NORTH CAROLINA		**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
DURHAM COUNTY		**2007 CVS 6306**
ROBERT D. WARREN, AND LYN HITTLE	)	
Plaintiffs,	)	
v.	)	**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S RULE 12(b)(6) MOTIONS TO DISMISS AND REQUEST FOR HEARING (Rule 15.4(a))**
ELI RESEARCH, INC.,	)	
Defendant.	)	

Plaintiffs submit this brief in opposition to Defendant's Rule 12(b)(6) motions to dismiss plaintiffs' claims for (1) severance pay under the North Carolina Wage and Hour Act, (2) fraudulently inducing them to leave their jobs to come to work for Eli Research, and (3) punitive damages.

STATEMENT OF THE CASE

Plaintiffs filed this action in Durham County Superior Court on December 7, 2007. On January 9, 2008, defendant filed a Notice of Designation of Action as Mandatory Complex Business case under N.C. Gen. Stat. § 7A-45.4. Plaintiff's Objection to Designation and Motion to Remand to Durham County Superior Court was filed on February 11, 2008, and is currently pending before this court.

Defendant has not answered the Complaint. On February 8, 2008, defendant filed a motion to dismiss and a motion to strike. On February 18, 2008, Plaintiffs filed an Amendment to Complaint, adding a claim for relief for each plaintiff for breach of

contract which was inadvertently omitted from the original complaint. Plaintiff's Amendment to Complaint does not affect the pending Rule 12(b)(6) motions.

FACTS

The following paragraphs of the Complaint are relevant for purposes of the pending Rule 12(b)(6) motions.

FACTS ESTABLISHING HITTLE'S CLAIMS

Paragraph 10: At the time that Hittle was being recruited by Eli Research in February, 2007, she was employed as the Vice President, Finance, and Controller of EOS Airlines, at a salary of $175,000 per year.

Paragraph 11: On Friday, February 16, 2007, beginning at approximately 2:30 p.m., Hittle met with Greg Lindberg and Lance McCord, CFO of Eli Research, at a location on Park Avenue in New York City.

Paragraph 12: During this meeting, Hittle advised Lindberg and McCord that she would be willing to take a chance and give up her current job if Eli Research paid her an annual salary of $150,000, guaranteed for 12 months, which she described as "pay or play." Lindberg responded, "I like that idea."

Paragraph 13: Within thirty minutes after this meeting ended, Hittle received a telephone call from McCord in which McCord stated "we're going to do it" and advised Hittle that an offer letter was forthcoming.

Paragraph 14: On February 20, 2007, McCord sent an offer letter to Hittle which included an annual base salary of $150,000, with a "12 month guaranty from start date . . . "

Paragraph 15: The guaranty of 12 months salary from Hittle's start date was unconditional.

Paragraph 16: On or about March 7, 2007, Hittle advised McCord that she had been offered a salary increase to $200,000 per year and a $100,000 retention bonus to stay with EOS Airlines.

Paragraph 17: In reliance on the guaranty of 12 months of salary at $150,000, by Lindberg at the February 16 meeting, by McCord on the

telephone on February 16, and by McCord in correspondence dated February 20, 2007, Hittle resigned from her employment at EOS Airlines and accepted employment with Eli Research, starting on March 26, 2007.

Paragraph 23: Approximately [three months] later, in early July, Eli Research ran into cash flow problems for multiple reasons, including the following:

a. the impact of the Florida Attorney General's investigation of deceptive advertising;

b. changes to financial reporting requirements for Merrill Lynch after a new account manager with Merrill Lynch questioned Eli's aging practice for collateral eligible accounts receivable, and the booking of trial subscriptions as income, resulting in the reduction of accounts receivable on Eli's spreadsheet of over a million dollars; and

c. the new account manager at Merrill Lynch refused to consider further advances and demanded that Lindberg's personal withdrawals of cash from the company be itemized and explained, as these withdrawals were in direct violation of bank covenants.

Paragraph 24: In addition, in June, the expected sale of The Coding Institute and the American Academy of Professional Coders began to fall through.

Paragraph 25: As a result of these problems, and other personal financial issues, Lindberg decided to reduce overhead by reducing payroll, beginning with the most highly paid employees, the CEO/President, Mr. Warren, the CFO, Lance McCord, and the VP of Finance, Lyn Hittle.

Paragraph 26: Warren discussed reducing payroll for financial reasons with Lindberg during the week of July 2nd.

Paragraph 27: On Monday, July 9, 2007, Warren, McCord and Hittle were all terminated.

Paragraph 28: In a bad faith effort by Lindberg to avoid paying wages or severance pay as agreed to Hittle, and to attempt to deny unemployment benefits to Hittle, Lindberg delivered a termination letter dated July 9, 2007, to Hittle in which he states that he decided to terminate Hittle and purports to list "good reasons" for this decision.

Paragraph 29: Lindberg's purported reasons for terminating Hittle are irrelevant to Hittle's claim for unpaid wages or severance because Eli Research's agreement to pay Hittle 12 months salary was unconditional.

Paragraph 43: N.C. Gen. Stat. § 95-25.2(16) defines "wages" to include

severance pay.

Paragraph 45: Hittle was owed wages in the amount of $6,250 on or about the seventh and twenty-second day of each month from March 26, 2007 through March 25, 2008.

Paragraph 46: Hittle was only paid wages during the time period from March 26 through July 9, 2007.

Paragraph 47: Hittle is owed wages or severance in the amount of $106,250. As a result of defendant's violations of the North Carolina Wage & Hour Act, Hittle is entitled to recover from Eli Research the sum of $106,250 in unpaid wages or severance, plus an additional equal amount of wages or severance as liquidated damages pursuant to N.C. Gen. Stat. §95-25.22(a1), together with interest at the legal rate set forth in N.C. Gen. Stat. § 24-1 from the date this amount first became due, and the costs of this action and reasonable attorney's fees as provided by N.C. Gen. Stat. § 95-25.22(d).

Paragraph 49: On February 16 and February 20, 2007, Eli Research represented to Hittle that she would be paid an annual salary of $150,000 for a guaranteed 12 months.

Paragraph 50: This representation was false when it was made to Hittle; in particular, Lindberg, the ultimate decision maker, did not intend to carry out this representation when it was made.

Paragraph 51: As a result of this representation, Eli Research obtained the services of Hittle as VP, Finance.

Paragraph 52: This representation was reasonably calculated to deceive Hittle, made with the intent to deceive Hittle, and in fact deceived Hittle, resulting in damages to Hittle including but not limited to the loss of a $100,000 retention bonus, and annual wages of $200,000, from her former employer, EOS Airlines.

Paragraph 53: Hittle further alleges that it was the habit or routine practice of Lindberg and Eli Research to make false representations, and that evidence of other crimes, wrongs, or acts will be admissible as proof of motive, intent, and plan.

Paragraph 54: Eli Research's conduct resulting in damages to Hittle was in reckless disregard of Hittle's rights and was willful or wanton conduct within the meaning of N.C. Gen. Stat. §§ 1D-5(7) and 1D-15(a)(3). Eli Research's conduct was accompanied by fraud within the meaning of

N.C. Gen. Stat. §§ 1D-5(4) and 1D-15(a)(1). Hittle is entitled to recover punitive damages against Eli Research because its officers and managers participated in and condoned the fraudulent, willful and wanton conduct described herein.

FACTS ESTABLISHING WARREN'S CLAIMS

Paragraph 18: Warren first began discussions with Eli Research regarding employment in December, 2006.

Paragraph 19: After lengthy negotiations, Lindberg sent the final version of Warren's offer letter to him via a letter dated March 12, 2007.

Paragraph 20: Warren's offer letter for the job position of President/CEO of Eli Research contained the following terms:

a. An annual base salary of $225,000;
b. A bonus of up to $160,000 per year;
c. Stock options in Eli Holdings, LLC (to be formed) representing 2.5% of the appreciation of the total company equity value;
d. Severance pay in the amount of $225,000 "[i]f your employment is terminated for reasons other than cause for 'good reason' . . . . in the first 12 months of your employment . . . ."
e. Termination for cause for "good reason" is defined in the agreement as
    1) employee has engaged in misconduct, illegal conduct, including the conviction of Employee of, or the entry of a pleading of guilty or nolo contendere by Employee to, any felony, or an indictment for theft of Company property;
    2) a material violation of any written agreement between employee and the company, including without limitation this agreement or any non-disclosure and/or non competition agreement with the company;
    3) employee's material violation of any of the policies or practices of the company;
    4) a final judicial or administrative agency determination of unlawful harassment of any employee of the company;
    5) any action by the employee that creates an actual conflict .

Paragraph 21: In reliance on these [representations] made during

negotiations, as confirmed in Lindberg's March 12, 2007, offer letter, Warren resigned from his employment with Kaplan University.

Paragraph 22: Warren accepted the terms of the March 12, 2007, offer letter on March 12, 2007 and began working for Eli Research on or about March 29, 2007.

Paragraph 23: Approximately [three months] later, in early July, Eli Research ran into cash flow problems for multiple reasons, including the following:

a. the impact of the Florida Attorney General's investigation of deceptive advertising;
b. changes to financial reporting requirements for Merrill Lynch after a new account manager with Merrill Lynch questioned Eli's aging practice for collateral eligible accounts receivable, and the booking of trial subscriptions as income, resulting in the reduction of accounts receivable on Eli's spreadsheet of over a million dollars; and
c. the new account manager at Merrill Lynch refused to consider further advances and demanded that Lindberg's personal withdrawals of cash from the company be itemized and explained, as these withdrawals were in direct violation of bank covenants.

Paragraph 24: In addition, in June, the expected sale of The Coding Institute and the American Academy of Professional Coders began to fall through.

Paragraph 25: As a result of these problems, and other personal financial issues, Lindberg decided to reduce overhead by reducing payroll, beginning with the most highly paid employees, the CEO/President, Mr. Warren, the CFO, Lance McCord, and the VP of Finance, Lyn Hittle.

Paragraph 26: Warren discussed reducing payroll for financial reasons with Lindberg during the week of July 2nd.

Paragraph 27: On Monday, July 9, 2007, Warren, McCord and Hittle were all terminated.

Paragraph 30: In a bad faith effort to avoid paying severance to Warren, Lindberg advised Warren that he was being terminated for "performance reasons."

Paragraph 31: In a bad faith effort by Lindberg to avoid paying severance to Warren, Warren's termination letter dated July 9, 2007, lists (a) financial

deterioration of the business, (b) alienation, de-motivation, and disregard for team members, (c) slow pace of decisions, (d) micromanagement of minor details while missing the big picture, and (e) failure to take control of the earnings of the business as the reasons for Mr. Warren's termination.

Paragraph 32: In a bad faith effort to avoid paying severance to Warren, these purported "performance" issues are then defined by Lindberg as "materially contradict[ing] the past practices and policies of the company."

Paragraph 33: During his employment with Eli Research, Warren never received any performance evaluations.

Paragraph 34: During his employment with Eli Research, Warren was not told of any purported violations of policies or practices.

Paragraph 35: During his employment with Eli Research, Warren received no verbal warnings.

Paragraph 36: During his employment with Eli Research, Warren received no written warnings.

Paragraph 37: Warren did not materially violate any policies or practices of the company.

Paragraph 38: Warren is entitled to severance in the amount of $225,000.

Paragraph 56: N.C. Gen. Stat. § 95-25.7 required the defendant to pay Warren all wages due through the date of his last employment on or before the next regular pay day.

Paragraph 57: N.C. Gen. Stat. § 95-25.2(16) defines "wages" to include severance pay.

Paragraph 58: Warren has demanded payment of severance pay in the agreed upon amount of $225,000, and defendant has refused to pay.

Paragraph 59: Defendant has not even tendered any part of Warren's severance which is not in dispute pursuant to N.C. Gen. Stat. § 95-25.7A.

Paragraph 60: Defendants' failure to pay Warren is not in good faith, but is willful. Defendants have no reasonable grounds for believing that they are not in violation of the Wage and Hour Act.

Paragraph 61: As a result of defendant's violations of the North Carolina Wage & Hour Act, Warren is entitled to recover from Eli Research the sum

of $225,000 in unpaid severance, plus an additional equal amount of severance as liquidated damages pursuant to N.C. Gen. Stat. §95-25.22(a1), together with interest at the legal rate set forth in N.C. Gen. Stat. § 24-1 from the date this amount first became due, and the costs of this action and reasonable attorney's fees as provided by N.C. Gen. Stat. § 95-25.22(d).

Paragraph 63: On March 12, 2007, Lindberg and Eli Research represented to Warren that he would be paid severance of $225,000 if he were terminated without cause.

Paragraph 64: This representation was false when it was made to Warren; in particular, Lindberg, the ultimate decision maker, did not intend to carry out this representation when it was made.

Paragraph 65: As a result of this representation, Eli Research obtained the services of Warren as President and CEO.

Paragraph 66: This representation was reasonably calculated to deceive Warren, made with the intent to deceive Warren, and in fact deceived Warren, resulting in damages to Warren including lost wages and benefits and damage to his professional reputation.

Paragraph 67: Warren further alleges that it was the habit or routine practice of Lindberg and Eli Research to make false representations, and that evidence of other crimes, wrongs, or acts will be admissible as proof of motive, intent, and plan.

Paragraph 68: Eli Research's conduct resulting in damages to Warren was in reckless disregard of Warren's rights and was willful or wanton conduct within the meaning of N.C. Gen. Stat. §§ 1D-5(7) and 1D-15(a)(3). Eli Research's conduct was accompanied by fraud within the meaning of N.C. Gen. Stat. §§ 1D-5(4) and 1D-15(a)(1). Warren is entitled to recover punitive damages against Eli Research because its officers and managers participated in and condoned the fraudulent, willful and wanton conduct described herein.

ARGUMENT

I. THE RULE 12(b)(6) STANDARD OF REVIEW

The essential question on a motion to dismiss pursuant to Rule 12(b)(6) "is whether the complaint, when liberally construed, states a claim upon which relief can be granted on any theory." Oberlin Capital, L.P. v. Slavin, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001) (citations omitted) (emphasis in original). On a motion to dismiss, the complaint's material factual allegations are taken as true. Id. (citing Hyde v. Abbott Lab., Inc., 123 N.C. App. 572, 575, 473 S.E.2d 680, 682 (1996)).

When ruling on a Rule 12(b)(6) motion, the trial court should liberally construe the complaint and should not dismiss the action unless "it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." Davis v. Messer, 119 N.C. App. 44, 51, 457 S.E.2d 902, 906-907 (1995) (citation omitted).

Notice of the nature and extent of the claim is adequate if the complaint contains "sufficient information to outline the elements of [the] claim or to permit inferences to be drawn that these elements exist." 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1357, at 340 (2d ed. 1990)(emphasis added).

II. PLAINTIFFS HAVE STATED A CLAIM FOR RELIEF FOR UNPAID SEVERANCE PAY UNDER THE NORTH CAROLINA WAGE AND HOUR ACT

A. SEVERANCE PAY IS INCLUDED IN THE DEFINITION OF WAGES UNDER THE WAGE AND HOUR ACT

North Carolina law defines "wages" to specifically include severance pay. N.C. Gen. Stat. § 95-25.2. Employers must notify employees of "wages" at the time of hiring, and may do so either verbally or in writing. Id. § 95-25.13(1). Employers are required to inform an employee, in writing, at least 24 hours prior to any change in "wages." Id. § 95-25.13(3). Wages to terminated employees are due on the first regular payday following termination, and the employer may not lawfully withhold such wages absent the employee's written consent. Id. § 95-25.7.

B. MONETARY PAYMENTS MADE TO AN EMPLOYEE AS A RESULT OF TERMINATION ARE "SEVERANCE PAY" UNDER NORTH CAROLINA LAW.

Defendant argues that "the quoted portions of [Warren's] alleged instrument . . . makes no reference to 'severance'" and states that Warren "attempts to characterize an alleged guaranteed lump sum payment as severance." Defendant's Brief at p. 4. Defendant also argues at p. 3 of its brief that Hittle has no claim for severance because the factual allegations describing Hittle's offer letter do not refer to "severance payments."

Severance pay is not defined in either the Wage and Hour Act or in the Department of Labor's rules in the North Carolina Administrative Code. Plaintiffs' research uncovered no definitions of severance pay, separation pay, or severance wages anywhere in North Carolina's statutes or administrative code. However, at least two statutes would treat plaintiffs' payments as severance pay. First, Warren and Hittle would have paid state income taxes on these payments, except that the first $35,000 would be exempt from state tax pursuant to N.C. Gen. Stat. §105-134.6(b)(11), which

provides a deduction for: “[s]everance wages received by a taxpayer from an employer as the result of the taxpayer's permanent, involuntary termination from employment through no fault of the employee.” Second, the Employment Security Commission also would have treated these payments as severance, and barred the plaintiffs from receiving unemployment benefits for the duration of the severance period. N.C. Gen. Stat. § 96-8(10)(c)(“No individual shall be considered unemployed if, with respect to the entire calendar week, he is receiving, has received, or will receive as a result of his separation from employment, remuneration in the form of (i) wages in lieu of notice, (ii) accrued vacation pay, (iii) terminal leave pay, (iv) severance pay, (v) separation pay, or (vi) dismissal payments or wages by whatever name.”)

Severance pay by definition occurs after employment ends. Severance pay is “[p]ayment by an employer to [an] employee beyond his wages on termination of his employment.” Black’s Law Dictionary (Fifth Ed. 1979). Severance pay is “[m]oney (apart from back wages or salary) paid by an employer to a dismissed employee. Such a payment is often made in exchange for a release of any claims that the employee might have against the employer. -- Also termed separation pay; dismissal compensation.” Black's Law Dictionary (8th ed. 2004). Ballentine’s Law Dictionary, 3d Ed. (1969), defines severance pay as ”[a] payment made by an employer to an employee upon termination of the employment, otherwise known as dismissal compensation or separation wage.”

Hittle’s “pay or play” agreement – guaranteeing that she would be paid for 12 months -- means that if she were terminated in less than twelve months, she would receive severance pay through the end of the twelve month period. Likewise, Warren’s

lump sum payment of $225,000 if he is terminated without cause is obviously severance pay. Further, the evidence will show that Eli Research itself referred to Hittle's and Warren's severance pay as severance. Defendant's Rule 12(b)(6) motion must be denied unless "it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." Davis v. Messer, supra. The complaint's material factual allegations must be taken as true, and defendant's motion to dismiss must be denied.

C. HITTLE AND WARREN "EARNED" THEIR PROMISED SEVERANCE PAY WHEN THEY ACCEPTED EMPLOYMENT, STARTED WORKING FOR ELI RESEARCH, AND WERE TERMINATED IN LESS THAN ONE YEAR

> [T]he Wage and Hour Act requires an employer to notify the employee in advance of the wages and benefits which he will earn and the conditions which must be met to earn them, and to pay those wages and benefits due when the employee has actually performed the work required to earn them.

Narron v. Hardee's Food Sys., 75 N.C. App. 579, 583, 331 S.E.2d 205, 208, disc. rev. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

The terms of the plaintiffs' employment agreements establish the conditions which must be met for plaintiffs to earn severance pay. They must accept employment, start working for Eli Research and be terminated in less than one year. The severance is earned when the triggering event occurs, which for Hittle was when she was terminated, and for Warren, when he was terminated without cause as defined in the agreement. It is specious to equate plaintiffs' severance pay with claims for future unearned wages. Under Defendant's tortured interpretation of the statute, severance

pay would never be recoverable because the employee does not actually work the hours for which he or she is paid severance.

None of the cases cited by Defendant involve severance pay. Narron involved a claim for vacation pay. The trial court's grant of summary judgment in the employer's favor was reversed because genuine issues of material fact existed as to whether the vacation pay was earned (or accrued) under the employer's earlier vacation policy, before the policy was changed in accordance with N.C. Gen. Stat. § 95-25.12 to provide for forfeiture. Id., 75 N.C. App. at 583, 331 S.E.2d at 208.

Martin v. Pomeroy Computer Resources, Inc., 87 F.Supp. 2d 496 (W.D.N.C. 1999) was complex business litigation involving three consolidated actions. One of the claims alleged was breach of an employment contract which provided that it could be terminated for cause with 15 days notice. Id., 87 F.Supp. 2d at 499. The court noted that Martin alleged a cause of action pursuant to N.C. Gen. Stat. § 95-25.1, but the wording of the complaint was ambiguous, and appeared to allege the right to recover future unearned wages. Citing Narron, supra, the court noted that "to the extent Martin intends to assert such claims, they are hereby dismissed." Id., 87 F.Supp. 2d at 504.

McKnight v. Simpson's Beauty Supply, 86 N.C. App. 451, 358, S.E.2d 107(1987) does not stand for the proposition for which Defendant cites it, that is, that an employee with a contract for a definite term is limited to remedies based on breach of contract.[1]

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1 Hittle and Warren were "at will" employees because they did not have contracts for a definite term. That fact, however, does not bar them from enforcing the terms of their employment agreements. See, Arndt, supra, 170 N.C. App. at 525-26, 613 S.E.2d at 280 (2005). Nor does it prevent them from pursuing claims arising out of misrepresentations that induced them to accept employment in the first place. Walton

Defendant's Brief at p. 3. This contention is simply not true. See, Section III(C), infra, in particular, Brandis v. Lightmotive Fatman. The only claim for relief that an employee with a contract for a definite term cannot bring is wrongful discharge in violation of public policy.[2]

D. EVEN IF ELI RESEARCH COULD SHOW THAT IT ACTED IN GOOD FAITH, THE TRIAL COURT MAY STILL, IN ITS DISCRETION, AWARD LIQUIDATED DAMAGES UNDER THE WAGE AND HOUR ACT. THE EMPLOYER BEARS THE BURDEN OF SHOWING THAT IT ACTED IN GOOD FAITH.

Defendant's brief at p. 4 does not state the standard for awarding liquidated damages under the Wage and Hour Act. Defendant also does not cite any case law to support its dismissal argument, because there is none.

The plain language of N.C. Gen. Stat. § 95-25.22(a1)(emphasis added) states:

> In addition to the amounts awarded pursuant to subsection (a) of this section, the court **shall** award liquidated damages in an amount equal to the amount found to be due as provided in subsection (a) of this section, provided that **if** the employer shows to the satisfaction of the court that the act or omission constituting the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Article, the court **may**, in its discretion, award no liquidated damages or may award any amount of liquidated damages not exceeding the amount found due as provided in subsection (a) of this section.

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v. Carolina Telephone, 93 N.C. App. 368, 380, 378 S.E.2d 427, 434, disc. rev. denied, 325 N.C. 230, 381 S.E.2d 792 (1989)(fraudulent inducement claim not barred by employment at will doctrine).

2 It is well established that "'the tort of wrongful discharge arises only in the context of employees at will.'" Doyle v. Asheville Orthopaedic Assocs., P.A., 148 N.C. App. 173, 174, 557 S.E.2d 577, 577 (2001) disc. review denied, 355 N.C. 348, 562 S.E.2d 278 (2002)(citations omitted).

The rule for awarding liquidated damages in this state was stated in Hamilton v. Memorex Teltex Corp., 118 N.C. App. 1, 15, 454 S.E.2d 278, 286 (1995). "[T]he employer bears the burden of demonstrating that liquidated damages should not be imposed. However, even if an employer shows that it acted in good faith, and with the belief that its action did not constitute a violation of the Act, the trial court may still, in its discretion, award liquidated damages in any amount up to the amount due for unpaid wages. When the employer cannot make such a showing, the trial court has no discretion and must award liquidated damages."

Defendant's brief at p. 4 mischaracterizes the allegations in the complaint to argue that "[b]ecause Warren's own allegations demonstrate Eli's good faith in disputing his claims, Warren's claims for liquidated damages should be dismissed. " Warren's complaint clearly states the reasons for Eli's cash flow problems, all of which were caused by Greg Lindberg. Complaint, ¶¶ 23, 24, 25. The complaint also clearly states that Lindberg's reasons given for terminating Hittle and Warren were "a bad faith effort to avoid paying severance . . . ." Complaint, ¶¶ 28, 30, 31, 32.

Defendant's purported "good faith" is a factual issue for trial. The court can still award liquidated damages even if Eli Research could prove that it acted in good faith. Therefore, Defendant's motion to dismiss Warren's claim for liquidated damages must be denied.[3]

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3 Both plaintiffs have stated claims for liquidated damages. Complaint ¶¶ 47, 61.

III. PLAINTIFFS HAVE STATED CLAIMS FOR RELIEF FOR FRAUDULENT INDUCEMENT

A. PLAINTIFFS' COMPLAINT CLEARLY ALLEGES THE ELEMENTS OF FRAUD

To state a claim for fraud, Plaintiffs must show: (1) a false representation or concealment of material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) that does in fact deceive, and (5) results in damage to Plaintiffs. Ragsdale v. Kennedy, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974).

Plaintiff Hittle alleges that the representation was that she would be paid an annual salary of $150,000 for a guaranteed 12 months. Complaint, ¶¶ 12, 13, 14, 49. As a result she was deceived into resigning from her job with EOS Airlines and gave up a retention bonus of $100,000 and a salary of $200,000 a year. Complaint, ¶¶ 16, 17, 52. This representation "was false when it was made," "was reasonably calculated to deceive, made with the intent to deceive Hittle, and in fact deceived Hittle, resulting in damages to Hittle, including but not limited to the loss of a $100,000 retention bonus, and annual wages of $200,000." Complaint, ¶¶ 50, 52.

Plaintiff Warren alleges that the representation was that he would be paid severance pay of $225,000 if his employment was terminated for reasons other than cause as defined in the contract in the first 12 months of his employment. Complaint, ¶¶ 20(d) and (e), 63. As a result, he was deceived into resigning from his job with Kaplan University. Complaint, ¶ 21. This representation "was false when it was made," "was reasonably calculated to deceive Warren, made with the intent to deceive Warren, and in fact deceived Warren, resulting in damages to Warren, including lost wages and benefits and damage to his professional reputation." Complaint, ¶¶ 64, 66.

B. PLAINTIFFS ALLEGED THE TIME, PLACE AND CONTENT OF THE FRAUDULENT REPRESENTATION, THE IDENTIFY OF THE PERSON MAKING IT, AND WHAT WAS OBTAINED AS A RESULT.

Rule 9(b) of the North Carolina Rules of Civil Procedure requires that fraud be pled with particularity. A pleader meets the requirements of Rule 9(b) when his claim alleges the "time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations." Bob Timberlake Collection, Inc. v. Edwards, 176 N.C. App. 33, 39, 626 S.E.2d 315, 321 (2006) (quoting Terry v. Terry, 273 S.E.2d 674, 678, 302 N.C. 77 (1981))(quotations omitted).

Plaintiffs' fraud allegations are alleged exactly as required by Rule 9(b). Hittle alleged the time, place, content, identity, and what was obtained as a result in the Complaint. The content of the misrepresentation was the guaranty of 12 months salary, and this misrepresentation was made to Hittle (a) on February 16, 2007, on the telephone by McCord within thirty minutes of a meeting in person between Hittle, McCord and Lindberg on Park Avenue in New York City, and (b) by letter from McCord dated February 20, 2007. Complaint, ¶¶ 11, 12, 13, 14, 17. As a result of this misrepresentation, Eli Research obtained the services of Hittle as VP of Finance. Complaint, ¶ 51.

Warren alleged the time, place, content, identity, and what was obtained as a result. The content of the misrepresentation was that Warren would be paid $225,000 in severance if he were terminated in the first twelve months of his employment without cause as defined in paragraph 20(e), and this misrepresentation was made to Warren by Lindberg

in writing by letter dated March 12, 2007. Complaint, ¶¶ 19, 20. As a result of this misrepresentation, Eli Research obtained the services of Warren as President/CEO. Complaint, ¶ 65.

C. MALICE, INTENT, KNOWLEDGE, AND OTHER CONDITION OF MIND MAY BE AVERRED GENERALLY.

Rule 9(b) of the North Carolina Rules of Civil Procedure provides that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." N.C. R. Civ. P. 9(b). Defendant ignores this second sentence of Rule 9(b) in an attempt to argue that Plaintiffs "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." Defendant's Brief at p. 5.

In Brandis v. Lightmotive Fatman, Inc., 115 N.C. App. 59, 63, 443 S.E.2d 887, 888-89 (1994), the plaintiff alleged that defendant "orally 'offered employment to plaintiff for fourteen weeks at $2000 a week compensation to work as the gaffer on a film' . . . ." Id., 115 N.C. App. at 63, 443 S.E.2d at 889. Plaintiff reported to work "but was not permitted to complete the contract's stated duration of employment." These allegations were sufficient to allege a breach of contract claim. Id., 443 S.E.2d at 889-90. Plaintiff further alleged a fraudulent inducement claim. The "representation was that [plaintiff] Brandis had a job at $2,000.00 per week for 14 weeks in Wilmington, North Carolina. . . . This representation was material in that it deceived Brandis and induced him to move to New Hanover County and forego other work." Id., 443 S.E.2d at 890. The trial court granted defendant's Rule 12(b)(6) motion to dismiss plaintiffs claims for breach of contract, fraudulent inducement and unfair and deceptive trade practices. The Court of Appeals reversed in part, finding

that plaintiff stated a claim for both breach of contract and fraud. Defendant argued that the fraud claim was defective because the plaintiff failed to allege that the misrepresentation was false when it was made. Id., 115 N.C. App. at 65, 443 S.E.2d at 890. Relying on Williams v. Williams, 220 N.C. 806, 18 S.E.2d 364 (1942), the Court of Appeals concluded that plaintiff's complaint for fraud was sufficient to withstand a Rule 12(b)(6) motion to dismiss. Brandis, 115 N.C. App. at 66-67, 443 S.E.2d at 890-91.

Plaintiffs specifically alleged that the representations made to Hittle and Warren were false when they were made, and in particular, that Lindberg, the ultimate decision maker, did not intend to carry out these representations when they were made. Complaint, ¶¶ 50, 64. Plaintiffs further alleged that it was "the habit or routine practice of Lindberg and Eli Research to make false representations, and that evidence of other crimes, wrongs, or acts will be admissible as proof of motive, intent, and plan." Complaint ¶¶ 53, 67.[4] These allegations meet the scienter pleading requirement of Rule 9(b), and therefore Defendant's Rule 12(b)(6) motion to dismiss must be denied. See, Perkins v. Healthmarkets, Inc., 2007 NCBC 25 ¶ 69 (2007).

IV. PLAINTIFFS' CLAIMS THAT THEY WERE FRAUDULENTLY INDUCED TO QUIT THEIR JOBS AND ACCEPT EMPLOYMENT WITH ELI RESEARCH ARE SEPARATE AND INDEPENDENT TORTS FROM THEIR BREACH OF CONTRACT CLAIMS FOR NONPAYMENT OF PROMISED SEVERANCE PAY.

Plaintiffs' claims that they were fraudulently induced to quit their jobs are distinct from their breach of contract claims, and provide remedies for damages incurred which are

[4] Plaintiffs' evidence will show that Lindberg never intended to pay plaintiffs' severance, that he routinely doesn't pay what he has promised or keep his promises, and that his attitude is "sue me, let them deal with Greg (his lawyer)."

in addition to the severance pay owed for breach of contract. Hittle gave up a $200,000 per year salary and a $100,000 bonus when she quit her job with EOS Airlines in reliance on Defendant's promise of a "pay or play" guaranty of twelve months salary. Complaint, ¶¶ 12, 16, 17, 52. Warren gave up his job with Kaplan University in reliance on Defendant's promise of $225,000 severance if he were terminated without cause in his first year of employment. Complaint, ¶ 21. He suffered lost wages and benefits and damage to his professional reputation as a result. Complaint, ¶ 66.

Plaintiffs' fraudulent inducement claims are far more distinct from their breach of contract claims than the plaintiff's same claims which were allowed to proceed in Brandis v. Lightmotive Fatman, Inc., supra. Plaintiffs are allowed to proceed with all three of their claims because fraudulent inducement to accept employment is distinct from breach of contract, and the breach of a contractual agreement to pay severance allows the court to charge the jury on breach of contract and to award liquidated damages under the Wage and Hour Act. See, Arndt v. First Union Nat'l Bank, 170 N.C. App. 518, 525, 531-32, 613 S.E.2d 274, 280, 283 (2005).

The cases cited in Defendant's brief at p. 5 involve commercial disputes without separate claims and damages (such as the plaintiffs' giving up their jobs), and are not analogous to the case at hand.

V. PLAINTIFFS' COMPLAINT STATES A CLAIM FOR PUNITIVE DAMAGES

Rule 9(k) of the North Carolina Rules of Civil Procedure provides that "[a] demand for punitive damages shall be specifically stated, except for the amount, and the

aggravating factor that supports the award of punitive damages shall be averred with particularity." In the case at hand, Plaintiffs have specifically alleged two aggravating factors, that Defendant's conduct was "willful or wanton" within the meaning of N.C. Gen. Stat. §§ 1D-5(7) and 1D-15(a)(3), and that Defendant's conduct was accompanied by fraud within the meaning of N.C. Gen. Stat. §§ 1D-5(4) and 1D-15(a)(1). Complaint, ¶¶ 54, 68. Plaintiffs further alleged that it was the routine practice of Lindberg to make false representations. Complaint ¶¶ 53, 67.

These allegations meet the pleading requirements of Rule 9(k) and are more than sufficient to give defendant notice of the events or transactions giving rise to plaintiffs' punitive damages claims. See, Zubaidi v. Earl L. Pickett Enters., 164 N.C. App 107, 112-113, 595 S.E.2d 190, 193 (2004)(citing Vernon v. Crist, 291 N.C. 646, 653, 231 S.E.2d 591, 595 (1977) (allowing plaintiffs in a breach of lease/purchase agreement case to verbally amend pleadings to assert punitive damages claim where original complaint alleged defendant's actions were deceitful, malicious and willful).

Defendant's motion to dismiss Plaintiffs' punitive damages claim must be denied.

CONCLUSION

Defendant's Rule 12(b)(6) motions to dismiss are not warranted by the law and should be summarily denied.

Statement of Compliance with Word Count

Counsel for plaintiffs certifies that this brief is within the limitation on the length of briefs pursuant to Rule 15.8.

Request for Oral Argument

In the event that the Business Court decides to retain jurisdiction over this case, plaintiffs' counsel respectfully requests an in person hearing of all pending motions pursuant to Local Rule 15.4(a). Most, if not all, of defendant's legal arguments filed thus far in this case do not comply with Rule 11. Further, defense counsel has indicated his intention to file baseless counterclaims which will force plaintiffs' counsel to file a Rule 11 motion for sanctions. Counsel believes that the court's early guidance may serve to preserve judicial resources in this matter, and that these circumstances constitute special considerations warranting oral argument. Counsel further advises the court that she will be on vacation from February 21 through March 4, and requests that a hearing not be set until after March 5.

This the 21st day of February, 2008.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing Plaintiffs' Brief in Opposition to Defendant's Rule 12(b)(6) Motions to Dismiss was served on counsel for Defendant by electronic delivery to:

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This the 21st day of February, 2008.

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