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| STATE OF NORTH CAROLINA<br><br>BUNCOMBE COUNTY | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION<br>22CVS003924-100 |
| JAMES R. TALLEY,<br><br>Plaintiff,<br><br>v.<br><br>EARTH FARE 2020, INC. and DENNIS HULSING,<br><br>Defendants. | **ORDER AND OPINION ON POST-TRIAL MOTIONS** |

1. **THIS MATTER** is before the Court following the 8 August 2024 filing by Defendants Earth Fare 2020, Inc. and Dennis Hulsing (together, "Defendants") of the *Motion for Judgment Notwithstanding the Verdict* ("Defendants' Motion"), (ECF No. 64 ["Defs.' Mot."]); and the 12 August 2024 filing by Plaintiff James R. Talley of *Plaintiff's Motion for Judgment Notwithstanding the Verdict, New Trial, and Order Requiring Defendants to Provide PowerPoint Presentation* ("Talley's Motion"; and with Defendants' Motion, the "Motions"), (ECF No. 66 ["Pl.'s Mot."]).

2. After a trial, the jury found, in relevant part, that Defendant Dennis Hulsing ("Hulsing") was unjustly enriched by Plaintiff James R. Talley ("Talley"). Upon the jury's findings, and after consultation with the parties, the Court entered its Final Order and Judgment on 1 August 2024. (ECF No. 63 ["Final Or. & J."].)

3. Pursuant to Rules 50 and 59 of the North Carolina Rules of Civil Procedure (the "Rule(s)"), all parties now seek judgment notwithstanding the jury's verdict, with Talley also seeking a new trial on his breach of contract and Wage and Hour Act

claims, along with an order requiring Defendants to provide a PowerPoint presentation used for trial purposes during closing argument.

4. For the reasons set forth herein, the Court **DENIES** the Motions.

*Brooks, Pierce, McLendon, Humphrey & Leonard LLP by Robert J. King, Agustin Martinez, and D.J. O'Brien, III, for Plaintiff James R. Talley.*

*Hall Booth Smith, P.C. by Adam Peoples, for Defendants Earth Fare 2020, Inc. and Dennis Hulsing.*

Robinson, Judge.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. The Parties

5. Talley is a resident of Buncombe County, North Carolina. (Compl. ¶ 1, ECF No. 3.)

6. Hulsing is a resident of Johnson County, Kansas. (Compl. ¶ 3; Answer of Defs. ¶ 3, ECF No. 4 ["Answer"].)

7. Earth Fare 2020, Inc. ("Earth Fare 2020") is a North Carolina corporation with its principal place of business in Buncombe County, North Carolina. (Compl. ¶ 2; Answer ¶ 2.) At all relevant times, Hulsing was a director, officer, and agent of Earth Fare 2020. (Compl. ¶ 4; Answer ¶ 4.)

### B. Facts Relevant to Post-Trial Motions

8. The evidence presented to the jury during trial disclosed the following. Talley co-founded Earth Fare, Inc. ("Earth Fare") in 1994, but later left Earth Fare in 1999. (Compl. ¶¶ 8–9.) Talley then returned to Earth Fare in 2005, (Compl. ¶ 9),

and was later involved in "selling Earth Fare to a private equity firm[,]" (Compl. ¶ 10).

9. In February 2020, Earth Fare announced it was going out of business and began liquidating its stores, and it ultimately filed for bankruptcy protection. (Compl. ¶ 12; Answer ¶ 12.) Thereafter, Talley "began searching for investors to help Earth Fare survive." (Compl. ¶ 13.)

10. Hulsing and Talley were introduced, (Compl. ¶ 15; Answer ¶ 15), and Hulsing ultimately paid approximately $1,500,000.00 in exchange for Earth Fare's brand, intellectual property, and the right to three (3) store leases in Asheville, North Carolina; Roanoke, Virginia; and Athens, Georgia. (Compl. ¶ 17; Answer ¶ 17.)

11. Around 21 April 2020, Earth Fare 2020 was incorporated. (Compl. ¶ 21; Answer ¶ 21.) Hulsing was named CEO of Earth Fare 2020, (Compl. ¶ 22; Answer ¶ 22), and Talley and Hulsing were initial members of Earth Fare 2020's Board of Directors, (Compl. ¶ 23; Answer ¶ 23).

12. Talley served as Chief Sustainability Officer of Earth Fare 2020 from approximately March 2020 through April 16, 2022. (Compl. ¶ 56; Answer ¶ 56.) Additionally, Talley remained on Earth Fare 2020's Board of Directors until his resignation on 14 July 2022. (Compl. ¶ 31; Answer ¶ 31.)

13. During Talley's relationship with Defendants, numerous emails were exchanged pertaining to an alleged agreement between the parties relating to Talley's ability to earn stock options and other forms of compensation. Those emails have become the focus of this litigation.

### C. Procedural Background

14. This action commenced on 20 October 2022 with the filing of Talley's Complaint. (Compl., ECF No. 3.)

15. A trial by jury was held in Buncombe County from 22 July to 25 July 2024, (the "Trial"). (*See* ECF No. 49.)

16. Thereafter, the parties filed their respective Motions, and following the briefing period, a hearing on the Motions was held on 3 December 2024 (the "Hearing"). (*See* ECF No. 81.)

17. The Motions are ripe for resolution.

## II. LEGAL STANDARD

### A. Judgment Notwithstanding the Verdict

18. A motion for judgment notwithstanding the verdict ("JNOV")

> provides the trial court with an opportunity to reconsider the question of the sufficiency of the evidence after the jury has returned a verdict and permits the court to enter judgment in accordance with the movant's earlier motion for a directed verdict and notwithstanding the contrary verdict actually returned by the jury.

*Primerica Life Ins. Co. v. James Massengill & Sons Constr. Co.*, 211 N.C. App. 252, 256–57 (2011) (quotation marks omitted). A JNOV motion tests the sufficiency of the evidence to take the case to the jury and support a verdict for the non-movant. *Id.* at 257. "The party moving for judgment notwithstanding the verdict, like the party seeking a directed verdict, bears a heavy burden under North Carolina law." *S. Shores Realty Servs. v. Miller*, 251 N.C. App. 571, 578 (2017) (quoting *Taylor v. Walker*, 320 N.C. 729, 733 (1987)).

19. A JNOV motion should be denied "if there is more than a scintilla of evidence supporting each element of the non-movant's claim." *Hewitt v. Hewitt*, 252 N.C. App. 437, 442 (2017). "A scintilla of evidence is defined as very slight evidence[,]" *S. Shores Realty Servs.*, 251 N.C. App. at 578, and "[t]he trial court must construe the evidence in the light most favorable to the non-movant and resolve all evidentiary conflicts in the non-movant's favor[,]" *Morris v. Scenera Research, LLC*, 368 N.C. 857, 861 (2016).

**B. <u>New Trial</u>**

20. Rule 59(a) provides that "[a] new trial may be granted to all or any of the parties on all or part of the issues" on several different grounds; however, the Court should only do so where upholding the verdict would result in a miscarriage of justice. *See In re Will of Buck*, 350 N.C. 621, 628 (1999); *see also Strum v. Greenville Timberline, LLC*, 186 N.C. App. 662, 666 (2007) (finding that denying a Rule 59 motion for new trial was not an abuse of discretion even where the jury's verdict was inconsistent because the inconsistencies were surplusage).

21. The decision to grant a new trial is entirely within the trial court's discretion. However, this "discretion [ ] 'must be used with great care and exceeding reluctance.' " *Shaw v. Gee*, 2018 NCBC LEXIS 109, at *15 (N.C. Super. Ct. Oct. 19, 2018) (quoting *Buck*, 350 N.C. at 626). "It is well settled that a verdict should be liberally and favorably construed with a view of sustaining it, if possible . . . ." *Strum,* at 665 (quoting *Guy v. Gould*, 202 N.C. 727, 729 (1932)). The Court has discretionary power to set aside a verdict when it would be unjust to let it stand; and, if no question

of law or legal inference is involved in the motion, his action in so doing is not subject to review on appeal in the absence of a clear abuse of discretion. *Chisum v. Campagna*, 2019 NCBC LEXIS 28, at *50 (N.C. Super. Ct. Apr. 25, 2019) (quoting *Seaman v. McQueen*, 51 N.C. App. 500, 505 (1981)).

22. "Rule 59(a)(7) permits a new trial to be granted for '[i]nsufficiency of the evidence to justify the verdict.' The term 'insufficiency of the evidence' means that the verdict is against the greater weight of the evidence." *Buck*, 350 N.C. at 624 (citation omitted). "It is the jury's function to weigh the evidence and to determine the credibility of witnesses." *Anderson v. Hollifield*, 345 N.C. 480, 483 (1997). A new trial is improper if the jury's determination of a "fact-intensive question" was "reasonable" and did not "amount to a 'substantial miscarriage of justice.' " *Chalk v. Braakman*, 2019 N.C. App. LEXIS 263, at *16 (2019) (quoting *Justus v. Rosner*, 371 N.C. 818, 825 (2018)).

23. Rule 59(a)(8) permits a new trial to be granted for "[e]rror in law occurring at the trial and objected to by the party making the motion[.]" N.C.G.S. § 1A-1, Rule 59(a)(8). In order to obtain relief under Rule 59(a)(8), a party must show a proper objection at trial to the alleged error of law giving rise to the Rule 59(a)(8) motion. *Davis v. Davis*, 360 N.C. 518, 522 (2006).

## III. ANALYSIS

24. The Court first addresses Defendants' Motion, and then turns to Talley's Motion.

**A. Defendants' Motion**

25. At Trial, the jury found that Hulsing (but not Earth Fare 2020) was unjustly enriched by the services rendered by Talley. (Verdict at Issue 11, ECF No. 62 ["Verdict"].) As a result, the jury awarded Talley $195,000.00 to be paid by Hulsing—not Earth Fare 2020. (Verdict at Issue 13.) Defendants now seek JNOV on Talley's unjust enrichment claim on the basis that "Hulsing could not be unjustly enriched by [Talley]'s work securing investors for Earth Fare [2020], because [Talley] was employed from the outset to perform that exact task." (Br. Supp. Defs.' Mot. 5, ECF No. 65 ["Defs.' Br. Supp."].)

26. Defendants contend that because Talley was "employed pursuant to an express contract entitling him to receive a salary for the work he completed for [ ] Hulsing," Talley's claim was not properly before the jury. (Defs.' Br. Supp. 6.) Defendants do concede that they have been "unable to locate a published North Carolina case directly stating" the proposition that "an employer-defendant cannot be unjustly enriched by an employee-plaintiff 'performing the job [they] are paid a salary to perform.' " (Defs.' Br. Supp. 5 n.3 (citation omitted).)

27. However, in support of this contention, Defendants offer evidence that "[Talley]'s own complaint, deposition testimony, and trial testimony all defeat" his claim. (Defs.' Br. Supp. 6.) Defendants provide that Talley (1) "openly acknowledged there was a written agreement governing his compensation for securing investors," (Defs.' Br. Supp. 6–7 (citing Compl.,)); (2) "testified he was paid the $50,000 provided for in the written business plan he presented to [ ] Hulsing," (Defs.' Br.

Supp. 7 (citation omitted)); and (3) "reaffirmed at trial that he and [Hulsing] had an express contract that [Talley] would be compensated in exchange for the work he did on behalf of [ ] Hulsing in securing leases, merchants, and investors for Earth Fare [2020,]" (Defs.' Br. Supp. 7 (citing Transcript Vol. 1 at 21:1–4, ECF No. 64.1 ["Tr. Vol. 1."])).

28. Talley disagrees with Defendants' arguments on this issue in two respects.

29. First, Talley contends that Defendants should be estopped from changing positions on whether a contract was entered into regarding Talley's $50,000 salary. (Pl.'s Br. Opp'n Defs.' Mot. 4, ECF No. 74 ["Pl.'s Br. Opp."].) Talley argues that initially "Defendants [ ] asserted in their Answer that '[Talley] was not employed by either defendant[,]' " (Pl.'s Br. Opp. 4 (quoting Answer 6)), and now Defendants take the position that Talley "was employed pursuant to an express contract entitling him to receive a salary for the work he completed" for Hulsing, (Pl.'s Br. Opp. 4 (quoting Defs.' Br. Supp. 6)). As such, Talley argues that "Hulsing should be judicially estopped from taking [a] clearly inconsistent position" on whether a contract was entered into between the parties. (Pl.'s Br. Opp. 4.)

30. Defendants, in their Reply, contend that this argument is without merit, as "Defendants' affirmative defenses were specifically authorized" by Rule 8(e)(2), which allows a party to "state as many separate claims or defenses as he has regardless of consistency[.]" (Defs.' Reply at 6, ECF No. 77 ["Reply"].)

31. The Court agrees. Defendants were permitted under Rule 8(e)(2) to assert inconsistent affirmative defenses.

32. Second, Talley contends that the receipt of a salary does not hinder Talley's unjust enrichment claim. (Pl.'s Br. Opp. 7–8.) As Talley notes, "[t]he jury made no other finding as to any other alleged contract[,]" and as a result, it is Talley's contention that Hulsing's assertion that "there is some other 'express agreement between [Talley] and [ ] Hulsing' precluding the unjust enrichment claim[ ] fails." (Pl.'s Br. Opp. 6 n.4.)

33. Specifically, Talley relies on Talley's own testimony related to "multiple discussions with [ ] Hulsing 'about the rest of [his] compensation'[,]" (Pl.'s Br. Opp. 8 (quoting Tr. Vol. 1 at 32)), and the emails between Hulsing and Talley regarding "additional compensation promised to [ ] Talley beyond his base salary[,]" (Pl.'s Br. Opp. 8 (citing Trial Ex. 2)). Talley, relying on this evidence, contends that his "receipt of a salary does not foreclose his unjust enrichment claim." (Pl.'s Br. Opp. 8.)

34. The Court determines that there was sufficient evidence presented at Trial that Talley rendered services to Hulsing with the expectation that he would receive additional compensation separate and apart from his base salary of $50,000.00. As such, the jury's finding that Hulsing was unjustly enriched by Talley's conduct in the amount of $195,000.00 is well-supported based on the evidence presented at Trial.

35. Therefore, the Court hereby **DENIES** Defendants' Motion.

**B. <u>Talley's Motion</u>**

36. At Trial, the jury found that Defendants did not enter into any agreement with Talley. (Verdict at Issues 1, 2.) As a result, the jury was instructed not to answer issues relating to Talley's Wage and Hour Act claim. (Jury Instructions at 11, ECF

No. 61 ["Jury Instr."].) Talley now seeks JNOV on his breach of contract and Wage and Hour Act claims, or, alternatively, a new trial on these same issues. (Br. Supp. Pl.'s Mot. 1, ECF No. 67 ["Pl.'s Br. Supp."].) Additionally, Talley requests production of Defendants' PowerPoint presentation utilized during closing arguments. (Pl.'s Br. Supp. 8.)

37. The Court will first address Talley's Motion as it relates to his request for JNOV, and then turn to Talley's alternative request for a new trial.

**1. Judgment Notwithstanding the Verdict**

38. First, Talley seeks JNOV as to his breach of contract claims, arguing that "the evidence presented by Mr. Talley at trial established that he entered into an agreement with Mr. Hulsing." (Pl.'s Br. Supp. 3.) Talley contends that "Hulsing's admissions during his deposition and in his written communications, combined with the other extensive trial evidence summarized above, conclusively established at trial that the parties entered into an agreement." (Pl.'s Br. Supp. 5–6.) Further, Talley argues that "Defendants' breach of contract would also constitute a violation of the Wage and Hour Act," such that if Talley is entitled to JNOV on his breach of contract claims, he is similarly entitled to JNOV on his Wage and Hour Act claims. (Pl.'s Br. Supp. 6 n.3.)

39. Defendants disagree, arguing that "Plaintiff's testimony not only failed to show a prima facie case as to the *existence* of a subsequent contract, but also as to any *breach by the Defendants*." (Br. Opp'n Pl.'s Mot. 5, ECF No. 75 ["Defs.' Br. Opp."].) As to Talley's Wage and Hour Act claim, Defendants contend that "[Talley] does not

include a single assertion that he even presented evidence [at trial] to support that claim. . . [n]or did [Talley] clarify which section of the [Wage and Hour Act] he was entitled to judgment" on. (Defs.' Br. Opp. 6.)

40. The Court agrees with Defendants, and finds that the jury's conclusion that no enforceable agreement had been entered into between Talley and either of the Defendants is well-supported based on the evidence presented at Trial. Accordingly, Talley's Motion is **DENIED** in part as to his request for JNOV for his breach of contract claim, and as a result, Talley's Motion is similarly **DENIED** in part as to his request for JNOV on his Wage and Hour Act claim.

**2. New Trial on Talley's Breach of Contract Claims**

41. In the alternative, Talley contends he is entitled to a new trial on his breach of contract claims for three reasons: (1) "there was insufficient evidence to support the jury's verdict against Mr. Talley on his breach of contract claims against Defendants[,]" (Pl.'s Br. Supp. 7); (2) "Defendants' counsel's misstatement of law, . . . and the absence of a correcting or clarifying instruction by the Court, created a high probability of jury confusion[,]" (Pl.'s Br. Supp. 8–9); and (3) the Court "did not include [Talley]'s requested instruction in the final instructions to the jury," (Pl.'s Br. Supp. 9).

**a. Sufficiency of the Evidence**

42. First, as to the sufficiency of the evidence presented at Trial, Talley argues that the "trial evidence presented by [ ] Talley conclusively proved that the parties

entered into an agreement," and "Defendants did not show otherwise at trial[.]" (Pl.'s Br. Supp. 8.)

43. As a preliminary matter, even if there was an enforceable contract between Talley, on the one hand, and one or more of the Defendants, on the other hand, Talley was required to show both the existence of a contract and its breach. At Trial, Talley admitted on cross-examination that he was paid the salary and benefits expressly called for in the purported employment agreement he entered with Earth Fare 2020. Talley contended, however, that there were other promises made by Defendants with respect to his compensation that were not provided to him as agreed.

44. The burden was clearly on Talley to convince the jury of the existence of both of these elements.

45. Defendants argue that Talley's "own evidence defeated his breach of contract claim," as his "own testimony presented sufficient evidence upon which the jury could, and did, reasonably infer that the parties did not enter into a contract governing [compensation in addition to his salary such as] commissions or awards of equity in August 2020." (Defs.' Br. Opp. 7.)

46. The Court determines that because there was sufficient evidence to support the jury's conclusion either: (1) that no agreement in addition to salary payment had been entered into between Talley and either of the Defendants; or (2) if there was such an agreement, it was not breached, the evidence does not mandate entry of judgment in Talley's favor on the claim for breach of contract.

**b. Alleged Misstatement of Law During Closing Remarks**

47. Second, as to the statements made by Defendants' counsel during closing arguments and Talley's contention that the Court should have provided a clarifying or correcting instruction thereafter, Talley argues that "Defendants' counsel made a misstatement of law to the effect that [ ] Talley had to prove that a contract was actually signed in order for [ ] Talley to prevail on his breach of contract claim." (Pl.'s Br. Supp. 8.) As such, Talley contends without a "correcting or clarifying instruction by the Court" following Talley's objection, this alleged misstatement "created a high probability of jury confusion." (Pl.'s Br. Supp. 9.)

48. As a preliminary matter on this issue, while Defendants argue that Talley cites no authority "to support his contention that this Court can order defense counsel to produce illustrative summaries used during a closing argument[,]" and fails "to explain the relevance, let alone procedure, for compelling counsel to produce materials which are not part of the official record of transcript[,]" (Defs.' Br. Opp. 8), the PowerPoint presentation was provided to Talley's counsel during the hearing and thereafter filed on the record on 3 December 2024. (*See* ECF No. 82.) As a result, Talley's Motion is **DENIED** as moot as to this request.

49. Additionally, the Court notes that Talley's counsel did not properly specify or document its objection to Defendants' closing argument to the jury and no party requested that the final arguments be recorded. The Court concludes this failure is a separate and independent basis for denial of Talley's request for relief here.

### c. Exclusion of Proposed Jury Instruction

50. Talley argues that he requested that the Court include a jury instruction, providing that

> [For there to be an enforceable contract, t]here is no requirement that the offer be made in any particular form. A contract may be made orally between parties. The fact that a contract was not reduced to writing does not make it unenforceable. Although a contract may be made orally, you may consider written documents describing the contract as evidence of the parties' agreement or its terms.

(Pl.'s Br. Supp. 9; *see* Proposed Jury Instructions 15, ECF No. 55 ["Prop. Jury Instr."].) Talley contends that the Court should have included this instruction as it "was a correct statement of law and supported by the evidence at trial." (Pl.'s Br. Supp. 9.)

51. Defendants disagree, initially objecting to the inclusion of this instruction as it "is already included in the pattern [instruction]." (Prop. Jury Instr. 15.) Additionally, Defendants represent that the instruction provided by the Court "clearly addressed [Talley's] request in substance and made clear that a signed writing was not necessary for the jury to find the parties entered into a contract." (Defs.' Br. Opp. 9–10.)

52. The Court agrees with Defendants. Assuming Talley's request was proper, and the "request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, *in substance at least*[.]" *Minor v. Minor*, 366 N.C. 526, 531 (2013) (emphasis added) (quoting *Calhoun v. State Highway & Pub. Works Comm'n*, 208 N.C. 424, 426 (1935)). The instructions given by the Court to the jury at Trial provided that

> An "offer" is an expression of willingness to do or refrain from doing a particular thing. There is no requirement that the offer be made in any particular form. *It may be made orally, in writing, or by conduct which reasonably indicates the offering party's intention to be bound if the other party accepts.* An "acceptance" is an expression of assent to the offer. If the offer does not specify a particular method, manner, or form of acceptance, acceptance can be made in any manner and by any medium reasonable under the circumstances. *Acceptance may be oral, in writing, or by conduct which reasonably signifies that the accepting party assents to each material term of the offer.* However, if the offer specifies circumstances, or circumstances unambiguously indicate, a particular method, manner, or form of acceptance, acceptance must be made in the method, manner, or form specified or indicated.

(Jury Instr. 7 (emphasis added).) As such, the jury was instructed that an offer and an acceptance may be oral, in writing, or by conduct which reasonably signifies the parties' intention. The instruction given to the jury was, in substance, the same as the instruction sought by Talley.

53. Therefore, Talley's argument as it relates to the Court's exclusion of his proposed jury instruction related to oral contracts does not pass muster as a reason to grant a new trial on Talley's breach of contract claims.

**3. New Trial on Talley's Wage and Hour Act Claims**

54. Finally, Talley contends he is entitled to a new trial on his Wage and Hour Act claims because the Court provided the jury with an incorrect instruction on the law. (Pl.'s Br. Supp. 10.) Talley argues that the "Wage and Hour Act does not require that an employee prove the existence of a contract . . . for the employee to be entitled to unpaid wages under the Act." (Pl.'s Br. Supp. 10–11 (citing N.C.G.S. § 95-25.1 *et seq.*).)

55. Talley contends that he "presented evidence that he rendered services to Defendants, that Mr. Hulsing promised him payment for those services, and that Mr. Talley was ultimately not paid for those services." (Pl.'s Br. Supp. 11.) As a result, Talley argues "[t]his evidence entitled Mr. Talley to have his Wage and Hour Act claim considered by the jury, even if the jury rejected his separate breach of contract claim." (Pl.'s Br. Supp. 11.)

56. In response, Defendants offer that as Talley was "seeking unpaid wages based on a purported agreement that provided for him to receive commissions based on investor funds he raised" on Defendants' behalf, the instruction given by the Court directing the jury to only consider the Wage and Hour Act claim if they found there was a contract governing such compensation was correct. (Defs.' Br. Opp. 11.) Further, Defendants argue that Talley "expressly testified that he received a $50,000 salary in exchange for the work he did at [ ] Hulsing's direction." (Defs.' Br. Opp. 12 (citing Tr. Vol. 1 at 20:01–32:02).) As such, Defendants contend that Talley's own evidence presented shows that "he met the conditions to receive, and did receive, the wages to which he was entitled." (Defs.' Br. Opp. 12.)

57. First, the Court notes that there appear to be two separate "contractual" arguments at issue: (1) the employment contract between Talley and Earth Fare 2020, in which Talley received a salary of $50,000.00 in exchange for his role as Chief Sustainability Officer; and (2) the alleged "agreement" for stock, stock options, and other forms of compensation discussed by email.

58. As it relates to Talley's employment contract, it appears based on the Court's review of the record, and the evidence presented at Trial, that it is undisputed that Talley was paid a $50,000.00 salary as a result of the work he performed for Earth Fare 2020. (*See* Tr. Vol. 1 at 20:01–32:02.) As such, the Wage and Hour Act claim brought by Talley cannot be premised on this contract, as he admits he was paid the agreed-to salary for the work he performed.

59. However, Talley appears to argue that his Wage and Hour Act claim is based on an alleged agreement by email with Hulsing, either individually or on behalf of Earth Fare 2020, for stock, stock options, and other forms of compensation for which he was entitled to the benefits of the agreement. (Pl.'s Br. Supp. 10.) As such, the Court instructed the jury that if they found that an agreement had been reached between Talley and either of the Defendants as to those terms, then they were to consider the Wage and Hour Act claim accordingly. (*See* Jury Instr. 11.) Likewise, if the jury did not find an agreement existed related to these terms, then they were not to consider the Wage and Hour Act claim as there was no employment relationship, apart from Talley's $50,000.00 salary which he admits he was paid, that would entitle Talley to stock, stock options, or other forms of compensation. (*See* Jury Instr. 11.)

60. Talley relies on *Martinez-Hernandez v. Butterball, LLC* for the contention that the Wage and Hour Act "contains no requirement of an express contract or agreement to pay for particular work. Rather, the statute applies to all time an employee has been 'suffer[ed] or permit[ted] to work.' " 578 F. Supp. 2d 816, 821 (E.D.N.C. 2008); (*see* Pl.'s Reply 9, ECF No. 79 ["Pl.'s Reply"]).

61. In *Butterball*, the plaintiffs alleged that Butterball "failed to pay them . . . regular and overtime pay for actual, compensable time worked[,]" which included "time spent changing into and out of personal protective gear required by Butterball, time spent traveling to and waiting at production lines, and time that Butterball automatically deducted for breaks." *Id.* at 818. Butterball sought summary judgment on this claim, arguing that "plaintiffs ha[d] failed to establish that Butterball contracted to pay plaintiffs for the time plaintiffs spent engaging in such activities as changing into and out of protective gear, walking to and from workstations and waiting at workstations for production lines to start." *Id.* at 820.

62. The Court in *Butterball* found in favor of the plaintiffs, explaining that

> were the Court to interpret [the Wage and Hour Act] as requiring plaintiffs to prove that their employer expressly agreed to pay them for particular services performed . . . an employer would be able to avoid payment of *any* wages to his employees by simply claiming that the services rendered, although for the benefit of the employer, were something other than 'work'.

*Id.* at 822.

63. In this case, Defendants do not argue that Talley's responsibilities and obligations were not "work" as defined in the Wage and Hour Act, and instead contend that the work performed by Talley had already been expressly contracted for and Talley was compensated in accordance with that express agreement. (Defs.' Br. Opp. 12.) In fact, Talley admitted at Trial that he was paid a salary of $50,000.00 for the whole "bundle of jobs" that he performed "up until [he] resigned from working." (Trial Vol. 1 at 26:18–22; *see also* Trial Vol. 1 at 31:6–10; 31:25–32:04.)

64. While Talley argues that he "presented evidence establishing that he was . . . promised additional compensation in the form of stock, stock options, and payments relating to investor funds[,]" (Pl.'s Reply 8), it appears Talley was justly compensated at $50,000.00 annually for the work he expressly contracted to perform for Earth Fare 2020, and as determined by the jury at Trial in this case, the parties did not reach another agreement for any extra compensation that Talley was attempting to bargain for. Therefore, the reasoning in *Butterball* is inapplicable to this dispute.

65. Therefore, Talley's Motion is hereby **DENIED** in part as it relates to his request for a new trial on his Wage and Hour Act claims.

## IV. CONCLUSION

66. For the foregoing reasons, the Court hereby **DENIES** the Motions.

**SO ORDERED**, this the 12th day of December, 2024.

/s/ Michael L. Robinson
Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases