

STATE OF NORTH CAROLINA  
COUNTY OF [REDACTED]

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. [REDACTED]

[REDACTED] and  
[REDACTED],  
Plaintiff

v.

[REDACTED] LLC,  
[REDACTED] and  
[REDACTED]  
Defendants

**BRIEF IN SUPPORT OF  
DEFENDANTS' [REDACTED] AND  
[REDACTED] MOTION FOR SUMMARY  
JUDGMENT**

Defendants, [REDACTED] LLC (' [REDACTED] and [REDACTED] ([REDACTED] respectfully move this Court to grant summary judgment in their favor since there are no genuine issues of material fact and are entitled to judgment as a matter of law.

The totality of the Plaintiffs claims rests on the notion of a legally enforceable contract with [REDACTED] and [REDACTED]. As the foregoing demonstrates, in addition to the absence of dispute as to any material facts, [REDACTED] and [REDACTED] are entitled to judgment as a matter of law since there was no legally enforceable contract, and even to the extent one exists, it is legally barred.

**STATEMENT OF FACTS**

On February [REDACTED], [REDACTED] wrote two checks. One to [REDACTED] LLP for \$ [REDACTED],<sup>1</sup> and another, to [REDACTED], [REDACTED]'s son, and former [REDACTED] manager, in the

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<sup>1</sup> Exhibit 1.

amount of \$ [REDACTED].<sup>2</sup> The same day, [REDACTED] e-mailed [REDACTED] stating [REDACTED]0 of [REDACTED] was intended for his personal use.<sup>3</sup> [REDACTED] deposited the first check into [REDACTED] Bank [REDACTED] account and wired out the company account, [REDACTED] to himself.<sup>4</sup> On July [REDACTED] [REDACTED] paid [REDACTED] \$ [REDACTED] to partially satisfy the amount owed,<sup>5</sup> a fact which [REDACTED] accepts as true. On [REDACTED] [REDACTED], [REDACTED] e-mailed [REDACTED] clarifying the remaining \$ [REDACTED] was understood as a loan to [REDACTED]<sup>6</sup> In response, [REDACTED] stated he would be sending a promissory note. Despite the [REDACTED] loan, no promissory note was ever signed by the parties, nor was [REDACTED] ever identified as a guarantor in his personal capacity. Finally, after more than four years after their last exchange, on [REDACTED], the Plaintiffs filed the instant Complaint.

## ARGUMENT

### **I. [REDACTED] and [REDACTED] are Entitled to Summary Judgment Because Plaintiffs Cannot Substantiate Their Claims for Breach of Contract and Even Presuming the Existence of a Contract, Their Claims are Barred by Law**

#### A. Standard of Review

Under Rule 56(a) of the North Carolina Rules of Civil Procedure, “summary judgment is properly entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *Patterson v. Worley*, 828 S.E.2d 744, 747 (N.C. Ct. App. 2019). “In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial and must be viewed in a light most favorable to the non-

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<sup>2</sup> Complaint ¶¶ 3, 6.

<sup>3</sup> Exhibit 2.

<sup>4</sup> Exhibit 3.

<sup>5</sup> Exhibit 4.

<sup>6</sup> Exhibit 2.

moving party.” *Id.* Once the moving party establishes there is no triable issue of material fact, “the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial.” *Id.* Said another way, summary judgment is appropriate when an essential element of a plaintiff’s claim is either non-existent or unsupported by evidence, or if a plaintiff cannot overcome an affirmative defense which would bar the claim. *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 84, 609 S.E.2d 259, 261 (2005).

B. Plaintiffs Fail to Demonstrate the Existence of a Valid Contract as a Matter of Law

Under North Carolina law, a breach-of-contract claim requires “(1) [the] existence of a valid contract and (2) breach of the terms of that contract.” *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citing *Jackson v. Carolina Hardwood Co.*, 120 N.C. App. 870, 871, 463 S.E.2d 571, 572 (1995)). To constitute an enforceable oral agreement, “the parties must express themselves in such terms that the Court can ascertain to a reasonable degree of certainty what they intended by their agreement.” *Thomas v. McMahon*, No. 08 CVS 24887, 2015 NCBC LEXIS 67, at \*26 (N.C. Super. Ct. June 23, 2015) (quoting *F. Indus., Inc. v. Cox*, 45 N.C. App. 595, 599, 263 S.E.2d 791, 793 (1980)). It must be clear there has been “a meeting of the minds,” meaning “that the parties assent to the same thing in the same sense.” *Pike v. Wachovia Bank & Tr. Co.*, 274 N.C. 1, 11, 161 S.E.2d 453, 462 (1968). “When there has been no meeting of the minds on the essentials of an agreement, no contract results.” *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 912 (1998). More relevant to the facts at issue here, to recover on a promissory note, “the party seeking relief must show execution, delivery, consideration, demand, and nonpayment.” *Kane Plaza Assocs. v. Chadwick*, 126 N.C. App. 661, 664, 486 S.E.2d 465, 467 (1997) (citation omitted).

i. ██████'s Loan Was Negotiable Instrument and Not a Contract

Under N.C. Gen. Stat. §25-3-104, a negotiable instrument is statutorily defined as (1) an unconditional promise or order to pay a fixed amount of money—with or without interest—(2) if it is payable to bearer or to order at the time it is issued or first comes into possession of a holder and is payable at a definite time. Here, ██████, according to his own Complaint, agreed to loan Defendants ██████ with an applicable interest rate of ██████.<sup>7</sup> Essential to this argument is the fact that apart Defendants' assurances, *no other conditions were attached to this verbal understanding*.<sup>8</sup> In other words, this was an agreement to repay a loan plus interest. Consequently, under well-established North Carolina law, ██████'s loan clearly amounted to a negotiable instrument, (and, specifically, a promissory note), and not a contract. Moreover, while not plead as such in ██████ Complaint, its plain language confirms it was not a legally enforceable contract, but a negotiable instrument.

ii. *The Absence of Any Other Conditions Apart from Repayment and Interest Confirms ██████ Promissory Note Is Not a Contract Because it Lacks Consideration*

To reiterate the argument raised above, in which ██████ loan amounts to a mere negotiable instrument, even a promissory note cannot be a legally enforceable contract absent adequate consideration. *Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 75, 715 S.E.2d 273, 282 (2011). "A bare promise, made without consideration, creates no legal rights and imposes no legal obligations." *Kingsdown, Inc. v. Hinshaw*, 2016 NCBC LEXIS 15, at \*24 (N.C. Super. Ct. February 17, 2016) (quoting *Stonestreet v. S. Oil Co.*, 226 N.C. 261, 263, 37 S.E.2d 676, 677 (1946)); see also *Watson Elec. Constr. Co.*, 160 N.C.

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<sup>7</sup> Complaint ¶¶ 4-6.

<sup>8</sup> Complaint ¶6.

App. at 655, 587 S.E.2d at 94 (“Consideration is the glue that binds parties together, and a mere promise, without more, is unenforceable.”). At issue here is whether [REDACTED]’s loan provided consideration, which “consists of any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee.” *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 590, 619 S.E.2d 577, 581 (2005) (“[O]ur courts have held that consideration which may be withdrawn on a whim is illusory consideration which is insufficient to support a contract.”); *see also Milner Airco, Inc. of Charlotte, N.C. v. Morris*, 111 N.C. App. 866, 870, 433 S.E.2d 811, 814 (1993) (holding contract unenforceable for lack of consideration because “while reciting consideration, [the contract] does not bind the employer to any promise”).

Here, even if it were demonstrated Plaintiffs maintained a promissory note with [REDACTED] or [REDACTED] there is no evidence demonstrating they received any consideration for executing an otherwise nonexistent promissory note. *Bumgardner v. Groover*, 245 N.C. 17, 22, 95 S.E.2d 101, 105 (1956). Consequently, because the verbal promissory note at issue here lacks consideration, it is not a legally enforceable contract. Thus, the Plaintiffs’ claims should be dismissed as a matter of law.

C. Even if a Contract Had Existed, Plaintiffs’ Claims are Barred by the Applicable Statute of Limitations

Even presuming a contract existed between Plaintiffs and/or [REDACTED] or [REDACTED] they failed to produce any evidence of when it was breached. In North Carolina, “[t]he statute of limitations for contracts . . . commences on the date the contractual promise is broken.” *Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 671, 384 S.E.2d 36, 41 (1989). *See also* N.C. Gen. Stat. § 1-52(1) (the limitations period “begins to run on the date the promise is broken”); *Glover v. First Union Nat’l Bank*, 109 N.C. App. 451, 455, 428 S.E.2d 206, 208 (1993) (same).

Here, according to their Complaint on [REDACTED], "Plaintiff's have made several attempts to contact discuss payment of the loan." "Defendants have not made any payments on the loan. And have ignored the Plaintiff's[.]"<sup>9</sup> Hence, the Plaintiffs contend the breach of the verbal agreement took place on [REDACTED]. Consequently, if the purported contract was breached on [REDACTED], Plaintiff's had until [REDACTED], to file their breach of contract claims under North Carolina law. Yet, the Plaintiffs did not file suit until [REDACTED], and *more* than three years after the purported breach. Consequently, Plaintiffs' claim is barred by the statute of limitations. Moreover, once the statute of limitations is properly pled, and the facts are not in conflict, summary judgment is appropriate. *Soderlund v. Kuch*, 143 N.C. App. 361, 546 S.E.2d 632 (2001). The burden of proof shifts to the plaintiff to show that the action was filed within the statute of limitations. *Id.* at 361. Since there is an absence of a dispute of material fact as to the breach and the applicable statute of limitations, Plaintiffs' claims should be dismissed as a matter of law.

D. Even if a Contract Existed, Plaintiffs' Claims are Barred by the Applicable Statute of Frauds

"Generally, a promise to answer for another's debt falls within the statute of frauds and must be in writing to be enforceable." [REDACTED] v. *Artisan 2510, Inc.*, 233 N.C. App. 107, 758 S.E.2d 482 (2014). It should also be signed by the party against whom the claim is made. N.C. Gen. Stat. §22-1 (2013). A guaranty contract is subject to the parol evidence rule which "prohibits the consideration of the evidence as to anything which happened prior to or simultaneously with the making of a contract which would vary the terms of the agreement." *R.B. Cronland Bldg. Supplies, Inc. v. Sneed*, 162 N.C. App. 142, 145-46, 589 S.E.2d 891, 893

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<sup>9</sup> Complaint ¶7

(2004) (internal citations omitted). “If a contract falls within the statute of frauds, the party against whom enforcement is sought may generally avoid enforcement if there is no written memorandum of that party’s assent to the contract.” *Plasma Ctrs. of Am., LLC v. Talecris Plasma Res., Inc.*, 222 N.C. App. 83, 89, 731 S.E.2d 837, 842 (2012).

There is no allegation in the Complaint as to how [REDACTED] is liable to Plaintiffs’ claim for the amount advanced to [REDACTED]. If the Plaintiffs allege that [REDACTED] is a guarantor, he can avoid enforcement of a breach of contract and fraud claims since the Statute of Frauds mandates promise to pay another person’s debt should be in writing. Plaintiffs admit they entered into a verbal agreement, and there was no reference to guaranty by [REDACTED] on behalf of [REDACTED]. Thus, absent a written guaranty, applicable the Statute of Funds bars Plaintiffs’ claims, and they should be dismissed as a matter of law.

**II. [REDACTED] and [REDACTED] are Entitled to Summary Judgment Since Plaintiffs Fail to Produce Evidence in Support of and Fraud Claims and Even if They Had, Their Fraud Claims are Time-Barred**

**A. Plaintiffs Fail to Produce Evidence in Support of Their Fraud Claims**

The “parties are bound by admissions and allegations within their pleadings unless withdrawn, amended, or otherwise altered pursuant to N.C.R. Civ. P. 15.” *Webster Enters. v. Selective Ins. Co.*, 125 N.C. App. 36, 41, 479 S.E.2d 243, 247 (1997). “Such judicial admissions have ‘the same effect as a jury finding and [are] conclusive upon the parties and the trial judge.’” *Id.* (internal citation omitted). A contrary position cannot be taken by the pleader thereafter. *Id.*

Here, there is undisputed evidence that [REDACTED] \$ [REDACTED] to [REDACTED] [REDACTED] on [REDACTED]

[REDACTED].<sup>10</sup> This payment was admitted by the Plaintiffs, and it negates the allegation that

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<sup>10</sup> Exhibit 4. In fact, Plaintiffs admits that [REDACTED] had repaid [REDACTED] to them. (See Request No. 5 in Defendants [REDACTED] and [REDACTED] Requests for Admission.).

██████████ or ██████████ had any fraudulent intent. Despite their repayment, Plaintiffs have not produced any tangible evidence that ██████████ and ██████████ intended to defraud Plaintiffs in any way. Hence, because the Plaintiffs' fraud claims are unsupported by any material facts, they should be dismissed as a matter of law.

B. Plaintiffs' Fraud Claims are Time-Barred by the Applicable Statute of Limitations

“Ordinarily, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact.” *Everts v. Parkinson*, 147 N.C. App. 315, 319, 555 S.E.2d 667, 670 (2001). “However, when the bar is properly pleaded, and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, and summary judgment is appropriate.” *Id.* And according to the applicable statute of limitations, N.C.G.S. §1-52(9), fraud claims made after three years are time-barred. *See* N.C.G.S. §1-52(9); *Guyton v. FM Lending Servs.*, 199 N.C. App. 30, 35, 681 S.E.2d 465, 471 (2009). The applicable period only begins to run once a plaintiff discovers such fraud. *Guyton*, 199 N.C. App. at 35.

Here, Plaintiffs' Complaint alleges Defendants ██████████ and ██████████ “with the intent to defraud the Plaintiffs, took the ██████████ dollars (\$██████████) loan amount from the Plaintiffs, with no intention of paying the Plaintiffs back[.]”<sup>11</sup> As mentioned above, the Plaintiffs demanded repayment on ██████████ ██████████.<sup>12</sup> The Plaintiffs' own statements suggest that on ██████████, they believed the Defendants had intended to defraud them. Hence, the Plaintiffs purportedly discovered of any fraud was on ██████████. Given the applicable three-year statute of limitations, they only had until ██████████, to file their complaint.

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<sup>11</sup> Complaint ¶18.

<sup>12</sup> *Id.* at ¶17.

Yet, they only filed their complaint in [REDACTED]. Hence, as with their breach of contract claims, their fraud claims are time-barred, and therefore, their claims should be dismissed as a matter of law.

CONCLUSION

For the foregoing reasons, Defendants, [REDACTED] and [REDACTED] respectfully request this Court grant their Motion for Summary Judgment.

This the [REDACTED] day of [REDACTED].

[REDACTED], PLLC

By: \_\_\_\_\_

N.C. State Bar [REDACTED]

N.C. State Bar [REDACTED]

*Attorneys for Defendants,*

*LLC and [REDACTED]*

NORRA LEGAL

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing **BRIEF IN SUPPORT OF DEFENDANTS [REDACTED] LLC AND [REDACTED] [REDACTED] MOTION FOR SUMMARY JUDGMENT** was served upon all parties by facsimile and by depositing a copy of the same in an official depository of the United States Postal Service in a postage-paid envelope addressed to:

[REDACTED]  
[REDACTED]  
[REDACTED]

Telephone: [REDACTED]

Facsimile: [REDACTED]

*Attorney for Plaintiffs*

This the [REDACTED] day of [REDACTED].

\_\_\_\_\_  
[REDACTED]  
[REDACTED]

NORRA LEGAL