

punitive damages, attorney's fees, costs and interest.¹ Eli vigorously denies any wrongdoing and respectfully submits that the Plaintiffs' Complaint should be dismissed for the following reasons:

- **Hittle admits receiving all wages she had earned as of the date of her termination, and her claims for unearned amounts do not fall under the North Carolina Wage and Hour Act;**
- **Warren's claims for unearned amounts do not fall under the North Carolina Wage and Hour Act, and his allegations demonstrate that he is not entitled to liquidated damages under the act;**
- **Neither Warren nor Hittle alleges a cognizable claim for common law fraud because the allegations forming their fraud claims are not distinct or separately identifiable from their putative contract claims;**
- **Neither Warren nor Hittle alleges a cognizable claim for fraudulent inducement because they do not allege facts sufficient to show that Eli never intended to perform under the terms of their "offer letters" when those letters were delivered; and**
- **Warren and Hittle do not allege facts or circumstances sufficient to warrant the imposition of punitive damages.**

Accordingly, Plaintiffs' claims are fatally flawed, and they should be dismissed.

ARGUMENT

The Court may dismiss the Plaintiffs' Complaint if no law supports their claims, if sufficient facts to make out a good claim are absent, or if a fact is asserted that defeats their claims. *Imes v. City of Asheville*, 163 N.C. App. 668, 594 S.E.2d 397 (2004). Plaintiffs allege four causes of action: (1) Violations of the North Carolina Wage and Hour Act as to Hittle; (2) "Willful" Violations of the North Carolina Wage and Hour Act as to Warren; (3) common law fraud or fraudulent inducement to accept employment as to Hittle; and (4) common law fraud or fraudulent inducement to accept employment as to Warren. Each of the Plaintiffs' claims is either not supported by North Carolina law or not supported by the factual averments contained in the Complaint.

A. Hittle admits receiving all wages she had earned as of the date of her termination, and her claims for unearned amounts do not fall under the North Carolina Wage and Hour Act.

The Plaintiffs' first cause of action seeks relief on behalf of Hittle for alleged violations of Section 95-25.7 of the North Carolina Wage and Hour Act, which addresses an employer's failure to pay wages to a

¹ Eli does not admit that valid employment contracts exist between itself and the Plaintiffs, and if this action progresses, Eli intends to challenge the sufficiency of the instruments on which the Plaintiffs' claims are based.

terminated employee. In order to maintain this claim, Hittle must allege facts sufficient to show that Eli failed to pay Hittle “wages” she had *earned* as of the date of her termination. *See Narron v. Hardee’s Food Sys.*, 75 N.C. App. 579, 583, 331 S.E.2d 205, 208 (1985).

Hittle does not dispute that she was paid all wages that she had earned through the date of her termination. Indeed, she clearly states that she received wages from the inception of her employment with Eli on March 26, 2007, through the date of her termination on July 9, 2007. (Complaint ¶ 46). Instead, Hittle’s sole claim appears to be that she is owed additional money under an alleged “12 month guaranty [of her salary] from start date.” (Complaint ¶¶ 14-15). Although Hittle seeks to characterize this alleged salary guarantee as severance pay in an effort to assert a Wage and Hour Claim, the factual allegations describing Hittle’s alleged “offer letter” are entirely devoid of any reference to “severance payments.” (Complaint ¶¶ 10-17). Moreover, Hittle fails to allege that she did anything or performed any service to *earn* the payments she alleges she is due.

North Carolina law is well settled that the Wage and Hour Act does not provide a cause of action for the recovery of future *unearned* wages. *See Martin v. Pomeroy Computer Resources, Inc.*, 87 F. Supp. 29 496, 504 (W.D.N.C. 1999)(citing *Narron, supra*). An employer’s liability to pay wages and benefits is due “*when the employee has actually performed the work required to earn them.*” *Narron*, 75 N.C. App. at 583, 331 S.E.2d at 208 (emphasis added). If Hittle seeks to claim that she was not an at-will employee but had an employment contract with Eli for a definite term, her remedies are limited to those permissible based on Eli’s alleged breach of contract. *See eg. McKnight v. Simpson’s Beauty Supply*, 86 N.C. App. 451, 358 S.E.2d 107 (1987)(plaintiff alleged breach of contract guaranteeing employment for two years). Because Hittle’s claims are but a thinly veiled attempt to improperly avail herself to the Wage and Hour Act’s provisions permitting the recovery of liquidated damages and attorney’s fees, her claims under that statute should be dismissed with prejudice.

B. Warren’s claims for unearned amounts do not fall under the North Carolina Wage and Hour Act, and his allegations demonstrate that he is not entitled to liquidated damages under the act.

Like Hittle, Warren must allege facts sufficient to show Eli failed to pay him “wages” he had *earned* as of the date of his termination. *See Narron, supra*. Like Hittle, Warren does not claim that Eli failed to pay him through the date of his termination. Additionally, Warren does not allege that he did anything or performed any service to earn the additional lump sum payment he seeks. Instead, Warren couches his claims under the Wage and Hour Act as a claim for unpaid “severance.” (Complaint ¶¶ 57-60). Once again, the quoted portions of the alleged instrument on which Warren seeks to rely make no reference to “severance” owed Warren. (Complaint ¶ 20). Instead, it is Warren who attempts to characterize an alleged guaranteed lump sum payment as severance. If Warren, like Hittle, seeks payment of unearned, future compensation allegedly guaranteed by Eli, his proper remedy sounds in contract law, not in violations of the Wage and Hour Act, and his claims under the Act should be dismissed.

Warren also appears to allege so-called “willful” or “knowing” violations of the Wage and Hour Act, entitling him to liquidated damages, based on the allegation that Eli “has not even tendered any part of Warren’s severance which is not in dispute pursuant to N.C. Gen. Stat. § 95-25.7A.” Warren’s own allegations regarding the circumstances surrounding his termination belie those claims. Specifically, Warren acknowledges that he was terminated following a downturn in the company’s revenues and cash flow. Further, he alleges that the termination provisions contained within his “offer letter” provided that Eli could terminate him “for cause.” (Complaint ¶ 20). Finally, Warren alleges and acknowledges that Eli contends Warren’s actions or inactions directly caused that downturn, thereby justifying his dismissal. (Complaint ¶ 23-24, 31-32). As a result of these allegations, Warren’s own allegations demonstrate that the company rightfully disputes that it owes him anything and therefore owes him no obligation to make any payment under N.C. Gen. Stat. 95-25.7A. Because Warren’s own allegations demonstrate Eli’s good faith in disputing his claims, Warren’s claims for liquidated damages should be dismissed.

C. Neither Warren nor Hittle alleges a cognizable claim for common law fraud because the allegations forming their fraud claims are not distinct or separately identifiable from their putative contract claims

Plaintiffs’ tort claims in this case are neither ‘identifiable’ nor ‘distinct’ from what are, in essence, claims for breaches of alleged employment contracts. As a result, they should be dismissed. In their Wage

and Hour claims, Plaintiffs appear to allege the existence of employment contracts entitling them to the payment of so-called guaranteed, unearned sums of money. Likewise, in their fraud claims, Plaintiffs contend that Eli's failure to pay them despite its purported promises to do so constitute fraud. Neither Plaintiff alleges any additional fact outside of Eli's alleged failure to pay to support their claims for fraud. (Complaint ¶¶ 48-54, 62-68).

North Carolina law requires the dismissal of tort claims that are not both "identifiable" and "distinct" from a "primary breach of contract claim." See *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331,346 (4th Cir 1998); *Strum v. Exxon Co.*, 15 F.3d 327 (4th Cir. 1994); See also *Media Network, Inc. v. Mullen Advertising, Inc.*, 2007 WL 2570175, 2007 NCBC 1 (N.C. Super. Jan 19, 2007) (NO. 05 CVS 7255, 05 CVS 15428), *Garlock v. Hilliard*, 2000 WL 33914616, 2000 NCBC 11 (N.C. Super. Aug 22, 2000) (NO. 00-CVS-1018). North Carolina litigants are not permitted "to manufacture a tort dispute out of what is, at bottom, a simple breach of contract claim." Such attempts are "inconsistent with both North Carolina law and sound commercial practice." *Strum*, 15 F.3d at 329. Because the allegations on which the Plaintiffs' fraud claims rest do not support any distinct or identifiable tort that is separate from their potential breach of contract claims, those claims should be dismissed.

D. Neither Warren nor Hittle alleges a cognizable claim for fraudulent inducement to accept employment because they do not allege facts sufficient to show that Eli never intended to perform under the terms of their "offer letters" when those letters were delivered.

Finally, Plaintiffs' fraud or fraudulent inducement to accept employment claims should be dismissed because they lack definiteness and specificity regarding the representations allegedly made by Eli and Eli's alleged intent not to perform when those representations were made. *Rowan County Bd. Of Educ.*, 418 S.E.2d 648, 659 (N.C. 1992). The purpose of the specificity requirement is to aid "courts in distinguishing mere puffing, guesses, or assertions of opinions from representations of material facts." *Id.* North Carolina courts uniformly recognize the narrow scope of fraudulent inducement claims and subject them to heightened pleading requirements. *Strum* 15 F.3d at 331. A failure to perform a promise can be a basis for fraud only where there is evidence the promissor had a "specific intent" not to perform at the time a promise was made. *Hoyle v. Bagby*, 253 N.C. 778, 117 S.E.2d 760, 762 (N.C. 1961). "[M]ere generalities and conclusory

allegations of fraud will not suffice' to sustain a fraud claim." *Strum*, 15 F.3d at 331. Thus, where a plaintiff does "nothing more than assert that [a promissor] never intended to honor its obligations under [an] agreement," dismissal as a matter of law is appropriate. *Id.*

Here, Plaintiffs make conclusory allegations that Eli's representations were false when made and that Eli did not intend to carry out the representations when they were made. (Complaint ¶¶ 50, 64). In accordance with *Strum*, their claims are ripe for dismissal on that basis alone. Additionally, Plaintiffs' own allegations regarding Eli's conduct defeat their claims for fraudulent inducement. Plaintiffs concede that Eli performed under the terms of their alleged "offer letters" for three months and that they were terminated only after the company suffered a downturn in business and cash flow. (Complaint ¶¶ 23-27). These allegations directly contradict the allegation that Eli did not intend to honor its alleged promises when those promises were made. *See Hoyle*, 253 N.C. 778, 117 S.E.2d 760 (1961)(noting that plaintiff's allegation that defendant did not intend to pay him at inception of contract were contradicted by plaintiff's acknowledgement that defendant had no obligation to pay him until defendant received payment from third party).

As the United States District Court for the Middle District of North Carolina noted in *Norman v. Tradewinds Airlines, Inc.*:

"[f]raud is a much overused and misused cause of action. Its abuse has been fueled by the access it provides to otherwise unavailable discovery and to punitive damages. Its misuse has been exacerbated by [the] embrace of the 'promissory' form of fraud whereby a promise made with no intent to perform is deemed actionable as fraud. Unfortunately, too many cases have gotten to the jury and large tort verdicts have been rendered on a theory of fraud that had no business being anything other than breach of contract. The problem is not with the distinction between fraud and breach of contract, however, the problem lies in our courts' failure to appreciate or require competent proof of the distinct elements.

286 F.Supp.2d 575, 594 (M.D.N.C. 2003). In this case, Plaintiffs' allegations are not pled with sufficient particularity to support claims for fraudulent inducement to accept employment, and they should not be permitted to access otherwise unavailable discovery or punitive damages as a result. Plaintiffs' claims for fraudulent inducement and their claims for punitive damages, which rest on those claims, should be dismissed with prejudice.

STATEMENT OF COMPLIANCE WITH WORD COUNT

The undersigned counsel certifies that the foregoing **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS** is within the limitations on length of briefs pursuant to Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February, 2008, a copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS** was served pursuant to the North Carolina Rules of Civil Procedure on:

Lynn Fontana
Attorney at Law
115 E. Main Street
Raleigh, North Carolina 27701
Attorney for Robert D. Warren and Lyn Hittle

/s/ Jessica Tyndall

BROWN LAW LLP