THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Case No: 5:23-cv-00489-D-BM

CHRISTOPHER CAUDILL; RACHEL NIKETOPOULOS; and DAVID FRIEDLANDER, A/K/A DOVID FRIEDLANDER Plaintiff(s) v. THE NORTH CAROLINA SYMPHONY SOCIETY, INC.; THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES; and SANDI MACDONALD Defendant(s)	**NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' COMPLAINT** **[Fed. R. Civ. P. 12(b)(1), (2) and (6)]**

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Now comes the North Carolina Department of Natural and Cultural Resources ("NCDNCR") and pursuant to Local Rule 7.2 respectfully submits this memorandum in support of NCDNCR's motion to dismiss Plaintiffs' Complaint ("Complaint").

NATURE OF THE CASE

Plaintiffs Chris Caudill, Rachel Niketopoulos and Dovid Friedlander (collectively, "Plaintiffs"), musicians formerly employed with the North

Carolina Symphony Society, Inc., filed a Complaint on August 31, 2023, (DE 1) against the North Carolina Symphony Society, Inc. (the "N.C. Symphony, Inc." or "Symphony Orchestra"), Sandi Macdonald, the N. C. Symphony Inc.'s President and Chief Executive Officer and the North Carolina Department of Natural and Cultural Resources ("NCDNCR"), alleging violations of their rights through a mandated COVID-19 vaccine policy and subsequent denial of a religious accommodation under Title VII of the Civil Rights Act of 1964 and violation of the Free Exercise Clause pursuant to 42 U.S.C. § 1983. Plaintiffs' Complaint asserts two causes of action:

1. Violation of Title VII of the Civil Rights Act of 1964 against the N.C. Symphony, Inc. and NCDNCR (Count I);

2. Violation of 42 U.S.C. § 1983 (Free Exercise Clause) against the N.C. Symphony, Inc. and Ms. Macdonald (Count II).

STATEMENT OF FACTS[1]

In June of 2003, Plaintiff Chris Caudill ("Caudill"), who plays the French horn, joined the Symphony Orchestra in the horn section. (DE 1, ¶31). Plaintiff Rachel Niketopoulos ("Niketopoulos"), also a French horn player, joined the Symphony Orchestra in 2005. (CP 32) Caudill and Niketopoulos are married.

[1] While Plaintiffs' allegations are presumed to be true for the purposes of this motion, Defendant reserves the right to contest them at the appropriate time if this case proceeds.

(DE 1, ¶33). Plaintiff Dovid Friedlander ("Friedlander"), who plays the violin, joined the Symphony Orchestra more than fifteen years ago. (DE 1, ¶34).

The N.C. Symphony, Inc. is a non-profit corporation which was incorporated in 1933, and is organized as a non-profit under Chapter 55A of the North Carolina General Statutes. Sandi Macdonald is the President and Chief Executive Officer of the N.C. Symphony, Inc. (DE 1, ¶¶ 9-10). The N.C. Symphony, Inc.'s restated Articles of Incorporation state that the purpose of the non-profit corporation is to promote and foster musical culture within and without the State, including organizing the North Carolina Symphony Orchestra and supervising the musicians[2]. It is governed by a Board of Directors and, upon information and belief, Defendant Macdonald reports to that Board. N.C.G.S. § 143B-94 (2023).

The NCDNCR is a cabinet-level department within the North Carolina government whose duties include, *inter alia*, assisting local organizations and

[2] This Court may take judicial notice of matters of public record which cannot be reasonably disputed and can readily be determined from accurate sources. *See* Fed. R. Evid. 201; *Sec'y of State for Defense v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir 2007)("In reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record".); *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (noting that a court may take judicial notice of public information when reviewing a motion to dismiss); *Johnson v. North Carolina*, No. 4:14-cv-50, 2015 U.S. Dist. LEXIS 11487, at *6 n.3 (E.D.N.C. Jan. 30, 2015)("On a motion to dismiss, courts may properly take judicial notice of matters of public record.")

the community with needs, resources and opportunities related to the arts. (DE 1, ¶ 10); N.C.G.S. § 143-406 (2023). In support of the N.C. Symphony, Inc., NCDNCR assigns several NCDNCR (State) employees to assist in some administrative functions of the N.C. Symphony, Inc. (DE 1, ¶ 10). N.C.G.S. § 126-5(c11)(2).

In August 2021, in response to the Covid-19 pandemic, the North Carolina Symphony Player's Association (though not clear from Plaintiffs' complaint, this is believed to be the labor union for orchestra musicians in North Carolina) and the N.C. Symphony, Inc., issued a COVID-19 Vaccination Policy for the 2021-2022 season. (DE 1, ¶ 42). According to Plaintiffs, the vaccination policy provided that, to be part of the orchestra, musicians must receive COVID-19 vaccinations or have a medical or religious exemption. *Id.* Additionally, the union's Orchestra Committee ("OC") informed its members that "Management" (again, it is unclear from the complaint whether this is the management of the union or management of the N.C. Symphony Society, Inc.) would provide musicians with a "Religious Accommodation Request Form." According to Plaintiffs, if the religious accommodation was approved, the policy included, "twice weekly testing during all weeks of the season." (DE 1, ¶ 43). Additionally the OC informed its members that approved unvaccinated players would be socially distanced. (DE 1, ¶ 44).

In early September 2021, Plaintiffs sought religious accommodations from the vaccination requirement. (DE 1, ¶ 46). Plaintiffs allege that, on September 14, 2021, Sandi Macdonald, President and CEO of the N.C. Symphony, Inc., denied the Plaintiffs religious accommodation request. (DE 1, ¶ 49). Plaintiffs were placed on unpaid leave with health benefits through the 2021-2022 season, approximately September through early June. (DE 1, ¶¶ 42 fn.18, 51). Plaintiffs further allege Ms. Macdonald agreed to meet with them by April 1, 2022 to discuss whether the N.C. Symphony, Inc., could accommodate them after that time. Despite having been placed on unpaid leave for an entire symphony season, Plaintiffs allege that they elected not to file charges at the EEOC. (DE 1, ¶ 51). Plaintiffs further allege that Ms. MacDonald's true basis for denying Plaintiffs religious accommodation request was not an inability to provide a reasonable accommodation but rather Ms. Macdonald wanted to promote a "culture" of vaccination at the N.C. Symphony, Inc. (DE 1, ¶ 59). Ms. Macdonald never scheduled the April 1st meeting with Plaintiffs and on May 17, 2022, sent letters to the Plaintiffs that they are terminated, effective June 30, 2022, for failing to comply with the Covid-19 Vaccination Policy. Macdonald informed Plaintiffs that it was an undue hardship for the N.C. Symphony, Inc., to allow Plaintiffs to perform with

mitigation measures and it had become an undue hardship to continue to provide Plaintiffs with unpaid leave with health benefits. (DE 1, ¶ 60).

Niketopoulos filed her Charge of Discrimination with the EEOC on August 19, 2022, Caudill on September 19, 2022 and Friedlander on October 22, 2022 (Friedlander, without explanation, asserts he did not receive his May 17th letter until July 28, 2022). (DE 1, ¶¶ 60 fn. 31, 61). On June 4, 2023, the EEOC issued Right to Sue letters to Plaintiffs[3]. (DE 1, ¶ 62).

QUESTIONS PRESENTED

I. WHETHER PLAINTIFFS' TITLE VII CLAIM AGAINST NCDNCR SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

II. WHETHER PLAINTIFFS' TITLE VII CLAIM AGAINST NCDNCR SHOULD BE DISMISSED FOR FAILURE TO

[3] Plaintiffs' EEOC Charges of Discrimination and Right to Sue letters are attached to Defendant's Motion to Dismiss as: Exhibit 1-Caudill's September 19, 2022 EEOC Charge of Discrimination; Exhibit 2-Friedlander's October 22, 2022 EEOC Charge of Discrimination; Exhibit 3- Niketopoulos' August 19, 2022 EEOC Charge of Discrimination; Exhibit 4-Caudill's June 4, 2023 EEOC Notice or Right to Sue; Exhibit 5-Friedlander's June 4, 2023 EEOC Notice or Right to Sue; and Exhibit 6-Niketopoulos' June 4, 2023 EEOC Notice or right to Sue and are incorporated herein. A document referenced in and integral to the complaint may be considered in a motion to dismiss even of outside the pleadings. *See Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995); *Plummer v. Veolia Trans. Servs.*, No. 5:09-CV-557, 2010 U.S. Dis. Lexis 64419, at *1 n. 1 (E.D.N.C. June 29, 2010)(considering EEOC Charge and other documents attached to defendant's motion to dismiss because they were integral to and relied upon by the complaint).

EXHAUST ADMINISTRATIVE REMEDIES AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

DISMISSAL STANDARDS

1. Rule 12(b)(6) Standard.

A motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the complaint. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989). The "court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff in weighing the legal sufficiency of the complaint," but does not consider "legal conclusions, elements of a cause of action, . . . bare assertions devoid of factual enhancement[,] . . . unwarranted inferences, unreasonable conclusions, or arguments." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citations omitted). The 12(b)(6) standard for dismissal requires the articulation of facts that, if true, demonstrate a claim that the plaintiff may plausibly be entitled to relief. *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" --- a standard that requires

more than facts "that are 'merely consistent with' a defendant's liability." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) Although the Court accepts factual allegations as true, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007) Therefore, to survive a motion to dismiss, a complaint must provide more than "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

2. Rule 12(b)(1) Standard.

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the burden of proving subject matter jurisdiction on a motion to dismiss is on the party who asserts the existence of subject-matter jurisdiction, the plaintiff. *See Mims v. Kemp*, 516 F.2d 21 (4th Cir. 1975). "Unlike the procedure in a 12(b)(6) motion where there is a presumption reserving the truth finding role to the ultimate factfinder, the court in a 12(b)(1) hearing weighs the evidence to determine its jurisdiction." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. Va. 1982). "When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Evans v. B. F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (citations omitted)

3. Rule 12(b)(2) Standard.

A motion filed under Rule 12(b)(2) of the Federal Rules of Civil Procedure tests a court's jurisdiction over an individual. Again, the burden is on the plaintiff to demonstrate that jurisdiction is proper, *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1272 (6th Cir. 1998), and the plaintiff must set forth specific facts showing that the court has jurisdiction. *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 930 (6th Cir. 1974). Although a plaintiff who opposes a 12(b)(2) motion is entitled to have all reasonable inferences drawn in his favor, the court is not required to look solely to plaintiff's proof. *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, *rev'd on other grounds*, 7 F.3d 1130 (4th Cir 1993).

ARGUMENT

I. PLAINTIFFS' TITLE VII CLAIMS AGAINST NCDNCR SHOULD BE DISMISSED BECAUSE THE PLAINTIFFS WERE NOT EMPLOYEES OF NCDNCR OR THE STATE OF NORTH CAROLINA AND PLAINTIFFS HAVE OTHERWISE FAILED TO STATE A CLAIM AGAINST NCDNCR.

All of Plaintiffs' claims against NCDNCR should be dismissed because Plaintiffs' employer—and Defendant Macdonald's employer—was the North Carolina Symphony Society, Inc., and not NCDNCR or the State of North Carolina.

Title VII provides that it shall be an "unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). "Title VII on which plaintiff relies require[s] that a claimant be an employee or applicant for employment, 42 U.S.C. §§ 2000e-2(a) . . . [,] and thus employee status is an element of a substantive Title VII claim." *Curl v. Reavis*, 740 F.2d 1323, 1327 n. 2 (4th Cir. 1984).

Under Title VII, "[t]he term 'employee' means an individual employed by an employer . . ."42 U.S.C. § 2000e-(f). "[A] plaintiff's status as an employee under Title VII is a question of federal, rather than of state, law; it is to be ascertained through consideration of the statutory language of the Act, its legislative history, existing federal case law, and the particular circumstances of the case at hand." *Curl*, 740 f.2d at 1327. (quoting *Calderon v. Martin County*, 639 F.2d 271, 272-73 (5th Cir. 1981)). State law is relevant insofar as it describes the plaintiff's position, including his duties and the way he is hired, supervised and fired. *Id*. (quotations and citations omitted). As such, the court must "focus principally on the responsibilities and powers inherent in the position, rather than on the actions of specific individuals, including plaintiffs,

who hold or have held the position." *Kelley v. City of Albuquerque*, 542 F.3d 802, 810 (10th Cir. 2008).

In adopting this definition, Congress essentially left the term "employee" undefined. *See Cilecek v. Inova Health Sys. Servs.*, 115 F.3d 256, 259 (4th Cir. 1997). The Fourth Circuit has found that when Congress uses the term "employee" in a statute without defining it, the courts will presume that Congress intended to describe the "conventional master-servant relationship as understood by common-law agency doctrine." *Id.* (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992)).

In *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989), the Supreme Court identified a non-exhaustive list of factors relevant to determining whether an individual is an employee under the common law of agency. *See Mangram v. Gen. Motors Corp.*, 108 F.3d 61, 62-63 (4th Cir. 1997). These factors include: 1) control of hours worked by the individual and administrative details incident to work; 2) source of instrumentalities of individual's work; 3) duration of the relationship between the parties; 4) whether the hiring party has right to assign additional work or to preclude the individual from working at other facilities; 5) method of payment; 6) the individual's role in hiring and paying assistants; 7) whether

work is part of the regular business of the hiring party and how it is customarily discharged; 8) provision of employee benefits; 9) tax treatment of income; and 10) the parties' belief as to type of relationship. *See Cilecek*, 115 F.3d at 259 (citing *Reid*, 490 U.S. at 751-52)

Based on the factual allegations raised in the Plaintiffs' complaint and the attached Charges of Discrimination, in applying the foregoing factors, Plaintiffs have not shown that they were ever NCDNCR's employees.

Here, Plaintiffs have not alleged or averred that they were hired by NCDNCR (or, the State), that NCDNCR controls their hours of work, has the right to assign work, or preclude them from working at different facilities, or controls where or when they will perform as part of the Symphony Orchestra. Rather, Plaintiffs admit they were hired by N.C. Symphony, Inc., and each musician in the orchestra signs a contract every January that is negotiated between an elected Orchestra Committee, the local musicians union, and the N.C. Symphony, Inc. (DE 1, ¶¶ 42-48) **(Exs. 1 and 2).** Accord, N.C.G.S. § 95-98 (2023) (Contracts between the State and any labor union, trade union or labor organization bargaining for any public employee are against public policy of the State and are unlawful and void.). Plaintiffs do not contend that NCDNCR has any control over the instrumentalities of their work. Plaintiffs have each worked for the N.C. Symphony Orchestra for over fifteen years (DE

1, ¶¶ 31, 32 and 34) and have presumably signed an employment contract with the N.C Symphony, Inc. each of those years. There is no allegation or facts in the Complaint that NCDNCR is involved in the hiring or firing of Symphony Orchestra musicians, or that NCDNCR directed, or had the authority to direct, someone in the hiring, firing, or disciplining of the same. All the allegations related to the adverse employment action are aimed at Ms. Macdonald in her position as President and CEO of the N.C. Symphony, Inc. (DE 1, ¶¶ 11, 49, 51, 60, 65, 66 and 67). Plaintiffs have not alleged or averred that they were paid by NCDNCR (or the State), that they received health or other benefits from the State, or that they pay into the State's retirement system. *See* N.C.G.S. § 135-1 (2023) ("employee" shall mean, *inter alia*, full-time employees, agents or officers of the State of North Carolina or and any of its departments, bureaus or institutions.) Plaintiffs have not alleged or averred they received any guidance, performance evaluation (DE 1, ¶ 71) or support from the human resources division at NCDNCR or the North Carolina Office of State Human Resources, which makes policies and rules governing State employees. N.C.G.S. § 126-1 (2023)

Utilizing the *Reid* test, Plaintiffs do not meet the definition of a NCDNCR employee for the purposes of Title VII. Instead, Plaintiffs make the blanket legal assertion that "[u]nder State law, employees of the Symphony

are considered State employees. N.C. Gen. Stat. § 126-(c11)(2).” (DE 1, ¶ 23)[4]. Plaintiffs convolute and misapply the law. The intent and purpose of Chapter 126, the North Carolina Human Resources Act, is to establish for the State a system of personnel administration. N.C.G.S. § 126-1. All State employees not exempted from Chapter 126 are subject to the provisions and protections of the chapter. Under N.C.G.S. § 126-5(c11)(2), “*employees* of the Department of Natural and Cultural Resources” whose positions are assigned to assist the “North Carolina Symphony” are exempted from certain classifications, compensation, holidays, promotion and transfer requirements. However, they are not wholly exempted from Chapter 126 and are State employees (emphasis added). Chapter 126 applies to employees that may be assigned to the N. C. Symphony Society, Inc., but it does not create State employees from whole cloth. *See* N.C.G.S. § 143B-53.2(c) (2023) (“The exemptions to Chapter 126 of the General Statutes authorized by G.S. § 126-5(c11)(2) for the *employees* of the Department of Natural and Cultural Resources listed in that subsection shall be used to develop organizational classification and compensation innovations that will result in the enhanced efficiency of operations.”)

[4] Plaintiffs are members of the State Employees Credit Union (SECU). (DE 1, ¶ 23). The SECU is formed under N.C.G.S. § 54-109.1 as a cooperative, non-profit association with their own qualifications for membership. Membership or qualification for membership does not make you a State employee.

(emphasis added). Plaintiffs and the other twenty-six N.C. Symphony, Inc., employees and the approximate sixty-six orchestra musicians[5] are not transformed into NCDNCR (or, State) employees under N.C.G.S. § 126-5(c11)(2). Rather, the six employees listed on NCDNCR's website as employees of NCDNCR (DE 1, ¶ 20) and assigned to administratively assist the Symphony Orchestra and are full time State employees, subject to the rights and privileges of Chapter 126 with a few limited exemptions[6]. Plaintiffs are not. Importantly, Plaintiffs have not alleged or averred that the six NCDNCR employees assisting the Symphony Orchestra had any input or participation in the creation or implementation of the Symphony Society's COVID-19 policy or decision to terminate their employment.

Plaintiffs further allege that the N.C. Symphony, Inc. receives funding from the State and therefore has an impact on the state treasury. (DE 1, ¶¶ 21-22). Presumably, Plaintiffs are asserting that State funding transforms the N.C. Symphony, Inc. into a state actor. It does not. The U.S. Supreme Court's opinions in *Blum v. Yaretsky*, 457 U.S. 991, 1010-11, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982), and *Rendell-Baker v. Kohn*, 457 U.S. 830, 840, 102 S. Ct. 2764,

[5] DE 1, ¶ 20, fn. 7, "Symphony Website, *Our People*."
[6] Under N.C.G.S §126-5(c11)(2) these same exemptions apply to NCDNCR employees at the NC Museum of History, Tryon Palace, Transportation Museum, and others.

73 L. Ed. 2d 418 (1982), and the Fourth Circuit's opinion in *Mentavlos v. Anderson*, 249 F.3d 301, 319 (4th Cir. 2001), make clear that even when a private organization relies significantly on the State for funds, that dependence does not alone make the acts of the private organization acts of the State.

Plaintiffs also allege that the N.C. Symphony, Inc., is a "statewide-versus local-concern" and that it is "North Carolina's state orchestra" embracing a legacy of "statewide service and music education." (DE 1, ¶ 24). These allegations do not assert that a state law or regulation compels the Symphony Orchestra's conduct or that the N.C. Symphony, Inc., is so pervasively intertwined with NCDNCR as to be considered state conduct. *See Peltier v. Charter Day School, Inc.*, 8 F.4th 251, 266-268 (4th Cir. 2021). The operation of an orchestra could hardly be considered a state function, and Plaintiffs have not alleged or averred any facts the NCDNCR has any approval or supervision of the Symphony Orchestra's COVID-19 policies or hiring and firing policies.

a. N.C. Symphony, Inc. and NCDNCR are not a single or integrated employer.

Plaintiffs' claims against NCDNCR should be dismissed because NCDNCR did not employ the Plaintiffs, and Plaintiffs have failed to allege or aver facts sufficient to support a claim that N.C. Symphony, Inc. and NCDNCR

are a single legal entity. Defendants must generally employ a plaintiff to be liable for employment discrimination; however, defendants who do not directly employ a plaintiff may still be considered the plaintiff's employer in civil rights lawsuits. *See, e.g., Dunlap v. TM Trucking of the Carolinas, LLC*, 288 F. Supp. 3d 654, 664 (D.S.C. 2017). Under the "integrated employer" or "single employer" doctrine, "a parent company and its subsidiary can be considered a single employer for purposes of Title VII liability," *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 409 n.3 (4th Cir. 2015) (internal quotations omitted), when they are so "interrelated that they constitute a single employer," *Hukill v. Auto Care, Inc.*, 192 F.3d 437, 442 (4th Cir. 1999), *abrogated on other grounds*, *Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143 (4th Cir. 2012).

To determine whether to treat corporate entities as an "integrated employer," courts consider the following factors: "(1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control." *Hukill*, 192 F.3d at 442. Although "no single factor is conclusive," control of labor operations "is the most critical factor." *Id.* (citing *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 764 (5th Cir. 1997) (finding that control of labor relations has traditionally been the most important)).

Under the first and second considerations, the courts look to whether the separate corporations share a common manager who runs the day-to-day operations, can hire and fire employees and transfer employees between locations. *Gilbert v. Freshbikes*, LLC, 32 F. Supp. 3d 594, 603 (D. Md. 2014); *see also Hukill*, 192 F.3d at 443. Third, the courts look to whether a single party controls employment decisions across multiple corporations, including the power to hire, fire, supervise, and set employee schedules, and whether one individual owns and has financial control over the different enterprise. *Gilbert*, 32 F. Supp. 3d at 603; *see also Hukill*, 192 F.3d at 444 (finding no centralized control of labor operations when the company had "no power to hire, fire, or supervise employees" at the allegedly related companies).

Here, Plaintiffs have failed to allege or aver any facts that NCDNCR had the ability to hire, fire, or transfer any of the three Plaintiffs. Likewise, there are no facts alleged that NCDNCR has control over the Symphony Orchestra's budget. The N.C. Symphony, Inc., has approximately 30 employees (not including musicians) who are tasked with the day-to-day operations of the Symphony Orchestra, including a Personnel Manager, Director of Orchestral Personnel, Senior Vice President of Finance and Administration & CFO, Vice President of Marketing, Vice President of Philanthropy, among others.

The N.C. Symphony, Inc., is a non-profit corporation established in 1933 (DE 1, ¶ 9). The corporation was organized to promote and foster musical culture and education within and without the State including "organizing the North Carolina Symphony orchestra" and "supervising and providing for the training of musicians." **(Ex. 7, 2010 N.C. Symphony, Inc., Articles of Restatement).**

In 1943 the North Carolina General Assembly enacted Article 2 of Chapter 140 of the N.C. General Statutes addressing the North Carolina Symphony Society, Inc. The Act established, *inter alia*, a sixteen-member governing board of trustees (§ 140-6), allowed the adoption of by-laws by the board of trustees (§140-7), and provided that the Symphony Society "shall be under the patronage and control of the state" (§140-8). In 1983, the North Carolina General Assembly amended N.C.G.S. §140-8 and removed the language placing the Symphony Orchestra under the control of the State. 1983 N.C. Sess. Laws c. 913; N.C.G.S. §140-8 (2023).

In 1973, the General Assembly enacted the Executive Organization Act. 1973 N.C. Sess. c. 476. As part of the Act, the functions, powers and duties of the N.C. Symphony, Inc. were transferred and vested within NCDNCR, "except as otherwise provided by the Executive Organization Act of 1973." N.C.G.S. §143B-51(b). The Executive Organization Act also repealed N.C.G.S. §140-6

(1973 N.C. Sess. c. 476, s.89) and replaced it with N.C.G.S. §143B-94. 1973 N.C. Sess. c. 476, s.88. N.C.G.S. § 143B-94 confirms that the N.C. Symphony, Inc., shall "continue to be under the patronage of the State" as provided in Article 2 of Chapter 140. Therefore, the N.C. Symphony, Inc., continued to be governed by its board of trustees, which had the authority to adopt by-laws for the Symphony Orchestra. *See* N.C.G.S. § 140-7. Additionally, all language that the N.C. Symphony, Inc., shall be under the "control" of NCDNCR has been removed from the statutes. While "patronage" accurately reflects the regular State appropriations made to the non-profit corporation, the North Carolina General Assembly made a conscientious decision to remove the word "control" from the statutory text. "When the wording of an amended statute differs in substance from the wording of the statue prior to amendment, we can only conclude that [the General Assembly] intended the statute to have a different meaning." *Nalley v. Nalley*, 53 F.3d 649, 652 (4th Cir. 1995).

b. N.C. Symphony, Inc. is not agency or subdivision of NCDNCR.

In *Lebron v. National Railroad Passenger Corp*., 513 U.S. 384, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995) the National Railroad Passenger Corporation ("Amtrak") was deemed part of the federal government for First Amendment purposes. *Lebron*, 513 U.S. at 400. ("We hold that where, as here,

the Government [1] creates a corporation by special law, [2] for the furtherance of governmental objectives, and [3] retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.").

Here, it is plain enough that the N.C. Symphony, Inc., was not created by special statute. Rather, it was created in 1933 under the general non-profit incorporation statutes of North Carolina. (DE 1, ¶ 10). Article 2 of Chapter 140 of the North Carolina General Statutes was enacted in 1943 to "support" the Symphony Orchestra. (DE 1, ¶ 15). Additionally, the N.C. Symphony, Inc.'s governing body continues to be a board of trustees now consisting of not less than 16 members. The Governor and the Superintendent of Public Instruction serve as ex officio members. Four members are named by the Governor. The remaining ten trustees are chosen by members of the N.C. Symphony, Inc. N.C.G.S. §143B-94. NCDNCR (or, the State) therefore, does not retain permanent authority to appoint a majority of the trustees for the N.C. Symphony, Inc. The *Lebron* test is not met and the N.C. Symphony, Inc. is not an agency or subdivision of NCDNCR.

c. COVID-19 Vaccination Policy.

In August 2021, the N.C. Symphony, Inc., and the North Carolina Symphony Player's Association announced a COVID-19 Vaccination Policy

that required all orchestra musicians to receive a COVID-19 vaccination or have a medical or religious exemption from the requirement. (DE 1, ¶ 42). Plaintiffs further allege that on September 14, 2021, their religious accommodation requests were denied by the N.C. Symphony, Inc. (DE 1, ¶ 49), and they were ultimately terminated effective June 30, 2022 for failing to comply with the COVID-19 Vaccination Policy. (DE 1, ¶ 6). At the same time Plaintiffs allege they were required to receive a COVID-19 vaccination, the State and NCDNCR were implementing its COVID-19 policy, which did not require State employees to be vaccinated.

On July 29, 2021, Governor Roy Cooper issued Executive Order No. 224 directing the Office of State Human Resources ("OSHR") to issue a COVID-19 policy that State employees must either: 1) provide proof that they are fully vaccinated or, 2) be tested at least once a week for COVID-19. The Order applied to all cabinet level agencies. **(Ex. 8, Executive Order 224).** NCDNCR is a cabinet level agency. (DE 1, ¶ 10). In response, OSHR issued the State policy titled, "Requirement for COVID-19 Testing and Face Coverings as an Alternative to Proof of Full Vaccination," effective September 1, 2021. **(Ex. 9, State policy titled, "Requirement for COVID-19 Testing and Face Coverings as an Alternative to Proof of Full Vaccination").** NCDNCR followed the State policy for employees to: 1) provide proof of full vaccination

or, alternatively, 2) wear a face mask while indoors at work and provide results of COVID-19 testing each week. The policy also provided for accommodation requests. This policy was effective until May 9, 2022, when the State no longer required weekly testing for employees who were not fully vaccinated. **(Ex. 10, State policy titled, "Policy on Face Coverings and on Vaccination or Testing.").**

Plaintiffs allege they were NCDNCR employees during the pertinent time alleged in their complaint. (DE 1, ¶ 23). However, they also agree that they were subject to the Symphony Orchestra's August 2021 mandatory vaccination COVID-19 policy announced by their labor union and the N.C. Symphony, Inc. (DE 1, ¶ 42). This incongruity is emblematic of the ambiguities and uncertainties of Plaintiffs' Complaint. They attempt to paint themselves as NCDNCR employees all the while alleging they were under the supervision and control of the N.C. Symphony, Inc. Had they been NCDNCR employees, they would have had the option to test weekly in lieu of becoming vaccinated. In sum, Plaintiffs allege that they were terminated pursuant to the Symphony's COVID-19 Vaccination Policy, rather than on the basis of any policy enacted and enforced by the State or NCDNCR. That concession bolsters the argument that Plaintiffs lack a cause of action against NCDNCR.

II. PLAINTIFFS FAILED TO EXHAUST THEIR EEOC

ADMINISTRATIVE REMEDIES.

Before filing a discrimination claim under Title VII, Plaintiffs must timely file an administrative charge with the EEOC and exhaust the administrative procedural requirements. 42 U.S.C. § 2000e-5(b). "Only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent title VII lawsuit." *Evans v. Techs. Applications & Serv. Co.*, 80 f.3d 954, 963 (4th Cir. 1996). The Supreme Court held that Title VII's charge-filing requirement is not jurisdictional, but rather a claims-processing rule. *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1850-51, 204 L. Ed. 2d 116 (2019). *See Oswaldo Argueta v. Fred Smith Co.*, No. 5:19-cv-84-FL, 2019 U.S. Dist. LEXIS 204733, 2019 WL 6337426, at *3 (E.D.N.C. Nov. 26, 2019) (finding that *Davis* requires that the charge-filing requirement be analyzed under Rule 12(b)(6)). Therefore, failure to exhaust EEOC administrative remedies claims will be analyzed under Rule 12(b)(6).

A. Plaintiffs' Title VII claims against NCDNCR must be dismissed because Plaintiffs did not file an EEOC charge naming NCDNCR as a respondent.

Proper EEOC charges must meet several requirements. The charge must be in writing and verified under oath or affirmation under penalty of perjury. *See Edelman v. Lynchburg Coll.*, 535 U.S. 106, 112, 122 S. Ct. 1145, 152 L. Ed. 2d 188 (2002). A charge is sufficient "only if it is 'sufficiently precise to identify the parties, and to describe generally the action or practices complained of.'" *Chacko v. Patuxent Inst.*, 429 F.3d 505, 508 (4th Cir. 2005) (quoting 29 C.F.R. § 1601.12(b) (2004)). The scope of the plaintiffs' right to file a federal lawsuit is determined by the charge's contents. *See Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 132 (4th Cir. 2002). Likewise, individual defendants who were not named as respondents in EEOC charges generally cannot be held liable in federal court. Specifically, "[u]nder Title VII, a civil action may be brought after administrative proceedings have ended or conciliation attempts have failed only 'against the respondent named in the [administrative] charge.'" *Alvarado v. Bd. of Trustees of Montgomery Cmty. Coll.*, 848 F.2d 457, 458 (4th Cir. 1988); *see also*, *EEOC v. 1618 Concepts, Inc.*, 432 F. Supp. 3d 595, 603 (M.D.N.C. 2020) ("The failure to name a party in an EEOC charge may constitute a failure to exhaust administrative remedies . . . .").

An EEOC charge serves two important purposes: (1) "it notifies the charged party of the asserted violation" and (2) "it brings the charged party

before the EEOC and permits effectuation of the [Civil Rights] Act's primary goal, the securing of voluntary compliance with the law." *Dickey v. Greene*, 710 F.2d 1003, 1005 (4th Cir. 1983), *rev'd on other grounds*, 729 F.2d 957 (4th Cir. 1984); *see Miles v. Dell, Inc.*, 429 F.3d 480, 491 (4th Cir. 2005) (noting that administrative exhaustion is to "ensure[] that the employer is put on notice of the alleged violations so that the matter can be resolved out of court if possible"). The exhaustion requirement, therefore, is not "simply a formality to be rushed through so that an individual can quickly file his subsequent lawsuit." *Chacko v. Patuxent Inst.*, 429 F.3d 505, 510 (4th Cir. 2005). It "serves a vital function in the process of remedying an unlawful employment practice." *Balas v. Huntington Ingalls Indus., Inc.*, 711 F.3d 401, 407 (4th Cir. 2013). "Clearly, an entity not named in the administrative charge, and not provided with notice of the charge or the proceedings, cannot participate in the administrative conciliation processes." *Marshall v. Anne Arundel Cty. Md.*, No. SAG-18-0074, 2020 U.S. Dist. LEXIS 71083, 2020 WL 1939712, at *5 (D. Md. Apr. 22, 2020).

In this matter it is undisputed that Plaintiffs did not name NCDNCR in their charges of discrimination with the EEOC. **(Exs. 1-3)** Likewise, Plaintiffs have failed to allege or aver that NCDNCR had any knowledge of the EEOC

charges of discrimination, or that NCDNCR participated in the administrative proceedings or conciliation.

It is anticipated Plaintiffs may attempt to cure their failure to name NCDNCR in their EEOC charges through an alternative "substantial identity" exception to the Title VII naming requirements. "Although the Fourth Circuit has not formally adopted the test, other Courts within the circuit have employed the substantial identity test to assess whether a civil action can fairly be brought against a defendant other than the one named in the EEOC charge." *Marshall*, 2020 U.S. Dist. LEXIS 71083, 2020 WL 1939712, at *5; *see also Bing Yang v. Lai*, 2022 U.S. Dist. 117396 *12, 2022 WL 244834 (M.D.N.C. 2022) ("Some courts in the Fourth Circuit have recognized a 'substantial identity' exception to the general rule that a [discrimination] civil action may only be brought against a respondent listed on the EEOC charge."); *1618 Concepts*, 432 F. Supp. 3d at 604, ("although the Fourth Circuit has only discussed the substantial identity exception in dicta . . . other courts in this district have applied the exception."). Under the "substantial identity" test, "[i]f unnamed defendants are substantially or 'functionally' identical to named [respondents], then the plaintiff may sue all defendants in a district court action, despite failing to name some of them in the administrative action." *Mayes v. Moore*, 419 F. Supp. 2d 775, 783 (M.D.N.C. 2006).

Under this exception, courts consider four factors:

> 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint;
>
> 2) whether, under the circumstances, the interests of a named [respondent] are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings;
>
> 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party;
>
> 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named [respondent].

Id. (quoting *Glus v. G.C. Murphy Co.*, 562 F.2d 880, 888 (3d Cir. 1977)).

Even if this court undertakes an analysis under the "substantial identity" factors, the dual purposes of the naming requirement have not been satisfied. The facts alleged fail to support that NCDNCR had notice of the charges against it, and that its interests were fairly represented by the named party at the EEOC, the North Carolina Symphony Society, Inc.

First, the allegations in Plaintiffs' Complaint support a reasonable inference that Plaintiffs could have ascertained the names of the unnamed entity, NCDNCR, through reasonable effort. Plaintiffs allege they are State employees. (DE 1, ¶¶ 23, 69, 70, 72, 74-76 and 80). They further allege that Ms. Macdonald, the CEO and President of the N.C. Symphony, Inc., is listed

on the NCDNCR website as "leadership" (DE 1, ¶¶ 11 and 20) and several other high level Symphony Orchestra employees are also listed on the NCDNCR webpage as employees of the NCDNCR. (DE 1, ¶ 20). Plaintiffs' Complaint allegations themselves establish that the NCDNCR's identity was or should have been known to them.

Under the second factor, Plaintiffs have failed to plausibly allege that the interests of the N.C. Symphony, Inc., the named respondent in the EEOC charge, are so similar to those of the NCDNCR that it would be unnecessary to include NCDNCR in the EEOC proceedings. In *Efird v. Riley*, the court refused to dismiss claims against a sheriff where only the sheriff's department as a whole had been named as respondent in the EEOC charge. 342 F. Supp. 2d 413, 423 (M.D.N.C. 2004). The court reasoned that because, by statute, the sheriff had the exclusive right to hire, discharge, and supervise the employees in his office and was the official party that could be held liable for employment law violations committed by the sheriff's department, the sheriff himself had reason to know his conduct was at issue and he could be held responsible in his official capacity. *Id.* at 420, 422. Moreover, the sheriff had participated in the EEOC proceeding. *Id.* at 423. Here, there is no allegation that NCDNCR had any authority to hire, discharge or supervise employees of the Symphony Orchestra, much less musicians in the orchestra who had contracts of

employment with the Symphony Orchestra that included labor union protections. **(Exs. 1-3).** Further, there is no allegation that NCDNCR participated in the EEOC proceedings or that NCDNCR could be held responsible for employment law violations committed by the N.C. Symphony, Inc. Nor is there an allegation that the Symphony's Vaccination Policy and the State OSHR's or NCDNCR's Vaccination Policy was one and the same.

Contrast, *Davis v. BBR Management, LLC*, where the court dismissed the individual defendants not named in the EEOC charge. Civil Action No. DKC 10-0552, 2011 U.S. Dist. LEXIS 8716, 2011 WL 337342, at *5 (D. Md. Jan. 31, 2011). Plaintiff filed a charge at the EEOC naming "Babcock & Brown Residential-Holly Tree as the discriminating employer." 2011 U.S. Dist. LEXIS 8716, [WL] at *1. The Plaintiff then brought suit in federal court against that entity and two individual employees. *Id.* Plaintiff contended that the claims against the unnamed employees should not be dismissed because they were not named in the EEOC charge because their employer was named and the employees were described in the facts portion of the EEOC charge. 2011 U.S. Dist. LEXIS 8716, [WL] at *4. The court disagreed with the plaintiff, and found that "the individual defendants named in Plaintiff's complaint had no reason to know of the EEOC charge and were not in positions to make them substitutable for or essentially identical to the named respondent in the

charge." 2011 U.S. Dist. LEXIS 8716, [WL] at *5. Moreover, court concluded that "[t]he fact that their names were mentioned in the particulars section of the charge is not adequate" and dismissed the claims against the unnamed individual defendants. *Id.*

Here, the relationship of unnamed NCDNCR to the named respondent, N.C. Symphony, Inc., "is not so similar that the interests of the [named party] would render the presence of [Defendants] unnecessary in the administrative process." *Scurry v. Lutheran Homes of S.C., Inc.*, C/A No. 3:13-2808-JFA—PJG, 2014 U.S. Dist. LEXIS 123490, 2014 WL 4402797, at *4 (D.S.C. Sept. 3, 2014). There are no allegations that NCDNCR "had . . . reason to know of the EEOC charge," or "were . . . in positions to make them substitutable for or essentially identical" to N.C. Symphony, Inc. *Davis*, 2011 U.S. Dist. LEXIS 8716, 2011 WL 337342, at *5. Plaintiffs' EEOC Charges indicate that they were subject the Symphony Orchestra's vaccine mandate, which required all musicians to be vaccinated or receive a religious exemption. The decision to implement the COVID-19 vaccine policy was reached by the musician's labor union and the N.C. Symphony, Inc. The decision to deny the religious exemption was made by their employer, the N.C. Symphony, Inc. **(Exs. 1-3).**

Conversely, NCDNCR, in compliance with the State's COVID-19 policy, did not mandate that NCDNCR employees must be vaccinated. Therefore, under the gravamen of the EEOC charge, NCDNCR could not be "essentially identical" to the N.C. Symphony, Inc. Because NCDNCR's interests are not so similar to the N.C. Symphony, Inc., it follows that under the fourth factor, the Symphony Orchestra did not represent NCDNCR's interests. *See Mayes v. Moore*, 419 F. Supp. 2d 775, 783 (M.D.N.C. 2006) (finding where second factor weighed in favor of the unnamed defendants, the fourth factor also weighed in those defendants' favor).

"The third factor considers actual prejudice to the unnamed party" stemming from its absence during the EEOC proceedings. *1618 Concepts*, 432 F. Supp. 3d at 605. Plaintiffs' Complaint does not provide any information about the inquiry conducted during those proceedings. The June 4, 2023, Notice of Right to Sue letters "granted [Plaintiffs'] request for a Notice of Right to Sue, and more than 180 days have passed since the filing of [the] charge" the "EEOC is terminating its processing of this charge." **(Exs. 4-6).** Therefore, the EEOC terminated its investigation without making any findings or conclusions that may or may not establish any employment discrimination. NCDNCR was unable to present to the EEOC any information concerning; 1) the employment status or history of Plaintiffs; 2) the conflicting COVID-19

policies between the N.C. Symphony, Inc. and the NCDNCR; 3) the fact that NCDNCR does not supervise, manage, hire, or fire orchestra musicians and, 4) NCDNCR has no ability to return Plaintiffs to their jobs as orchestra musicians if required by this Court. Additionally, it can be inferred that the N.C. Symphony, Inc., would have complied with the EEOC request for a Position Statement, including documentation, which would have addressed its COVID-19 policy and the reasoning behind its decision to deny the Plaintiffs' religious exemption. None of this would or could have addressed NCDNCR's concerns. NCDNCR was prejudiced by Plaintiffs' request to terminate the EEOC investigation and the inability, as a separately named respondent, to address any issues raised by the EEOC. Distinguish, *Bockman v. T&B Concepts of Carrboro, LLC*, 1:19CV622, 2020 U.S. Dist. LEXIS 179871, 2020 WL 5821169, at *9 (M.D.N.C. Sept. 30, 2020), where the court found that the named and unnamed Defendants were so similar that it was unnecessary to include the unnamed defendant in the EEOC charge. Therefore, when the EEOC was unable to conclude that the information obtained against the named defendant established a violation of the statute, there was no prejudice to the similar unnamed defendant. Other courts have held that when "the EEOC filings in the record do not indicate that any party represented the interest of the [unnamed defendants] during the administrative proceeding,"

this factor should weigh in favor of the unnamed defendants. *See Scurry*, 2014 U.S. Dist. LEXIS 123490, 2014 WL 4402797, at *4; *see also Mayes*, 419 F. Supp. at 783, (concluding that the named and unnamed parties were separate entities and the unnamed party was prejudiced because "no one represented [the unnamed parties] interests in the administrative process.")

Finally, the fourth factor examines whether the unnamed party has represented to the complainant that its relationship with the complainant should be through the named party. Here, Plaintiffs alleged the N.C. Symphony, Inc. and NCDNCR are Plaintiffs' employers. If that were the case, Plaintiffs should have named NCDNCR in the EEOC Charges.

Examining all the relevant factors, the dual purposes of the naming requirement have not been satisfied. *See 1618 Concepts*, 432 F. Supp. 3d at 603. Of the four factors, courts have found that "the second and third speak most directly to the dual purposes of the Title VII naming requirement," *Id.* at 604, because "they are most reflective of the two-fold purpose of the naming requirement, that is, providing notice and an opportunity for voluntary conciliation." *Keener v. Universal Cos.*, 128 F. Supp. 3d 902, 915-16 (M.D.N.C. 2015) (cleaned up and quotations omitted). Because the facts alleged fail to support a reasonable inference that NCDNCR had notice of the charges against them, and that NCDNCR's interests were fairly represented by the

named party, this court should dismiss Plaintiffs' Title VII claims against NCDNCR for failure to exhaust the required administrative procedures

B. Plaintiffs Title VII claims against NCDNCR must be dismissed because Plaintiffs did not file an EEOC charge within the required time.

"Before a plaintiff may file suit under Title VII or the ADEA, he is required to file a charge of discrimination with the EEOC." *Jones v. Calvert Group, Ltd.,* 551 F.3d 297, 300 (4th Cir. 2009). The charge of discrimination must be filed with the EEOC within 180 days after the alleged unlawful employment practice occurred. *See* 42 U.S.C. § 2000e-5(e); *Jones,* 551 F.3d at 300 (charge must be filed within 180 days after the unlawful employment practice). "[T]he filing period runs from the time at which the employee is informed of the allegedly discriminatory employment decision, regardless of when the effects of that decision come to fruition." *Price v. Litton Business Systems, Inc.*, 694 F.2d 963, 965 (4th Cir. 1982). A plaintiff may not recover for discriminatory acts that occurred outside the 180-day time period. *Belton v. City of Charlotte*, 175 Fed. Appx. 641, 652-53 (4th Cir. 2006) (per curiam).

In *Delaware State College v. Ricks*, 449 U.S. 250, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980), the Supreme Court considered when such an act "occurs" in the context of a university professor's discriminatory discharge claim under Title VII of the Civil Rights Act of 1964. The Court held that the alleged discrimination had occurred when the university denied the professor tenure

and informed him of that act, a date over a year before his last day of work. The Court emphasized that "even though one of the *effects* of the denial of tenure -- the eventual loss of a teaching position--did not occur until later . . . 'the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.'" *Id.* at 258 (quotation omitted) (emphases and alteration in original). The date of that act marks the time from which the 180 days are counted. To the extent that notice enters the analysis, it is notice of the employer's actions, *not* the notice of a discriminatory effect or motivation, which establishes the commencement of the pertinent filing period. The Fourth Circuit has faithfully followed that criterion in discriminatory employment cases, wherein the courts have counted the 180 days from either the time of discharge or from the moment the employee received advance notice of the pending discharge. *See, e.g., Hamilton v. 1st Source Bank*, 928 F. 2d 86 (4th Cir. 1990); *English v. Pabst Brewing Co.*, 828 F.2d 1047 (4th Cir. 1987).

A review of Plaintiffs' Complaint demonstrates that the alleged discriminatory act, the denial of a religious exemption to the Symphony Orchestra's labor union-mandated COVID-19 vaccination policy, occurred in early September 2021. (DE 1, ¶¶ 42 and 46). Specifically, in August 2021, the North Carolina Symphony Player's Association, the Symphony Orchestra's labor union, announced a mandatory COVID-19 vaccine policy for its union members, including the Plaintiffs. In fact, Plaintiffs Caudill and Niketopoulos

allege they were "part" of the Symphony Orchestra's labor union. (DE 1, ¶¶ 42-43). In early September 2021, in accordance with the labor union's vaccination policy, Plaintiffs sought religious accommodations from the vaccine requirement. (DE 1, ¶ 46). On September 14, 2021, Ms. Macdonald denied Plaintiffs' religious accommodation request. (DE 1, ¶ 49). Plaintiffs were placed on unpaid leave for the 2021-22 symphony season. Plaintiffs were to meet with Ms. Macdonald by April 1, 2022, to discuss any accommodation. Plaintiffs hoped a resolution to their suspension could be reached before April 2022 and did not file a charge of discrimination with the EEOC at that time. (DE 1, ¶ 51). The April 2022 meeting never occurred and on May 17, 2022, Plaintiffs were sent correspondence indicating they were terminated as of June 30, 2022. (DE 1, ¶ 60). Plaintiffs filed their EEOC charges on August 19, 2022 (Niketopoulos), September 19, 2022 (Caudill) and October 22, 2022 (Friedlander). (DE 1, ¶ 61). Therefore, Plaintiffs were all aware of the alleged discriminatory conduct, failure to accept a religious accommodation to the labor union's vaccine mandate, in September 2021 and adverse employment action was taken at that time, unpaid suspension.

CONCLUSION

For all the reasons detailed above, NCDNCR request that the Court dismiss all of Plaintiffs' claims.

Respectfully submitted, this the 3rd day of November, 2023.

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CERTIFICATE OF WORD COUNT

The undersigned hereby certify that pursuant to LR 7.2(f)(3) of the Local Civil Rules, the foregoing Memorandum contains 8,380 words (including the body of the brief, headings, and footnotes, but excluding the caption, signature blocks, this certificate of compliance, and exhibits) as reported by the word-processing software.

This the 3rd day of November, 2023.

/s/ *Charles G. Whitehead*
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