UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

BARRINGTON BOYD, **Plaintiff** **v.** **TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA; TIAA-CREF INDIVIDUAL & INSTITUTIONAL SERVICES, LLC** **Defendants**	**Civil Action No. 3:17-cv-00224**

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Despite having ample opportunity to marshal evidence to prove his claims for breach of an employment separation agreement and retaliation in violation of Title VII of the Civil Rights Act of 1964, the plaintiff Barrington Boyd ("Boyd") has not put forth any proof at all to support his allegations that Teachers Insurance and Annuity Association of America and TIAA-CREF Individual & Institutional Services, LLC (collectively, "TIAA") impeded his employment search by submitting FINRA filings with which he disagrees or providing negative employment references. In fact, all of the record evidence shows that TIAA's FINRA filings complied with its independent obligations to FINRA and were in accordance with an agreement the parties entered into to settle Mr. Boyd's prior EEOC claims, and TIAA has not even been asked to provide, much less provided, any employment references for Mr. Boyd. For those reasons, as well as the independent reason that Mr. Boyd's retaliation claim is time-barred, this Court should not permit this case to reach a jury and should enter summary judgment in TIAA's favor. If this Court determines, however, that Mr. Boyd can proceed on liability, it should nevertheless hold

that he cannot put on any evidence of damages at trial, as discovery has now closed and he has not provided a damages computation in violation of the Federal Rules of Civil Procedure.

1. Undisputed Facts in Support of TIAA's Motion for Summary Judgment

Mr. Boyd worked for TIAA from June 2005 to March 15, 2015, when TIAA terminated his employment. [Compl. ¶ 10, 11.] Because Mr. Boyd was a registered securities professional, TIAA was required to report Mr. Boyd's termination to FINRA via FINRA's Form U5. [Compl. ¶ 12.] TIAA filed a Form U5 on March 24, 2015 that contained the following "Termination Explanation," which is a required field on the Form U5 form: "Did not meet internal performance expectations for position. No violation of industry rules, no customer harm, not securities related." [Compl. ¶ 12.]

a. Mr. Boyd's Prior EEOC Charges

Mr. Boyd objected to the "Termination Explanation," and in response filed two charges of discrimination with the EEOC asserting (among other things) that TIAA's "Termination Explanation" was discriminatory. [Compl. ¶ 13.] TIAA and Mr. Boyd participated in EEOC mediation on June 16, 2015. [Compl. ¶ 14.] At the conclusion of the mediation, TIAA and Mr. Boyd—who was represented by counsel [Boyd 35:6-35:21, 53:6-54:13. Cited excerpts from Mr. Boyd's deposition are attached hereto as Exhibit A.]—mutually agreed to resolve both of Mr. Boyd's EEOC claims of discrimination, and the parties executed a Separation Agreement and Release in Full (the "Agreement" [Exh. 2][1]) on June 26, 2015.

b. The Separation Agreement.

[1] All numbered exhibits are exhibits introduced during Mr. Boyd's deposition—to avoid confusion, TIAA has kept the numbering assigned to the exhibits in the deposition. All lettered exhibits to this brief are separate exhibits that were not introduced during Mr. Boyd's deposition.

In the Agreement, Mr. Boyd fully and finally released TIAA for any claims related to the "Termination Explanation." [Exh. 2 ¶ 11.] In exchange, TIAA agreed, among other things, to file an amended Form U5 that revised the Termination Explanation to state: "Discharged: disagreement regarding internal policy requirements for the position. No violation of industry rules, no customer harm, not securities related." [Exh. 2 ¶ 3.] TIAA also agreed that if it were asked to give an employment reference for Mr. Boyd, it would not give any letter of recommendation or personal reference for Mr. Boyd, but would instead give the contact information for the third-party, independently operated and neutral employment verification system to which TIAA subscribes. [Exh. 2 ¶ 4.]

i. Revised U5

TIAA complied with Paragraph 3 of the Agreement, and submitted a revised Form U5 on July 22, 2015 (the "July Form U5" [Exh. 3].) Per the FINRA-promulgated form, each amendment to a Form U5 requires an "explanation for amendment." [Boyd 63:2-13; Declaration of James Brogan ("Brogan Decl.," attached as Exh. B) ¶¶ 4, 8.] The Agreement did not address the "explanation for amendment" whatsoever, and did not impose on TIAA the requirement that it incorporate any particular language for that section. [Boyd 52:8-10.] TIAA included the following language on the July Form U5 to explain why TIAA was amending the Form U5: "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." [Exh. 3; Brogan Decl. ¶¶ 6-7.] The language that TIAA included for the "explanation for amendment" on the July Form U5 is standard language that TIAA includes on amended Form U5's, and was not

drafted with regard to Boyd's prior EEOC charges or with any discriminatory or retaliatory intent. [Brogan Decl. ¶¶ 9-12.]

After TIAA filed the July Form U5, Mr. Boyd's counsel Java Warren objected to the "explanation for amendment" language. [Exh. 5; Declaration of Heather White ("White Decl.," attached as Exhibit C) ¶¶ 6-7.] Between September and December 2015, TIAA and Mr. Warren discussed how to clarify the "explanation for amendment." [Exh. 5; White Decl. ¶¶ 6-7.] Mr. Boyd's counsel drafted a new explanation that read, "Amended to accurately reflect the intent of the previous amendment." TIAA submitted a second revised Form U5 on December 7, 2015 (the "December Form U5") with the language proposed by Mr. Warren replacing the prior "explanation for amendment" section. [Compl. ¶ 23; White Decl. ¶ 8.]

ii. Employment References

Mr. Boyd has produced evidence in discovery that indicates that he has sought employment sporadically between 2015 and 2018. To assist in this effort, TIAA complied with Paragraph 4 of the Agreement by providing Mr. Boyd with the contact information (a website and hotline number) for the neutral third-party employment verification system TIAA uses. [Exh. 2 ¶ 4; Exh. 8.] Notwithstanding the provision in the Agreement that TIAA would provide neutral employment verification only, as well as his allegations in this lawsuit that TIAA provided negative employment references for him after 2015, Mr. Boyd voluntarily gave out contact information for his former TIAA supervisors Michelle Floris and Linda Reeves to potential employers. [Boyd 79:20-80:19 and Exhibit 7.] In fact, Mr. Boyd testified that he continued to provide employers with the contact information of his TIAA supervisors as late as April 2018, a year after he filed this lawsuit. [Boyd 142:22-143:4 and Exhibit 20.]

Even though Mr. Boyd has encouraged potential employers to contact TIAA, no prospective employer has contacted any TIAA employee—including Ms. Floris and Ms. Reeves—to ask for a job reference for Mr. Boyd. [Amended Interrogatory Answers, ("Interrogatory Answers," attached as Exhibit D), ¶ 4]. The employment verification hotline received only two requests about Mr. Boyd; TIAA is informed and believes that two employers contacted the neutral employment verification hotline—which TIAA does not maintain or operate—to obtain basic employment information for Mr. Boyd on April 6 and May 30, 2016. [*Id.*] TIAA has not had any other contact with potential employers related to Mr. Boyd.

Mr. Boyd has not produced any evidence to the contrary. Rather, Mr. Boyd has merely speculated that because employers declined to offer him employment after he provided names of potential references from TIAA, TIAA must have provided negative references. He could not identify any person at TIAA with whom any potential employer spoke, or the dates or content of such any such communications. [*See, e.g.*, Boyd 70:18-71:22, 72:4-74:15, 83:21-84:2, 84:7-85:3, 85:10-20, 85:23-87:1, 87:2-88:7, 88:8-91:21, 91:22-92:18.] And there is some evidence that **Mr. Boyd—not TIAA**—voluntarily disclosed to potential employers that he is currently engaged in litigation with TIAA, after which he alleges the employer declined him an employment opportunity. [Boyd 148:16-149:10 and Exh. 7.]

Nor has Mr. Boyd produced any evidence that any potential employer declined to hire Mr. Boyd because of his amended U5 forms. For example, Mr. Boyd testified in his deposition that he submitted job applications for which he was not selected for an interview, but he did not know whether they ever reviewed any Form U5 related to his application. [Boyd 132:9-15, 133:10-16, 134:12-23, 137:20-138:3, 138:4-24, 139:2-140:11, 143:10-23, 144:16-19, 145:1-14, 147:8-17.] This is true even though Mr. Boyd served third-party subpoenas on a number of

employers to whom he submitted job applications. [Declaration of Rebecca Lindahl ("Lindahl Decl.," attached as Exhibit E), ¶ 3.] In sum, Mr. Boyd has not produced a shred of evidence that any potential employer even reviewed, much less based an employment decision upon, any of Mr. Boyd's Form U5s or any action by TIAA.

c. Procedural History.

On December 27, 2016—more than a year after Boyd's counsel contacted TIAA about the "explanation for amendment" language on the July Form U5, and more than a year after TIAA filed a clarifying explanation—Boyd filed an EEOC charge of discrimination, in which he claimed that TIAA retaliated against him by including the "explanation for amendment" language on the July Form U5 and providing negative employment references. [EEOC Charge attached as Exh. F.] On January 23, 2017, the EEOC issued a right to sue letter. [Compl. ¶ 30; EEOC dismissal attached as Exh. G.] Mr. Boyd subsequently filed the instant action on April 26, 2017, alleging breach of the Agreement and retaliation in violation of Title VII of the Civil Rights Act of 1964. [Compl. at 4-5.] The parties conducted discovery in this matter, which concluded on July 2, 2018.[2]

2. Argument.

Both of Mr. Boyd's claims fail as a matter of law and TIAA is entitled to summary judgment because: (i) Mr. Boyd's EEOC charge of discrimination was not timely, so his

[2] Mr. Boyd filed a motion to compel the deposition of TIAA on Friday, July 27, and also requested that the Court extend certain deadlines so that Mr. Boyd can complete discovery. TIAA will respond to Mr. Boyd's motion to compel before the Court's deadline to respond, but in the meantime informs the Court that counsel for TIAA will continue to meet and confer with Mr. Boyd's counsel about the Rule 30(b)(6) deposition notice that Mr. Boyd served four days before the close of discovery and to which TIAA objected on a number of grounds, including that it required testimony on topics that implicate attorney-client privilege. The deposition will require travel to New York, and has been difficult to schedule at the last minute due to pre-planned summer vacations of counsel and witnesses.

retaliation claim is time-barred; (ii) TIAA did not violate the Agreement, which is silent as to the "termination explanation," by including a termination explanation on the amended Form U5s or subsequently modifying the July Form U5 at Mr. Boyd's request; and (iii) TIAA has not given any job references to any employers. Indeed, Mr. Boyd has not presented any evidence whatsoever to support his claims, which makes it especially appropriate to end this case before it reaches a jury. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). To the extent, however, that the Court determines that Mr. Boyd claims can survive summary judgment on liability, Mr. Boyd should not be permitted to put on any evidence of his damages because he did not provide TIAA with a damages computation, in violation of the Federal Rules of Civil Procedure.

a. Mr. Boyd's retaliation claim is time-barred, but even if it were not, it fails as a matter of law.

Mr. Boyd waited too long to file his EEOC charge of discrimination, so his claim is time-barred, but even if it were not, Mr. Boyd cannot prevail on his retaliation claim as a matter of law because he cannot establish an adverse employment action or a causal link between protected activity and any such action.

i. Mr. Boyd's retaliation claim is time-barred.

To challenge an allegedly unlawful employment practice under Title VII, including retaliation, a plaintiff must first file a timely charge with the EEOC within 180 days after the alleged unlawful practice. 42 U.S.C. 2000e-5(e)(1); 29 U.S.C. 626(d). Otherwise, the claim is time-barred. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Here, Boyd alleges retaliation based in part upon the July Form U5. Mr. Boyd was unequivocally aware of the July Form U5 in July 2015, when he received a copy from TIAA [Exh. 3], and September 2015, when his counsel contacted TIAA to request a further amended Form U5, which TIAA

submitted to FINRA in December 2015. [Exh. 7; White Decl. ¶¶ 6-7.] Mr. Boyd did not, however, file his EEOC charge of discrimination until December 2016, over a year after TIAA amended the Form U5 at Mr. Boyd's request. [Exh. F.] Mr. Boyd's claim for retaliation based upon the July Form U5 is thus time-barred and must be dismissed.

Mr. Boyd also claims that TIAA retaliated against him when it provided negative job references. There is not, however, any competent evidence that TIAA ever provided Mr. Boyd with a job reference of any sort, other than two telephone calls that potential employers made to TIAA's neutral employment verification hotline on April 6 and May 31, 2016. [Exh. D ¶ 4.] Even if those references could be construed as an adverse employment action, which TIAA denies because Mr. Boyd expressly bargained for the use of the third-party employment verification system in the Agreement, both telephone calls occurred more than 180 days before Mr. Boyd filed his EEOC charge of discrimination on December 27. 2016.[3] Mr. Boyd's retaliation claim based upon negative job references is thus also time-barred, and this Court should dismiss it.

ii. Mr. Boyd cannot prove an adverse employment action.

To establish a prima facie case of retaliation, Mr. Boyd must show that: (i) he engaged in protected activity; (ii) TIAA took adverse action against him; and (iii) a causal relationship existed between the protected activity and the adverse action alleged. *Foster v. Univ. of Md.—E. Shore*, 787 F.3d 243, 250 (4th Cir. 2015). An alleged adverse action must be material; Title VII does not protect individuals from all perceived retaliation, but rather only from retaliation that "produces an injury or harm." *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006).

[3] June 30, 2016 was 180 days before December 27, 2016, so any claims that accrued before that date are time-barred.

Here, Boyd alleges that TIAA's amendment explanation in the July Form U5 and unspecified negative employment references constitute "adverse action" sufficient to support a retaliation claim. Both claims fail. First, regarding the amendment explanation language, TIAA worked with Mr. Boyd's counsel to amend the July Form U5 when it received Mr. Boyd's complaints about that language. TIAA changed the amendment explanation language to reflect Mr. Boyd's wishes almost three years ago. It remains unclear exactly what Mr. Boyd alleges TIAA could or should have done differently.

Second, Boyd has produced no evidence at all that TIAA provided even a single negative employment reference for him, acknowledging for every job application and potential employer he identified in discovery that he does not know whether TIAA ever gave a negative reference for him and has never seen or heard any such reference. [*See, e.g.*, Boyd 70:18-71:22, 72:4-74:15, 83:21-84:2, 84:7-85:3, 85:10-20, 85:23-87:1, 87:2-88:7, 88:8-91:21, 91:22-92:18.] TIAA has submitted sworn testimony that it did not receive any such calls. [Exh. D ¶ 4.] In addition, the fact that he continued to give out his former supervisors' contact information at least a full year after he filed this lawsuit undermines his assertions on this point. [Boyd 79:20-80:19 and Exhibit 7, 142:22-143:4 and Exhibit 20.] Because there is no evidence that TIAA took adverse action against Boyd, the retaliation claims fail.

iii. <u>To the extent he can prove an adverse employment action, Mr. Boyd cannot establish a causal link between protected activity and any adverse action.</u>

Even if he could prove an adverse employment action, which he cannot, Mr. Boyd cannot establish the requisite causal link between his protected activity of filing EEOC charges of discrimination in 2014 and 2015 and any such adverse action. To establish a causal link, Mr. Boyd must either: (i) produce evidence that shows actual causation—meaning a clear and

explicit intent on TIAA's part to punish Mr. Boyd for filing his EEOC charges—or (ii) establish a "close temporal link" between the protected activity and the adverse employment action. *Perry v. Kappos*, 489 Fed. App'x 637, 643 (4th Cir. 2012).

Mr. Boyd has not produced any evidence showing actual causation. The only competent testimony on this point is the declaration of Mr. James Brogan, the TIAA employee who drafted the amendment explanation for the July Form U5. [Brogan Decl. ¶ 6.) Mr. Brogan testified that the amendment explanation language was typical of the language TIAA uses in similar circumstances with other employees and that he did not harbor any discriminatory animus or intent when he drafted the language. [*Id.* ¶¶ 9-12.] Mr. Brogan also testified that he was not involved in the investigation or resolution of Mr. Boyd's filed EEOC charges, [*id.* ¶ 11], and did not draft the amendment explanation language in an attempt to retaliate against Mr. Boyd for filing those charges. [*Id.* ¶ 12.]

Mr. Boyd must therefore rely on temporal proximity to show causation. Mr. Boyd alleges that his protected activity in this case is his filing of EEOC charges on January 27, 2015 and March 19, 2015. [Exh. F.] The first event Boyd challenges as retaliation is the amendment explanation language in his July Form U5. TIAA filed the July Form U5 on July 22, 2015. [Exh. 3.] The time lapse between Mr. Boyd's latest EEOC charge in 2015 and the filing of the amendment explanation is four months and three days.

As a matter of law, this length of time is too long to support a finding of causation based on temporal proximity. *Perry v. Kappos*, 489 Fed. App'x at 643. Only in situations where the challenged conduct follows the protected activity "very closely" will temporal proximity alone satisfy this element. *Perry v. Kappos*, 489 Fed. App'x at 643 (citing *Clark Cnt. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001)). A time lapse of three to four months is "too long to

establish a causal connection by temporal proximity alone." *Id.* (citing *Pascual v. Lowe's Home Ctrs., Inc.*, 193 Fed. App'x 229, 233 (4th Cir. 2006)). In fact, even a time lapse of as few as ten weeks between the protected activity and the alleged retaliation is long enough to "weaken significantly the inference of causation between the two events." *King v. Rumsfeld*, 328 F.3d 145, 151 n.5 (4th Cir. 2003). Where the time lapse is too long to permit an inference of a causal relationship between the challenged acts and the protected activity, a plaintiff must "present additional evidence of retaliation" for his claim to survive. *Id.* (citing *Lettieri v. Equant Inc.*, 478 F.3d 640, 650 (4th Cir. 2007). Because Mr. Boyd has not produced any other evidence of retaliatory conduct, his retaliation claim based on the filing of the July Form U5 fails.

For Mr. Boyd's claim based on negative employment references, it is impossible to evaluate any causation based on temporal proximity because Mr. Boyd has not produced evidence of any negative employment reference, and therefore has not identified any specific date on which the alleged retaliation occurred. This failure necessarily defeats any attempt by Mr. Boyd to establish causation through temporal proximity for this alleged retaliation. *Hinton v. Virginia Union Univ.*, 185 F. Supp. 3d 807, 838-39 (E.D. Va. 2016) (dismissing a retaliation claim when the plaintiff did not allege facts to show actual causation or dates sufficient to show temporal proximity). Because Mr. Boyd cannot establish that TIAA's alleged retaliatory conduct was caused by his protected activity, Mr. Boyd's retaliation claims fail as a matter of law.

b. Mr. Boyd's breach of contract claim fails because TIAA did not breach the Agreement by filing the July Form U5 and Mr. Boyd waived any breach caused by the December Form U5.

Mr. Boyd's breach of contract claim cannot withstand a motion for summary judgment. Mr. Boyd has not provided any legal support for his argument that TIAA's July 2015 amendment explanation violated the Agreement. In fact, TIAA's amendment explanation language could not

have violated the Agreement, because the Agreement is completely silent as to all portions of the contemplated Amended U5 other than the "Termination Explanation." In addition, the amendment explanation language is neither false nor inconsistent with the Agreement, as Mr. Boyd has alleged, but rather comports completely with the parties' agreed-upon "termination explanation" language. Finally, even if the amendment language were an inconsistent addition to the Form U5 that constituted a material breach, that breach was cured at Mr. Boyd's request and in the manner he chose in December 2015, and thus waived.

i. The July Form U5 did not breach the Agreement.

Mr. Boyd has not put on any evidence that the July Form U5 violated the Agreement. The elements of a breach of contract claim are (1) existence of a valid contract and (2) breach of the terms of that contract. *See, e.g., Supplee v. Miller-Motte Business College, Inc.*, 239 N.C. App. 208, 217 768 S.E.2d 582, 590 (N.C. App. 2015). By its plain language, the Agreement only addresses the "Termination Explanation" section of the contemplated Amended U5, a fact that Mr. Boyd admitted at his deposition. [Boyd 52:8-10.] Although FINRA requires TIAA to provide an amendment explanation, the Agreement neither refers to nor requires TIAA to include any particular language in the "explanation of amendment" section of the Amended U5. Because there is no contractual term related to the "explanation of amendment" language in the U5, TIAA's amendment explanation could not have violated the Agreement.

Neither is the amendment explanation language a deviation from the agreed-upon language in the "termination explanation" section of the Form U5. The language TIAA chose is entirely consistent with the Termination Explanation, the accuracy of which Boyd expressly agreed he would not "challenge in any way." [Compl. ¶ 16; Exh. 2 ¶ 3.] The March Form U5 stated that TIAA terminated Boyd because Boyd "did not meet internal performance

expectations for position." The Amended U5 changed that explanation, providing instead that Boyd and TIAA had a "disagreement regarding internal policy requirements for position." [Agreement ¶ 3; Exh. 3.] The amendment explanation language in the July Form U5 reconciles these two differing explanations by explaining that, "[t]he 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." [Exh. 3.] This language explains the "disagreement regarding internal policy requirements for position" that is referred to in the July Form U5 termination explanation. Mr. Boyd has not—and cannot—explain why this amendment explanation is a material deviation or negation of the "termination explanation" language to which he agreed. Because the amendment explanation language is consistent with the termination explanation for which Mr. Boyd bargained with TIAA, the amendment explanation does not defeat the purpose of the Agreement, but instead is consistent with the Agreement's purpose. *Cf. Long v. Long*, 160 N.C. App. 664, 668, 588 S.E. 2d 1, 4 (2003).

ii. The breach of contract claim was waived by the December 7, 2015 U5 amendment.

To the extent that the Court finds that the July Form U5 could violate the Agreement, or that Mr. Boyd is actually basing his breach of contract claim on the December Form U5 rather than the July Form U5, Mr. Boyd has waived that claim. Mr. Boyd, through his attorney, identified the purported breach of the Agreement, requested a specific remedy, and obtained that remedy. Mr. Boyd thus knowingly and voluntarily waived his breach of contact claim. *See, e.g., Fetner v. Granite Works*, 251 N.C. 296, 302, 111 S.E.2d 324, 328 (1959) (explaining that the elements of waiver are (1) existence at the time of the waiver of a known right; (2) knowledge of

the right; and (3) an intention to relinquish that right); *Demeritt v. Springsteed*, 204 N.C. App. 325 (2010).

This is especially true to the extent Mr. Boyd bases any part of his breach of contract claim on the December Form U5, the language of which Mr. Boyd hand-selected. In fact, to the extent Mr. Boyd can survive summary judgment on his breach of contract claim, his claim and any related damages he is able to prove should be limited to the time period between July to December 2015. Mr. Boyd has not, however, forecast any evidence that he lost job opportunities during that window of time. Mr. Boyd should not therefore be permitted to reach a jury on this claim.

iii. Mr. Boyd does not have any evidence that TIAA gave him negative employment references.

Mr. Boyd also claims that TIAA breached the Agreement by giving negative employment references. This claim fails for the simple reason that there is no evidence that TIAA has ever provided a negative employment reference for Mr. Boyd.

As an initial matter, Mr. Boyd testified in his deposition that he voluntarily gave out contact information for his former supervisors, and continued to do so as late as April 2018, a year after this lawsuit was filed. [Boyd 79:20-80:19 and Exhibit 7, 142:22-143:4 and Exhibit 20.] This conduct alone calls into question any allegation that TIAA's supervisors were providing negative employment references for him, and implies that Mr. Boyd would have waived any claim regarding references, had TIAA given them.

Even setting aside this behavior, Mr. Boyd failed to produce any evidence in discovery that even one potential employer requested or received a negative job reference from TIAA. He could not identify any person at TIAA with whom any potential employer spoke, or the dates or content of such any such communications. [*See, e.g.*, Boyd 70:18-71:22, 72:4-74:15, 83:21-84:2,

84:7-85:3, 85:10-20, 85:23-87:1, 87:2-88:7, 88:8-91:21, 91:22-92:18.][4] Instead, Mr. Boyd speculated that TIAA gave negative employment references because some employers declined to offer him employment after he provided names of potential references from TIAA. (*See, e.g.*, Boyd 80:20-81:2).[5] TIAA provided sworn testimony to the contrary, confirming that Mr. Boyd's speculative allegations are false and that it has not given any references. [Exh. D ¶ 4.]

Even if the Court were required to accept Mr. Boyd's unsupported and demonstrably false suppositions, however, they are inadmissible hearsay and not competent evidence that can defeat a summary judgment motion. *Plum Properties, LLC v. Holland*, 807 S.E. 2d 676, 679 (N.C. App. 2017) (inadmissible hearsay "cannot be used to meet the burden of production necessary to defeat summary judgment."). A breach of contract claim necessarily requires evidence that a breach actually occurred. *See Supplee v. Miller-Motte Business College, Inc*., 239 N.C. App. at 217, 768 S.E.2d at 590. Because Mr. Boyd has not produced any competent evidence that TIAA provided even one negative employment reference, his breach of contract claim fails.

c. Mr. Boyd should be prohibited from presenting any damages theory.

To the extent that Mr. Boyd is able to survive summary judgment on liability, TIAA nonetheless requests that the Court enter an order finding that he cannot present any evidence of damages to the jury, and thus can receive nominal damages only if he prevails at trial. *See, e.g., Silicon Knights, Inc. v. Epic Games, Inc*., 2012 WL 1596722 (E.D.N.C. May 7, 2012)(collecting cases describing the consequences for failing to disclose a damages computation during

[4] Mr. Boyd also admitted that one potential employer, Foresters Financial, did not claim to have contacted TIAA or to have received a negative employment reference. [Boyd 79:17-24.]

[5] "Q. Do you have any personal knowledge as to whether Ms. Wylie ever contacted TIAA for an employment reference? A. I -- I believe she did. Q. Do you know that for a fact? A. She didn't say -- she didn't say, 'Hey, I called them and they told that.' But I believe she did, because she withdrew the offer."

discovery); *AVX Corp. v Cabot Corp.*, 252 F.R.D. 70, 76-81 (D. Ma.. 2008)(finding at summary judgment that a plaintiff could not introduce evidence of damages when it failed to supplement its damages computation). Mr. Boyd did not disclose any damages computation at all in either his initial disclosures[6] or in his answers to interrogatories,[7] and was unable to quantify his damages during his deposition. [Boyd 92:23-94:19, 96:15-100:6, 102:12-107:13.] Nor did Mr. Boyd disclose a damages expert, and the time for disclosing experts has passed. [Lindahl Decl. ¶ 6.] Discovery has now closed, and Mr. Boyd can no longer supplement his discovery responses to include a damages computation. Mr. Boyd is thus foreclosed from putting on any evidence of damages at trial.

3. Conclusion

For the foregoing reasons, TIAA respectfully requests that the Court grant summary judgment in favor of TIAA on Mr. Boyd's claims for breach of contract and retaliation.

This the 1st day of August, 2018.

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[6] Mr. Boyd described his damages in his initial disclosure as follows, "At this time, Plaintiff has not yet calculated the extent of his damages. Plaintiff will supplement his discovery as he is able to ascertain his damages through discovery." [Lindahl Decl. ¶ 3 and Exh. 1.]

[7] In his interrogatory answers, which he served on March 13, 2018, Mr. Boyd described his damages as follows, "Discovery is ongoing in this matter, and Plaintiff has not yet been able to fully calculate the amount of his damages. Plaintiff will supplement his response to this Interrogatory when he is able to supply the requested computation." [Lindahl Decl. ¶ 4 and Exh. 2.]

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and have verified that such filing was sent electronically using the CM/ECF system to the following:

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