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Savage v. Scandit Respondent's Brief Dckt. 45143

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

RESPONDENT'S BRIEF

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

Honorable Jason D. Scott, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I. STATEMENT OF THE CASE

A. Nature Of The Case

This appeal involves a simple, straight-forward rule of law that is well established under Idaho Supreme Court precedent – that a plaintiff has no claim for wages under the Idaho Wage Claim Act unless and until compensation has been "earned" under the terms of a compensation agreement.

Plaintiff-Appellant Karen L. Savage ("Savage") is a current sales employee of Defendant-Respondent Scandit Inc. ("Scandit"). In addition to receiving an annualized base salary of $101,000, Savage is a participant in a generous Commission Compensation Plan ("CCP") that provides for commissions on Savage's licensing of Scandit software to customers. Under the CCP, commissions do not become "earned" until Scandit receives payment from the customer. 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 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 Agreement (the "Amazon Agreement") under which Amazon would pay 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, Savage stands to earn commissions totaling approximately $400,000. However, under the express terms of the CCP, those commissions only become "earned" upon Scandit's receipt of payments from Amazon.

Before Scandit received even the first annual payment from Amazon – and thus before Savage had earned any commission – Savage filed a Complaint for unpaid wages under the Idaho Wage Claim Act. In her Complaint, Savage contends that (1) she was entitled to the entire commission immediately upon execution of the Amazon Agreement; (2) the sale to Amazon entitled her to immediate payment of a $36,000 "annual" bonus, even though the year had not yet ended; and (3) she is entitled to treble damages under the Wage Claim Act. In short, despite the fact that Scandit had not received a single dollar from Amazon, Savage filed a wage claim seeking to turn $400,000 of yet-to-be-earned commission potential *over a five-year period* into an immediate judgment of more than $1,200,000.

Under the Wage Claim Act, a claim for unpaid wages cannot exist 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 expressly provides that "commissions shall become **earned**...only upon ... actual receipt of payment from the customer."

Savage has not and cannot state a claim for unpaid wages because, as Savage concedes, Scandit had not received any payment from Amazon at the time Savage filed her Complaint. Thus, Savage had not "earned" any commission under the terms of the CCP and no "wages" were due to Savage. Savage similarly cannot state a claim for unpaid wages in the form of a $36,000 annual bonus because an **annual** bonus, by its very nature, is not due before year end. Accordingly, the District Court correctly held that Savage failed to state a claim for unpaid wages under the Wage Claim Act.

B. Statement Of Undisputed Facts[1]

Scandit is an enterprise mobility and data capture company that specializes in barcode scanning applications for businesses. R. 4-13 (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 employs Savage as a Senior Sales Executive. *Id.* at ¶ 7.

Savage's compensation terms are described in the CCP, which governs Savage's compensation for the year running from "January 1, 2016 through December 31, 2016." R. 16-24. As set forth in the CCP, Scandit pays Savage 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 641,001[2] or more." *Id.* 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 Savage's territory. *Id.* at §§ II., IV.

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

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1 For purposes of a motion to dismiss and appellate review of the District Court's dismissal of Savage's Complaint, the Court considers Savage's non-conclusory and well-pled factual allegations to be true. This recitation of Savage's allegations should not be construed as an admission that any of Savage's factual allegations are true.

2 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 and CHF is 0.9975 to 1. All references to currency in this brief are to United States Dollars unless otherwise specified.

commissions become earned until Scandit receives payment from the customer: "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, 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.*

In short, the CCP contemplates that anticipated commissions will often be "prepaid" (i.e., advanced) before they are actually "earned." The CCP refers to such advances as "prepaid but **unearned** commission." *Id.* at § IV (emphasis added). As the CCP repeatedly emphasizes, however, any "prepaid but **unearned** commission" must be returned to Scandit if Scandit does not receive payment from the customer. *Id.* (emphasis added); *see also id.* at §V ("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.").

On September 27, 2016, Scandit and Amazon entered into a five-year Master Software License Agreement (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. R. 6 (Complaint, ¶ 16); R. 64-90.

Savage's complaint alleges that the "Amazon Agreement was booked during late September 2016 by Scandit." R. 6 at ¶ 18. Conspicuously absent from Savage's Complaint, however, is any allegation that Scandit received payment from Amazon – the critical event that

must occur before any commission is "earned" under the CCP. As Savage acknowledged in connection with a motion for leave to amend her Complaint, Amazon did not make its first of five annual payments until late-November 2016. *See* Reporter's Transcript, 16:6 – 17:3; 40:19-22 ("[A]t the time the complaint was filed, I think we can establish as a matter of fact there was no actual payment by Amazon."); R. 141. Within a few days after Amazon signed the last of several contract documents and initiated its first payment, Scandit pre-paid Savage's commission in full. *Id.*

C. Course Of Proceedings Below

Savage filed a Verified Complaint for Collection of a Wage Claim under Idaho Code § 45-601, *et seq.* ("Complaint") on November 1, 2016. R. 4-28. The Complaint contains three causes of action. First, it asserts what is commonly known as a "wage claim" – a claim for unpaid wages under the Idaho Wage Claim Act, Idaho Code § 45-601 *et seq.* *Id.* at ¶ 28-33. Even though Scandit had yet to receive payment from Amazon as required for any commission to be "earned" under the CCP, the primary basis of Savage's wage claim was that Scandit did not pay Savage a commission of $385,234 for the Amazon Order "on the date [it was] due." *Id.* The secondary basis of the wage claim is an allegation that, although 2016 had not yet ended, Scandit had not yet paid Savage an "Annual Quota Achievement Bonus" of $36,000. *Id.* Savage asserts that, under Idaho Code § 45-615(2), the commission and bonus should be trebled, for a total claim of $1,263,702. *Id.*

Second, Savage's Complaint asserts a declaratory judgment cause of action, which raises a variety of disputes related to the commission allegedly due from the Amazon Order. *Id.* at ¶¶ 34-40. Third, Savage's Complaint asserts a "Contract Claim for Commission Due," which

asserts that "the failure of Scandit to pay the Commission Due to [Savage] amounts to a breach of the Agreement." *Id.* at ¶¶ 41-45.

Scandit moved to dismiss Savage's wage claim pursuant to I.R.C.P. 12(b) for failure to state a claim. R. 44-90. Savage opposed that motion and also moved for leave to file an amended complaint. R. 94-102. After a hearing on February 6, 2017, the District Court (the Honorable Jason D. Scott) issued a Memorandum Decision and Order Granting Defendant's Motion to Dismiss and Denying Plaintiff's Motion to Amend. R. 137-151. The parties thereafter stipulated to dismissal with prejudice of Counts 2 and 3 of Savage's Complaint. R. 152-155. On April 17, 2017, the District Court issued a Judgment dismissing Savage's Complaint with prejudice. R. 161-162. Savage filed a Notice of Appeal on May 26, 2017. R. 163-167. This appeal involves only Savage's wage claim as the other causes of action were voluntarily dismissed with prejudice.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

Whether Scandit is entitled to an award of attorney's fees on appeal pursuant to Idaho Appellate Rule 40 and 41and Idaho Code § 12-121.

III. STANDARD OF REVIEW

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) ("[T]he 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.* On appeal, the Idaho Supreme Court reviews *de novo* the District Court's 12(b)(6) order of dismissal. *See ABC Agra, LLC v. Critical Access Group, Inc.*, 156 Idaho 781, 783 (2014).

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. *Eagle Equity Fund, LLC v. TitleOne Corp.*, 161 Idaho 355, 362 (2016) ("A court is not required to permit the amendment of a complaint where such amendment would be futile."). "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.* "The grant or denial of leave to amend after a responsive pleading has been filed is a matter that is within the discretion of the trial court and is subject to reversal on appeal only for an abuse of that discretion." *Thomas v. Med. Ctr. Physicians, P.A.*, 138 Idaho 200, 205 (2002).

IV. ARGUMENT

A. The District Court Correctly Dismissed Savage's Wage Claim

The District Court correctly dismissed Savage's claim for unpaid wages under the Wage Claim Act for failure to state a claim because, at the time Savage filed her Complaint, she had

not yet "earned" the disputed wages and they therefore were not "wages" due under the Wage Claim Act.

1. The Wage Claim Act Applies Only to Claims for "Wages"

The Wage Claim Act gives special "preferred" status to "wages" earned by employees. For example, wage claims receive a preference in insolvency proceedings such that they will be paid by insolvency trustees prior to other claims. *See* Idaho Code § 45-602. The Wage Claim Act also gives preferred status to wage claims in matters of execution and attachment. *Id.* at § 45-605. Similarly, the Wage Claim Act prohibits employers from withholding wages from a paycheck without an employee's written authorization. *Id.* at § 45-609.

Although wage claims generally arise out of a contract, wage claims also receive special preference in terms of available remedies. As opposed to the actual and/or consequential damages that are the remedy for a breach of contract claim, a successful claim for unpaid wages can potentially result in either statutory penalties (I.C. § 45-607) or treble damages. *Id.* at § 45-615 (providing for "damages in the amount of three (3) times the unpaid wages found due and owing").

These special preferences do not apply to every claim brought by an employee against an employer. For example, a breach of contract claim brought by an employee for something other than wages does not fall within the Wage Claim Act. *See, e.g.*, *Whitlock v. Haney Seed Co.*, 114 Idaho 628, 635 (Ct. App. 1988) (a claim for the cash value of a life insurance policy payable upon death or retirement does not fall within the Wage Claim Act because it is not a claim for wages earned by the employee). Accordingly, the first question in any claim brought under the

Wage Claim Act is whether the claim is for "wages." If not, the Wage Claim Act and its special remedies and preferences do not apply. *Id.*

2. Compensation Must be "Earned" Before it is a "Wage"

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." In interpreting that definition, the Idaho Supreme Court has consistently held that all forms of compensation must be "earned" before they become "wages" for purposes of the Wage Claim 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 Wage Claim 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 [Wage Claim Act]").

3. Employers may Define by Contract when Commissions Become Earned

The question of when a commission becomes "earned" such that it is a "wage" under the Wage Claim 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 contractually define when a commission is "earned" for purposes of the Wage Claim Act. In *Bakker*, 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 Wage Claim 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 Wage Claim 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 Wage Claim Act. *Id.*

4. Under the CCP, Commissions are not "Earned" until Payment is Received

As authorized by *Bakker*, the CCP defines exactly when commissions are "earned" and thereby become wages under the Wage Claim Act. Specifically, 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." R. 18 at § IV (bold in original, underscoring added).

Savage'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." R. 6 at ¶¶ 16-18. That assertion is contrary to the express terms of the CCP, which provides that Commissions are "earned" only upon receipt of payment from the customer. Amazon had not made any payment to Scandit at the time

Savage filed her Complaint. Thus, just like the employee in *Bakker*, Savage cannot state a wage claim under the Wage Claim Act because, at the time she filed her Complaint, she had not "earned" any commission under the clear terms of the CCP. Because Scandit had not been paid by Amazon, no commission had become "earned" and the amount claimed by Scandit was not a "wage" due under the Wage Claim Act. *See Bakker*, 141 Idaho at 190–91(holding that Plaintiff had not "earned" her commission under the plain language of her contract and therefore had no "unpaid wages" and thus no claim under the Wage Claim Act).

5. Pre-paid Commissions are Not Wages

The fact that the CCP provides for prepayment of **unearned** commissions does not change this result. The CCP makes clear that any commissions "prepaid" after an order has been booked but before payment has been received by the customer are not yet "earned," but rather are "prepaid but **unearned** commission." R. 18 at § IV (emphasis added). To this end, the CCP expressly states that (i) "paid but unearned commissions must be returned to Scandit," and "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." *Id.* 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" because the commission payments have not yet been earned); *Morangelli v. Chemed Corp.*, 922 F. Supp. 2d 278, 293-297 (E.D.N.Y. 2013) (dismissing a nine-state class action lawsuit because, under the law of all nine states, "advances" are not "wages" and no wage claim can exist until commissions have been "earned" as defined in a compensation agreement).

Savage argues that cases from California are distinguishable because the California wage statute includes the term "earned" in its definition of wages. That argument ignores the fact that the Idaho Supreme Court has repeatedly and consistently held that compensation must be "earned" before it is a wage. Moreover, the Idaho Wage Claim Act expressly recognizes the distinction between wages that have 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 Savage 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.

Savage next attempts to distinguish these authorities by arguing that the CCP does not expressly use the term "advance." That argument, however, 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, Savage cites no authority to support her argument that the difference in terminology is in any way legally meaningful. Instead, she relies on a California case, *Harris v. Investor's Bus. Daily, Inc.*, 138 Cal. App. 4th 28 (2006), to argue that the CCP does not provide for an advance, but rather a "commission subject to a condition subsequent" that constitutes a "wage." *See* Appellant's Brief, p. 23.

Harris is not helpful to Savage's position. *Harris* involved a dispute over whether a commission previously paid to an employee was a "wage" that had already been earned or an "advance" on a commission that had not yet been earned. That distinction mattered because California law prohibits employers from taking back "wages" that have been earned but does not prohibit recoupment of an "advance." Just like the Idaho Supreme Court in *Bakker*, the California court focused on whether the commission had been "earned" under the terms of the commission agreement between the parties. The court explained that, if "a condition to the employee's right to the commission had yet to occur, an advance was not a wage." *Id.* at 41. However, if the "commission was earned at the time of sale ... the money paid for commissions is wages, not an advance." *Id.* at 40. The court held that the commission in question was a

"wage" and not an "advance" because, under the terms of the commission agreement, the commission was "**earned** at the time of the sale, not at some designated point in the future." *Id.* at 41 (emphasis added).

Harris does not help Savage because, unlike the commission agreement in *Harris*, the CCP expressly provides that no commission is earned until receipt of funds from the customer and that any payment made to an employee before that time is merely a "prepaid but **unearned** commission" (i.e., an advance). *See Deleon v. Verizon Wireless, LLC*, 207 Cal. App. 4th 800, 803 (2012) (explaining that "*Harris* is inapposite" where an employee's compensation plan "clearly and expressly stated the retail sale representative's commissions were not earned at the time of sale of the cell phone service plan and referred to commission payments as 'advances'").

Contrary to Savage's vague assertions, this case does not turn on some distinction between an "advance" and a "commission subject to a condition subsequent." In fact, neither *Harris* nor any other case cited by Savage so much as mentions the concept of a condition subsequent. "A condition subsequent is a condition that, if performed or violated, as the case may be, defeats the contract, or one that, if not met by one party, abrogates the other party's obligation to perform." *Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716, 725, 291 P.3d 399, 408 (2012). "Thus, a contract that is conditioned to become void on a specified event is one subject to a condition subsequent." *Id.*

The CCP does not contain a condition subsequent. Instead, as authorized by *Bakker*, it provides that no commission is earned until actual receipt of payment from a customer. The whole point of *Bakker* (and *Harris* for that matter) is that a commission is not "earned," and thus not a "wage," until any contingency in the parties' commission agreement has been satisfied.

See Bakker, 141 Idaho at 191. *Bakker* refers to such a contingency as a "condition precedent" to earning a commission, and holds that no wage claim exists until all contractual contingencies to earning a wage have been satisfied. *Bakker*, 141 Idaho at 192.

6. Savage's "Arithmetically Ascertainable" Theory is Not Supported by Idaho Law

Idaho law does not support Savage's contention that commissions become "wages" due under the Wage Claim Act as soon as they are "arithmetically ascertainable," nor does any case cited by Savage so hold. Rather, the cases cited by Savage 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.

Savage'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 a 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. 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.*

Savage's reliance on *Meschino v. Frazier Indus. Co.*, 2016 WL 4083342 at *4 (D. Mass. Aug. 1, 2016) is similarly unhelpful to her cause. Savage cites *Meschino* for the proposition that commissions are "earned" under the Massachusetts Wage Act when the commission becomes "arithmetically ascertainable." *See* Appellant's Brief, p. 19. But that is not what *Meschino* holds. While *Meschino* explains that a commission must be "mathematically ascertainable" before it can be earned, it makes clear that the ultimate test is whether a commission has been "earned" under the terms of the employment agreement. *Id.* Conveniently omitted from Savage's briefing is the critical holding 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," a court must look to "the plain meaning of the definition of earned commissions set out in the Employment Agreement." *Id.* at *5.

Savage's reliance on *Meschino* is peculiar because its fact pattern and ultimate conclusion so closely mirror and support the District Court's conclusion here. Just like Savage, the employee in *Meschino* asserted that he was entitled to commissions within a certain amount of time after a sale had been "booked." *Id.* The court rejected that argument because 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.*

The Massachusetts standard is consistent with Idaho law as explained in *Bakker*. While courts may address whether commissions are ascertainable as a preliminary inquiry, the ultimate question is whether commissions have been "earned" under the terms of the applicable agreement between the parties. *See Bakker*, 141 Idaho at 190.

7. Savage Cannot State a Claim for Unpaid Wages Because Amazon had Not Made Any Payment at the Time Savage Filed her Complaint

Savage contends that the District Court "applied the wrong legal standard" by analyzing whether Savage had "earned" a commission. *See* Appellant's Brief, pp. 34-35 ("[T]he correct legal standard for determining whether a commission is 'wages' under the IWCA is not whether the commission is 'earned.'"). With all due respect, Savage is wrong. As the Idaho Supreme Court held in *Bakker*, all forms of compensation must be "earned" before they become "wages" and the parties can define by contract when a commission is "earned" for purposes of the Wage Claim Act. *See Bakker*, 141 Idaho at 190.

The District Court correctly applied *Bakker* in dismissing Savage's wage claim. Just like the employee agreement at issue in *Bakker*, the CCP defines precisely when Savage'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." R. 16 at § IV (bold in original, underscoring added). Because Scandit had not been paid by Amazon at the time Savage filed her Complaint, Savage had not earned any commission under the plain

language of the CCP and therefore cannot state a claim for unpaid wages under the Wage Claim Act.

Savage's argument to the contrary is based on selective quotations and violates rules of contract interpretation. Savage 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." R. 18 at § IV. Not only does that quote not reference **earned** commissions, but Savage takes the quote out of context and in violation of the rule that a contract must be interpreted as a whole. *See St. Clair v. Krueger*, 115 Idaho 702, 705 (1989) ("In interpreting any provision of a contract, however, our cases indicate that the entire agreement must be viewed as a whole.").

As set forth unambiguously in the CCP when viewing the contract as a whole, the **earning** of commissions and the pre-payment of **unearned** commissions 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." R. 18 at § IV.

Second, although commissions do not become "earned" until Scandit 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" (i.e., an advance) until the commission has been "earned" upon receipt of payment

from the customer. *Id.* (emphasis added); *see also id.* at § V. Under *Bakker*, those advances are not "wages" because no commission has yet been "earned."

The District Court correctly dismissed Savage's wage claim under the Wage Claim Act because Savage did not allege (nor could she) that Scandit had received payment from Amazon at the time she filed her Complaint. Thus, Savage had not "earned" any commission under the unambiguous terms of the CCP and no "wages" were due to Savage at the time she filed her Complaint. At best, Savage alleges that Scandit was late in providing her with an **advance** on a potential commission she had not yet earned. As a matter of law, such an allegation does not state a claim for "wages" under the Wage Claim Act, and the district court was correct in dismissing this claim. *See Owsley*, 141 Idaho at 136 (dismissal is appropriate if the plaintiff has not "alleged sufficient facts in support of his claim which, if true, would entitle him to relief").

B. The District Court Correctly Dismissed Savage's Wage Claim Based on the Annual Quota Achievement Bonus

The CCP provides for an "Annual Quota Achievement Bonus" of $36,000 "if the combined ['Annual Contract Value'] of renewals and Orders equals CHF 641,001 or more." R. 20 at § IV.E. Savage's Complaint asserts that Savage achieved her annual quota upon booking of the Amazon Order in September 2016 and that Scandit was required to pay the bonus immediately thereafter. R. 8 at ¶ 27, 33, Appellant's Brief, p. 31. Specifically, even though 2016 had not yet ended, Savage contends that her Annual Quota Achievement Bonus became due immediately upon booking of the Amazon Order and that Scandit violated the Wage Claim Act by waiting to pay the annual bonus until the end of the year. *Id.*

The District Court correctly dismissed Savage's claim because there is no contractual basis for Savage's assertion that the Annual Quota Achievement Bonus came due several months

before the end of the year. To the contrary, everything about the Annual Quota Achievement Bonus makes clear that it comes due, if achieved, at the end of the year.

First and foremost, it is telling that Savage attempts to relabel and mischaracterize the bonus as an "Achievement Bonus." *See* R. 6 at ¶ 14; Appellant's Brief, p. 28. The CCP in fact calls it an "**Annual** Quota Achievement Bonus." R. 20 at § IV.E (emphasis added). The bonus is based on the "**Annual** Contract Value" of sales over the 2016 year compared to Savage's "**Annual** Quota." *Id.* at §§ IV.E, II (emphasis added). The CCP repeats the "annual" nature of the bonus no fewer than four times throughout the document. *See id.* at §§ I(F), IV(E) and App. A §§ 1, 5. Moreover, the Annual Quota Achievement Bonus is included as part of an agreement entitled "**2016** Commission Compensation Plan" that is expressly defined to encompass the term from "January 1, 2016 through December 31, 2016." *Id.* at page 1 (emphasis added). Thus, the only logical interpretation is that the Annual Quota Achievement Bonus becomes due, if achieved, at the conclusion of the annual term.

Indeed, by its very nature, an **annual** bonus is earned on an **annual** basis and paid at the end of the year. *See, e.g.*, EMPLOYEE BENEFITS AND COMPENSATION GUIDE (CCH 2016) ¶ 4332, 2015 WL 8407980 ("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."); Black's Law Dictionary (10th ed. 2014) (defining "Annual" as "1. Occurring once every year; yearly ... 2. Of, relating to, or involving a period of one year"); *Boesel v. Swaptree*, Inc., 31 Mass.L.Rptr. 55, 2013 WL 7083258, at *4 (Mass. Super. Dec. 23, 2013) ("The word 'Annual' further describes that the Annual Bonus was to be paid once based upon a full year's employment....the plain

language describing the bonus as "Annual" means that the payment of the bonus was contingent upon Boesel earning it by continuing employment for the full calendar year.").

Despite the very nature of an annual bonus, and despite the lack of any contractual basis for a due date partway through the year, Savage insists that she should not have to wait even "one second after the quota figure has been achieved before the [Annual Quota] Achievement Bonus becomes due and payable." *See* Appellant's Brief, p. 31. Not only does that position find no support in the CCP, but it would produce absurd results. *See United States v. Irvine*, 756 F.2d 708, 710 (9th Cir. 1985) ("The language of the contract is to be read as a whole and given a reasonable interpretation, not an interpretation that would produce absurd results.") (citation omitted).

Annual bonuses are a very common component of compensation and are generally based on company sales, profitability or an employee's individual production. For example, law firms often have policies under which associate attorneys are eligible for an annual bonus if they bill 1800 hours during the year. Under Savage's theory, an associate would be entitled to payment of such an annual bonus on the very day that she bills her 1800th hour. If the associate bills the 1800th hour on November 30th, but is not paid the "annual" bonus that very day on her November paycheck, she could sue for treble damages on December 1st. A ruling in favor of Savage would incentivize employees to file "Gotcha!" lawsuits for treble damages the very day after they think their annual bonus becomes "arithmetically ascertainable" in an attempt to convert a generous annual bonus into a treble damage windfall.

In addition to erroneously attacking the district court's finding that that payment of the Annual Quota Achievement Bonus was not due before the end of the year, Savage also

incorrectly criticizes the District Court's reliance on the CCP's quota credit reversal provision as a secondary basis for dismissal of her annual bonus claim. While that analysis is not necessary to affirm dismissal of the annual bonus claim, the District Court's analysis was correct. The Annual Quota Achievement Bonus is based on the achievement of an "Annual Quota" for sales in the amount of CHF 641,001. R. 20 at § IV.E. The CCP provides that, "[i]f 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." *Id.* at § V (emphasis added).

Savage erroneously asserts that this provision applies only to reverse commission advances, but not Quota credit toward the Annual Quota Achievement Bonus. To the contrary, the provision expressly states that uncollected receivables result in reversal of both (1) "Quota credit" and (2) "prepaid commission." Given that the Annual Quota Achievement Bonus is based on achievement of an annual quota, reversal of any "Quota credit" impacts whether the Annual Quota Achievement Bonus has been earned and further highlights the absurdity of Savage's contention that she was entitled to the Annual Quota Achievement Bonus the very second the Amazon Order was booked.

In any event, as the District Court made clear, its quota reversal analysis was merely a secondary basis for dismissal and does not impact the District Court's primary conclusion that payment of the Annual Quota Achievement Bonus was not due before the end of the year. R. 148 ("[E]ven if there is some flaw in the Court's logic that the annual bonus wasn't even 'earned' before year's end [because of the potential for Quota credit reversal], it nevertheless is true that payment of the annual bonus didn't come due before year's end.").

C. The District Court Correctly Denied Savage's Motion for Leave to File a First Amended Complaint

In response to Scandit's motion to dismiss, Savage sought leave to file a First Amended Complaint. R. 94-102. The proposed First Amended Complaint does not add any material factual allegations. Instead, it asserts estoppel theories and claims that Scandit waived the contractual contingency that Scandit receive payment from a customer before any commission is earned. R. 97-102. The District Court correctly denied Savage's motion because the proposed First Amended Complaint is futile. *See Eagle Equity Fund, LLC v. TitleOne Corp.*, 161 Idaho 355, 362 (2016) (noting that 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).

The District Court dismissed Savage's initial Complaint because it did not allege that Scandit received payment from Amazon – the critical event that must occur before any commission is "earned" under the CCP. Savage's proposed First Amended Complaint is futile because it does not address that fatal flaw. To the contrary, Savage concedes that Amazon did not make even its first of five annual payments until late-November 2016, well after she filed her Complaint. *See* Reporter's Transcript, 40:19-22.

As the District Court correctly concluded, the equitable theories asserted in the proposed First Amended Complaint are also futile. 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.*

Savage's proposed First Amended Complaint does not allege facts that would support either element of a waiver theory. First, Savage points to no act by Scandit demonstrating an unequivocal intent to waive the CCP's requirement that Scandit receive payment from Amazon before any commission is "earned." The October 28, 2016 email relied upon by Savage (R. 26-28) does not evidence a waiver. To the contrary, it expressly states that Savage's commission remains unearned unless and until Scandit receives payment from Amazon. *Id.* (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" for prepaid but unearned commissions).

Moreover, Savage cannot contend that she relied to her detriment on the email. Scandit sent the email on October 28, 2016 – after the sale to Amazon, but before Amazon had paid Scandit any amount under the Agreement. *Id.* Savage filed her Complaint just two business days later, thereby making impossible any argument that she relied to her detriment on the email.

The proposed First Amended Complaint similarly fails to allege facts supporting an equitable estoppel theory, the elements of which are: "(1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment was made with the intent that it be relied upon; and (4) that 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." *Washington Fed. Sav. v. Van Engelen*, 153 Idaho 648, 655 (2012).

The proposed First Amended Complaint does not identify any false representation or concealment of a material fact. The October 28th email certainly contains no such misrepresentation. Rather, it reaffirms the terms of the CCP. Moreover, as explained above, Savage cannot establish that she relied to her detriment on the email.

Finally, Savage has not alleged facts to support a quasi-estoppel claim, the elements of which are: "(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." *Id.*

Savage has not identified any inconsistent position taken by Scandit. The email in question is consistent with both the CCP and Scandit's position in this litigation in stating that commissions are not earned until payment is received from Amazon.

In summary, because Savage's proposed amendments fail to allege the essential elements of her claims, the District Court did not abuse its discretion in denying Savage's motion for leave to file an amended complaint. *See Eagle Equity Fund, LLC v. TitleOne Corp.*, 161 Idaho 355, 362 (2016).

D. Savage's Reliance on Scandit's November Pre-Payment of the Unearned Commission is a Red Herring

On multiple occasions in her briefing, Savage references the fact that Scandit pre-paid the commission in full in late-November 2016. *See* Appellant's Brief, pp. 8, 21-22. Savage raises that fact in an attempt to manufacture an inference that Scandit paid the commission at that time in response to Savage's lawsuit and out of fear that it had somehow violated the Wage Claim Act. *Id.* While Savage's assertion is false and misleading, it serves to highlight the question of law at the heart of this case.

As an initial matter, Savage's assertion is premised on a misunderstanding of not only the conditions required before a commission is earned, but also the conditions required before even an advance will be prepaid. As explained in more detail above, the prepayment and earning of commissions are based on two separate events. First, "unearned" commissions are "prepaid" upon "booking" of an order. Second, commissions are "earned" only upon receipt of payment from the customer.

The fact of the matter is that Scandit prepaid Savage in late-November 2016 because that is when the Amazon Agreement was actually booked. The CCP provides that a contract is not "booked" – the event that triggers prepayment of "unearned commissions" – until several criteria are met, including execution of a "contract, schedules and other associated documentation." R. 18 at § IV(i). Moreover, "[i]f 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 [prepayment of the unearned] commission until the contingency has expired." *Id.*

The Amazon Agreement contains an express exit clause that would allow Amazon to terminate its software order under specified conditions without any payment obligation to

Scandit. Specifically, the Amazon Agreement and Software Order No. 1 contemplate that various parties and non-parties would execute a mutually agreeable escrow agreement and that Scandit would deliver the applicable source code to an escrow agent within sixty (60) days after executing Software Order No. 1, i.e., by November 26, 2016. *See* R. 69, 88 (Amazon Agreement, ¶ 9.1; Software Order No. 1, ¶ 11). Under the terms of the Amazon Agreement's exit clause, any failure to satisfy the November 26th deadline would allow Amazon to terminate the Amazon Agreement, without any obligation to Scandit. *Id.*

While executing a mutually agreeable escrow agreement sounds simple, it turned out not to be. The escrow agreement proposed by Savage was rejected and the exit clause deadline was not met. Rather than exercise its exit clause rights, Amazon agreed to extend the November 26th deadline at Savage's request. A few days later, an escrow agreement was fully executed, the software code was delivered and Amazon initiated its first of five annual payments. The Amazon order was "booked" under the terms of the CCP when the exit clause was satisfied. Accordingly, Scandit pre-paid[3] Savage's commission a few days later.

Importantly, the outcome of this case does not depend on when the Amazon Order was booked. Indeed, when the booking occurred is irrelevant, and that issue is not before the Court and need not be addressed. However, the distinction between when "prepaid but unearned commissions" are advanced (upon "booking") and when the commission is earned (upon "actual receipt of payment from the customer") highlights the question of law squarely before the Court

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3 Most of that payment was still "prepaid but unearned commission," as opposed to wages, because Amazon had paid only its first of five annual payments. The commission will become earned over five years if and when Amazon makes it annual payments.

– whether Savage's claim that she was *owed an advance* supports a claim for "wages" due under the Wage Claim Act.

Savage's complaint is based entirely on the assertion that the Amazon Order was "booked" in September 2017. R. 6 at ¶ 17. Even assuming that allegation to be true, the booking of an order triggers only the **advance** of "prepaid but unearned commissions," which are not "wages" under the Wage Claim Act because they have not yet been "earned." At best, Savage might be able to assert a weak contract claim if she could somehow establish damages.[4] However, because Scandit had not received payment from Amazon at the time Savage filed her Complaint, Savage has no claim for wages under the Wage Claim Act.

Finally, adopting Savage's position would likely result in employers abandoning the practice of advancing commissions to employees. *See Deleon v. Verizon Wireless, LLC*, 207 Cal. App. 4th 800, 803, 143 Cal. Rptr. 3d 810, 812–13 (2012) (dismissing wage claim because "commission advances are not wages" and noting that a contrary conclusion "might result in the loss of a benefit to the retail sales representatives" in the form of "access to cash rather than having to wait for the contingencies to occur"). Savage's attempt to take advantage of Scandit's generous advance practices to turn a claim for unearned wages into an $800,000 windfall should be rejected.

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4 In fact, the third cause of action in Savage's Complaint asserts just such a claim. R. 11 at ¶¶ 41-45. In recognition that such a claim had no merit, Savage stipulated to dismissal of that claim with prejudice. R. 152-155.

E. Attorney's Fees on Appeal

1. Savage is Not Entitled to Attorney's Fees

Savage claims entitlement to attorney's fees on appeal pursuant to Idaho Code § 45-615**Error! Bookmark not defined.**, which 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...." (Emphasis added). That claim fails because the District Court did not enter judgment in favor of Savage. Even in the unlikely event that this case were to be remanded for further proceedings, Savage would not be the prevailing party as required for an award of fees under Idaho Code § 45-615 because no judgment has been rendered in her favor, as required to an award of attorney's fees under Idaho Code § 45-615.

2. Scandit Should be Awarded Attorney's Fees on Appeal Because this Appeal has been Pursued without Foundation

Scandit respectfully requests an award of attorney fees on appeal pursuant to Idaho Code § 12-121. An award of attorney fees under Idaho Code § 12-121 is appropriate "when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation." *Eagle Equity Fund, LLC v. TitleOne Corp.*, 161 Idaho 355, 362–63, 386 P.3d 496, 503–04 (2016).

Simply stated, Savage has no basis to pursue this appeal. The law in Idaho is well settled that an employee has no claim for "wages" unless and until the alleged wages are "earned" under the terms of the employment agreement. Savage's primary assertion on appeal – that the District Court "applied the wrong legal standard" by looking to "whether the commission is 'earned'" –

is frivolous. *See* Appellant's Brief, pp. 34-35. That standard is firmly established as the law in Idaho as set forth by the Idaho Supreme Court in *Bakker*.

V. CONCLUSION

For the foregoing reasons, Scandit respectfully asks the Court to affirm the District Court's dismissal of Savage's Complaint and award Scandit attorney fees on appeal.

DATED THIS 1 day of December, 2017.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
D. John Ashby
William K. Smith
Attorney for Defendant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1 day of December, 2017, I caused to be served a true copy of the foregoing RESPONDENT'S BRIEF by the method indicated below, and addressed to each of the following:

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