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IN THE SUPREME COURT OF THE STATE OF IDAHO

KAREN L. SAVAGE,

Plaintiff-Appellant,

v.

SCANDIT INC.,

Defendant-Respondent.

Supreme Court Docket No: 45143
Valley County No.: CV-2016-290-C

OPENING BRIEF OF PLAINTIFF/APPELLANT KAREN L. SAVAGE

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

Honorable Jason D. Scott, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This case is about applying the express language of the Idaho Wage Claim Act ("IWCA") to an employment contract to figure out when a commission and an achievement bonus are due. This case is about protecting the promise made and bargain that was presented to, and relied and acted upon, by the employee, but reneged on by the employer.

The District Court's reasoning in dismissing Plaintiff/Appellant's claim is rooted in a notion that a potential to later recoup or claw back some of the money that the employment contract says is owing somehow prevents an ascertainable sum due from being deemed "wages." The fundamental error in this thinking is that the IWCA does provide freedom of the parties to contract when non-traditional wages like commissions and bonuses will be "due." But simply because an employment contract uses the word "earned" in a way to potentially claw back part of a commission that has already been paid does not change the nature of a promise to pay the employee 100% of the commission at an earlier date. The IWCA expressly requires payment of wages due when the same are "due," without regard to any later right that may arise to claw back or recoupment.

With respect to the commission, the specific employment contract in this case provided that "100% of the respective commission will be paid [when the sale was booked]," and with respect to the bonus, that "Employee will earn a bonus of USD 36,000 if the combined Annual Contract Value of renewals and Orders equals CHF [Swiss franc] 641,001 or more." Of course, those promises motivated Plaintiff/Appellant Karen L. Savage to work hard to secure a multi-

million dollar sale to Amazon for her employer and get it booked during 2016. She finally received an email from her employer's CEO over a month after the Amazon contract was signed, acknowledging a commission amount of $390,234 and an Annual Quota Achievement Bonus amount of an additional $36,000 and "suggesting how to handle your commission from securing Amazon deal."[1] The suggestion was not that 100% of the commission would be paid despite the fact that all revenue had already been booked. The suggestion was instead to engage in a plan to distribute CHF 30,000 of her commission amount to other employees (unauthorized by Savage) and to pay the rest of her commission out annually in installments over four years (with an implied threat that "normally" the employer would pay the commission out over five years and only after they had received payments from Amazon). At the next payday, the employer graced Savage with a $5,000 "symbolic" payment. Understandably, Savage filed a wage claim suit immediately thereafter. Not surprisingly, the filing of that suit yielded payment of the full commission amount and the bonus.

One irony of this case is that the employer in this instance had every ability to craft language that followed Idaho's wage claim law and instead neglected to call the alleged early payment of the commission at issue a discretionary "advance," but instead indicated that 100% of the respective commission was due upon booking. Another irony is that the employer bases its entire argument for the commission not being due upon booking upon other language in the contract that says the commission is not "earned" until all payments are received, but then changes its tune when the word "earned" is used to describe the point at which the "annual quota

[1] R. 26 and 61.

achievement bonus" becomes due based on a threshold amount of sales being reached during the annual term of the contract. The District Court erred by dismissing the Complaint without allowing the wage claim to proceed forward to discovery and ultimately to a jury.

B. Course of Proceedings.

The Verified Complaint for Collection of a Wage Claim Under Idaho Code § 45-601 and Demand for Jury Trial in this matter on behalf of Appellant was filed on November 1, 2016, in Valley County, Idaho.[2] That Complaint included three counts: (1) a wage claim under Idaho Code § 45-615; (2) for declaratory judgment; and (3) a contract claim for commission due.[3] The Answer to Complaint and Demand for Jury Trial was filed on December 13, 2016.[4] A Motion to Dismiss Wage Claim was filed on December 13, 2016.[5] A Motion for Leave to File First Amended Verified Complaint was filed on January 24, 2017.[6] After oral argument on February 6, 2017, the District Court, Judge Jason D. Scott, issued its Memorandum Decision and Order ("Order") Granting Defendant's Motion to Dismiss and Denying Plaintiff's Motion to Amend on February 16, 2017.[7] A Stipulation Regarding Final Judgment was executed on March 15, 2017, wherein Counts 2 and 3 were withdrawn so that an immediate appeal could be filed.[8] A Preliminary Order on Stipulation re Final Judgment was entered on March 28, 2017.[9]

[2] R. 4-13.
[3] R. 8-12.
[4] R. 34-43.
[5] R. 44-46.
[6] R. 94-102.
[7] R. 137-157.
[8] R. 152-155.
[9] R. 156-157.

A Supplemental Stipulation re Final Judgment was executed on April 11, 2017.[10] Judgment was entered dismissing Plaintiff Karen L. Savage's Complaint with prejudice on April 17, 2017.[11] Notice of appeal was timely filed on May 26, 2017.[12]

C. Statement of the Facts.

Scandit is an enterprise mobility and data capture company that specializes in bar code scanning applications for businesses in fields that include healthcare, logistics, manufacturing, and retail industries. Scandit's services and products allow customers to rapidly build, deploy, and manage mobile apps for smart phones, tablets, and wearable devices, all for a lower total cost of ownership than traditional dedicated devices.[13]

Approximately two years ago, Savage began working for Scandit as a Senior Sales Executive.[14] For the year 2016, and specifically for the time period from January 1, 2016, through December 31, 2016, Scandit provided to Savage as part of her employment agreement a 2016 Commission Compensation Plan (the "CCP").[15] Under the CCP, Savage was entitled to be paid a salary, plus commissions on new business, plus commissions on renewals of customer contracts, and she also had the potential for bonuses.[16] Specifically, under the CCP, Scandit had promised to Savage that:

[10] R. 158-160.
[11] R. 161-162.
[12] R. 163-167.
[13] R. 5.
[14] R. 5.
[15] R. 5. See also R. 16-24.
[16] R. 5-6. See also R. 16024.

> **IV. COMMISSIONS**
>
> 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. . . .
>
> 100% of the respective commission will 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.[17]

The CCP also provides for an "Annual Quota Achievement Bonus" that states in its entirety, "Employee will earn a bonus of USD [$]36,000.00 if the combined ACV [Annual Cash Value] of renewals and Orders equals CHF 641,001" (the "Achievement Bonus").[18]

During that year, 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").[19] The Amazon Agreement was

[17] R. 5-6. See also R. 18.
[18] R. 6 and R. 18.
[19] R. 6.

booked during late September 2016.[20] 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").[21]

Savage performed all conditions precedent to the Amazon Commission becoming due and owing to her under the CCP and applicable law.[22] For several weeks after the Amazon Commission was booked, Savage received no word as to when the Amazon Commission, which was due and owing, would be paid or what the amount of said commission would be.[23]

On October 28, 2016, Scandit's CEO, Samuel Mueller, at 11:41:39 AM MDT, sent an email to Savage regarding the commission.[24] In the email, Mueller acknowledged the total amount of the commission to be $390,234. However, Mueller 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.[25] Contrary to Mueller's implication in the email, taking $30,000 of her commission away and distributing it in this manner was without authorization from Savage.[26]

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

[20] R. 6 and 61.
[21] R. 6.
[22] R. 7.
[23] R. 7.
[24] R. 7 and R. 26-28.
[25] R. 7 and R. 26.
[26] R. 7 and R. 26.

[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."[27]

On October 31, 2016, on the regular payday, nothing near "100% of the respective commission" promised by the CCP was paid and; instead; only a mere $5,000 described as "AMAZON (Symbolic 1st payment)" was made to Savage with respect to the Amazon Commission.[28]

Understandably, Savage sought counsel and filed a wage claim lawsuit on November 1, 2016.[29] The Wage Claim Count stated, in part:

> 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.

[27] R. 7 and R. 26.
[28] R. 7.
[29] R. 4.

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.

In late November 2016, after that lawsuit was filed – and apparently in response to that filing – Scandit paid the full amount of the commission, clearly fearful of the consequences of not paying "wages" when due.[30]

On January 23, 2017, Savage filed a Motion to Amend, seeking leave to file an Amended Complaint that, in part, included a substantially revised paragraph 17[31] to the effect that:

> 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

[30] R. 141.

[31] This paragraph 17 was modifying paragraph 19 of the original Complaint, but all of the prior paragraphs of the Amended Complaint and the original Complaint were the same. R. 7 and R. 98–99. This was because in the original Complaint, there was a mistake in numbering of paragraphs such that the numbering skipped from paragraph 10 to 13. R. 5-6.

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.

R. 98-99. A similar change to paragraph 30 under Count 1 to add these theories was sought in the amendment by adding in new paragraphs 30 c. and d. as follows:

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

* * *

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

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.

The District Court determined to grant the Motion to Dismiss and deny the Motion to Amend. This Appeal followed.

II. ISSUES PRESENTED ON APPEAL

A. Whether the District Court Erred in Holding as a Matter of Law that a Commission Subject to a Condition Subsequent is Not "Wages Due" Under the Idaho Wage Claim Act § 45-601, *et seq.*;

B. Whether the District Court Erred in Ignoring the Plain Language of the Idaho Wage Claim Act that Requires Payment of Wages When "Due" and Instead Improperly Imposing a Reading of the Word "Earned" Based on the Parties' Contract to Hold that a Commission Payment Was Not Due;

C. Whether the District Court Erred in Determining that the Payment Due to Savage was in the Nature of an Advance and Therefore Not Wages;

D. Whether the District Court Erred in Determining that a Contractual Definition of "Earned" Made an Ascertainable and Owing Commission Subject to Clawback or Recoupment Right and Somehow Prevented that Commission from Otherwise Being "Due" Under the Idaho Wage Claim Act and the Parties' Contract;

E. Whether the District Court Erred in Applying Reasoning From Wage Cases Involving Compensation Earned in Increments as Services are Performed to a Wage in the Form of a Commission Which in Fact Became Due at the Time Specified in the Parties' Contract;

F. Whether the District Court Erred in Determining that an Annual Achievement Bonus Could, Under no Set of Facts, be "Due" under the Idaho Wage Claim Act § 45-601, *et seq.*, in the Month that it was "Earned," but Instead Must, as a Matter of Law, Only be Due at the End of the Calendar Year;

G. Whether the District Court Erred in Not Granting Leave to Amend;

H. Whether the District Court Erred in Considering Issues Not Raised in the Briefs or in Oral Argument in Ruling on a Motion to Dismiss; and

I. Whether Plaintiff/Appellant is entitled to Costs and Attorneys' Fees Under Idaho Code § 45-615(2).

III. ARGUMENT

A. Standard on Review.

1. Motion to Dismiss Standard

An order dismissing a case pursuant to Rule 12(b)(6) of the Idaho Rules of Civil Procedure ("I.R.C.P.") is reviewed *de novo*. *ABC Agra, LLC v. Critical Access Grp, Inc.*, 156 Idaho 781, 783, 331 P.3d 523, 525 (2014). The Supreme Court applies the same standard it applies when reviewing a motion for summary judgment, but treats the factual allegations of the complaint as true on their face. *Hammer v. Ribi*, 401 P.3d 148, 151 (Idaho 2017) (citing *Losser v.*

Bradstreet, 145 Idaho 670, 672–73, 183 P.3d 758, 760–61 (2008)); *ABC Agra, LLC*, 156 Idaho at 783, 331 P.3d at 524. The Court views all facts and inferences in favor of the non-moving party. *Id*.; *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (citing *Orthman v. Idaho Power Co*., 126 Idaho 960, 961, 895 P.2d 561, 562 (1995); *Miles v. Idaho Power Co*., 116 Idaho 635, 637, 778 P.2d 757, 759 (1989)). However, "[a] 12(b)(6) motion looks only at the pleadings to determine whether a claim for relief has been stated," and the Supreme Court "determines whether the non-movant has alleged sufficient facts in support of his claim, which if true, would entitle him to relief." *Hammer*, 401 P.3d at 151 (quoting *Young*, 137 Idaho at 104, 44 P.3d at 1159; *Idaho Wool Growers Ass'n, Inc. v. State*, 154 Idaho 716, 720, 302 P.3d 341, 345 (2012)).[32] After drawing all inferences in the non-moving party's favor, the Court asks whether a claim for relief has been stated under Idaho law. *Id*. "The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Id*. (citations and internal quotations omitted). The interpretation of an unambiguous contract or statute is a question of law subject to free review. *Idaho Wool Growers Ass'n, Inc. v. State*, 154 Idaho 716, 720, 302 P.3d 341, 345 (2012) (citing *Bakker v. Thunder Spring–Wareham, LLC*, 141 Idaho 185, 190, 108 P.3d 332, 337 (2005); *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417, 420, 247 P.3d 644, 647 (2011)). The Court should reverse the District Court decision if reasonable persons could reach differing conclusions or draw conflicting inferences from the factual assertions in the Complaint. *Cf. Bakker v. Thunder Spring-Wareham,*

[32] It is noteworthy that the moving papers by Defendant Scandit on the Motion to Dismiss did not seek to convert this Motion to a summary judgment under Rule 12(d), and Scandit, in its briefing, confirmed that Savage as "the non-movant is entitled to have h[er] factual assertions treated as true . . . ." R. 7.

LLC, 141 Idaho 185, 189, 108 P.3d 332, 336 (2005) (explaining the standard applicable to reviewing a motion for summary judgment).

2. Motion to Amend Standard

As to the standard of review for a denial of a motion to amend under I.R.C.P. 15(a)(2), this Court has stated:

> After a responsive pleading has been filed a party may amend a pleading only by leave of court or by written consent of the other party. I.R.C.P. 15(a). "[L]eave shall be freely given when justice so requires." *Id.* "The denial of a plaintiff's motion to amend a complaint to add another cause of action is governed by an abuse of discretion standard of review." *Thomas v. Medical Center Physicians, P.A.*, 138 Idaho 200, 210, 61 P.3d 557, 567 (2002). The test for determining whether the district court abused its discretion is: (1) whether the court correctly perceived that the issue was one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether it reached its decision by an exercise of reason. *Id.*
>
> A court may consider whether the allegations sought to be added to the complaint state a valid claim in determining whether to grant leave to amend the complaint. *Id.* (citing *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank N.A.*, 119 Idaho 171, 804 P.2d 900 (1991)). A court, however, may not consider the sufficiency of evidence supporting the claim sought to be added in determining leave to amend because that is more properly determined at the summary judgment stage. *Thomas*, 138 Idaho at 210, 61 P.3d at 567 (citing *Christensen Family Trust v. Christensen*, 133 Idaho 866, 993 P.2d 1197 (1999)).

Estate of Becker v. Callahan, 140 Idaho 522, 527-28, 96 P.3d 623, 628-29 (2004).

B. Viewing the Facts and Inferences in Favor of Savage as the Same Were Pled, the Amazon Commission was not an "Advance," but Constituted Wages Due and Owing Under Idaho Code § 45-608.

1. A commission subject to a condition subsequent is still wages due for purposes of a wage claim; if the commission amount is ascertainable and due under the parties' agreement, it is indeed "wages due" under Idaho Code § 45-608.

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) 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**." (Emphasis added). The primary question presented by this appeal then is whether a commission amount that is contractually agreed to be 100% paid as of a date certain is indeed wages despite the fact that future events may render some or all of the commission susceptible to claw back or recoupment.

The District Court was wrong in this case to characterize the Amazon Commission as anything but a wage that was due by contract upon booking of the Amazon sale. The District Court's reasoning with respect to the Amazon Commission focused on the notion that "advances on unearned commissions are not wages under the Act.[33]

With all due respect, the parties here did not contract for "advances against unearned commissions." Further, by shoe horning its way into these labels that are not found in the four corners of the parties' CCP, the District Court rotely treated the Idaho Wage Claim Act statutory

[33] R. 142-146.

definition of wages under Idaho Code Section 45-601(7) as though it was written exclusively for compensation paid on a "time or task piece basis," which is only "due" or "earned" after those hours or task pieces are completed. Thus, the Court ignored that, with respect to a commission, primarily[34] the terms of the parties' contract determine when the commission is "due" to be paid. Case law cited by Scandit and relied upon by the District Court struggled with items not mentioned expressly in Idaho Code Section 45-601(7) in the same manner as "commission" is mentioned. These cases were improperly utilized to "graft" an "earned" prerequisite or test onto when a commission can constitute a wage, even when the parties' own agreement clearly said "100% of the respective commission [will be paid upon booking]." By mentioning "commission basis" as a means to determine compensation, Section 45-601(7) leaves it up to the parties' contract to say when the commission is due. A test that imposes an indefeasible right to payment (under the guise of the word "earned") as the touchstone of when a commission is due – while ignoring the language of the parties' contract – does violence to the express directive to pay wages when "due" of the IWCA statute. Proceeding in this vein, the District Court ignored: (a) the plain meaning of the statutory scheme direction with respect to ascertaining compensation required to be paid on a "commission basis" and when the same was "due;" and (b) the application of a basic principle of wage law that "employers and employees can[] contract for the

[34] "Primarily" is used in the sense of the type of more detailed contracts often associated with commissions, such as the CCP in the present case. It defines when the commission is due to be paid, e.g., "100% of the respective commission will be paid . . . no later than within 30 days of the end of the month during which the transaction has been booked." For example, too, in the case of *Bakker v. Thunder Spring–Wareham, LLC,* 141 Idaho 185, 108 P.3d 332 (2005), the court mentioned default rules from real estate law as to when a real estate broker earns his commission (presumably because the work involved sales of real estate), but said that the parties' contract could vary these rules. If the contract provides for a commission, but gives no guidance on when it is due to be paid, presumably general law will provide a default or gap filler provision based on the type of work involved.

terms of compensation regarding when wages are earned and/or due, so long as relevant law is respected." *Bakker v. Thunder Spring–Wareham, LLC*, 141 Idaho 185, 190, 108 P.3d 332, 337 (2005).

The starting point in this analysis is that the statute unambiguously states that compensation for labor or services in the form of "commissions" are "wages." *See Paolini v. Albertson's Inc*., 143 Idaho 547, 549, 149 P.3d 822, 824 (2006) (noting that while the Act "does not define wages as including all forms of compensation," "commissions" are included in the statutory text) (citations omitted). This Court has held that "[t]he definition of 'wage' includes any ascertainable unpaid commissions and bargained-for compensation. . . ." *Moore v. Omnicare, Inc.,* 141 Idaho 809, 819, 118 P.3d 141, 151 (2005) (citing *Polk v. Larrabee,* 135 Idaho 303, 309, 17 P.3d 247, 253 (2000), and *Neal v. Idaho Forest Indus., Inc*., 107 Idaho 681, 683, 691 P.2d 1296, 1298 (Ct.App. 1984)). The District Court in this case acknowledged that the statutory scheme "expressly includes commissions."[35]

Accordingly, when a commission is both (1) ascertainable and (2) due, an employee has a cognizable wage claim under Idaho Code Section 45-608. In this case, the state of the record is that the employment agreement says "100% of the respective commission will be paid . . . within 30 days of the end of the month during which the transaction has been booked." The Complaint alleged that "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 CCP referred to the amount in question as

[35] R. 143.

"commission," provided the means to calculate it, and it was calculated as indicated in the CEO of Scandit's email attached to and made part of the Complaint. Thus, the factual situation that should have been considered by the District Court is that 100% of the Amazon Commission was due by the time the last payday of the month of October 2016 came around, and it was not paid at that time. Idaho Code Sections 45-608 ("[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 . . ."); and 45-609 ("No employer may withhold or divert any portion of an employee's wages."). Savage was, therefore, within her rights in seeking "wages due" her that had not been paid when due when she filed the Complaint for a wage claim in this matter on November 1, 2016.

Scandit argued, however, and the District Court agreed, that the word "earned" is somehow a necessary prerequisite to commissions becoming or qualifying as "wages" under the Act. Scandit relies on language in the CCP with respect to the Amazon Commission which states:

> 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.

First, it is important to note that nothing about the language cited "undoes" the other contractual language that 100% of the commission is due and owing upon booking. That language simply states conditions which may or may not occur and, if they occur, could initiate a claw back or

recoupment right of the employer as against the employee for the previously paid commission amount. Further, the commission is not referred to as being discretionarily "advanced" or otherwise defined in a way that would lead anyone to believe payment of 100% of the commission amount is not due under the CCP, i.e., a mandatory payment upon the associated order being booked.

Second, along these same lines, "earned" is being contractually defined in a narrow way in the CCP as simply "not subject to recoupment or claw-back." This contractual definition is significantly narrower than "earned" as generally defined, e.g., "to become duly worthy of or entitled or suited to."[36] The latter broad definition is more clearly the sense in which "due" is utilized in the actual key wording used in Idaho Code Section 45-608 ("[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. . ."). Scandit did not say in the CCP, for instance, that payment of the commission amount upon booking shall be discretionary or even that said payment would be a discretionary advance against future commissions yet to be paid. Scandit said "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." Under Idaho wage claim law, that sounds like an ascertainable commission that is presently due upon booking the order, and the narrow definition of "earned" in the CCP as equivalent to conditions subsequent that may result in a

[36] Merriam Webster Online Dictionary. https://www.merriam-webster.com/dictionary/earn.

right to be paid back some or all of the commission, does not push back or delay the earlier date the commission became due.

Third, Scandit's argument is unsupported by the statute or by the case law Scandit relies on. For example, Scandit relies on the Court of Appeals decision in *Whitlock v. Haney Seed Co*., 114 Idaho 628, 759 P.2d 919 (Ct.App. 1988), for its argument that all compensation must be "earned" before it can be a wage. However, the issue in *Whitlock* was whether a life insurance policy constituted wages under the Act. The court held that a life insurance policy was not "wages." The Court of Appeals reasoned:

> We do not believe [the] language [of I.C. § 45-601(4)] encompasses the cash value of a life insurance policy payable to an employee where, as here, the proceeds of the policy were to be paid to the employee at retirement or to his heirs upon his death. **The policy is a fixed benefit of employment status. As such, it is compensatory in a generic sense; but it is not compensation earned in increments as services are performed.** In this respect it is unlike wages. It is also unlike compensation paid in direct consideration of services rendered, in amounts over and above an employee's regular "paychecks."

Id. (emphasis added). The *Whitlock* court differentiates "wages" derived from an employee's services performed incrementally from "benefits" which are derived from an employee's static "employment status." The inquiry into whether commissions are "earned," and therefore "wages," is not relevant here. The code already defines "commissions" as wages. The "earned compensation" test used in *Whitlock* is not necessary or relevant here.

In analyzing this issue, it is more appropriate to focus on the Idaho Supreme Court case of *Polk v. Larrabee* 135 Idaho 303, 17 P.3d 247 (2000), which is instructive on when a commission amount is ascertainable and thus becomes a "wage" under the Act. In that case, the

plaintiffs brought a claim under the IWCA for commission wages they alleged were due and owing at the time they resigned from a real estate company. *Id*. at 306, 17 P.3d at 250. The employer in that case alleged 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." *Id*. at 308, 17 P.3d at 252. The employer alleged that "since some of the homes did not close, it would have actually overpaid the Polks if it had been the amount the Polks had demanded." *Id*. The *Polk* court rejected this argument, stating "[the employer] will not be allowed to escape the wage claim penalty by claiming that the amount was unascertainable prior to trial." *Id*. at 311, 17 P.3d at 255. The court reasoned that Idaho Code Section 45-615(2) directs the jury to determine the base amount of a wage claim judgment on the amount of "unpaid wages **found** due and owing" and therefore "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)(citing *Smith v. Idaho Peterbilt, Inc.*, 106 Idaho 846, 683 P.2d 882 (Ct. App. 1984) (Despite the parties' dispute as to "the exact amount of the percentage rate of commissions" at termination, the question for the trier of fact was, "was a sum due, and if so, how much.").

The Massachusetts case of *Meschino v. Frazier Industrial Company*, 2016 WL 4083342 (U.S. D. Ct. Mass. 2016), is also persuasive in determining when a commission that is subject to a claw back becomes "ascertainable" and thus, an earned "wage" under the Massachusetts Wage Act. In that case, the plaintiff sued his employer to recover unpaid commissions under the applicable Massachusetts Wage Act that the employer had deducted from his pay. *See Meschino*, 2016 WL 4083342 at * 1. The parties' contract stated that an employee's "[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." *Id*. The contract also provided that "[i]n the event of an error clearly attributable to the salesman, the company reserves the right to recover by deduction up to 25% of the cost caused by the error." *Id*. at *2. The court found that despite the presence of a claw back clause, the contract was still sufficient in providing an "arithmetically determinable" means to calculate the amount of commission. *Id*. at *4. The court reasoned 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'." *Id*. at *5. The court held that the employer's failure to do so rendered the commissions arithmetically ascertainable at the earlier point in time and thus were earned "wages" under the Massachusetts Wage Act even though they were subject to a claw back. *Id*.

Applying *Meschino* and *Polk*, it is clear that the presence of a claw back or deductions clause does not prevent ascertainable commissions from being "due" and therefore "wages." However, in its Order in the present case, the District Court raises the same issue argued by the employers in *Polk* and *Meschino.* In its Order, the District Court explained that it may be unfair to hold that commissions subject to a condition subsequent are "wages" under the IWCA.[37] The Court fears that, should the condition subsequent occur, thus entitling Scandit to "recalculate"

[37] R. 144.

and "reverse" part of her commission, Savage would allegedly become unjustly enriched for having received damages on wages she subsequently lost the right to. However, the truth of the matter is that Savage would not be "unjustly" enriched for the simple reason that both parties agreed and bargained for the terms of the CCP, including the right to be paid "100% of the respective commission . . . 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." The language of the contract made the commission "due" at that point.

When drafting the CCP, Scandit could have called the prepayment of commission an "advance against her commission." Scandit was free to provide that Savage would not have "the right to" the commission until Amazon had paid the full amount. Instead, Scandit drafted the CCP so as to obligate Scandit to pay over to Savage 100% of the commission within 30 days of booking the order. The potential for "recoupment" or for "claw back" in the nature of a condition subsequent did not change the fact that the commission was "due" upon booking. After all, just as the condition subsequent could occur, it also could not occur. And if anything "unjust" is occurring here, it would be luring an employee into thinking that 100% of their commission would be paid upon booking, only to engage in a sharp practice and be able to effectively say "Oh, those words about paying 100% of the commission when booked, they do not mean what they say," and leave the employer with no consequence in order to encourage voluntary compliance.

It should not be lost on this Court that Scandit paid 100% of the commission due within days after the filing of the Complaint despite the announced plan by its CEO to drag out payment

for years, because of the "accounting and liquidity management perspective" of the company. It took the filing of court action to encourage compliance with what Scandit said it would do with respect to the Amazon Commission. Boiled down to its essence, all Savage asks of this Court is that it clarify that the contractual terms used by employers to entice employees with the promise of payment of a commission be construed to mean what they say regarding when payment is due.

Even a commission that is subject to a claw back is nevertheless ascertainable and therefore is a "wage" under the IWCA. *See Meschino v. Frazier Industrial Company*, 2016 WL 4083342 at * 1 (U.S. D. Ct. Mass 2016); *Harris v. Investor's Bus. Daily, Inc*., 41 Cal. Rptr. 3d 108, 118 (Cal. Ct. App. 2006). Scandit argues, however, that the Amazon Commission was an "advance" and therefore not a "wage" under the IWCA. Scandit and the District Court both cite to *Steinhebel v. Los Angeles Times Commc'ns*, 24 Cal. Rptr. 3d 351, 353 (Cal. Ct. App. 2005), in holding that "advances" are not "wages" under the IWCA.[38] Quoting *Steinhebel*, the district court stated: "[t]he essence of an 'advance'" is that "at the time of payment the employer cannot determine whether the commission will eventually be earned[39] because a condition to **the employee's right to the commission** has yet to occur or its occurrence as yet is otherwise unascertainable."[40] (citing *Steinhebel* at 353) (emphasis added). Thus, the court in *Steinhebel* reasoned that if an employee is paid *before* they have the contractual "right to" the commission,

[38] R. 145.
[39] It is important to note that unlike I.C. § 45-608, the analogous California statute, Cal Lab Code § 201, includes "earned" in its definition. California's Supreme Court citing the "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 *Peabody v. Time Warner Cable, Inc.*, 59 Cal. 4th 662, 668, 328 P.3d 1028, 1032 (2014).
[40] R. 145.

that payment is called an "advance." However, an "advance" is materially different from when an employee has the present contractual "right to" the commission, although the payment of the commission may be subject to a condition subsequent. A commission subject to a condition subsequent is still a commission and, hence, "wages." *See Meschino,* 2016 WL 4083342 at * 1; *Harris* 41 Cal. Rptr. 3d at 118.

The difference between an "advance" and a commission subject to a condition subsequent is explained in another California case, *Harris v. Investor's Bus. Daily, Inc*., 41 Cal. Rptr. 3d 108, 118 (Cal. Ct. App. 2006). In *Harris*, the employees' compensation contract provided that they would receive points from a sale toward a commission, but were "charged back" the points received if a customer canceled the subscription within 16 weeks. *Id*. at 117. The *Harris* court distinguished the *Steinhebel* employment agreement on the following "critical difference":

> 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 [*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 in original). The *Harris* court stated that the *Harris* employer's contract instead "suggested that the points [upon which the commission was based] were earned[41] at the

[41] Again, the word "earned" here is not used the same way the CCP defines "earned." The CCP defines "earned" as "no longer subject to recoupment or claw-back." California's Supreme Court citing the "earned" statutory language has recognized that "commissions are not earned or owed until agreed-upon conditions have been satisfied." *Nguyen*

time of the sale, not at some designated point in the future." *Id*. In Harris, the fact the employees were entitled to the points at the time of sale under the contract made all the difference, and the fact the points could later be clawed back upon the happening of a condition subsequent did not prevent the court from indicating the commission was earned at the time of the sale. *Id*.

Like the contract at issue in *Harris*, the CCP unambiguously states that Savage has the right to 100% of the commission a reasonable time after booking the sale, but that the commission could later be clawed back upon the happening of a condition subsequent. Unlike the contract in *Steinhebel*, the CCP fails to use the word "advance" when describing any part of the commission. Instead of using the word "advance," the CCP at § V is titled "COMMISSION PAYMENT REVERSALS." The section 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). The section states that "[c]ommission shall become earned (i.e., not subject to **recoupment or "claw-back"** by Employer) only upon [revenue recognition and actual payment]." (Emphasis added). The following sentence of the CCP states that if "one or both of these conditions fail to occur, the paid but unearned[42] **commissions must be returned** to Scandit by Employee." (Emphasis added). The entire language and tone of the "Commission Payment Reversals" section, together with the unambiguous clause that "100% of the respective commission **will be paid**," strongly suggests that the employee has the "right" to the ascertainable commission at the time the order is booked (emphasis added). The fact that this is

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v. Wells Fargo Bank, 2016 WL 5390245, at *11 (N.D. Cal. Sept. 26, 2016) (citing *Peabody v. Time Warner Cable, Inc*., 59 Cal. 4th 662, 668 328 P.3d 1028, 1032).

[42] "Earned" meaning no longer subject to recoupment or claw back.

money that is determined to be owing and paid, but that may later be divested, does not change that commission's character as "due" at that point in time.

Unlike an "advance," which is characterized by the conditions precedent or contingencies that keep a commission from being due, the CCP only uses the word "contingencies" to describe certain tasks that must happen prior to 100% of the commission being payable. The CCP states that "Scandit reserves the right **not to book the sale and withhold commission until the contingency has expired**." (Emphasis added). After explaining 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, all "contingencies" having been satisfied. This ascertainable commission is a "wage" under I.C. 45-608. *Moore*, at 819, 118 P.3d at 151 ("[t]he definition of 'wage' includes any ascertainable unpaid commissions . . . ."). It was inappropriate for the District Court to conclude, when viewing all facts and reasonable inferences in favor of Savage, that the Amazon Commission was not "wages" as a matter of law.

The Idaho Supreme Court case of *Bakker v. Thunder Spring–Wareham, LLC,* 141 Idaho 185, 108 P.3d 332 (2005), is authoritative on the point that parties are free to contract as to when an employee is entitled to be paid compensation for work performed. In *Bakker*, a real estate agent sued for unpaid wages under the IWCA after she was terminated. The terms of her contract provided that she would "be paid .25% of 1% on all successful closings of escrow on [housing units] . . . during [her] term of employment." This contract was different from the common law

rule at the time, which provided that a real estate agent was entitled to a commission when he procured a buyer "ready willing and able" to purchase property according to the seller's terms. *Id*. at 190. However, the Court explained that her contract was unambiguous in that she would only be "paid" a commission on a house if it successfully closed while she was still an employee. The Court held that employers and employees are free to "contract for the terms of compensation regarding when wages are earned and/or due."[43] *Id*.

Like the Court found in *Bakker*, the CCP represents the entire bargained-for agreement between Scandit and Savage. Scandit was free to determine which terms it used and words it did not use in the CCP. Scandit chose not to call Savage's commission an "advance." Scandit chose to define the word "earned" as "subject to recoupment or claw-back[.]" Finally, Scandit chose to unambiguously specify that "100% of the respective commission will be paid [upon booking of the Order]." These choices were not by accident, but presumably to encourage and motivate employees. On a motion to dismiss under I.R.C.P. 12(b)(6), any other ambiguities in the CCP's language about whether Savage was entitled to the commission she was due should be viewed in favor of Savage.

2. Viewing the Facts in Favor of Savage as Plead in the Complaint, the Amazon Commission was Wages Due and Owing Under the IWCA.

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

[43] Scandit relies heavily on *Bakker* for its use of the word "earned." However, the true issue in *Bakker* was that the employee had no right to any commission at all under the terms of her contract. The court in *Bakker* did not use the word "earned" to hold any special meaning other than "being owed" or being entitled to payment, i.e., as due.

by the employers." Amazon Commissions were wages under the IWCA, the only other element necessary to raise a cognizable claim under Idaho Code Section 45-608 is that those wages were due.

The Amazon Agreement was booked during late September 2016. Based on allegations in the Complaint, during late September 2016 or October 2016, 100% of the respective commission from the Amazon Agreement became due and owing to Savage under the unambiguous terms of the CCP which state that "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." Savage performed all conditions precedent to the Amazon Commission becoming due and owing to her under the CCP, yet on October 28, 2016, Savage received an e-mail from Scandit's CEO Samuel Mueller informing her that, while her commission on the Amazon Agreement was indeed $390,234, Scandit would pay her the commission over four years' time. Further, 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. On Savage's regular payday, more than a month after the Amazon Agreement was booked and all conditions precedent to it being due and owing were met, Savage received only a check for $5,000 entitled "AMAZON (Symbolic 1st payment)." The full amount of wages due and owing to Savage were not paid when due upon booking within the terms of the CCP or under Idaho Law. Accordingly, Savage's allegations sufficiently allege that Scandit failed to pay her wages that were due and

owing under Idaho Code Section 45-608. The District Court erred in dismissing Count 1 of her Complaint.

C. A Legally Cognizable Claim Was Made that an Achievement Bonus was Due in the Month it was "Earned."

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) 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." Wages earned over time, such as bonuses, are also considered "wages." As explained by this Court, Idaho Code Section § 45-608(1):

> [R]equires 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 become 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). This Court in *Paolini* did not say the annual bonus would come due in December, or the end of the year, but during "a specific calendar month," which presumably would have been specified in the parties' agreement.

The simple issue before this Court is whether, absent any language specifying what month a bonus becomes due, an employee may fairly expect an employer to pay her wages in the month that the employment agreement says she "earned" them. The CCP at § IV.E provides for an "Annual Quota Achievement Bonus" stating:

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

(Emphasis added). On its last page, under the heading "Annual ACV & Renewals Quota Achievement Bonus," the CCP also contains language that "Employee is eligible to a bonus of CHF 36,950 if the combined ACV of renewals and Orders equals CHF 641,001 or more."[44] "ACV" is simply defined to mean "Annual Contract Value" in Paragraph III which is entitled "Calculation of Quota Credit." [45]

Thus, there is no ambiguity in the CCP that the achievement bonus is "earned" when the quota is reached. The CCP's reference to "annual" appears in the heading and does not qualify "earn" or any part of the operative sentence. It is not even referred to as simply an "Annual Bonus," as the other modifier of the word "Bonus" includes "Quota Achievement." There are no terms in the headings or operative sentences that indicate the Achievement Bonus will not become due and owing until the end of the year. Indeed, if the reference in a header were enough to answer the question of when such a bonus was payable, one would expect to never see references to a time to pay such bonus in any employment contract. *See e.g., Obourn v. Am. Well Corp*., 115 F. Supp. 3d 301, 304 (D. Conn. 2015), *on reconsideration in part*, No. 3:15-CV-48 (JCH), 2015 WL 5943389 (D. Conn. Oct. 13, 2015) (contract states "You will be eligible to receive an annual bonus (the 'Annual Bonus') in the amount of $75,000 . . . which shall be payable within 60 days following the end of the calendar year to which it relates"); *Bukuras v. Mueller Grp, LLC*, 592 F.3d 255, 258 (1st Cir. 2010) (contract states "Bonus,"

[44] R. 24.
[45] R. 17.

"an annual bonus, payable at the conclusion of each fiscal year, equivalent to not less than 5% of the bonus pool applicable to compensate executive management of the company"). Indeed, "annual" itself does not mean at year end, it means only "occurring or happening every year or once a year."[46] Focusing just on the header of the paragraph, the District Court decision steps right over the wording of "Quota Achievement" to settle and fix "annual" equated with year end as the measure of when the bonus is earned. Annual does not have to refer to the time the Achievement Bonus is payable as the District Court assumes, and "Quota Achievement" is possible long before the year is out. Annual can refer to the entire time period during which the employee has to make the "Quota" and thereby earn or become eligible for the Achievement Bonus. In other words, the heading can just as well be read "Annual Quota . . . . Achievement Bonus" so that "Annual" modifies "Quota" and "Achievement" modifies "Bonus," and in turn "Annual Quota" modifies "Achievement Bonus." This is the reading proffered by Savage and rejected by the District Court. The District Court chose simply to view this as an "Annual Bonus" and ignored the inconvenient words and phrases "Annual and Bonus" in between.

When there is potential ambiguity in a "title," the actual operative language of the sentences under the heading becomes especially important to give meaning to what the heading is saying. In the CCP, the main sentence itself says that "Employee **will earn** a bonus of USD 36,000 if the combined ACV of renewals and Orders equals CHF 641,001."[47] The other

[46] Merriam-Webster Online Dictionary Definition of "Annual." https://www.merriam-webster.com/dictionary/annual.
[47] It is ironic that the argument of Scandit with respect to the Amazon Commission is that Scandit gets to contractually define when that compensation is "earned" and therefore "due," but that when Scandit does say so with respect to the Achievement Bonus, "earned" suddenly does not yet mean "due" at the present time.

sentence relating to the Achievement Bonus is almost identical, except it uses the word "eligible" in place of "earned." There is nothing in these sentences about waiting until the end of the year or even waiting one second after the quota figure has been achieved before the Achievement Bonus becomes due and payable. It is therefore more than reasonable for an employee to conclude that the reference to "annual" is simply to the time period within which the employee had the right to "earn" that bonus. It is completely sound for an employee reading the language of this provision to deduce 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 during the term of the CCP. If Scandit wished to specify a set time for payment or clarify that it would be paid at the end of the year, they certainly could have done so.

On a motion to dismiss standard, any inherent contract ambiguity about when a commission is "due" should be viewed in favor of the non-moving party. *Hammer v. Ribi*, 401 P.3d 148, 151 (Idaho 2017) (citing *Losser* 145 Idaho at 672–73, 183 P.3d at 760–61). When the ambiguities in the CCP are resolved in favor of Savage, it is more than possible that the Achievement Bonus became "due" in the same month that it was earned.

Further, the Court's decision cites to Paragraph V of the CCP to "strongly suggests no mid-year measurement date should be used" because it references that Scandit had the right to reverse all Quota credit if it turned out that the customer fell more than 60 days behind in making payment.[48] The District Court reasoned then that the potential for the contingency occur before year end makes the year end the cutoff date. The problem with the Court's utilization of

[48] R. 147.

Paragraph V is twofold. First, it was not argued in Scandit's briefing nor during the hearing. *Silicon Int'l Ore, LLC v. Monsanto Co.*, 155 Idaho 538, 548, 314 P.3d 593, 603 (2013) ("[T]he nonmoving party in a motion for summary judgment need only respond to those issues raised by the moving party in its opening memorandum."). Second, had Savage been afforded an opportunity to address it, Savage could have pointed out (a) that "Quota" reversal has nothing to do with the Annual Contract Value under the Achievement Bonus, and (b) that the mere fact that it could be undone in the future did not prevent it from being deemed wages due at the time it was "earned" in accordance with the CCP.

The language in Paragraph V. cited by the District Court is in a subparagraph under the opening paragraph which ends by saying "any prepaid commissions will be reversed as described below." That paragraph says nothing about "bonus" payments being reversed. The "Annual Quota Achievement Bonus" is not a "commission" but a "bonus." Now, adjustment of the "quota" credit can make a difference under Paragraph II., "Quota," to calculation credit against the New Business Quota or the Renewal Quota. But it makes no change to the Annual Contract Value upon which the Achievement Bonus is based and earned when that mark is met. The ACV is first defined in Paragraph III., and it is used extensively in that paragraph as an "ACV Multiplier" for calculation of the Quota credit for a multiple year deal and the timing of Quota credit from that deal. But there is nothing with respect to Paragraph V. or otherwise that says that the Quota credit is applied to the Achievement Bonus Paragraph IV.e. in determining whether "the combined ACV of renewals and Orders equals CHF 641,001 or more," either initially or later on. There is nothing saying that this is anything other than simply the booked

Annual Contract Value of renewals and orders at any point during that annual time period. And, indeed, that ACV calculation for Savage was already done in this case by the Scandit CEO and acknowledged in his October 29, 2016 email, i.e., "36,000 of ACV achievement commission . . . this year" and "Annual Quota Achievement Bonus 36,000" as part of list where total is labeled "Earned salary and commissions 2016."[49] There is nothing in Paragraph V. or elsewhere in the CCP that claws back, recoups, or otherwise undoes the one time calculation of ACV for purposes of calculation of the Achievement Bonus.

Further, even if the Achievement Bonus once paid could somehow be undone because a payment was made later, the same argument made elsewhere in this brief with respect to a commission being due under the parties' CCP – because it is ascertainable and contract language seems to require its immediate payment – also cross-applies to the Achievement Bonus. A bonus has, after all, been held to be wages as being "part of the compensation bargained for in the agreement of employment." *Thomas v. Ballou-Latimer Drug Co.*, 92 Idaho 337, 342, 442 P.2d 747, 752 (1968). Accordingly, Count 1 of the Complaint adequately states a claim that wages due Savage were not paid to her when required by Idaho Law.

D. The District Court Applied the Wrong Legal Standard when it Denied Savage's Motion to Amend.

A court should liberally grant a motion to amend a complaint. *Iron Eagle Dev., LLC v. Quality Design Sys., Inc.*, 138 Idaho 487, 492, 65 P.3d 509, 514 (2003) (citing *Hayward v. Valley Vista Care Corp.*, 136 Idaho 342, 345, 33 P.3d 816, 819 (2001). A court's decision to

[49] R. 26-27.

grant a motion to amend a complaint is a matter of discretion. *Id*. The standard for reviewing a discretionary decision is whether the court: "(1) perceived the issue as discretionary, (2) acted consistently with the legal standards applicable to the choices before it and within the outer bounds of its discretion, and (3) reached its decision by an exercise of reason." *Schmechel v. Dille*, 148 Idaho 176, 186, 219 P.3d 1192, 1202 (2009) (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

Generally, when pleading that a party has met all conditions precedent, it is sufficient for the party to "allege generally" that all conditions precedent have occurred or been performed. *See* I.R.C.P. 9(c). Savage respectfully submits that the District Court did not apply the correct legal standard in denying Savage's Motion to Amend and, therefore, its decision to deny Savage's Motion was an abuse of discretion.

In its Order, the District Court held that the proposed amendments would be futile.[50] The Court reasoned that none of the amendments would change its conclusion that Savage had not "earned" the Amazon Commission.[51] However, as explained in the above sections of this brief, the correct legal standard for when determining whether a commission is "wages" under the IWCA is not whether the commission is "earned." Rather, the correct standard in determining whether Savage was entitled to the commission was whether it was ascertainable and "due and owing." This same issue is present, as argued above, with respect to the Achievement Bonus as well. This issue is precisely what Savage's proposed amendments address. The purpose of the

[50] R. 146.
[51] R. 146.

proposed amendments was to reinforce Savage's allegations that she had in fact "**performed all conditions precedent to the Amazon Commission becoming due and owing** to her under the CCP." The proposed amendments go to the heart of the District Court's reasoning that Savage was not entitled to the Amazon Commission or Achievement Bonus because there were conditions precedent to it becoming "earned" and, therefore, was more like an "advance." The proposed amendments directly seek to clarify and add further support to the fact all conditions precedent to the commission becoming presently due were satisfied, and hence the commission was not an "advance" as Scandit argued nor was the Achievement Bonus subject to being later undone as the District Court held. Because the District Court applied the wrong legal standard, it abused its discretion in denying Savage's Motion to Amend the Complaint.

In the alternative, Savage's amendments allege that had any conditions precedent to her becoming entitled to the commission not been met, those conditions were established by a waiver or estoppel theory. 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.3d 789, 793 (Ct. App. 1994). Savage's amendments sufficiently allege that Scandit representatives had conversations with Savage in the months of September and October, during which they represented to her that she had fulfilled all obligations and conditions necessary for the Amazon Commission to be due and owing. Such statements directly contradict Scandit's current argument that Ms. Savage is not in fact due and owed the Amazon Commission because it was still subject to a claw back.

Savage's proposed amendments also ask that the doctrine of equitable estoppel bar Scandit from asserting the Amazon Commission was not "due" within the 30-day timeframe designated in the CCP. The elements of equitable estoppel are: "(1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth, (2) the party asserting estoppel did not know or could not discover the truth, (3) the false representation or concealment was made with the intent that it be relied upon and (4) the person to whom the representation was made or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice." *Keesee v. Fetzek*, 111 Idaho 360, 362, 723 P.2d 904, 906 (Ct. App. 1986) (citing *Twin Falls Clinic & Hospital Building Corp. v. Hamill*, 103 Idaho 19, 22, 644 P.2d 341, 344 (1982)). Savage sufficiently alleged these elements in her proposed amendments. First, the proposed amendments state that Scandit representatives had conversations with Savage in the months of September and October in which they represented to her that she had fulfilled all obligations and conditions necessary that the Amazon Commission was due and owing. It is more than plausible that such statements would have been made by the Scandit representatives, knowing they were false and with the intent that Savage rely on them. Scandit has in fact relied on those statements from Scandit and its representatives to her detriment.

Savage's proposed amendments also set forth valid facts for the application of the doctrine of quasi estoppel. Unlike equitable estoppel and waiver, "quasi estoppel does not require a misrepresentation by one party or actual reliance by the other." *Med Servs. Grp Inc.*, 126 Idaho at 96, 878 P.3d at 795 (citing *Keesee v. Fetzek*, 111 Idaho 360, 362, 723 P.2d 904, 906

(Ct.App.1986). Quasi estoppel is a "broadly remedial doctrine, often applied ad hoc to specific fact patterns." *Keesee*, 111 Idaho at 362, 723 P.2d at 906. The purpose of the doctrine is to "preclude a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him." *Id*. (citing *KTVB, Inc. v. Boise City*, 94 Idaho 279, 281, 486 P.2d 992, 994 (1971)). To state a claim for quasi estoppel, the party seeking estoppel must demonstrate:

> (1) the offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.

Atwood v. Smith, 143 Idaho 110, 114, 138 P.3d 310, 314 (2006) (citing *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 144, 75 P.3d 194, 198 (2003). In this case, Savage's Amended Complaint sufficiently illustrates the inequity that would result should Scandit be permitted to argue that the Amazon Commission was never due and owing. Scandit's position is inconsistent with the representations made by Scandit's representatives, as well as the plain, unambiguous text of the CCP, that Savage had earned and become entitled to her commission within 30 days of booking. It would be inequitable for Scandit to now take a position contrary to the position it maintained when it accepted the benefit of Savage's efforts in securing the Amazon Contract. Savage's proposed amendments more than sufficiently allege that Scandit should be estopped from arguing that Savage's Amazon Commission was never due and owing under the equitable doctrine of quasi estoppel.

Finally, Savage's Motion to Amend sought to clarify the conversion rate between the Swiss Franc and the American Dollar. Should this Court decide to reverse the District Court's decision, this amendment should be granted.

Savage respectfully submits that the District Court did not apply the correct legal standard in denying Savage's Motion to Amend. In denying the Motion, the Court reasoned that none of the amendments would change its conclusion that Savage had not "earned" the Amazon Commission. However, the correct substantive legal standard in determining whether Savage was entitled to the commission under Idaho Code Section 45-608 was whether it was "due and owing to her." This issue is exactly what Savage's proposed amendments address and what Savage's equitable claims seek to bar Scandit from contradicting. Accordingly, Savage's Motion to Amend her Complaint was not futile and should not have been denied.

E. Savage is Entitled to Costs and Attorneys' Fees on Appeal.

Savage requests, and is entitled to, her costs on appeal pursuant to Idaho Appellate Rule 40 and Idaho Code Section 45-615(2). Idaho Appellate Rule 40(a) provides that "[c]osts shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the court," and Idaho Code Section 45-615(2) provides that "[a]ny judgment rendered by a court of competent jurisdiction for the plaintiff in a suit filed pursuant to this section may include all costs and attorney's fees reasonably incurred in connection with the proceedings." Savage's

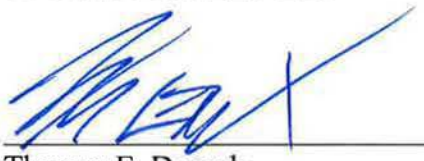
appeal in this matter falls within the purview of Idaho Appellate Rule 40(a) and Idaho Code Section 45-615(2), and Savage is entitled to her costs and attorneys' fees incurred in pursuing her appeal.

IV. CONCLUSION

For the foregoing reasons, Savage respectfully requests that this Court reverse the District Court's decision, hold that the Complaint does indeed state legally cognizable claims for nonpayment of wages due for a commission and for an achievement bonus, hold that the proposed offered Amended Complaint should have been allowed leave to be filed, and remand the case for appropriate proceedings in conformance with said holding.

DATED this 5th day of October, 2017.

GIVENS PURSLEY LLP



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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2017, I caused to be served a true and correct copy of the foregoing document to the persons listed below by the method indicated:

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