hereby incorporated by this reference and restated as if set forth in full.

35. Idaho Code § 10-1202 provides that "[a]ny person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise,

may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

36. Idaho Code § 10-1201 provides for "Declaratory Judgments" and goes on to state that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree."

37. Idaho Code § 10-1205 provides that "[t]he enumeration in Sections 10-1202, 10-1203 and 10-1204, does not limit or restrict the exercise of the general powers conferred in Section 10-1201, in any proceedings where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty."

38. Idaho Code § 10-1208 provides that "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper."

39. Savage has the following disputes with Scandit:

- a. whether Idaho Code § 45-608(2) requires that any commission due or the Achievement Bonus be paid within 15 days of the pay period in which the commission or Achievement Bonus was compensation for services performed during that period;
- b. whether in light of Idaho Code § 45-601, et. seq., and other applicable law, the claw-back provisions of the CCP impermissibly attempt to allow the commission once due and paid as wages to be clawed back;
- c. whether in light of Idaho § 45-601, et. seq. and its premising a wage claim on compensation "due," the attempt to define commissions as being "earned" in the CCP is impermissibly being based on a condition subsequent occurring after 100% of the commission is due to be paid, and

¹ CHE 290,234 multiplied by 1.02888, the escalation rate as of September 27, 2016, equals \$401,503.95.
² \$401,503.95 less \$8,000.00 received by Plaintiff prior to filing initial suit equals \$396,503.95.
³ The Annual Quota Achievement Bonus of \$36,000 under the CCP is specified as U.S. dollars.

thus is an impermissible attempt to deny a wage due to the employee and is unenforceable;

- d. whether in light of Idaho Code § 45-601, *et. seq.*, and other applicable law, the claw-back provisions of the CCP and the provisions for pay back of a portion of commission previously paid and due upon termination are unconscionable or against public policy or otherwise unenforceable;
- e. whether on the basis of a fiduciary duty owed by virtue of entering into the CCP for a commission based payment, the attempt not to pay the commission immediately but to pay it over time is a breach of said fiduciary duty; and
- f. whether the CCP as it exists, or as modified by applicable law, has been breached by the failure to pay the Amazon Commission and Achievement Bonus when due.

40. Savage is entitled to a declaratory judgment decreeing and declaring that all of the foregoing propositions are answered in the affirmative and to such other monetary and injunctive and other further relief as may be appropriate and may flow from said declaration in the interest of justice.

COUNT 3

Contract Claim For Commission Due

41. The foregoing paragraphs are hereby incorporated by this reference and restated as if set forth in full.

42. Count 3 is plead in the alternative to Counts 1 and 2 and only in the event that the Court finds the relief sought in both such counts to not be appropriate.

43. The Commission Due is an amount due by the agreement of the parties and all conditions precedent to its payment to the Plaintiff Savage have been satisfied.

44. The failure of Scandit to pay the Commission Due to Savage amounts to a breach of the agreement of the parties.

45. Pursuant to Count 3, Savage is entitled to judgment that:

- a. Scandit has breached the employment agreement and is liable for the Commission Due and Achievement Bonus Due in the amount of \$421,234,432,503.95;
- b. interest is due on the amount of the Commission Due at 12% per annum as allowed by Idaho Code § 28-22-104(1) for money after the same becomes due from and after October 15, 2016 at the per diem rate of \$138.458 per day for every day thereafter, for a total amount due in interest as of November 1, 2016 of \$2,215.86; interest is due on the amount of the Commission Due and Achievement Bonus still outstanding at 12% per annum as allowed by Idaho Code § 28-22-104(1) for money after the same becomes due from and after October 15, 2016 for every day thereafter until the same is paid; and
- c. that under Idaho Code § 12-120(3) and 12-121, Savage is also entitled to recover her costs and attorneys' fees as more particularly described in the attorneys' fees and costs section below.

ATTORNEYS' FEES AND COSTS

46. Savage has retained the services of Givenus Pursley LLP, and is entitled to an award of attorneys' fees and costs under Idaho Code §§ 12-120(3), 12-121, 45-615(2) and Rule 54 of the Idaho Rules of Civil Procedure. In the event of a judgment by default, Savage claims attorneys' fees and costs in the amount of \$5,000, or in such other and further amount as may be proven at the appropriate time in the proceedings.

DEMAND FOR JURY TRIAL

47. Savage demands a trial by jury of no less than twelve (12) persons on all triable issues pursuant to Idaho Rule of Civil Procedure 33(b).

PRAYER FOR RELIEF

WHEREFORE, Savage prays this Court enter the following relief:

- 1. For judgment in favor of Plaintiff and against Defendant on all counts of the foregoing Complaint;
- 2. For judgment for the specific relief sought in each such count;
- 3. For costs and attorneys' in the amount of \$5,000 in the event of a judgment by default or in such other and further amounts as may be proven at the appropriate time in the proceedings for and on the basis as set forth in the body of this Complaint and incorporated herein by reference; and
- 4. For such other and further relief as the Court may deem appropriate in the premises.

DATED this ____ day of November _____, 2017.

GIVENS PURSLEY LLP

Thomas E. Dvorak
Attorneys for Karen L. Savage

VERIFICATION

STATE OF IDAHO)
) ss.
County of Idaho)

Karen L. Savage, in accordance with Idaho Rules of Civil Procedure 11(c), (d) and Idaho Code Section 9-1406, and to the same effect as having been first duly sworn, state and declare as follows: I am the Plaintiff herein, I have read the foregoing Verified Complaint for Collection of a Wage Claim Under Idaho Code § 45-601, et seq, know the contents thereof, and believe the contents thereof to be true and correct to the best of my knowledge and belief. I certify and declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this ____ day of November _____, 2017.

Karen L. Savage

Thomas E. Dvorak (ISB ID# 5043)
GIVENS PURSLEY LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
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13528796_1 (12948-3)

DOUGLAS A. MILLER, CLERK
By [Signature] Deputy

JAN 23 2017

Case No. _____ Inst. No. _____
Filed _____ A.M. 5:00 P.M.

Attorneys for Karen Savage

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT FOR THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

KAREN L. SAVAGE,

Plaintiff,

v.

SCANDIT INC.,

Defendant(s).

Case No. CV-2016-290-C

**MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO FILE
FIRST AMENDED VERIFIED
COMPLAINT**

COMES NOW, Plaintiff, Karen L. Savage (hereinafter "Savage") by and through her attorneys of record, Givens Pursley LLP, and hereby submits this Memorandum in Support of Motion for Leave to file a First Amended Complaint.

Plaintiff seeks leave to amend its Count 1 of the Verified Complaint in order to clarify that certain aspects of the Commission Compensation Plan (the "CCP") which Scandit by means of its Answer apparently intends to rely on as a defense, even to the extent that they were not fulfilled in this case (Plaintiff contends that all were), nevertheless were expressly or impliedly waived by the conduct of Scandit. Waiver is a voluntary, intentional relinquishment of a known right or advantage. *Med. Servs. Grp., Inc. v. Boise Lodge No. 310, Benev. & Protective Order of Elks*, 126 Idaho 90, 94, 878 P.2d 789, 793 (Ct. App. 1994). "The existence of waiver ordinarily is a question of fact, and if there is any substantial evidence in the record to support a waiver it is

for the trier of fact to determine whether the evidence establishes such a waiver." *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518, 650 P.2d 657, 660 (1982)(citing *C.I.T. Corp. v. Hess*, 88 Idaho 1, 9, 395 P.2d 471, 475 (1964); *Independent Gas & Oil Co. v. T. B. Smith Co.*, 51 Idaho 710, 724-25, 10 P.2d 317, 322 (1932)). Waiver may be communicated by conduct. *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 256, 846 P.2d 904, 907 (1993)("Waiver will not be inferred except from a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to estoppel")(citation omitted). The similar doctrines of equitable and quasi estoppel are introduced as alternative theories upon which Scandit's conduct or actions caused these condition precedents to be deemed satisfied and made the wages at issue come due.

In the present case, the attached email which becomes part of the Complaint provides a basis to believe that Scandit's CEO had waived on behalf of Scandit itself any conditions to the commission becoming due to be paid. Further, conversations also occurred between the Plaintiff and her manager to the effect that the Amazon Commission was due to Plaintiff Savage. As a point of note, the CCP contract does not include usual contractual provisions limiting waiver, i.e., indicating no waiver may occur or that it requires the signature of all parties or anything of the ilk.


Furthermore, since filing the Complaint, Plaintiff's counsel has become aware of the significance of the difference in currency between the Swiss Franc and the American Dollar and abbreviations that reflect this in the parties' agreement. Additional amendments are sought to reflect this awareness.

I.R.C.P. 15(a) provides that a party may amend its Complaint with leave of court and that "leave shall be freely given when justice so requires." The Court should grant Savage's motion for leave to amend in this case because Defendants would not suffer any prejudice as a result of

the amendment. In the interests of justice, and leave to amend being liberally granted under the rules, especially at the early stages of the case, Plaintiff respectfully requests that such leave be granted.

DATED this 23rd day of January, 2017.

GIVENS PURSLEY LLP




Thomas E. Dvorak
Attorneys for Karen L. Savage

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2017, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

D. John Ashby
Hawley Troxell Ennis & Hawley LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617

- Hand Delivery
- Facsimile
- Overnight Courier
- U.S. Mail



 Thomas E. Dvorak

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13529017_1 (12948-3)

DOUGLAS A. MILLER, CLERK
By [Signature] Deputy

JAN 30 2017

Case No. _____ Inst. No. _____
Filed _____ A.M. 5:00 P.M.

Attorneys for Karen Savage

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT FOR THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

KAREN L. SAVAGE,

Plaintiff,

v.

SCANDIT INC.,

Defendant(s).

Case No. CV-2016-290-C

**MEMORANDUM IN OPPOSITION
TO MOTION TO DISMISS**

COMES NOW, Plaintiff, Karen L. Savage (hereinafter "Savage") by and through her attorneys of record, Givens Pursley LLP, and hereby files this Memorandum in Opposition to Motion to Dismiss.

INTRODUCTION

Defendant's Motion to Dismiss Count 1 of Plaintiff's Complaint is not well taken. Count 1 adequately states two items as wages that were not paid when due and owing. First, by placing the largest retail contract that Scandit had ever seen, under the express terms of the Commission Compensation Plan (the "CCP"), 100% of the respective commission on that sale became arithmetically ascertainable upon Scandit booking the Amazon sale, and therefore was a wage due and owing at that point in time ("Amazon Commission"). Second, the volume of the Amazon order at \$2.475 million, was so large that it caused Karen to immediately "earn" her Annual Quota Achievement Bonus ("Achievement Bonus"), as the express language of the CCP clearly says that the Achievement Bonus is earned when the goal is reached. The current phrasing of the Complaint and/or the proposed amendment of the Complaint, by saying as much, states a legally sufficient wage claim.

BACKGROUND

As an initial matter, and essentially an aside, Savage takes issue with Scandit deriding the timing of the filing of this Complaint, apparently in an attempt to jaundice the Court against Savage. By her filing a wage complaint immediately after the commission became “due and owing” under the CCP and Idaho law, Savage simply availed herself of the rights afforded to her and offered to her under her employer’s compensation scheme. *Goff v. H.J.H. Co.*, 95 Idaho 837, 839–40, 521 P.2d 661, 663–64 (1974) (“[L]egislative intent and public policy support this requirement that treble damages be allowed where unpaid wages are due and owing.”). Indeed, the email from Scandit’s CEO belies that company’s intent was to take the 100% commission payment that had been promised upon booking of the order and instead parse it out to Savage over four years. And that email itself was long in coming. The employer has all the power in the employee relationship. Without the fear that an employee will timely invoke their rights under the wage claim statutes, what incentive does an employer have to pay the wages that are due in the form of a commission when the law requires them to be paid? Employees should not have to beg and negotiate with their employers to be paid. Scandit may not have been familiar with wage claim laws at the beginning of this dispute—but it is now for sure so familiar. And that awareness is to the present and future benefit of all Scandit employees.

ARGUMENT

A. The Complaint Adequately States a Viable Cause of Action¹ As The Achievement Bonus was A Wage Due and Owing Under Idaho Law.

Ninety-Five percent of the words in the Memorandum in Support of Motion to Dismiss (hereinafter “Defendant’s Memo.”) are devoted to arguing the Amazon Commission is not due and owing, based on the notion that (a) under Idaho law, a commission has to be “earned” before it is a wage, and (b) the employer has total discretion to define what “earned” means within its contract. By contrast, a mere three sentences at the end of Scandit’s brief argue the proposition that the Achievement Bonus “is earned on an annual basis (not immediately upon the occurrence

¹ In the interest of brevity and knowing this Court’s intimate familiarity with the Motion to Dismiss legal standard requiring that the allegations of the complaint, when taken literally, must state a viable legal claim, counsel has elected to forgo regurgitating it.

of a contingency), and therefore not due until the end of the year.” In those three sentences, an accusation is made that Plaintiff is being “disingenuous”² by stating that the Achievement Bonus is “earned” when the requisite sales amount is achieved. But the key CCP language at § IV.E relative to the “Annual Quota Achievement Bonus” is in fact:

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

(first emphasis added, later emphasis in original). Defendant omits the “will earn” language when it purports to paraphrase § IV.E in its background facts via partial quotes. Defendant’s Memo. at 4. The plain language of the CCP specifies an employee “will earn” that bonus if “renewals and Orders” equal a specified amount. The Achievement Bonus is not discussed in the CCP in terms of it being a “commission” and thus none of the “earned” language in the CCP relative to “commissions” has any applicability to the Achievement Bonus. The reference to “annual,” incidentally, is in the heading, it is not even in the operative sentence itself.³ But there is nothing about any of the language either in the heading or sentence itself that says that the timing of payment is to be delayed to the end of the year. There is nothing about the nature of this Achievement Bonus that requires waiting until year end to calculate the “combined ACV of renewals and Orders.” In this context, the unambiguous, plain meaning of this provision is that the “annual” reference measures the time during which the employee has to produce “ACV renewals and Orders” equaling the requisite number to “earn” the bonus, at the expiration of which, the “annual” clock restarts again the race to “earn” the bonus. The reference to an “annual” provision is simply to the time period within which the employee had the right to “earn” that bonus, but the language is clear on its face that the employee “will earn” that bonus at the point the requisite volume of sales is reached. If Scandit wanted to specify a different time or

² Defendant’s Memo. at p. 11. Googling the word “disingenuous” yields the following: “not candid or sincere, typically by pretending that one knows less about something than one really does” and the synonyms listed include insincere, dishonest, untruthful, false, deceitful, duplicitous, lying, mendacious, hypocritical.”

³ Cf. *State v. Murphy*, 94 Idaho 849, 851, 499 P.2d 548, 550 (1972)(“Where a heading is enacted as part of a code and where the meaning of the code is ambiguous, resort may be had to the heading as an aid in ascertaining legislative intent. But where the meaning of the code is clear and unambiguous without resort to the heading, courts will not consider it.”)

clarify that it would be paid at the end of the year, they certainly could have done so.

Idaho Code requires that “Employers shall pay all wages due to the employees at least once during each calendar month” and “the end of the pay period for which payment is made on a regular payday shall not be more than fifteen (15) days before such regular payday.” Idaho Code § 45-608(1) and (2). Indeed, the following language by Idaho Supreme Court seems to be penned for exactly this kind of situation:

[Idaho Code § 45-608(1)] requires employers to “pay all wages due to their employees at least once during each calendar month, on regular paydays designated in advance by the employer.” By its terms, it is not limited to wages earned during a calendar month or to wages that are normally paid every calendar month. **It applies to wages due during the month.** Wages earned over a longer period of time, such as an **annual bonus** based upon net profits, will come due **during a specific calendar month** and are covered by the statute.

Paolini v. Albertson's Inc., 143 Idaho 547, 549, 149 P.3d 822, 824 (2006)(emphasis in bold added, emphasis in italics in original).⁴ It is noteworthy that the *Paolini* court did not say the annual bonus would come due at the end of the year, but during “a specific calendar month,” presumably to be specified in the parties’ agreement. A portion of Count 1 in the Complaint in this case adequately states a wage claim that the Achievement Bonus for 2016 became “due” in September when the requisite “combined ACF of renewals and Orders” had been reached, and was not timely paid when required by Idaho law.

B. The Amazon Commission Became Ascertainable Upon Booking of the Customer’s Order, Was Not an “Advance” But Wages Due

Turning now to the Amazon Commission, the Complaint states a cognizable claim by stating the commission became due upon booking the order.

Under Idaho Code § 45-601, “Wage claim” means an employee’s claim against an employer for compensation for the employee’s own personal services” Idaho Code § 45-601(6). “Wages” in turn is defined to mean “compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece or commission basis.” Idaho

⁴ This same language was cited with approval in *Gray v. Tri-Way Const. Ser. Inc.*, 147 Idaho 378, 385, 210 P.3d 63, 70 (2009).

Code § 45-601(7). Scandit argues that “the Idaho Supreme Court has consistently held that all forms of compensation must be ‘earned’ before they become ‘wages’ for purposes of the Idaho Claims for Wages Act.” Defendant’s Memo. at 7. The only Idaho Supreme Court cases Scandit cites for this proposition are *Bilow v. Preco, Inc.*, 132 Idaho 23, 29, 966 P.2d 23, 28 (1998), and *Moore v. Omnicare, Inc.*, 141 Idaho 809, 819, 118 P.3d 141, 151 (2005). Both 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. Counsel for Savage respectfully submits “earned” is not a synonym for all possible circumstances and myriad types of employment compensation that may constitute wages under Idaho law, and that the focus should be on (1) whether the amount is actual “compensation for labor or services rendered,” and (2) whether the compensation is indeed “due” and “due and owing,” as per the directive of the relevant Idaho statutes.⁵ There does not seem to be a dispute here that this commission was in the nature of “compensation for services rendered”; the dispute is centered on when the particular commission became “due and owing.” *Polk v. Larrabee*, 135 Idaho 303, 17 P.3d 247 (2000), also utilizes the concept alluded to in *Moore* of whether unpaid commissions that are wages are “ascertainable” and therefore

⁵See 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 in context of the type of compensation being discussed as to whether that compensation is “due” and/or “earned,” chose to use both words in that one sentence, but only to use “due” or “due and owing” elsewhere in the Wage Claim Act, not “earned.” California, however, in a manner dissimilar to Idaho, actually uses the word “earned” in its statutory equivalent of I.C. § 45-608(1) (first sentence) and 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)).

“due and owing.” The *Polk* 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).⁶

The case of *Meschino v. Frazier Industrial Company*, 2016 WL 4083342 (U.S. D. Ct. Mass. 2016), is persuasive on when a commission becomes “ascertainable.” There, interpreting provisions of the Massachusetts Wage Act requiring that wages must be paid no more than six days from the termination of the pay period in which such wages were earned, the court stated that language in the contract that the “[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” and that “the commission margin payable will stay with the job until paid” resulted in a contract term that made the commission amount “arithmetically determinable” under the terms of the employee’s compensation plan. The issue arose because the commission contract also said that in the event of an “an error clearly attributable to the employee, the company reserves the right to recovery by deduction up to 25% of the cost caused by the error.” The Court noted that had the employer meant to have those commissions “not be arithmetically determinable until the earnings on the employees sales had been aggregated with the bookable losses in his quarterly portfolio,” then the employer “need only to have inserted the phrase ‘against the aggregate commission due at the end of the quarter,’ after the word ‘deduction’.” The failure to do so rendered the

⁶ *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* 309, 17 P.3d at 253.

commissions arithmetically ascertainable at the earlier point in time and thus wages due, meriting summary judgment in favor of the employee.

Similarly here, the CCP says “100% of the respective commission **will be paid** as soon as reasonably practicable following the booking of the Order,” and goes on to lay out a number of criteria to be fulfilled for “a closed transaction to be formally booked and **the commission to be paid.**” § IV (emphasis added). The CCP says if there are contingencies in the customer contract, “Scandit reserves the right **not to book the sale and withhold commission** until the contingency has expired.” After rolling out the “criteria” for the sale to be formally booked, the CCP says “Scandit reserves the right to **withhold the respective sale commission until all the above tasks [for booking of the order] are complete.**” (Emphasis in original.) Thus, the CCP defines the commission as being ascertainable and “due and owing” at the point in time the associated order is booked by Scandit. Count I of the Complaint alleges that those conditions precedent to the sale being formally booked have been met, and thus is a legally viable cause of action.⁷

Like the employer in *Meschino*, Scandit points to other provisions of the CCP, attempting to argue that a commission must be “earned” to be a wage and because the CCP says there must be recognition of revenue and actual receipt of payment by the customer. But that is not entirely correct. What the CCP says at the beginning of that sentence is “Commission shall become **earned** (i.e., not subject to recoupment or “claw-back” by Employer) only upon [revenue recognition and actual payment].” The next sentence of the CCP goes on to say that if “one or both of these conditions fail to occur, the paid but unearned commissions must be returned to Scandit by Employee.” “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,

⁷ Plaintiff has also sought to file an Amended Complaint that adds in as an alternative theory in Count 1 that the conditions precedent to the sale being formally booked and the commission thus becoming ascertainable and due and accordingly, “wages,” if not otherwise satisfied were waived either expressly or implicitly by Scandit.

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.”⁸

What is conspicuously absent from the CCP is any mention of the word “advance.”⁹ The absence of such wording, when it would have been so easy to add, is what allows a finder of fact to read the CCP and believe that the Amazon Commission was “ascertainable” and therefore “found due and owing” under Idaho law upon Scandit booking the order. Ambiguities in employment contracts should be construed against the drafter, and this rule of construction should be applied vigorously when the employer has every incentive to “motivate” an employee by making them think they are entitled to be paid 100% commission easily, early, and simply upon the associated customer order being booked.

Scandit cites *Steinhebel v. Los Angeles Times Commc'ns*, 24 Cal. Rptr. 3d 351, 353 (Cal. App. 2005), and *Gress v. Fabcon, Inc.*, 826 N.E.2d 1, 4 (Ind. Ct. App. 2005), as support for its position that there is special magic in its use of the word “earned” in the CCP. In *Harris v. Investor's Bus. Daily, Inc.*, 41 Cal. Rptr. 3d 108, 118 (Cal. App. 2006), *as modified on denial of reh'g* (Apr. 24, 2006), the court considered a similar policy to the “claw back” definition of earned in the present case. In *Harris*, the employees received points from a sale towards a commission, but were “charged back” the points if a customer canceled the subscription within 16 weeks. *Id.* at 117. The *Harris* court distinguished the *Steinhebel* employment agreement “that the [*Steinhebel*] employment agreement **clearly identified the commission as an advance:** ‘The Times will pay you two weeks in advance for the order. Beginning on the second pay period after your start date, you will receive an *advance* against your commissions.’ The

⁸ 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 is initially “ascertainable,” and therefore “due and owing” under Idaho law, i.e., a wage at that point in time. “Recalculate” implies that it was already calculated once, i.e., already “ascertainable” as an unpaid commission and therefore “due” and an unpaid wage.

⁹ 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)).

[*Steinhebel*] court reasoned that, because a condition to the employee's right to the commission had yet to occur, an advance was not a wage within the meaning of section 221." *Id.* at 118 (emphasis added). The *Harris* court stated that the *Harris* employer's materials instead "suggested that the points [upon which the commission was based] were earned at the time of the sale," so they could be considered earned¹⁰ at the time of sale. *Id.* The CCP in the present case resembles *Harris*, not *Steinhebel*, in that no mention of an "advance" is made whatsoever and instead the CCP suggests that "100%" commission will be paid upon order booking.¹¹

The *Gress* case also mentions that initial payments of commissions were "advances" prominently in its fact section, presumably because that was a shared understanding of the parties in that case. *Gress* is further distinguishable from the "no mention whatsoever of advances" CCP in the present case in that under Indiana law, if the payment of a commission is "not linked to the amount of work done by the employee or if the compensation is based on the financial success of the employer, it is not a wage," and this was bound up in the Court's holding, i.e., the employer had to wait until the job "closed out" to determine the commission amount based on profitability of that job. *Gress*, 826 N.E.2d at 4. Idaho law is not so strictly inclined, as noted in the prior discussion of *Moore, Polk and Whitlock, infra*.¹²

Under Idaho law, the important event is when the Amazon Commission became "due" because it was "ascertainable," not language defining "earned." Under the CCP, that commission became ascertainable upon Scandit booking the sale. That is the only condition precedent to the wage being "due." Only after the order is booked and the commission is "due

¹⁰ It also bears repeating that unlike Idaho, California uses the word "earned" in its statute, *see supra* footnote 5.

¹¹ An additional point to be made is that there are aspects of the CCP and the email from Scandit's CEO which make it sound like the contemplated delay in payment of the commission for a number of years is for the convenience of Scandit and not related directly to this sale, and *Steinhebel* has also been distinguished from the impermissible situation where "the conditions [on earning the commission do not] relate to the sale and . . . merely serve as a basis to shift the employer's cost of doing business to the employee." *Sciborski v. Pac. Bell Directory*, 140 Cal. Rptr. 3d 808, 824 (Cal. App. 2012)(citing *Hudgins v. Neiman Marcus Grp., Inc.*, 34 Cal. App. 4th 1109, 41 Cal. Rptr. 2d 46 (1995), *as modified* (May 25, 1995)). The CEO refers to "liquidity management perspective" in justifying the four year time table for payment, and in § V. the CCP says "employee is accountable for any cancellation or termination of an Order, whether by the customer or Scandit, or other reduction in expected revenue" (emphasis added).

¹² *See also Bilow v. Preco, Inc.*, 132 Idaho 23, 28, 966 P.2d 23, 28 (1998)(deferral account funds were part and parcel of employee's wages under Idaho law even when based on company-wide pre-tax profit).

and owing," do the lack of the recognition of revenue and/or lack of actual payments happen, and therefore, these are in the nature of conditions subsequent, conditions of defeasance. Scandit chose the words it used in the CCP; it did not choose the Idaho Wage Law term "due and owing"; it did not choose the word "advance." Instead, it specified that "100% of the respective commission will be paid [upon booking of the Order]." Count 1 adequately states a viable claim as to the Amazon Commission as well.

CONCLUSION

Therefore, in conclusion, it is respectfully submitted that Defendant Scandit's Motion to Dismiss should be denied in its entirety.

DATED this 30th day of January, 2017.

GIVENS PURSLEY LLP



Thomas E. Dvorak
Attorneys for Karen L. Savage

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2017, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

D. John Ashby
Hawley Troxell Ennis & Hawley LLP
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- Hand Delivery
- Facsimile
- Overnight Courier
- U.S. Mail



Thomas E. Dvorak

DOUGLAS A. MILLER, CLERK

By [Signature] Deputy

JAN 30 2017

Case No. _____ Inst. No. _____

Filed _____ A.M. 5:00 P.M.

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

KAREN L. SAVAGE,)
)
 Plaintiff,)
)
 vs.)
)
 SCANDIT INC.,)
)
 Defendant.)
)
 _____)

Case No. CV-2016-290-C

MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR LEAVE
TO FILE FIRST AMENDED VERIFIED
COMPLAINT

I. INTRODUCTION

In an apparent attempt to defeat Defendant Scandit Inc.'s ("Scandit") pending Motion to Dismiss Wage Claim (the "Motion to Dismiss"), Plaintiff Karen L. Savage has filed a Motion for Leave to File First Amended Verified Complaint (the "Motion for Leave"). Plaintiff's Motion for Leave has no impact on the Motion to Dismiss and should be denied because the amendment would be futile.

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE
TO FILE FIRST AMENDED VERIFIED COMPLAINT - 1

As detailed in the Motion to Dismiss, the crux of Plaintiff's original Complaint (the "Initial Complaint") is a claim against her employer, Scandit, for unpaid wages under the Idaho Claims for Wages Act (the "Wage Act") based on a five-year licensing deal that Plaintiff made with Amazon on Scandit's behalf, and to which she sought commission. As also detailed in the Motion to Dismiss, Plaintiff's wage claim (Count 1 of the Initial Complaint) must be dismissed because no facts have been asserted that would give rise to a claim under the Act. Although Plaintiff stands to earn commissions totaling approximately \$400,000 if Amazon pays Scandit licensing fees that become due in annual installments over the next five years, she has not yet earned them. Under the express terms of Plaintiff's Commission Compensation Plan ("CCP"), no commission is "earned" -- and, thus, no wages are due -- unless and until Scandit receives payment from Amazon. Because Scandit had not been paid a single dollar by Amazon at the time Plaintiff filed her Initial Complaint, and because neither Plaintiff's Initial Complaint nor the Proposed Amendment Complaint has asserted (or could assert) that any such payment had been made, Plaintiff lacks a wage claim under the Act. For this reason, just as Plaintiff's wage claim must be dismissed for failure to state a claim, the Motion for Leave must be denied due to its futility.

II. MOTION TO AMEND STANDARD

Although leave to amend is generally granted liberally, a motion to amend a complaint should not be granted where the proposed amendment would be a "futile act." *See Spur Products Corp. v. Stoel Rives LLP*, 142 Idaho 41, 49 (2005). "In determining whether an amended complaint should be allowed, where leave of court is required under Rule 15(a), the court may consider whether the new claims proposed to be inserted into the action by the

amended complaint state a valid claim.” *Black Canyon Racquetball Club, Inc. v. Idaho First Nat’l Bank, N.A.*, 119 Idaho 171, 175 (1991). Leave to file an amended complaint is properly denied “[i]f the amended pleading does not set out a valid claim.” *Id.*

III. ARGUMENT

A. Plaintiff’s Initial Complaint¹ and Scandit’s Motion to Dismiss

The Idaho Supreme Court has consistently held that all forms of compensation must be “earned” before they become “wages” for purposes of the Wage Act. *See Bilow v. Preco, Inc.*, 132 Idaho 23, 29 (1998). Thus, a claim for compensation that has not yet been earned, but rather may be earned in the future, is not a claim for “wages.” *See Moore v. Omnicare, Inc.*, 141 Idaho 809, 819–20 (2005) (explaining that “claims for future wages do not fall within the purview of the mandatory trebling statute”). The question of **when** a commission becomes “earned” such that it is a “wage” under the Wage Act is determined by contract. *See Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185 (2005).

Here, then, the question of whether Plaintiff earned the commission she claimed was due is governed by the CCP. *See* Complaint, Exh. A at § IV. The CCP expressly provides that commissions are not “earned” until, among other requirements, there has been “actual receipt of payment from the customer.” *Id.* Although the CCP provides for **pre-payment of unearned** commissions upon satisfaction of certain requirements (including but not limited to “booking” of a sale), the CCP makes clear that any commissions “pre-paid” after an order has been booked are

¹ Scandit refers the Court to its Memorandum in Support of Motion to Dismiss Wage Claim for a more complete recitation of the facts and relevant contract provisions.

not “earned” commissions. *Id.* at ¶¶ IV, V (“**paid but unearned** commissions must be returned to Scandit”; “in the event Scandit ... does not receive payment from the customer per the terms of the Order, any **prepaid** commissions will be reversed”) (emphasis added).

Despite the plain terms of the CCP, Plaintiff alleged in the Initial Complaint that Scandit was in violation of the Wage Act for failing to have paid her commission on a September 27, 2016 deal with Amazon (the “Amazon Agreement”), **even though Amazon had not yet paid Scandit a single dollar**. *See* Initial Complaint, ¶¶ 16-19. Scandit moved to dismiss Count 1 of the Initial Complaint because, even if accepted as true, the facts set forth therein do not state a claim under the Wage Act. As detailed in the Motion to Dismiss (currently pending before this Court), even assuming that the Amazon Agreement was entered into and “booked” in September 2016, as Plaintiff alleges, such facts do not render Plaintiff’s commission “earned” under the express terms of the CCP which, as a matter of law, governs when commissions are earned such that they become wages.

B. Plaintiff’s Motion for Leave to File First Amended Verified Complaint is Futile

Plaintiff’s Proposed Amended Complaint is futile because it does not fix the fatal flaw of the Initial Complaint that renders the wage claim subject to dismissal, because there is no assertion that Scandit had received payment from Amazon for the Amazon Agreement. Without such payment, there is no commission earned under the terms of the CCP, and therefore no cognizable claim for unpaid wages under the Wage Act. Recognizing this infirmity, Plaintiff has inappropriately attempted to use the Proposed Amended Complaint as a vehicle to argue that Scandit waived “any and all conditions precedent” to the commission becoming due and payable (or, alternatively, is equitably estopped from asserting otherwise), rather than to add any factual

allegations in support of such a theory. Indeed, and notably, the Proposed Amended Complaint **does not add any new factual allegations** to support such a theory (and the only facts that are alleged undermine it).

Plaintiff's waiver theory is based solely on the same email that she already attached as Exhibit B to the Initial Complaint, which she now apparently wants to claim waives the CCP's requirement that Scandit receive payment from Amazon before any commission is "earned." To the contrary, however, the email evidences no such waiver, instead expressly recognizing that Plaintiff's commission remains unearned unless and until Scandit receives payment from Amazon (explaining that pre-payment of unearned commissions could result in a situation where Scandit "would have to reverse any previous commission payment and claw back previously paid commission" and explicitly "maintaining the claw back option of course" for prepaid but unearned commissions). *See* Complaint, Exh. B. In light of the absence of any additional factual allegations that would enable Plaintiff to maintain a claim under the Wage Act, the Proposed Amended Complaint should be disallowed as futile.

IV. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Motion for Leave to File First Amended Verified Complaint. In the alternative, Plaintiff's Motion should be granted only if the Proposed Amended Complaint deletes the Count 1 Wage Claim in its entirety.

DATED THIS 30th day of January, 2017.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By



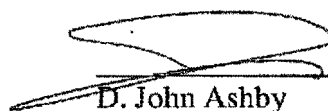
D. John Ashby, ISB No. 7228
Attorneys for Defendant Scandit Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of January, 2017, I caused to be served a true copy of the foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED VERIFIED COMPLAINT by the method indicated below, and addressed to each of the following:

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D. John Ashby

Claims for Wages Act. Under binding Idaho Supreme Court authority, a claim for unpaid wages in the form of a commission arises only after the commission has become “earned” as defined in an employee’s commission agreement. Here, Plaintiff’s 2016 Commission Compensation Plan (“CCP”) expressly provides that commission is “earned” on a customer sale only upon actual receipt of payment from the customer. Plaintiff cannot state a wage claim under the Idaho Claims for Wages Act because there is no allegation that Amazon had paid even a single dollar to Scandit at the time Plaintiff filed her Complaint.

Faced with the fact that Plaintiff had not – by the express terms of the CCP – earned any commission at the time she filed her Complaint, and in a desperate effort to defeat the Motion to Dismiss, Plaintiff has attempted to muddy the waters by asserting a theory inconsistent with Idaho law. Specifically, by citing selective case quotes (including in a number of out-of-state cases), Plaintiff attempts to advance a theory that her alleged commission became wages due as soon as it was “mathematically ascertainable.” No Idaho Court has adopted such a theory. To the contrary, the law in Idaho (and in fact the law in the other states referenced by Plaintiff) is that commissions become “wages” only after they are “earned” as defined by the agreement between the parties.

The other two theories asserted in Plaintiff’s Opposition Memorandum should similarly be rejected. First, Plaintiff makes passing reference to a waiver theory. However, she offers no evidence of an intentional waiver by Scandit of the conditions placed on commissions becoming “earned,” nor has she even hinted at any detrimental reliance by Plaintiff on any alleged “waiver,” both of which are required to establish waiver. Second, Plaintiff’s argument that she was entitled to an **annual** bonus several months before the end of the year contradicts the terms

of the CCP, rules of contract interpretation, and the very nature of an **annual** bonus.

Accordingly, the wage claim asserted in Plaintiff's Complaint must be dismissed with prejudice.

II. ARGUMENT

A. Plaintiff Fails to State a Wage Claim Based on Earned Commission

1. Plaintiff's "Mathematically Ascertainable" Theory is Not Supported by Idaho Law

Idaho law does not support Plaintiff's contention that commissions become "wages" due under the Idaho Claims for Wages Act as soon as they become "mathematically ascertainable." The cases cited by Plaintiff in support of this proposition reference the question of whether an alleged commission is "ascertainable" as only a **preliminary** issue in the determination of whether a commission has become earned, not as the deciding factor.

Plaintiff's reliance on *Polk v. Larrabee*, 135 Idaho 303 (2000), is misplaced. *Polk* involved an employment contract that promised an employee a "5% commission on every home sold by the company" and "a 20% share of the profits of the company." *Id.* at 307. Unlike the CCP, the contract in *Polk* did not contain any conditions that had to occur before the employee would be deemed to have earned commission on the sold houses. When the employer in *Polk* fired the employee and refused to pay commissions at the time of termination despite the houses having been sold, the jury determined that \$18,698 in commissions was due and owing to the employee upon termination. *Id.* After trial, when the employer argued against trebling of the unpaid commissions on the ground that the commission amount was disputed and not "ascertainable" until the jury had determined it, the Court disagreed, reasoning that the jury's verdict was a determination that the commission "was due at the time the Polks terminated their employment." *Id.* at 309. Critically, however, the conclusion in *Polk* that the earned but unpaid

commissions were wages **did not** hinge on the fact that they were ascertainable, nor did the Court hold that any commission is due and payable as soon as it becomes ascertainable. Instead, the question of whether the commissions were ascertainable was merely a **preliminary inquiry** to the ultimate question of whether the commissions were due and owing at the time of termination of employment (which question would be answered by the terms of the employee's commission plan). *Id.*¹

2. Compensation Must be “Earned” Under the Terms of an Employee Agreement Before it is a “Wage” for Purposes of the Idaho Claims for Wages Act

Tellingly, Plaintiff's Opposition Memorandum completely ignores the controlling Idaho Supreme Court case at the heart of Scandit's Motion to Dismiss Wage Claim. In *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185 (2005), the Court held that it is the agreement

¹ Plaintiff also cites *Moore v. Omnicare, Inc.*, 141 Idaho 809, 819 (2005), which states in passing, citing *Polk v. Larrabee*, 135 Idaho 303 (2000), that the definition of “wage” includes “any ascertainable unpaid commissions and bargained-for compensation.” As stated above, however, *Polk* only held that ascertainable unpaid commissions were wages because the employer had not, in that case, imposed any conditions on commissions becoming earned. Equally important, *Moore* in no way stands for the proposition that commissions become due and owing as soon as they are mathematically ascertainable. In fact, *Moore* had nothing to do with commissions or determining whether amounts were ascertainable. *Moore* instead addressed a liquidated damages provision in an employee's employment agreement, finding that it was akin to a claim for “future wages,” -- in other words, wages that had not yet been earned -- that “do not fall within the purview of mandatory trebling.” *Id.* In short, no Idaho case has held that commissions become due and owing as soon as they are mathematically ascertainable. To the contrary, as detailed below, the Idaho Supreme Court, in *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185 (2005), has held that commissions do not become wages due and owing unless and until they have become “earned,” as determined by the terms of an employee's commission agreement.

between an employer and employee that dictates when a commission becomes “earned” such that it is a “wage” under the Idaho Claims for Wages Act. *Id.* at 190-91. The employee in *Bakker* signed a commission agreement providing that sales commissions would be earned only upon “successful closing[] of escrow” (as opposed to upon contract signing) on properties sold while the employee remained employed by the employer. *Id.* at 188. After termination of employment, the employee asserted a wage claim based on commissions allegedly due for the sale of units on which customers had signed purchase and sale agreements, but that had not closed escrow. *Id.*

Under the theory posited by Plaintiff, the employee’s commission in *Bakker* would have been “ascertainable” (and thus a wage) as soon as customers had signed purchase and sale agreements. This was not, however, the result of *Bakker*. Instead, the Idaho Supreme Court found that the commissions had **not** become earned wages, analyzing the employee’s wage claim not in terms of whether the alleged commissions were ascertainable, but rather whether the commissions had become “earned” by the terms of the commission agreement. *Id.* at 190-91. Because the commission agreement provided that commissions would not become earned unless and until escrow had successfully closed, the employee had no claim for unpaid wages under the Idaho Claims for Wages Act. *Id.* That the commission amount was “ascertainable” was inconsequential.

While Plaintiff may dislike the rule that employers determine when commissions become earned (and therefore wages), as it defeats her attempt to obtain an \$800,000 windfall, the Idaho Supreme Court has clearly held as a matter of law that employers and employees are free to “contract for the terms of compensation regarding when wages are earned and/or due.” *Id.*

“Beyond [paying minimum wage and paying employees at least monthly], 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.” *Id.*

Even the cases cited by Plaintiff are consistent with this rule. For example, Plaintiff relies heavily on *Meschino v. Frazier Indus. Co.*, 2016 WL 4083342 at *4 (D. Mass. Aug. 1, 2016), for the proposition that commissions are “earned” under the Massachusetts Wage Act when the commission becomes “‘arithmetically determinable’ under the terms of the employee’s compensation plan.” But this is not what *Meschino* holds. To the contrary, *Meschino* makes clear that commissions must not only be arithmetically determinable **but also** due and owing, a condition that Plaintiff’s Opposition Memorandum conveniently omits. As the *Meschino* Court states: “Commission payments vest when the amount of such commissions...has been definitely determined **and** has become due and payable to such employee.” *Id.* (emphasis added). Also conveniently omitted from Plaintiff’s Opposition Memorandum is the very next line of the *Meschino* decision: “When a compensation plan specifically sets out the contingencies an employee must meet to earn a commission, courts apply the terms of the plan.” *Id.* Thus, to determine whether a wage has been “earned,” the Court must look to “the plain meaning of the definition of earned commissions set out in the Employment Agreement.” *Id.* at *5. The Massachusetts standard is consistent with Idaho law as explained in *Polk* and *Bakker*. While courts may address whether commissions are ascertainable as a **preliminary** inquiry, the

ultimate question is always whether commissions have been “earned” under the terms of the applicable agreement between the parties.²

3. Plaintiff Cannot State a Claim for Unpaid Wages Absent Payment from Amazon

The analysis applied in *Bakker* and *Meschino* applies here and requires dismissal of Plaintiff’s wage claim. Just like the employee agreements at issue in *Bakker* and *Meschino*, the CCP defines precisely when Plaintiff’s commissions become “earned.” Specifically, the very first line in the “commissions” section of 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.” *Id.* at § IV (second emphasis added). Because Scandit had not been paid by Amazon at the time Plaintiff filed her Complaint, Plaintiff had not earned any commission under the plain language of the CCP and therefore cannot state a claim for unpaid wages under the Idaho Claims for Wages Act.

Plaintiff’s argument to the contrary is based on selective quotations and violates rules of contract interpretation. Plaintiff asks the Court to look only to one line in the third paragraph of the commissions section of the CCP, which provides that “100% of the respective commission will be paid as soon as reasonably practicable following the booking of the order.” *See* Complaint, Exh. A at § IV. Not only does this quote not reference **earned** commissions, but Plaintiff takes the quote out of context and in violation of the rule that a contract must be

² Eerily reminiscent of the assertions made by Plaintiff in this case, the employee in *Meschino* tried to assert that he was entitled under Massachusetts’ wage law to commissions within a certain amount of time after a sale had been “booked.” *Id.* The court rejected that argument on the ground that the employment agreement did not provide that commissions were earned upon booking of a sale. Instead, the employment agreement provided that commissions became earned only upon client payment. *Id.* The court therefore held that the employee had not established a claim for unpaid wages because he had “not offered any evidence of client payments.” *Id.*

interpreted as a whole. See *Execulines Ltd. v. Tel-Am. of Salt Lake City, Inc.*, 121 Idaho 621, 623 (Ct. App. 1991) (“Under Idaho law, in interpreting any provision in a contract, the entire agreement must be viewed as a whole.”).

As set forth unambiguously in the CCP, the **earning** of commissions and the pre-payment of **unearned** commissions (i.e., an advance) are governed by two different standards. First, the CCP expressly and unambiguously provides that no commission becomes “earned” until, among other requirements, “actual receipt of payment from the customer.” See Complaint, Exh. A at § IV.

Second, although commissions do not become “earned” until Scandit actually receives payment from a customer, the CCP provides that **anticipated** commission amounts will be “prepaid” 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.” *Id.* As the CCP repeatedly emphasizes, any such payment is considered a “prepaid but **unearned** commission” until the commission has been “earned” upon receipt of payment from the customer. *Id.* (emphasis added); see also *id.* at § V.

As explained in Scandit’s Memorandum in Support of Motion to Dismiss Wage Claim, the CCP’s distinction between “earned” commissions and “prepaid but unearned commissions,” mirrors Idaho Code § 45-608’s distinction between “wages due” and “an advance of wages to be earned,” and courts around the country recognize that advances are not “wages” under similar state wage acts. Plaintiff attempts to distinguish these authorities by arguing that the CCP does not expressly use the term “advance,” but in doing so puts form over substance and ignores the clear terms of the CCP, which uses the unambiguous phrase “prepaid but unearned commission,”

which is synonymous with an advance. *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (defining "prepay" as "to pay in advance"); Dictionary.com Unabridged, Random House, Inc. 1 Feb. 2017 (defining "prepay" as "to pay for in advance") (available at <http://www.dictionary.com/browse/prepay>); BURTON'S LEGAL THESAURUS (2nd Ed. 1992) (listing, as synonyms for "prepay", the following: "give compensation for in advance, make payment in advance, ...[and] pay in advance"). Notably, Plaintiff cites no authority to support her argument that the difference in terminology is in any way legally meaningful.

In summary, Plaintiff cannot state a claim for unpaid wages under the Idaho Claims for Wages Act because Plaintiff does not allege (nor could she) that Scandit had received payment from Amazon at the time she filed her Complaint. Thus, Plaintiff had not "earned" any commission under the unambiguous terms of the CCP and no "wages" were due to Plaintiff at the time she filed her Complaint.

4. Plaintiff Cannot Establish a Waiver

Plaintiff has separately filed a Motion for Leave to File First Amended Verified Complaint (the "Motion for Leave"), which includes a Proposed Amended Complaint that hints at a waiver theory, and the Opposition Memorandum similarly hints at such a theory. However, Plaintiff provides no analysis or authority for a waiver argument other than a one-sentence reference in a footnote. In any event, Plaintiff has not alleged and cannot allege facts that would support a colorable claim that Scandit waived the CCP's requirement that it receive payments from Amazon before commissions are earned.

To establish a waiver, two elements must be met: (1) an intentional relinquishment of a known right or advantage, and (2) detrimental reliance. *See Washington Fed. Sav. v. Van*

Engelen, 153 Idaho 648, 655 (2012). Under the first element, the party asserting waiver has the burden to show a clear intent to waive. *Pocatello Hosp., LLC v. Quail Ridge Medical Investor, LLC*, 156 Idaho 709, 719 (2014). Waiver will not be inferred absent “a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to estoppel.” *Id.* Under the second element, “the party asserting waiver must also show that he acted in reasonable reliance upon [the waiver] and that he thereby has altered his position to his detriment.” *Id.*

Here, Plaintiff has not alleged facts that would support either element of a waiver theory. First, Plaintiff can point to no act by Scandit demonstrating an unequivocal intent to waive the CCP’s requirement that Scandit receive payment from Amazon before any commission is “earned.” Plaintiff’s apparent reliance on the email attached to her Complaint as Exhibit B is unavailing. That email evidences no waiver, but, to the contrary, expressly recognizes that Plaintiff’s commission remains unearned unless and until Scandit receives payment from Amazon (explaining that pre-payment of unearned commissions could result in a situation where Scandit “would have to reverse any previous commission payment and claw back previously paid commission” and explicitly “maintaining the claw back option of course” for prepaid but unearned commissions). *Id.*

Moreover, Plaintiff has not alleged that she relied to her detriment on the email. Scandit sent the email on October 28, 2016 -- after Amazon had entered into the Amazon Agreement, but before Amazon had paid Scandit any amount under the Agreement. Plaintiff filed her Complaint just two business days later, thereby making impossible any argument that she relied to her detriment on the email.

B. Plaintiff Fails to State a Wage Claim Based on the Annual Quota Achievement Bonus

Finally, Plaintiff's continued attempt to assert a wage claim on a theory that Scandit was required to pay Plaintiff an "annual" bonus of \$36,000 three months before the annual term of the CCP had been completed must fail. While Plaintiff tries to relabel the bonus an "Achievement Bonus," the CCP in fact calls it an "**Annual Quota Achievement Bonus**" that is earned "if the combined ACV of renewals and Order equals CHF 641,001 or more." *See* Complaint, Exh. A at IV.E (emphasis added). The Annual Quota Achievement Bonus is included as part of Plaintiff's "**2016 Commission Compensation Plan**," which is expressly defined to encompass the term from "January 1, 2016 through December 31, 2016." *Id.* at page 1 (emphasis added).

Plaintiff asks the Court to ignore the multiple references to this bonus as an "annual" bonus by citing to *State v. Murphy*, 94 Idaho 849 (1972), a case holding that headings are not to be considered when interpreting **statutes**. But the CCP is not a statute, rendering that case inapposite. Where, like here, the terms of a contract are at issue, it is a well-recognized rule of contract construction that "in interpreting any provision in a contract, the entire agreement must be viewed as a whole." *See Execulines Ltd. v. Tel-Am. of Salt Lake City, Inc.*, 121 Idaho at 623. This means that the **annual** bonus heading of the **annual** bonus provision in the CCP cannot be disregarded. Because it is axiomatic that an **annual** bonus, by its very nature, is earned on an **annual** basis and paid at the end of the year, Plaintiff cannot be held to have earned an annual bonus three months prior to year's end. *See, e.g.*, EMPLOYEE BENEFITS AND COMPENSATION GUIDE (CCH 2016) ¶ 4332 ("As the name suggests, [annual bonuses] are paid out on a yearly

basis....Even when annual bonuses are based on employee performance, they are long-delayed rewards for what may have been excellent work at the beginning of the year.”).³

III. CONCLUSION

For the foregoing reasons, Scandit respectfully requests that this Court dismiss with prejudice Plaintiff's cause of action under the Idaho Claims for Wages Act for failure to state a claim.

DATED THIS 2th day of February, 2017.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

D. John Ashby, ISB No. 7228
Attorneys for Defendant Scandit Inc.

³ Plaintiff's citation to *Paolini v. Albertson's Inc.*, 143 Idaho 547 (2006) does not support her position. That case addressed whether stock options are wages under the Idaho Claims for Wages Act. The Court noted in *dicta* that certain types of wages, including annual bonuses, are **not** normally paid every calendar month. Instead, the court noted that such compensation "will come due during a specific calendar month," which presumably means the month after the annual term. *Paolini* certainly does not hold that annual bonuses become due before the end of a year.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2th day of February, 2017, I caused to be served a true copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS WAGE CLAIM by the method indicated below, and addressed to each of the following:

Thomas E. Dvorak
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D. John Ashby

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT **FEB 16 2017**
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

Case No. _____ Inst. No. _____
Filed _____ A.M. _____ P.M.

KAREN L. SAVAGE,
Plaintiff,
vs.
SCANDIT INC.,
Defendant.

Case No. CV-2016-290-C

MEMORANDUM DECISION AND ORDER
GRANTING DEFENDANT'S MOTION TO
DISMISS AND DENYING PLAINTIFF'S
MOTION TO AMEND

Plaintiff Karen L. Savage claims her employer, Defendant Scandit Inc., failed to make timely payment of her wages, entitling her to treble damages under Idaho's wage claims act ("the Wage Claims Act"), I.C. §§ 45-601 to -621. Scandit moves to dismiss Savage's wage claim, contending that some of what Savage claims to be owed isn't "wages" and that payment of the rest hadn't yet come due when she filed suit, leaving her without a viable wage claim. In response, Savage moves to amend her complaint to bolster her wage claim with equitable theories on which Scandit purportedly is foreclosed from asserting some of its otherwise-existing contractual rights in defending against her wage claim. These motions were argued and taken under advisement on February 6, 2017. For the reasons that follow, Scandit's motion to dismiss is granted and Savage's motion to amend is denied.

I.

BACKGROUND

Scandit is an enterprise mobility and data capture company that specializes in barcode scanning applications. (Compl. ¶ 6.) Savage began working for Scandit as a senior sales executive about two years ago. (Id. ¶ 7.) Her compensation for the year 2016 was governed by a

contract entitled “2016 COMMISSION COMPENSATION PLAN (January 1, 2016 through December 31, 2016).” (Id. ¶¶ 8-9 & Ex A.) The Court will call that contract “the CCP.” Under the CCP, Savage was entitled to be paid a six-figures annual salary, plus commissions on new business, commissions on renewal business, and the potential for both quarterly bonuses of \$4,000 each and an annual bonus of \$36,000. (Id. Ex. A § I.)

Through Savage’s efforts, Scandit inked a lucrative Master Software License Agreement (“the Amazon Agreement”) with Amazon Services, LLC on September 27, 2016. (Id. ¶ 16.) Savage’s total commission on the Amazon Agreement is \$390,234. (Id. ¶ 22.) She claims that, under the terms of the CCP, her commission on the Amazon Agreement became due and owing—but wasn’t paid—in late September or October of 2016. (Id. ¶¶ 18, 25-26.) Scandit agrees that the commission wasn’t paid during that timeframe and, for present purposes, is willing to indulge Savage in the assumption that prepayment was due during that timeframe. Still, Scandit says, the commission hadn’t yet been “earned” during that timeframe and what is significant is whether it had been “earned,” not whether its prepayment was required.

Indeed, in its section IV, the CCP differentiates between when a commission must be paid to Savage and when she has “earned” it, the former commonly predated the latter:

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.

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. . . .

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. . . .

(Id. Ex. A § IV (bold type in original) (underscoring added).)

The CCP then provides, in its section V, a protocol for reversal—or “claw-back”—by Scandit of any “prepaid commissions” Savage receives, but ultimately fails to “earn,” under the CCP’s section IV. (Id. Ex. A § 5.) Section V also says that when a customer with whose business Savage is credited falls more than sixty days behind in making payment, Scandit not only has this “claw-back” right with respect to prepaid commissions, but also has “the right to reverse all Quota credit” pertaining to the unpaid portion of the transaction, so that it no longer would contribute to her meeting the CCP’s various performance quotas. (Id.)

The Amazon Agreement’s signing had a second compensation consequence, giving rise to a second dispute between Savage and Scandit. Because of its signing, Savage crossed a quota threshold she needed to cross to earn a \$36,000 annual bonus. (Id. ¶ 27.) That quota is set forth in the CCP’s section IV(E), which is entitled “**Annual Quota Achievement Bonus**” and which says Savage “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.” (Id. Ex. A § IV(E) (bold type in original) (underscoring added).) Savage claims she was entitled to receive the \$36,000 annual bonus in September 2016 but hadn’t received it by the end of the following month. (Id. ¶ 27.) Scandit seemingly doesn’t disagree that Savage crossed the quota threshold necessary to earn the \$36,000 annual bonus in connection with the Amazon Agreement’s signing, but Scandit says the bonus, being an annual one pertaining to the calendar year 2016, didn’t come due until after that calendar year had ended. The CCP doesn’t specify when the \$36,000 annual bonus is payable, but it does repeatedly refer to the \$36,000 annual bonus as exactly that—an “annual” bonus. It does so in its section 1(F), in its section IV(E), and in sections 1 and 5 of its Appendix A. Additionally, the CCP recites at its outset that it is Savage’s “2016” compensation plan, spanning the period from “January 1, 2016 through December 31, 2016.” (Id. Ex. A.)

On October 28, 2016, Scandit's CEO, Samuel Mueller, e-mailed Savage a proposed multi-year payment schedule for her commission on the Amazon Agreement. (Id. Ex. B.) As justification for a multi-year payout, Mueller said as follows:

Given the size and long duration of the deal, from [an] accounting and liquidity management perspective we have to expect considerable risk that Amazon might find a way to not pay one of the (annual) fees and back out of the contract at a later time, in which case we would have to reverse any previous commission payment and claw back previously paid commission.

(Id. Ex. B.) In the e-mail, Mueller repeatedly mentioned that Scandit retained its "claw-back" right in case Amazon failed to make payment under the Amazon Agreement. (Id.) A few days later—specifically, on the regular October 31 payday—Scandit made a \$5,000 payment to Savage, labeled "AMAZON (Symbolic 1st payment)." (Id. ¶ 25.)

Savage sued Scandit the next day, claiming that the \$385,234 remaining balance of her \$390,234 commission on the Amazon Agreement and her \$36,000 annual bonus should already have been paid. Three claims are asserted in her complaint: (i) Count 1, a claim under the Wage Claims Act for treble the \$385,234 remaining balance of the commission and for treble the \$36,000 annual bonus; (ii) Count 2, a claim for declaratory relief designed to establish her entitlement to the treble those amounts; and (iii) Count 3, a claim that Scandit breached the CCP by failing to pay her the full commission and the annual bonus. (Id. ¶¶ 28-45.)

On December 3, 2016, Scandit moved to dismiss Count 1—Savage's wage claim—under I.R.C.P. 12(b)(6). Scandit's theory is that Count 1 fails to state a claim for relief because, under the terms of the CCP, Savage's commission on the Amazon Agreement had not been "earned," and her annual bonus had not come due, when she filed suit on November 1, 2016.

As part of her opposition strategy, Savage moved on January 24, 2017, for leave to amend her complaint. Savage seeks permission to bolster Count 1 with equitable theories on which Scandit purportedly is foreclosed from asserting some of its otherwise-existing contractual

rights in defending against Count 1, as well as to make some technical corrections designed to ensure that her allegations correctly calculate, in United States dollars, the amounts at issue, taking into account the exchange rate between the dollar and the Swiss Franc.

As already noted, Scandit's motion to dismiss and Savage's motion to amend were argued and taken under advisement on February 6, 2017. They are ready for decision. It is worth noting that, during the hearing, Scandit's counsel informed the Court that the amounts in dispute—the potential for trebling them aside—were paid in full in late November 2016. Savage's counsel didn't disagree.

II.

LEGAL STANDARDS

A. Scandit's motion to dismiss

Under I.R.C.P. 12(b)(6), a claim is subject to dismissal if the complaint's factual allegations are insufficient to support it. The complaint's factual allegations "will be accepted as true, unless they are purely conclusory." *Orrock v. Appleton*, 147 Idaho 613, 618, 213 P.3d 398, 403 (2009). Consequently, when dismissal is sought under I.R.C.P. 12(b)(6), the Court's task is to determine whether the complaint's well-pleaded (*i.e.*, not conclusory) factual allegations, taken as true, state a claim that is viable under the law. *Id.* ("[O]n a motion to dismiss for failure to state a claim upon which relief may be granted, the question is whether the non-movant has alleged sufficient facts in support of his claim, which if true, would entitle him to relief."). If so, the motion to dismiss must be denied. If not, dismissal is appropriate, but the plaintiff should be granted leave to amend the complaint to cure the shortcomings that warrant dismissal unless it is clear the plaintiff cannot cure them. *E.g., Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1088 (9th Cir. 2015). In other words, dismissal without leave to amend—outright dismissal—is appropriate only if, from a review of the complaint, "it appears beyond doubt that the plaintiff

can prove no set of facts in support of [her] claim that would entitle [her] to relief.”

Colafranceschi v. Briley, 159 Idaho 31, 34, 355 P.3d 1261, 1264 (2015) (quoting *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156, 160 (2005)).

B. Savage’s motion to amend

I.R.C.P. 15(a)(2) governs motions made before trial for leave to amend pleadings. Under that rule, trial courts “should freely give leave when justice so requires.” I.R.C.P. 15(a)(2). Whether that standard is met in a given instance is a matter of discretion. *E.g.*, *Maroun v. Wyreless Sys., Inc.*, 141 Idaho 604, 612, 114 P.3d 974, 982 (2005), *abrogated on other grounds*, *Wandering Trails, LLC v. Big Bite Excavation, Inc.*, 156 Idaho 586, 591, 329 P.3d 368, 373 (2014). Leave to amend should be granted, however, unless (i) there is undue delay, bad faith, or a dilatory motive on the movant’s part, (ii) the movant has repeatedly failed to cure deficiencies in its pleadings by amending them, (iii) the amendment would unduly prejudice the nonmovant, or (iv) the amendment would be futile. *E.g.*, *id.* A proposed new claim is futile if the supporting factual allegations are insufficient to state a claim for relief. *E.g.*, *id.*

III.

ANALYSIS

A. Scandit’s motion to dismiss

Count 1 of Savage’s complaint is what is commonly called a “wage claim”—a claim for unpaid wages under the Wage Claims Act. Her wage claim has two parts. First, Savage contends Scandit violated the Wage Claims Act by not paying the \$385,234 balance of her commission on the Amazon Agreement during late September or October of 2016. Second, she contends Scandit violated the Wage Claims Act by not paying her a \$36,000 annual bonus for the calendar year 2016 within that same timeframe (in other words, long before 2016 had ended). Under the Wage Claims Act, “[a]ny person shall have the right to collect wages . . . provided . . .

pursuant to a contract of employment.” I.C. § 45-614 (emphasis added). That right is enforceable in court, I.C. § 45-615(1), and upon prevailing “the plaintiff shall be entitled to recover from the defendant . . . damages in the amount of three (3) times the unpaid wages found due and owing.” I.C. § 45-615(2). Thus, if Savage is correct, she will recover three times these amounts. The Court first addresses her claim concerning the commission on the Amazon Agreement and then turns to her claim concerning the \$36,000 annual bonus.

1. Amazon commission

The Wage Claims Act defines “wages” as “compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece or commission basis.” I.C. § 45-601(7). This definition is “broad[].” *Huber v. Lightforce USA, Inc.*, 159 Idaho 833, 842, 367 P.3d 228, 237 (2016). And it expressly includes commissions. The question presented here isn’t so simple, though, as whether commissions are “wages”; they assuredly are. Instead, the question is whether advances on unearned commissions, or prepaid commissions, are “wages” too. That question arises here because, at the time Savage filed this action, she indisputably hadn’t yet “earned” any commission on the Amazon Agreement, even assuming *arguendo* that by then she had become entitled to prepayment of the commission’s \$385,234 balance. This is made abundantly clear by the CCP’s sections IV and V, which under certain circumstances provide for prepayment to Savage of “unearned” commissions, describe the conditions that must be satisfied before she “earns” those unearned-but-prepaid commissions (including the undisputedly unsatisfied condition that Amazon make payment to Scandit under the Amazon Agreement), and require her to pay Scandit back if those conditions don’t eventually become satisfied. (Compl. Ex. A §§ IV-V.)

The problem Savage faces is that, in applying the Wage Claims Act, Idaho’s appellate courts have repeatedly read the term “wages” to mean compensation employees “earn” by

working for employers. *E.g.*, *Huber*, 159 Idaho at 842, 367 P.3d at 237 (“[T]he statute is not limited to wages earned during a calendar month or to wages normally paid every calendar month but also applies to wages earned over a longer period of time, such as an annual bonus based on net profits which will become due during a specific calendar month.”) (emphasis added) (quotation marks and brackets omitted); *Gray v. Tri-Way Constr. Servs., Inc.*, 147 Idaho 378, 385, 210 P.3d 63, 70 (2009) (to the same effect); *Paolini v. Albertson’s Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006) (to the same effect). In fact, both the Idaho Supreme Court and the Idaho Court of Appeals have held that “[w]ages . . . constitute ‘compensation earned in increments as services are performed.’” *Bilow v. Preco, Inc.*, 132 Idaho 23, 29, 966 P.2d 23, 29 (1998) (emphasis added) (quoting *Whitlock v. Haney Seed Co.*, 114 Idaho 628, 634, 759 P.2d 919, 925 (Ct. App. 1988)); *see also Latham v. Haney Seed Co.*, 119 Idaho 412, 415, 807 P.2d 630, 633 (1991) (to the same effect). Their longstanding view that “wages” must be “earned” doesn’t jibe with Savage’s position that unearned commissions are “wages” so long as the employer is obligated to prepay them.

Consider, in that regard, the possibility that Savage’s commission on the Amazon Agreement might never become entirely “earned.” Without gazing into a crystal ball, one can’t know whether Amazon will make all of the payments contemplated by the Amazon Agreement. To any extent payment isn’t made, Savage’s commission is unearned and subject to claw-back under the CCP’s plain terms. (Compl. Ex. A §§ IV-V.) If Savage has her way, she’d have not only the unearned portion of the commission to disgorge, but she’d have another two times that amount as a penalty under the Wage Claims Act, whose status—must it be disgorged too?—is uncertain. It makes little sense to expand the Wage Claims Act beyond its familiar territory of earned wages and into the realm of advances that employees might be required to repay. Though

it admittedly was applying statutory language not identical to Idaho's, the California Court of Appeal reached this same conclusion that advances aren't "wages" for purposes of wage claims acts. *See, e.g., Steinhebel v. Los Angeles Times Comm'ns*, 126 Cal. App. 4th 696, 705 (2005) ("The essence of an advance is that at the time of payment the employer cannot determine whether the commission will eventually be earned because a condition to the employee's right to the commission has yet to occur or its occurrence as yet is otherwise unascertainable. An *advance*, therefore, by definition is not a *wage* because all conditions for performance have not been satisfied.") (emphasis in original).

Furthermore, the Wage Claims Act doesn't invalidate, or let the Court second-guess, the compensation scheme to which Scandit and Savage agreed. The Idaho Supreme Court has held that the Wage Claims Act's requirement to pay employees at least monthly is its only limitation on employment contracts: "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." *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 190, 108 P.3d 332, 337 (2005). In fact, the *Bakker* court upheld a provision of an employment contract that disentitled the employee to commissions on transactions that failed to close until after the employment relationship terminated. *Id.* at 189-90, 108 P.3d at 336-37. Under the *Bakker* rule, there is no doubt that it is legally permissible for Scandit and Savage to agree that Savage doesn't "earn" a commission until the customer makes payment to Scandit.

Under the plain terms of the CCP, to which Savage voluntarily bound herself contractually, Savage hadn't "earned" the commission at issue before she sued Scandit to recover it. Unearned commissions aren't "wages" for purposes of the Wage Claims Act. Consequently, Scandit's alleged breach of Savage's contractual right to prepayment of an unearned commission

doesn't bring her within the Wage Claims Act's protective umbrella. Her wage claim therefore is subject to dismissal to the extent it is based on non-payment of the unearned commission. The dismissal is with prejudice, rather than without prejudice, because the wage claim cannot be repleaded so as to avoid this fatal defect; as already noted, there is no dispute that Amazon hadn't made any payment to Scandit under the Amazon Agreement before this action was filed, making the commission unearned.

In that regard, the Court has considered whether the defect would be cured by the proposed amendments Savage is pursuing through her pending motion for leave to amend her complaint. She seeks permission to assert various equitable theories on which Scandit purportedly is foreclosed from asserting some of its otherwise-existing contractual rights in defending against her wage claim. None of these theories is made out in a non-conclusory way in the proposed amended complaint. More importantly, none is addressed to or undermines this decision's *ratio decidendi*. Even if the proposal made by Scandit's CEO to pay Savage's commission over time amounted to a waiver of the CCP's conditions to Savage's right to prepayment of the commission, it wasn't a waiver of the CCP's conditions to Savage's "earning" the commission. Those conditions were effectively reiterated in the proposal itself, in that the proposal more than once mentioned the possibility for claw-back if Amazon didn't make payment as the Amazon Agreement contemplated. (Compl. Ex. B.)

2. Annual bonus

Savage also claims the right, under the Wage Claims Act, to treble the amount of the \$36,000 annual bonus she earned under the terms of the CCP for the calendar year 2016. An annual bonus is, of course, a "wage" for purposes of the Wage Claims Act. *E.g., Paolini*, 143 Idaho at 549, 149 P.3d at 824 ("Wages earned over a longer period of time, such as an annual bonus based upon net profits, . . . are covered by the statute."). An equally obvious proposition

is that the Wage Claims Act doesn't permit preemptive lawsuits in which treble damages are sought based on the non-payment of wages that haven't yet come due. *See id.* at 549-50, 149 P.3d at 824-25 (noting that I.C. § 45-608(1) requires the employer to "pay all wages due"). The issue presented is whether Savage's allegations make out a claim that Scandit failed to pay the \$36,000 annual bonus when it came due.

Savage has just one thing going for her: the CCP says she "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." (Compl. Ex. A § IV(E) (bold type in original) (underscoring added).) This makes the \$36,000 annual bonus unlike the commission on the Amazon Agreement, in that Savage at least has some basis for arguing that the annual bonus had been "earned" before she filed this action, whereas she has no basis at all for arguing that the commission had been "earned" before she filed this action.

But that's not the same as saying she has a sound argument that the annual bonus had been "earned" before she filed this action. To the contrary, her argument has a noticeable weakness: the absence of any contractual basis for using some date partway through 2016 as a permissible date by which to measure whether she met the quota she must meet to earn the annual bonus. The provision on which she relies, section IV(E), doesn't provide for using some mid-year measurement date. Moreover, section V strongly suggests no mid-year measurement date should be used. The CCP contemplates that Savage would generate new business and get credit toward the quota as the year 2016 proceeded. But section V gave Scandit "the right to reverse all Quota credit" if it turned out that the customer fell more than sixty days behind in making payment. That didn't happen with the Amazon Agreement, but the point is that it was possible under section V for quota credit awarded to Savage at some point in 2016 to be reversed

later in 2016, meaning that it was possible for her to cross the quota threshold at some point in 2016 but have some of her quota credit reversed, causing her not to meet the quota at year's end. This explains why Savage didn't actually even "earn" the annual bonus before the year ended; whether she "earned" it depends on whether she met the quota as of some measurement date, and the only logical measurement date is the close of business on December 31, 2016.¹

This logic is consistent with the CCP's unfailing tendency to refer to the \$36,000 annual bonus as an "annual" bonus. Section IV(E), on which Savage relies, is entitled "**Annual Quota Achievement Bonus.**" (Compl. Ex. A § IV(E) (bold type in original).) Section I(F) labels the annual bonus slightly differently, as the "**Annual ACV & Renewals Achievement Bonus.**" (Id. Ex. A. § I(F) (bold type in original).) These two labels are each repeated in its Appendix A, section 1 of which calls it the "Annual Quota Achievement Bonus" and section 5 of which calls it the "Annual ACV & Renewals Quota Achievement Bonus." (Id. Ex. A, App. A §§ 1, 5.). And, importantly, the CCP recites at its outset that it is Savage's "2016" compensation plan, spanning the period from "January 1, 2016 through December 31, 2016." (Id. Ex. A.) Thus, the parties' intent to provide for an annual bonus is perfectly clear. Nothing in the CCP justifies an expectation on Savage's part that the annual bonus would be paid before year's end.

Consequently, even if there is some flaw in the Court's logic that the annual bonus wasn't even "earned" before year's end, it nevertheless is true that payment of the annual bonus didn't come due before year's end. As already noted, Savage cannot make out a wage claim by filing suit before the wage at issue comes due. *See Paolini*, 143 Idaho at 549-50, 149 P.3d at 824-25; I.C. § 45-608(1) (requiring employers to "pay all wages due"). Because there is no contractual

¹ Scandit's decision to pay the annual bonus before year's end, having been made in response to this litigation and likely in hopes of resolving it, doesn't undermine this logic.

or other legal basis for Savage's assertion that her \$36,000 annual bonus for the calendar year 2016 came due about two months before the end of that calendar year, her wage claim is dismissed to the extent it is based on non-payment of the annual bonus. The dismissal is with prejudice because Savage has given the Court no reason to think she could replead her wage claim in a way that would cure this fatal defect.

B. Savage's motion to amend

As already noted, part of Savage's approach to opposing Scandit's motion to dismiss was moving to amend her complaint to assert various equitable theories on which Scandit purportedly is foreclosed from asserting some of its otherwise-existing contractual rights in defending against her wage claim. The Court has addressed those theories above, in determining whether the wage claim should be dismissed with, or instead without, prejudice. Because they do not potentially salvage the wage claim, the Court determined that the dismissal should be with prejudice. For the same reason, Savage's motion to amend is futile. It is therefore denied.


That said, the Court notes a secondary purpose for Savage's motion to amend: making sure her allegations correctly calculate, in United States dollars, the amounts at issue, taking into account the exchange rate between the dollar and the Swiss Franc. Counsel informed the Court during the hearing, however, that Scandit paid the amounts at issue, without trebling under the Wage Claims Act, after this action was filed. Because of that development, and because the Court has now dismissed the wage claim, it is unclear to the Court whether Savage has any continuing need to amend her complaint to serve this secondary purpose. If so, she is welcome to renew her motion to amend.

Accordingly,

IT IS ORDERED that Scandit's motion to dismiss Count 1 of Savage's complaint is granted.

IT IS FURTHER ORDERED that Savage's motion to amend her complaint is denied.

Dated this 16th day of February, 2017.



Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on February 16th, 2017, I served a copy of this document as follows:

Thomas E. Dvorak
Givens Pursley LLP
P.O. Box 2720
Boise, ID 83701-2720

U.S. Mail, Postage Prepaid
 Hand Delivered
 Electronic Mail
 Facsimile

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

U.S. Mail, Postage Prepaid
 Hand Delivered
 Electronic Mail
 Facsimile

DOUGLAS A. MILLER
Clerk of the District Court

By: Candice White
Deputy Court Clerk

Thomas E. Dvorak (ISB ID# 5043)
GIVENS PURSLEY LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300
Stipulation re Final Judgment.DOCX (12948-3)

DOUGLAS A. MILLER, CLERK
By [Signature] Deputy

MAR 15 2017

Case No. _____ Inst. No. _____
Filed _____ A.M. 5:00 P.M.

Attorneys for Karen Savage

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT FOR THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

KAREN L. SAVAGE,

Plaintiff,

v.

SCANDIT INC.,

Defendant(s).

Case No. CV-2016-290-C

STIPULATION RE FINAL
JUDGMENT

COME NOW, Plaintiff, Karen L. Savage (hereinafter "Savage") by and through her attorneys of record, Givens Pursley LLP, and Scandit, Inc. (hereinafter "Scandit"), by and through its attorneys of record, Hawley Troxell Ennis & Hawley LLP and hereby stipulate as follows:

1. Whereas, the Court recently issued a decision on Scandit's Motion to Dismiss, dismissing Count 1 of the Plaintiff's Complaint and also denying Savage's Motion for Leave to Amend.
2. Whereas, Savage wishes to put the case in a posture to appeal as soon as possible as she respectfully, but fundamentally, disagrees with the Court's interpretation of the applicable law.
3. Whereas, Scandit and Savage agree to treat as moot and, therefore, dismiss with

prejudice Count 3 of Savage's Complaint because Scandit has paid to Savage the commission and bonus that Savage alleges to be owed to her in Count 3.

4. Whereas, Count 2 essentially overlapped with some of the relief sought in both Count 1 and Count 3 as well as sought some additional relief, but Savage is willing to dismiss this count with prejudice to focus efforts and energy on an appeal of Count 1.¹

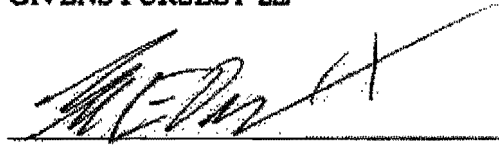
5. Whereas, both Scandit and Savage believe that the efficient administration and disposition of this case will be served by the dismissal of Counts 2 and 3 so that the case can be immediately appealed, allowing for a definitive answer as soon as possible as to the interpretation of applicable law.

6. Accordingly, it is hereby stipulated and agreed by the parties that (1) Counts 2 and 3 may be dismissed with prejudice; (2) a final judgment may be entered on the remaining count, Count 1, in accordance with the Court's Memorandum Decision and Order of February 16, 2017 (with Savage reserving all rights and grounds to appeal the dismissal of Count 1 upon the entry of the same, the fact of this stipulation to entry of such a judgment notwithstanding); and (3) the issue of costs and attorneys' fees and entitlement and amount of same, shall be reserved until after the resolution of the appeal by Savage and that the deadlines for filing of a memorandum of costs and fees shall be tolled and only begin to run upon the final disposition of such appeal (i.e., upon the issuance of and filing of the remitter with the district court after disposition of appeal under I.A.R. 38(c)).

¹ Savage acknowledges as does Defendant Scandit that there is some overlap between aspects of the declaratory judgment of Count 2 and the relief sought in both Count 1 and Count 3. Savage does not hereby stipulate to drop any argument that is actually set forth in Count 1 by virtue of the fact that it is repeated in some fashion in Count 2.

DATED this 15th day of March, 2017.

GIVENS PURSLEY LLP



Thomas E. Dvorak
Attorneys for Karen L. Savage

HAWLEY TROXELL ENNIS & HAWLEY LLP



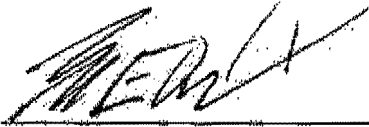
D. John Ashby
Attorneys for Scandit, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2017, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

D. John Ashby
Hawley Troxell Ennis & Hawley LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617

- Hand Delivery
- Facsimile
- Overnight Courier
- U.S. Mail



Thomas E. Dvorak

DOUGLAS A. [Signature] CLERK
By _____ Deputy

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT **MAR 28 2017**
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

Case No. _____ Inst. No. _____
Filed _____ A.M. 4:25 P.M.

KAREN L. SAVAGE,
Plaintiff,
vs.
SCANDIT INC.,
Defendant.

Case No. CV-2016-290-C
PRELIMINARY ORDER ON
STIPULATION RE FINAL JUDGMENT

On March 15, 2017, the parties filed a stipulation for entry of judgment, in which Plaintiff Karen L. Savage agrees to dismiss with prejudice the second and third counts of her complaint against Defendant Scandit Inc. to facilitate an immediate appeal of the Court's order dismissing the first count with prejudice under I.R.C.P. 12(b)(6). One provision of the stipulation calls for tolling the deadline for Scandit to seek an award of costs and attorney fees until after the appeal is decided. Absent some compelling explanation for why this unusual provision is needed, the Court rejects it. The parties are directed to tell the Court, in a filing to be made within fourteen days from the date of this order, whether they still wish to be bound by the balance of the stipulation. If so, the Court will enter judgment as the stipulate contemplates, and Scandit then will have fourteen days to seek costs and attorney fees as the prevailing party, should it wish to do so.

IT IS SO ORDERED.

Dated this 28th day of March, 2017.

[Signature]
Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on March 29th, 2017, I served a copy of this document as follows:

Thomas E. Dvorak
Givens Pursley LLP
P.O. Box 2720
Boise, ID 83701-2720

U.S. Mail, Postage Prepaid
 Hand Delivered
 Electronic Mail
 Facsimile

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

U.S. Mail, Postage Prepaid
 Hand Delivered
 Electronic Mail
 Facsimile

DOUGLAS A. MILLER
Clerk of the District Court

By: 
Deputy Court Clerk

DOUGLAS A. MILLER, CLERK
By *[Signature]* Deputy
APR 11 2017

Case No. _____ Inet. No. _____
Filed 11:46 A.M. _____ P.M.

D. John Ashby, ISB No. 7228
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5200
Email: jashby@hawleytroxell.com

Attorneys for Defendant Scandit Inc.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

KAREN L. SAVAGE,
Plaintiff,

vs.

SCANDIT INC.,
Defendant.

)
Case No. CV-2016-290-C
SUPPLEMENTAL STIPULATION RE
FINAL JUDGMENT

The above-named parties, by and through their respective counsel of record, and in response to the Court's March 28, 2017, PRELIMINARY ORDER ON STIPULATION RE FINAL JUDGMENT, hereby stipulate and state that they wish to be bound by their March 15, 2017 STIPULATION RE FINAL JUDGMENT, less the provision calling for tolling of the deadline for Defendant to seek and award of costs and attorney fees until after an appeal is decided. Accordingly, the parties ask the Court to enter judgment dismissing all counts in Plaintiff's Complaint in accordance with said March 15, 2017 Stipulation, except as modified by

Preliminary Order. In the event that Defendant does file a memorandum of costs and attorneys fees, by executing this Stipulation, Plaintiff does not waive any arguments against such an award and Plaintiff specifically reserves the same, including the argument that Defendant is not a prevailing party entitled to fees.

DATED THIS 11th day of April, 2017.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

Dr. John Ashby
Attorneys for Defendant Scandit Inc.

DATED THIS 11th day of
April, 2017.

GIVENS PURSLEY LLP

By 


Thomas E. Dvorak
Attorneys for Plaintiff Karen L. Savage

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of April, 2017, I caused to be served a true copy of the foregoing SUPPLEMENTAL STIPULATION RE FINAL JUDGMENT by the method indicated below, and addressed to each of the following:

Thomas E. Dvorak
GIVENS PURSLEY LLP
601 West Bannock Street
PO Box 2720
Boise, ID 83701-2720
[Attorneys for Plaintiff]

- U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail: ted@givenspursley.com
 Telecopy: 208.388.1300



D. John Ashby

APR 17 2017

Case No. _____ Inst. No. _____
Filed _____ A.M. 5:00 P.M.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

KAREN L. SAVAGE,

Plaintiff,

vs.

SCANDIT INC.,

Defendant.

Case No. CV-2016-290-C

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

Plaintiff Karen L. Savage's complaint is dismissed with prejudice. No relief is awarded to her.

Dated this 17th day of April, 2017.

[Signature]
Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on April 18th, 2017, I served a copy of this document as follows:

Thomas E. Dvorak
Givens Pursley LLP
P.O. Box 2720
Boise, ID 83701-2720

U.S. Mail, Postage Prepaid
 Hand Delivered
 Electronic Mail
 Facsimile

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

U.S. Mail, Postage Prepaid
 Hand Delivered
 Electronic Mail
 Facsimile

DOUGLAS A. MILLER
Clerk of the District Court

By:  _____
Deputy Court Clerk

Thomas E. Dvorak (ISB ID# 5043)
GIVENS PURSLEY LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300
13691738_1 (12948-3)

DOUGLAS A. MILLER, CLERK
By Miller Deputy

MAY 26 2017

Case No. _____ Inst. No. _____
Filed 1149 A.M. _____ P.M.

Attorneys for Karen Savage

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT FOR THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

KAREN L. SAVAGE,
Plaintiff,

v.

SCANDIT INC.,
Defendant(s).

Case No. CV-2016-290-C

NOTICE OF APPEAL

**TO: DEFENDANT SCANDIT INC. AND ITS ATTORNEYS OF RECORD, AND THE
CLERK OF THE ABOVE-ENTITLED COURT:**

NOTICE IS HEREBY GIVEN THAT:

1. Pursuant to Idaho Appellate Rule 17, the above named Plaintiff Karen L. Savage (hereinafter "Savage") appeals to the Idaho Supreme Court from the final Judgment entered in the above-entitled action on April 17, 2017. This Notice of Appeal, pursuant to Idaho Appellate Rule 17(e)(1), shall be deemed to include and present on appeal all interlocutory judgments, orders and decrees entered prior to the foregoing named Judgment (including without limitation that certain Memorandum Decision and Order Granting Defendant's Motion to Dismiss and Denying Plaintiff's Motion to Amend entered on February 16, 2017); all judgments, orders and decrees entered prior to the judgment, order or decree appealed from for which the time for

appeal has not expired and all interlocutory or final judgments, orders and decrees entered after the foregoing named Judgment.

2. Savage has the right to appeal to the Idaho Supreme Court and the judgments and orders described or incorporated herein pursuant to Idaho Appellate Rule 11(a)(1).

3. **PRELIMINARY STATEMENT OF ISSUES ON APPEAL:**

The following includes a non-exhaustive list of preliminarily identified issues on appeal, and Savage reserves the right to present additional issues on appeal:

- A. 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 pursuant to Idaho Wage Claim Act § 45-601, et seq. (“WCA”);
- B. Whether the District Court erred in determining under a motion to dismiss standard that the amount Savage claimed due and owing as an annual bonus was not wages pursuant to WCA;
- C. Whether the District Court erred in concluding under a motion to dismiss standard that an amount due and owing under a contract was not due and owing as a wage under the WCA simply because it could be clawed back based on conditions subsequent.
- D. Whether the District Court erred in determining under a motion to dismiss standard that an annual bonus was only “due” under the WCA after the calendar end of the year, even if the requisite amount of orders to make the bonus due and owing had been booked.
- E. Whether the District Court erred in not granting leave to amend.

4. **REPORTER'S TRANSCRIPT.** Savage request transcripts of the entirety of the following proceedings:

- A. Transcript of hearing on Defendant's Motion to Dismiss Wage Claim and other pending matters in case held on 2/6/2017; and
- B. Transcripts of all other hearings not specifically listed above held by the District Court in this matter.

5. **CLERK'S RECORD:** Savage requests that in addition to all documents automatically included in the record pursuant to Rule 28, I.A.R., that the Court include the following additional documents in the record (identified below as they are in the Court's repository):

	<u>Date</u>	<u>Document</u>
1.	11/1/16	Verified Complaint for Collection of a Wage Claim Under Idaho Code § 45-601, et seq.; Demand for Jury Trial
2.	11/1/16	Summons
3.	11/23/16	Notice of Appearance
4.	12/13/16	Answer to Complaint and Demand for Jury Trial
5.	12/13/16	Motion to Dismiss Wage Claim
6.	12/13/16	Memorandum in Support of Motion to Dismiss Wage Claim
7.	12/13/16	Declaration of Samuel Mueller
8.	12/20/16	Notice of Hearing
9.	1/23/17	Memorandum in Support of Motion for Leave to File First Amended Verified Complaint
10.	1/24/17	Motion for Leave to File First Amended Verified Complaint
11.	1/30/17	Memorandum in Opposition to Motion to Dismiss
12.	1/30/17	Memorandum in Opposition to Plaintiff's Motion for Leave to File First Amended Verified Complaint
13.	2/2/17	Reply Memorandum in Support of Motion to Dismiss Wage Claim

14. 2/16/17 Memorandum Decision and Order Granting Defendant's Motion to Dismiss and Denying Plaintiff's Motion to Amend
15. 3/15/17 Stipulation re Final Judgment
16. 3/18/17 Preliminary Order on Stipulation re Final Judgment
17. 4/11/17 Supplemental Stipulation re Final Judgment
18. 4/17/17 Judgment

6. **I CERTIFY:**

- (a) That a copy of this notice of appeal has been served on the reporter.
- (b) That the clerk of the district court has been paid \$160.00, the estimated fee for preparation of the reporter's transcript.
- (c) That the estimated fee of \$100.00, for preparation of the clerk's record has been paid.
- (d) That the appellate filing fee of \$129.00 has been paid.
- (e) That service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 25th day of May, 2017.

GIVENS PURSLEY LLP



Thomas E. Dvorak
Attorneys for Karen L. Savage

CERTIFICATE OF SERVICE


I hereby certify that on this 25th day of May, 2017, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

D. John Ashby
Hawley Troxell Ennis & Hawley LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617

Hand Delivery
 Facsimile
 Overnight Courier
 U.S. Mail

Dianne Cromwell
605 Fort Street
Boise, ID 83702

Hand Delivery
 Facsimile
 Overnight Courier
 U.S. Mail



Thomas E. Dvorak

IN THE DISTRICT COURT OF THE 4TH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF VALLEY

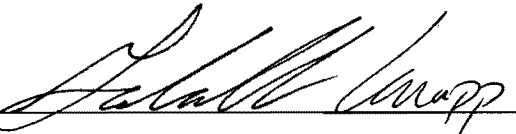
MAREN L. SAVAGE,)	
	)	SUPREME COURT NO. 45143
Plaintiff/ Respondent,)	
	)	Dist. Court No. CV-2016-290-C
-vs-)	
	)	CLERK'S CERTIFICATE
SCANDIT INC,	)	OF EXHIBITS
)	
Defendant/Appellant.)	
)	

I, DOUGLAS A. MILLER, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Valley, do hereby certify that the following is a list of the exhibits, offered or admitted and which have been lodged with the Supreme Court or retained as indicated:

<u>NO.</u>	<u>DESCRIPTION</u>	<u>OFFER/ADMIT</u>	<u>SENT/RETAINED</u>
------------	--------------------	--------------------	----------------------

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 27th day of July, 2017.

DOUGLAS A. MILLER,
Clerk of the District Court

By: 

IN THE DISTRICT COURT OF THE 4TH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR VALLEY COUNTY (IN THE (PUBLIC UTILITIES COMMISSION)
(INDUSTRIAL COMMISSION) OF THE STATE OF IDAHO)

KAREN L. SAVAGE,)
) SUPREME COURT NO. 45143
Plaintiff/ Respondent,)
) Dist. Court No. CV-2016-290-C
-VS-)
) CLERK'S CERTIFICATE
GRANDT INC,) OF SERVICE
)
)
Defendant/Appellant.)
)

TO: Thomas Dvorak
PO Box 2720
Boise, ID 83701
ATTORNEY FOR APPELLANT

TO: John D Ashby
PO Box 1617
Boise, ID 83701
ATTORNEY FOR RESPONDENT

YOU ARE HEREBY NOTIFIED:

That the Clerk's Record, Exhibits and Transcripts in the above entitled cause has been lodged with the District Court and copies sent to counsel; that objections to the Clerk's Record and Reporter's Transcript, including any requests for corrections, deletions, or additions, must be filed with the District Court together with a Notice of Hearing within twenty-eight (28) days from the date of this Notice.

DATED this 27th day of July, 2017.

DOUGLAS A. MILLER,
Clerk of the District Court

By: 
Deputy

IN THE DISTRICT COURT OF THE 4TH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR VALLEY COUNTY (IN THE (PUBLIC UTILITIES COMMISSION)
(INDUSTRIAL COMMISSION) OF THE STATE OF IDAHO)

KAREN L. SAVAGE,)	
	)	SUPREME COURT NO. 45143
Plaintiff,)	
	)	Dist. Court No. CV-2016-290-C
-vs-)	
	)	CLERK'S CERTIFICATE
SCANDIT INC,	)	OF RECORD
)	
Defendant.)	
)	
)	

I, DOUGLAS A. MILLER, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Valley, do hereby certify that the foregoing Record in this cause was compiled and bound under my direction and contains true and correct copies of all pleadings, documents and papers designated to be included under Rule 28, IAR, the Notice of Appeal, any Notice of Cross-Appeal, and any additional documents requested to be included.

I do further certify that all documents, x-rays, charts and pictures offered or admitted as exhibits in the above entitled cause, if any, will be duly lodged with the Clerk of the Supreme Court along with the Court Reporter's Transcript and Clerk's Record as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 27th day of July, 2017.

DOUGLAS A. MILLER
Clerk of the District Court

By 
Deputy