Appendix A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1488

BARRINGTON BOYD,

Plaintiff - Appellant,

v.

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA; TIAA-CREF INDIVIDUAL AND INSTITUTIONAL SERVICES, LLC,

Defendants - Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Graham C. Mullen, Senior District Judge. (3:17-cv-00224-GCM)

Submitted: April 3, 2020 Decided: May 29, 2020

Before GREGORY, Chief Judge, and HARRIS and QUATTLEBAUM, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Kristen E. Finlon, ESSEX RICHARDS, Charlotte, North Carolina, for Appellant. Rebecca K. Lindahl, Michaela C. Holcombe, KATTEN MUCHIN ROSENMAN LLP, Charlotte, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Barrington Boyd appeals the district court's order denying his partial motion for summary judgment and granting his former employer Teachers Insurance & Annuity Ass'n of America and TIAA-CREF Individual and Institutional Services, LLC ("TIAA")'s motion for summary judgment. On appeal, Boyd's sole claim is that TIAA breached a settlement agreement by including language on the Financial Industry Regulatory Authority, Inc. ("FINRA")'s Form U5 related to his termination that was not bargained for. Finding no error, we affirm.

We "review[] de novo [a] district court's order granting summary judgment." *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 565 n.1 (4th Cir. 2015). "A district court 'shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)). When a "district court's grant of summary judgment disposed of cross-motions for summary judgment, we consider each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." *Defenders of Wildlife v. N.C. Dep't of Transp.*, 762 F.3d 374, 392 (4th Cir. 2014) (internal quotation marks omitted).

To establish a breach of contract claim under North Carolina law, a plaintiff must establish "(1) existence of a valid contract and (2) breach of the terms of the contract." *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 827 S.E.2d 458, 472 (N.C. 2019) (brackets and internal quotation marks omitted). In interpreting the terms of the contract, "[i]f the language is clear and only one reasonable interpretation exists, the courts must enforce the

contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein." *Hodgin v. Brighton*, 674 S.E.2d 444, 446 (N.C. Ct. App. 2009) (internal quotation marks omitted).

We conclude that the settlement agreement did not prohibit TIAA from including the disputed language on the Form U5. The settlement agreement was clearly directed at amending the termination explanation in the U5. However, FINRA required TIAA to provide an explanation for the amendment. The settlement agreement was silent as to how to explain the amendment. TIAA's explanation provides context to the reason for termination contained in both U5s. As a licensed security professional represented by counsel in drafting the settlement agreement, the district court rightfully concluded that Boyd cannot claim ignorance of the fact that FINRA required an explanation for the amendment to excuse his failure to negotiate language for the amendment. *See Helms v. Schultze*, 588 S.E.2d 524, 527 (N.C. Ct. App. 2003) ("[T]he court's only duty is to determine the legal effect of the language used and to enforce the agreement as written." (internal quotation marks omitted)). Moreover, the mere fact that the agreement was silent as to how TIAA should have explained the amendment does not render the settlement agreement ambiguous.* *See Myers v. Myers*, 714 S.E.2d 194, 198 (N.C. Ct. App. 2011).

* In light of our conclusion that TIAA did not breach the settlement agreement, we need not address the parties' arguments as to whether Boyd waived his claim by subsequently negotiating a second amendment to the U5 in December.

(recognizing contract "is ambiguous if the writing leaves it uncertain as to what the agreement was" (brackets and internal quotation marks omitted)).

Therefore, we affirm the district court's order. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO. 3:17-CV-00224-GCM

BARRINGTON BOYD,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**ORDER**
	)	
TIAA-CREF INDIVIDUAL AND INSTITUTIONAL SERVICES, LLC TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA,	)	
	)	
Defendants.	)	
	)	

THE COURT HELD a hearing in this matter on March 27, 2019. For the reasons stated in open court, Defendant's Motion for Summary Judgment (Doc. No. 20) is **GRANTED** and Plaintiff's Motion for Partial Summary Judgment (Doc. No. 21) is **DENIED**.

SO ORDERED.

Signed: March 27, 2019

Graham C. Mullen
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

BARRINGTON BOYD,	)	
	)	
Plaintiff,	)	DOCKET NO. 3:17-CV-224
	)	
vs.	)	
	)	
TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA; TIAA-CREF INDIVIDUAL & INSTITUTIONAL SERVICES, LLC,	)	
	)	
Defendants.	)	
	)	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE GRAHAM C. MULLEN
UNITED STATES SENIOR DISTRICT COURT JUDGE
WEDNESDAY, MARCH 27, 2019, AT 2:30 P.M.

APPEARANCES:

On Behalf of the Plaintiff:

KRISTEN E. FINLON, ESQ.
Essex Richards, P.A.
1701 South Boulevard
Charlotte, North Carolina 28203

On Behalf of the Defendants:

REBECCA K. LINDAHL, ESQ.
MICHAELA C. HOLCOMBE, ESQ.
Katten Muchin Rosenman LLP
550 S. Tryon Street, Suite 2900
Charlotte, North Carolina 28202

ALSO PRESENT:

HEATHER WHITE, ASSOCIATE GENERAL COUNSEL

JILLIAN M. TURNER, RMR, CRR, CRC
Official Court Reporter
United States District Court
Charlotte, North Carolina

(Court called to order on Wednesday, March 27, 2019, commencing at 2:30 p.m.)

P R O C E E D I N G S

THE COURT: All right. We're here on the matter of Barrington Boyd against TIAA motions for summary judgment, and we have claims of retaliation and breach of contract from the plaintiff, and the issues have been briefed.

How long do each of you think you're going to need for arguing?

MS. LINDAHL: Approximately 15 minutes, Your Honor. This is Becky Lindahl on behalf of TIAA.

THE COURT: Approximately how long?

MS. LINDAHL: Fifteen minutes, Your Honor.

THE COURT: Fifteen.

MS. FINLON: And, Your Honor, Kris Finlon on behalf of Mr. Boyd.

I think for plaintiff's motion about 15 minutes will be fine as well.

THE COURT: All right. You may proceed then.

MS. FINLON: Okay. Your Honor, plaintiff has moved for partial summary judgment on his breach of contract claim only. And the basis for that motion is that -- well, the basis for plaintiff's claim is that the parties entered into a settlement agreement in 2015, in June of 2015. Plaintiff had been terminated in March 2015. And at the time of his

termination, a U5 was submitted to FINRA by the defendants stating that plaintiff was terminated for not meeting internal performance expectations for his position. The U5 at that time was two sentences. It said that there was no violation of industry rules, no customer harm, not securities related, but the first sentence referred to internal performance expectations.

Plaintiff then filed EEOC charges. He had filed one during his employment and one after. And in the course of settling those EEOC charges, the parties entered into an agreement whereby TIAA was to file an amended U5; and in the amended U5 the parties had agreed to language stating that there had been a disagreement regarding internal policy requirements for the position. So, in other words, the amendment was basically to change the first sentence of what had been filed in the U5.

TIAA did file the U5. They did include in the explanation for termination that language, but then in the explanation for that amendment they reinserted the same language that had been in the previous U5 about a failure to meet internal expectations. And in doing so, they breached the agreement by essentially putting in the same language that the parties had agreed was not going to be on the U5.

Defendant -- so in order to make out a breach of contract claim, plaintiff needs to show two elements,

obviously. One being that there was a contract, and the second being that there was a breach. And so I believe that the plain language of the agreement and the U5 shows that there was a breach.

Now, defendant has argued that plaintiff has waived this claim by entering into -- or agreeing to the filing of a third U5 in December of 2015. And that U5 had as an explanation for the amendment the fact that it was a more accurate -- I don't have the language directly in front of me, but I believe it was essentially that it was a more accurate explanation of the reason for his termination.

Unfortunately, that doesn't cure the breach of contract. And so defendant -- plaintiff has not waived his breach of contract claim because he learned a year after that amendment was made that an employer looking at his U5 could see all previous amendments. So, in fact, it basically compounded there of the second -- or of the first amendment.

And so on that basis, plaintiff has filed a motion for summary judgment, and I believe that he's entitled to summary judgment on his breach of contract claim and that claim should only be tried on the merits -- or on the damages. I apologize.

THE COURT: All right. Do you want to be heard on the defendant's motions for summary judgment as to the retaliation claim being barred by time?

MS. FINLON: Your Honor, I believe that defendant's motion for summary judgment in terms of the time bar mentions two different issues. One is whether or not there was retaliation in the form of the U5. And as I mentioned in my brief, the EEOC charge that plaintiff filed race and retaliation that's at issue in this case doesn't actually mention the U5. The U5 is not what he's claiming was retaliation. His retaliation claim is based on negative employment references that have been given by TIAA to prospective employers.

THE COURT: What's the evidence that there were?

MS. FINLON: Employers have asked him for the contact information and said that they are going to contact somebody over at TIAA and then suddenly he is not getting jobs, including the LPL witness, who I understand that there's conflicting evidence on that. But that individual did tell Mr. Boyd that he was going to contact TIAA managers for references.

THE COURT: Okay. What's the evidence that that happened? Isn't your argument that there's -- that the absence of further follow-up is evidence that it happened?

MS. FINLON: Yes. That Mr. Boyd is -- has not -- despite his long successful career as a financial adviser has not been able to secure other work. And, you know, that the fact that employers are saying we're going to contact TIAA for

reference and then suddenly stop responding to Mr. Boyd's communications or don't offer him a job.

THE COURT: Inferential.

MS. FINLON: Yes, sir.

THE COURT: Not direct.

MS. FINLON: Yes, Your Honor.

THE COURT: All right. Ma'am.

MS. LINDAHL: Thank you, Your Honor. I will start with the retaliation claim that Ms. Finlon was just discussing.

TIAA has moved for summary judgment on Mr. Boyd's retaliation claim on two principal grounds. And I will say that we did not understand until Ms. Finlon's argument just now that Mr. Boyd was not including the filing of the third -- or, excuse me, of the second U5 form as part of his retaliation claim. So to the extent that that is not at issue, I won't -- I won't waste the Court's time on arguing about that.

So then we're left with negative employment references. And there's two reasons why that claim should be dismissed at this stage. The first is that it's time-barred. The EEOC charge was not brought until December 27 of 2016, which means that Mr. Boyd can only obtain relief for any allegedly retaliatory acts that took place between June 30 of 2016, which is 180 days before the EEOC charge was filed.

The only evidence that Mr. Boyd purported to put forward about any job that he applied for or interviewed for during that June to December 2016 time frame is the LPL Financial job.

TIAA has put forth affirmative evidence that it was not contacted for any job references during that June 30 to December 2016 time frame nor any time frame other than two phone calls outside of the statute of limitations to a neutral employer reference line. But they received no phone calls asking for references during that time, did not give any references during that time. So that's -- that is set forth in the verified interrogatory answers of TIAA, which are unrebutted in the record.

Those witnesses who were named in TIAA's interrogatory answers have been disclosed and available to Mr. Boyd throughout the discovery period in this case, and there has been no contrary or contradictory discovery that has been raised showing that anything about TIAA's verified interrogatory answers is anything other than the absolute truth.

In Mr. Boyd's response to TIAA's motion for summary judgment, he submitted a declaration in which he said, I applied for a job at LPL Financial. I met with Mr. Reece Rhem, and he said he was going to contact TIAA for a job reference. I didn't get the job. Therefore, that is some

evidence that TIAA gave negative employment references.

We -- TIAA obtained a declaration of Mr. Rhem, which is on the docket at No. 31, Exhibit 4 to TIAA's reply in support of his motion for summary judgment.

Mr. Rhem testified, under oath, in his declaration that he never contacted TIAA for an employment reference; he never received any negative employment references from TIAA; and he never referenced or looked at FINRA's online database of U5 information. Did not consult it in connection with LPL's ultimate decision not to hire Mr. Boyd.

So the plaintiff bore the burden here to show some evidence of retaliation during the period that is not time-barred, and they have not done so. He has not done so. The only evidence in the record is TIAA's unrebutted evidence that it did not ask -- it was not asked for any negative -- excuse me. It was not asked for any job references, did not give any job references, and was never contacted by LPL, and that is corroborated by LPL.

So for that reason, Your Honor, TIAA asks that Your Honor dismiss Mr. Boyd's retaliation claim at the summary judgment stage.

Under breach of contract -- so there are cross-motions for summary judgment. The parties do agree on most of the facts. If I could just supplement some of the facts that Mr. Boyd's counsel put before the Court.

The first is that the settlement agreement which resolved two EEOC charges of discrimination that Mr. Boyd submitted to the EEOC in January and March of 2015, that settlement agreement is -- it's on the docket in many places.

Under that agreement, TIAA agreed to pay Mr. Boyd $120,000 in exchange for a complete release of those two claims. And as part of that negotiated settlement agreement -- Mr. Boyd was represented by counsel -- there was a paragraph that included specific language that TIAA was to include in the reason for termination form on the U5.

Well, TIAA as a FINRA member has to abide by FINRA rules. When you amend a U5, there has to be a reason given for the amendment. The separation agreement between Mr. Boyd and TIAA is completely silent as to the reason for amendment language.

So the original U5 stated that the reason for termination was did not meet internal performance expectations for position, and then there's standard language "No violation of industry rules, no customer harm, not securities related." That language appears on each iteration, so I won't repeat it each time.

The agreed language that the parties stipulated to in the separation agreement was, "Discharged: Disagreement regarding internal policy requirements for the position," and then there's that sentence that appears in all three.

When TIAA submitted that U5, it was required to give a reason. And so the reason it gave was, "The failure to meet internal policy expectations precipitated a conversation with the employee as to what those expectations were and should be. Ultimately, it was the inability to reach an understanding as to what the job expectations were that resulted in the separation."

That was an attempt by TIAA to harmonize the two reasons given on the first U5 and the amended U5 and to give truthful and accurate information to FINRA, as TIAA is required to do as a FINRA member.

Shortly after that U5 was filed, TIAA heard from Mr. Boyd's counsel that Mr. Boyd's counsel objected to the reason for amendment -- to the language and the reason for amendment.

From that point forward -- and the timing of this is set forth in the record in the attachments to the declaration of Heather White. There were communications between Mr. Boyd's counsel and TIAA in which TIAA's in-house legal department was engaging with Mr. Boyd's counsel and -- Mr. Boyd's former counsel. Mr. Boyd is represented by different counsel today. But TIAA was engaging with Mr. Boyd's counsel to make sure that any amended language in the reason for amendment would be satisfactory to Mr. Boyd.

And as evident in the exhibits to Ms. White's

declaration, TIAA's in-house legal department was attempting, was trying to drive this process forward, having to follow-up with Mr. Boyd's counsel to say is this language okay, can we get on the same page. And the very day that Mr. Boyd's counsel said this language is fine, we're on the same page, TIAA filed a further amendment of the U5, at Mr. Boyd's request, to resolve, in TIAA's view, fully and finally the purported breach of contract that the agreed U5 -- that TIAA filed as a result of the separation agreement that Mr. Boyd alleges.

TIAA does not concede that its language breaches the contract, but, nevertheless, it sought to accommodate Mr. Boyd after being told that he believed it was a breach of contract. And TIAA, in fact, did exactly what Mr. Boyd and his counsel asked it to do.

With respect to the argument that appeared in some of the briefs and also counsel raised it briefly earlier today that the U5s remain available on FINRA's website, that is true. It has always been true, and it was true at the time the separation agreement between Mr. Boyd and TIAA was executed at the conclusion of the EEOC mediation. So all versions of the U5 have always been available. That's not -- that is not new or unique to the U5 at issue here.

Mr. Boyd has never asked TIAA either thorough this court proceeding or in any other way to expunge his FINRA

filings. But even if he had, TIAA cannot expunge FINRA filings; only FINRA can do that.

So to the extent that there's an argument being raised in the context of this summary judgment motion that the failure to expunge the U5 is somehow a breach of the contract, first, it's not mentioned in the contract; but it also is not something that TIAA has the ability to do.

Your Honor, if I could consult with my client, I may be -- I may be finished with my argument.

Thank you, Your Honor.

THE COURT: All right, Counsel. Let me take a brief recess and confer with my law clerk about the arguments that we've heard and the context of the briefs. I have read all of the briefs, I promise.

MS. LINDAHL: Thank you, Your Honor.

MS. FINLON: Thank you.

THE COURT: And we'll be back in, and I will tell you what we're going to do with this matter.

(The proceedings were recessed at 2:51 p.m. and reconvened at 2:57 p.m.)

THE COURT: All right. I have -- I've read the briefs. I've seen the exhibits. I've heard the arguments of counsel. I've read your separation agreement and the statements made on the form sent to FINRA. There's two separate motions: One is defendant's motion for summary

judgment and plaintiff's motion for a partial summary judgment.

First, the defendant's motion for summary judgment as it pertains to the retaliation claim under Title VII. Title VII requires a charge of discrimination be filed with the EEOC within 180 days of the discriminatory act on which that charge is premised. That's in 42 U.S. Code 2000e-5(e)(1). Defendant argues that plaintiff failed to provide competent evidence to show that his claim is timely. The Court finds that the plaintiff has failed to create a genuine issue of material fact on this issue. Plaintiff relies on a statement made by a prospective employer that they intended to call plaintiff's references. Plaintiff intends to offer this testimony under Rule 803(3) in the *Hillmon* doctrine. This statement was made within the 180-day window. Defendant, on the other hand, submitted sworn affidavits in support of the fact that the defendant never provided negative employment references about plaintiff to any prospective employers. The defendant also submitted a declaration of the prospective employer who made the statement upon which plaintiff wants to rely. In that declaration, the prospective employer stated that they never received a negative reference from the defendant.

Given these circumstances, the Court finds there is no genuine issue of material fact. The Court finds that

plaintiff's claim is time barred. The defendant's motion for summary judgment as it pertains to the retaliation claim is granted.

Both parties have moved for summary judgment on the breach of contract claim. The facts surrounding the claim show there is no genuine issue of material fact remaining which requires the Court to determine which side is deserving of a judgment as a matter of law. Breach of contract in North Carolina requires two elements: One, the existence of a valid contract; and, two, a breach of those terms of that contract. *Poor v. Hill,* 138 N.C. App. 19, 2000. Neither party disputes that the separation agreement is a valid contract. Thus, the issue is whether the defendant breached that agreement.

First, the plaintiff argues that the defendant breached the contract by including the amendment -- including in the amendment explanation language in 2015 U5 submitted to FINRA. The Court finds that the amendment explanation section is not a breach of the separation agreement. The separation agreement is silent as to the amendment explanation section. Thus, the language cannot be a direct violation of the contract. Additionally, the language does not substantially defeat the purpose of the agreement. In his brief, plaintiff admitted that the purpose of the agreement was to remove the reference to Mr. Boyd's failure to "meet internal performance

expectations," Document No. 22, page 5. That language does not appear in the July U5. Thus, the Court finds that plaintiff received the benefit of his bargain.

Much has been made that all of plaintiff's U5s remain accessible by prospective employers. This, however, is a known fact within the industry. Plaintiff cannot fail to conduct adequate due diligence to understand the facts and circumstances surrounding the contract negotiations and later claim the defendant breached the contract due to plaintiff's failure. Thus, the Court finds the defendant's amendment explanation did not breach the contract.

Further, plaintiff also argued that defendant's providing of negative employment references breached the separation agreement. In support of this argument, plaintiff offered statements of prospective employers made to him during interviews. Each of the declarants stated that they intended to call the defendant to receive an employment recommendation. Plaintiff argues that the *Hillmon* doctrine allows these to show intent under Federal Rule of Evidence 803(3) and also action in conformity with that intent under *Hillmon*. While statements of intent can be used to show action in conformity therewith for the declarant, statements of intent cannot be used to show action by third parties, citing *U.S. v Jenkins*, 579 F.2d 840, 843, Fourth Circuit, 1978.

Plaintiff therefore has offered evidence that

prospective employers placed a call to defendant, but plaintiff has offered no evidence that defendant answered. Additionally, there is no evidence outside of mere conjecture that the defendant did in fact answer and provide a negative reference in breach of the agreement. Thus, the plaintiff failed to create a genuine issue of material fact.

For these reasons, the Court grants the defendant's motion for summary judgment in its entirety and denies plaintiff's motion for partial summary judgment.

Madam Clerk, the clerk is directed to prepare a judgment in conformity with this ruling.

Thank you very much, Counsel.

MS. FINLON: Thank you, Your Honor.

MS. LINDAHL: Thank you, Your Honor.

(The proceedings concluded at 3:04 p.m.)

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

CERTIFICATE OF OFFICIAL REPORTER

I, Jillian M. Turner, RMR, CRR, CRC, Federal Official Court Reporter, in and for the United States District Court for the Western District of North Carolina, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this the 9th day of April 2019.

/s/ Jillian M. Turner
Jillian M. Turner, RMR, CRR, CRC
U.S. Official Court Reporter

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO. 3:17-cv-00224-GCM

BARRINGTON BOYD,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
TIAA-CREF INDIVIDUAL & INSTITUTIONAL SERVICES, LLC TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA,	)	
	)	
Defendants.	)	
	)	

THIS MATTER is before the Court on Defendants' Motion to Dismiss for Failure to State a Claim (Doc. No. 8) filed with a Brief in Support of Motion to Dismiss (Doc. No. 8-1) on June 26, 2017. On July 10, 2017 Plaintiff filed his Memorandum in Opposition to the Motion to Dismiss (Doc. No. 9). Defendants filed a Reply in Support of Motion to Dismiss on July 21, 2017. (Doc. No. 11). For the following reasons, Defendants' Motion to Dismiss is **DENIED.**

I. BACKGROUND

Plaintiff Barrington Boyd ("Boyd") is a licensed investment advisor with Series 7 and 66 qualifications. (Compl. at 2, ¶ 9). He is an African-American man. (Compl. at 2, ¶ 9). Boyd began working for Defendants Teachers Insurance and Annuity Association of America and TIAA-CREF Individual and Institutional Services, LLC (collectively, "TIAA") in June 2005, and his employment was terminated on March 15, 2015. (Compl. at 2, ¶¶ 10–11). On March 24, 2015, TIAA submitted to the Financial Industries Regulatory Authority ("FINRA") a Uniform

Termination Notice for Securities Industry Regulation ("U-5"). (Compl. at 2, ¶ 12). In the section on the U-5 form provided for "Termination Explanation," TIAA stated, "Did not meet internal performance expectations for position. No violation of industry rules, no customer harm, not securities related." (Compl. at 2, ¶ 12).

Boyd filed two Charges of Discrimination with the Equal Employment Opportunity Commission ("EEOC"), asserting that TIAA discriminated against him on the basis of race, and on June 16, 2015, Boyd and TIAA participated in a mediation with the EEOC. (Compl. at 2, ¶ 13–14). As a result of that mediation, on June 26, 2015, Boyd and TIAA entered into a Separation Agreement and Release in Full ("Separation Agreement" or "the Agreement"). (Compl. at 2, ¶ 15). Pursuant to that Agreement, on July 22, 2015, TIAA submitted a revised U-5, replacing the language in the Termination Explanation section with "Disagreement regarding internal policy requirements for position. No violation of industry rules, no customer harm, not securities related." (Compl. at 3, ¶ 19). In the "Amendment Explanation" box immediately below the Termination Explanation, TIAA stated, "The failure to meet internal policy expectations precipitated a conversation with the employee as to what those expectations were and should be. Ultimately, it was the inability to reach an understanding as to what the job expectations were that resulted in the separation." (Compl. at 3, ¶ 20).

Boyd objected to the additional language in the Amendment Explanation, and TIAA again amended the U-5 on December 7, 2015, stating in the Amendment Explanation section, "Amended to accurately reflect the intent of the previous amendment." (Compl. at 3, ¶ 22–23).

Boyd alleges that he subsequently applied for numerous positions in the securities industry and was denied as a result of the inaccurate language provided in the U-5 form, as well as a result of negative references provided by TIAA. (Compl. at 4, ¶ 24–28).

On December 27, 2016, Boyd filed a Charge of Discrimination with EEOC asserting a claim of retaliation under Title VII of the Civil Rights Act of 1964. (Compl. at 4, ¶ 29). On January 23, 2017, the EEOC issued Boyd a Right to Sue Letter. (Compl. at 4, ¶ 30). On April 26, 2017, Boyd filed his Complaint alleging breach of contract and retaliation under Title VII. (Compl. at 4–5).

II. LEGAL STANDARD

When faced with a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must "accept as true all well-pleaded allegations and . . . view the complaint in a light most favorable to the plaintiff." *Mylan Labs, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). The Court "assume[s] the[] veracity" of these factual allegations, and "determine[s] whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). However, the court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., Inc. v. J.D. Assocs. LLP*, 213 F.3d 175, 180 (4th Cir. 2000). Thus, to survive a motion to dismiss, the plaintiff must include within his complaint "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

III. DISCUSSION

A. Consideration of the Separation Agreement

Because both the breach of contract claim and the retaliation claim rely heavily on the terms of the Separation Agreement, the Court must decide, as a threshold issue, whether or not the Separation Agreement in its entirety may be considered at this stage of the litigation. Boyd referenced it extensively in his Complaint but did not attach the entire Separation Agreement to his Complaint. (*See* Compl. at 4–5). TIAA subsequently attached it to its Motion to Dismiss as

Doc. No. 8-2 and argues that the Court may consider it because it "directly gives rise to Boyd's claims and is expressly referred to in Boyd's Complaint." (Defs.' Br. at 6). Boyd likewise urges the Court to consider the Separation Agreement without converting Defendants' Motion into a motion for summary judgment.

The Fourth Circuit has held that "[a]lthough as a general rule extrinsic evidence should not be considered at the 12(b)(6) stage, . . . 'a court may consider it in determining whether to dismiss the complaint [if] it was integral to and explicitly relied on in the complaint and [if] the plaintiffs do not challenge its authenticity.'" *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004) (quoting *Phillips v. LCI Int'l Inc.*, 190 F.3d 609, 618 (4th Cir. 1999)). Because the Separation Agreement provides the basis for Boyd's claim, is referenced throughout the Complaint, and is not disputed, the Court concludes that it can consider the Agreement in its entirety in assessing the plausibility of Boyd's claims at this stage of the litigation.

B. Breach of Contract

Boyd's first cause of action is for breach of contract. Under North Carolina law, "[t]he elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 768 S.E.2d 582, 590 (N.C. Ct. App. 2015) (quoting *Branch v. High Rock Lake Realty, Inc.*, 565 S.E.2d 248, 252 (N.C. Ct. App. 2002)).

Here, TIAA concedes that the Separation Agreement constitutes a valid contract. However, TIAA argues (1) that Boyd's breach of contract claim is barred by a release under the Separation Agreement, and (2) that even if Boyd did not release this claim, TIAA's actions—as alleged in Boyd's Complaint—do not establish a plausible claim for breach of contract.

First, TIAA asserts that Boyd's claim is barred by a release in Paragraph 3 of the Separation Agreement. Paragraph 3 of the Separation Agreement states:

> TIAA will file with the appropriate depository within the Financial Industry Regulatory Authority ("FINRA") the amended explanation of "discharged: disagreement regarding internal policy requirements for position. No violation of industry rules, no customer harm, not securities related" on your "Uniform Notice for Securities Industry Regulation" or "U-5." To be clear, you agree not to challenge in any way the accuracy and/or proprietary [sic] of the U-5 explanation above that TIAA will file with FINRA and to release TIAA pursuant to Paragraphs 11 and 12 below, from any claim related to the filing or content of that U-5 amendment.

(Separation Agreement, ¶ 3).

Paragraph 11(b), in turn, states, "This release of claims does not extend to your contractual right to enforce the terms of this Agreement or to any claims that may not be lawfully released." (Separation Agreement, ¶ 11(b)).

With respect to disputes over contract interpretation, "[a] contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law." *WakeMed v. Surgical Care Affiliates, LLC*, 778 S.E.2d 308, 312 (N.C. Ct. App. 2015) (quoting *Commscope Credit Union v. Butler & Burke, LLP*, 764 S.E.2d 642, 651 (N.C. Ct. App. 2014)). On its face, Paragraph 3 unambiguously prevents Boyd from challenging the "accuracy and/or proprietary [sic]" of the agreed-upon language of the "amended explanation" to be filed in the U-5, thus protecting TIAA from future lawsuits challenging that *specific* language. Nowhere does it prevent Boyd from suing to compel TIAA to submit the U-5 with the agreed-upon language or from suing for damages based on TIAA's failure to submit the U-5 with agreed-upon language. Further, Paragraph 11 unambiguously preserves Boyd's right to file suit to enforce the terms of the Separation Agreement, including TIAA's promise in Paragraph 3 to amend the U-5 to reflect the agreed-upon language.

Boyd's ability to assert this claim is expressly retained in Paragraph 11. He does not run afoul of Paragraph 3 by challenging the agreed-upon termination language in the Separation Agreement. Rather, he seeks relief for TIAA's alleged violation of Paragraph 3 by inserting additional language into the U-5, which was "neither accurate nor consistent with the language in Paragraph 3 of the Separation Agreement." (Compl. at 3, ¶ 21). Thus, his breach of contract claim is not barred by the release provisions of the Separation Agreement.

Second, TIAA asserts that, release notwithstanding, Boyd's Complaint fails to allege facts that would plausibly amount to a breach of the terms of the Separation Agreement with respect to the filing of the U-5 form.[1] Specifically, TIAA asserts that it did not breach the terms of the Agreement because the Agreement is silent as to the wording of the "Amendment Explanation" section of the amended U-5 and, regardless, that the given explanation comports with the agreed-upon language.

Although the Agreement does not specifically mention the Amendment Explanation section, Boyd's Complaint alleges that a central aspect of the Agreement was changing the language from the original U-5's language of "did not meet internal performance expectations" to the agreed-upon language of "disagreement regarding internal policy requirements." (Compl. at 2–3, ¶¶ 12, 20). Boyd alleges that TIAA did amend the Termination Explanation to the agreed-upon language but also placed additional language in the Amendment Explanation section—immediately following the Termination Explanation—continuing to claim that there was a "failure to meet internal policy expectations." (Compl. at 2–3, ¶¶ 12).

[1] Boyd's Complaint also alleges that TIAA breached the Separation Agreement by providing negative references about Boyd to other employers. (Compl. at 4). While TIAA denies this allegation, it concedes that—taken as true—it raises a plausible claim for relief.

This Court finds that Boyd's Complaint raises a plausible claim for a breach of contract. "In order for a breach of contract to be actionable it must be a material breach, one that substantially defeats the purpose of the agreement or goes to the heart of the agreement, or can be characterized as a substantial failure to perform." *Long v. Long*, 588 S.E.2d 1, 4 (N.C. Ct. App. 2003). "The question of whether a breach of contract is material is ordinarily a question for a jury." *Charlotte Motor Speedway, Inc. v. Tindall Corp.*, 672 S.E.2d 691, 302 (N.C. Ct. App. 2009). Taking the factual allegations in Boyd's Complaint as true, a jury could find that by placing the language of "failure to meet internal policy expectations" into the U-5, just below the Termination Explanation section, TIAA's actions "substantially defeat[ed] the purpose of the agreement or [went] to the heart of the agreement, or can be characterized as a substantial failure to perform." *See Long*, 588 S.E.2d at 4.

Thus, TIAA's motion to dismiss Boyd's claim for breach of contract must be denied.

C. Retaliation Under Title VII

Boyd's second cause of action is for retaliation under Title VII of the Civil Rights Act of 1964. Similar to its response to Boyd's breach of contract claim, TIAA argues (1) that Boyd's retaliation claim is barred by a release under the Separation Agreement, and (2) that even if Boyd did not release this claim, TIAA's actions—as alleged by Boyd's Complaint—do not establish a plausible claim of retaliation under Title VII.

First, TIAA asserts that it is released from retaliation claims made by Boyd under the Separation Agreement. Paragraph 11(a) of the Separation Agreement states, "Except as otherwise set forth in this Agreement, the Separation Payment in Paragraph 2 represents full and complete settlement in satisfaction of any and all claims you may have against TIAA arising on or before the date you sign this Agreement." (Separation Agreement, ¶ 11(a)). Additionally, the

Agreement releases and discharges TIAA "from any and all claims, in law or equity, which you ever had or now have regarding any matter arising on or before the date you sign this Agreement." (Separation Agreement, ¶ 11(a)).

Although Title VII retaliation claims fit within the category of claims waived in Separation Agreement, ¶ 11(a)(i), Boyd's claim did not arise "on or before the date" he signed the Agreement. Both parties agree—and the Agreement itself shows—that the Separation Agreement was signed on June 26, 2015. Taking Boyd's factual allegations as true, TIAA retaliated against him on July 22, 2015, when it filed the amended U-5 form, and at various other points in time after the amended U-5 had been filed by providing negative references to other employers. Prior to TIAA's actions on these dates, Boyd did not have a colorable claim for retaliation. Thus, the claims asserted by Boyd arose after the parties signed the Separation Agreement, and his claim for retaliation under Title VII is not barred by the release.

Second, TIAA asserts that the allegations in Boyd's Complaint fail to raise a plausible claim for retaliation under Title VII. Title VII § 704 makes it unlawful for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3 (2012).

At the motion to dismiss stage in a Title VII case, a plaintiff need only "allege facts sufficient to state all the elements" of a prima facie case for retaliation. *Templeton v. First Tenn. Bank, N.A.*, 424 F. App'x 249, 250 (4th Cir. 2011) (per curiam) (unpublished). In order to raise a prima facie case, a plaintiff must allege facts supporting three elements: "(1) that [he] engaged in a protected activity; (2) that [his] employer took an adverse employment action against [him];

and (3) that there was a causal link between the two events." *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405–06 (4th Cir. 2005).

Boyd's Complaint sufficiently alleges that he engaged in a protected activity. Title VII protects the activity of "employees who pursue their federal rights" by reporting or charging unlawful employment activity. *U.S. EEOC v. Lockheed Martin Corp.*, 444 F. Supp. 2d 414, 417 (D. Md. 2006) (quoting *EEOC v. Bd. of Governors of State Colls. and Univs.*, 957 F.2d 424, 427 (7th Cir. 1992)). By filing two Charges of Discrimination against TIAA with the EEOC asserting racial discrimination, Boyd certainly pursued his federal rights. Thus, his conduct is clearly a protected activity. *See U.S. EEOC*, 444 F. Supp. 2d at 417 (using "retaliation against employees who . . . file an EEOC charge" as an example of a protected activity); *see also*, *Price v. Thompson*, 380 F.3d 209, 212 (4th Cir. 2004) ("Price's EEOC claim is protected activity . . . .").

Boyd also sufficiently alleges that TIAA took an adverse employment action against him. To satisfy Title VII, an adverse employment action must be material—one that "might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). Thus, it must actually "produce[] an injury or harm." *Id.* at 67. Such action is prohibited whether taken against a current or former employee. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

Boyd alleges that TIAA retaliated against him by "interfering with his job search." (Compl. at 5, ¶ 39). Specifically, he alleges that TIAA falsely amended his U-5 form and provided negative referrals to prospective employers. (Compl. at 5, ¶ 39). Other courts have allowed cases to proceed past the motion to dismiss stage based on an allegation of negative

employment references. *See e.g.*, *Harris v. Ann's House of Nuts*, No. 4:14-cv-185, 2015 WL 3902017, at *4 (E.D.N.C. June 24, 2015); *Alberts v. Wheeling Jesuit Univ.*, No. 5:09-cv-109, 2011 WL 2132983, at *4 (N.D. W. Va. May 25, 2011). As alleged, the combination of the Amendment Explanation and TIAA's negative referrals led potential employers to deny employment to Boyd. Employers generally rely on references, and employers in the securities industry rely on information in the U-5 form in making hiring decisions. As a result, a "reasonable worker" might be dissuaded from making a charge of discrimination if he knows that he will likely be seriously hindered in his search for employment elsewhere as a result of making his charge. *See White*, 548 U.S. at 68. Thus, providing negative referrals and false information in a U-5 form are sufficient to qualify as adverse employment actions.

Finally, Boyd sufficiently alleges that TIAA's adverse employment action was caused by his decision to engage in protected activity. Alleging causation in a prima facie retaliation case is "less onerous" than meeting the but-for causation standard ultimately required to prove retaliation. *Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243, 251 (4th Cir. 2015). Close temporal proximity between when the employer learns of the protected activity and the adverse employment action can be enough to make a prima facie claim for causation. *Id.* at 253. Prima facie causation can also be found when the adverse employment action occurs "upon the employer's first opportunity" to carry out a harmful act to the employee. *Templeton*, 424 F. App'x at 251; *see also Price*, 380 F.3d at 213 (assuming without deciding that "an adverse action taken at the first opportunity satisfies the causal connection element of the prima facie case").

At this stage of the litigation, it is unclear exactly at what point TIAA first learned of Boyd's EEOC charges. However, it is clear that Boyd participated in an EEOC mediation with TIAA on June 16, 2015 and that TIAA submitted its revised U-5 form on July 22, 2015. This

close temporal proximity is sufficient to show causation. And to the extent that TIAA knew about the EEOC charges months beforehand, the allegation that TIAA took the adverse employment action at its "first opportunity"—when it filed the amended U-5 form—establishes sufficient prima facie causation to survive a motion to dismiss.

Thus, Boyd's Complaint sufficiently alleges all of the requisite elements of a prima facie claim for retaliation under Title VII and TIAA's motion to dismiss Boyd's claim for retaliation must be denied.

III. CONCLUSION

For the forgoing reasons, Defendant's Motion to Dismiss for Failure to State a Claim is hereby **DENIED.**

SO ORDERED.

Signed: September 20, 2017

Graham C. Mullen
United States District Judge