IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NORA VARGAS, on behalf of herself and others similarly situated,	§	
Plaintiff,	§	
v.	§	Civil Action No. 3:23-CV-02689-B
PANINI AMERICA, INC.,	§	
Defendant.	§	

ORDER

The Court held a hearing on August 28, 2024, to address the Order to Show Cause issued on July 19, 2024 (Doc. 25). Plaintiff is represented by Rogge Dunn Group ("RDG"), based in Dallas, and Weinberg Zareh Malkin Price LLP ("WZMP"), based in New York City (collectively, "Plaintiff's Counsel"). During the hearing, the Court gave Plaintiff's Counsel the opportunity to address their misstatements of law and misrepresentations of cases in their Response to the Motion to Dismiss ("Response"). *See generally* Doc. 22.

On July 19, 2024, the Court ordered Plaintiff's Counsel to show cause in writing "why they should not be sanctioned for violating Federal Rule of Civil Procedure 11 and Texas Disciplinary Rule of Professional Conduct 3.03" because of the misrepresentations in the Response. Doc. 25, OSC, 3. Plaintiff's Counsel previously chalked up the miscited law and unsupported legal propositions to "mistakes, . . . a lack of familiarity amongst counsel, siloed research and knowledge, and poor integration of the work product of multiple attorneys." Doc. 24, Ltr., 2. Such explanations

might explain the typos and misquoted law in the Response but they do not adequately explain the misstated legal principles and incongruous citations.[1]

In their response to the Order to Show Cause, the "reviewing" attorneys—Mr. Nesbitt and Mr. Zareh—admitted they did not review or "verify each of the cited cases" in the Response. Doc. 35, OSC Resp., 8. But Plaintiff's Counsel still did not explain how their drafting process led to cite their unsupported legal propositions and false case citations they did. Therefore, the Court set a hearing to address the show cause Order. Doc 40, Order.

A red flag to the Court that this Response's errors stem from use of artificial intelligence ("AI") is the type and trend of error. Besides typos and misquoting cases, the Response either misstates case holdings, a court's findings, or legal principles in at least ten cases. For example, the Response cites to *Johnson v. PRIDE Industries*—a case that has *nothing* to do with a class action—for the proposition that it upheld a class claim. Doc. 22, Resp., 18. Worse, the Court found that ChatGPT, an AI search engine, described *Johnson v. PRIDE Industries*, as cited by Plaintiff,[2] in the same erroneous manner that the Response describes it. When confronted with the Court's findings on ChatGPT, Plaintiff's lead New York counsel, who attested to playing a central role in the drafting process, could not provide any further explanation.

Some of the misstated cases serve as the only support for Plaintiff's contention in the Response. For example, *Bradshaw v. Unity Marine Corporation* is the only case the Response cites to

[1] After being ordered to confirm all "authorities cited that do not stand for the legal or factual proposition offered," Doc. 25, OSC, 3, Plaintiff's Counsel did not catch every error. For instance, they never raise *EEOC v. W&M Enterprises Inc.*, which the Response describes as having sufficient allegations for a hostile work environment claim. Doc. 22, Resp., 13 (citing 496 F.3d 393 (5th Cir. 2007)). But the Fifth Circuit was not reviewing the sufficiency of the allegations in *W&M Enterprises*; it was reviewing a summary judgment motion. A review of *W&M Enterprises*'s docket (4:04-cv-03372) shows there was never a motion to dismiss, addressing the sufficiency of allegations, ever filed in this case.

[2] The Response miscites this case as *Johnson v. PRIDE Industries*, 7 F.4th 391 (5th Cir. 2021).

support the Plaintiff's contention regarding standing for injunctive relief and declaratory judgment in a class action. *See* Doc. 22, Resp., 20. Contrary to the Response's description, *Bradshaw* is not a class action and it never discussed standing or either form of relief. The Westlaw reporter "2020 WL 6345744," which the Response cites for *Bradshaw*, also does not exist. Plaintiff's Counsel repeatedly characterized these kinds of the mistakes to their failure to *review* the final briefing, without providing any real explanation for how the misstated and miscited law was *drafted* into the Response in the first place.

Another case from the Response, *Mims v. Carrier Corporation*, is not only inapplicable to the proposition cited but Plaintiff's counsel cites to the wrong legal reporter, the wrong district court, and the wrong year when attempting to cite this case. Doc. 22, Resp., 2, 18, 22. In other instances, the Response asserts that the Fifth Circuit found a certain claim to be sufficient, but then goes on to cite cases that *dismissed* the claims in question. *See id.* 11–14, Neither in their written responses nor at the hearing could Plaintiff's Counsel explain how exactly such phenomena occurred in the Response.

The hearing presented the third opportunity for Plaintiff's Counsel to explain the magnitude of errors in the Response. But their testimony only confirmed that Plaintiff's Counsel has no other explanation for how the wrong case law or case cites were drafted into their brief. Mr. Nesbitt and Mr. Zareh[3] admitted they never reviewed the cases in question. Despite being unable to explain how the cases were drafted into the Response, they were emphatic no AI was used.

Attorney William Pham from WZMP testified that he drafted a significant part of the

[3] Mr. Zareh also testified that the Dallas-based lawyers, including Mr. Webster, did not review all the cases cited in the Response.

Response.[4] While it did not find credible Mr. Pham's denial of AI use, the Court pushed him to explain how else the foregoing cases made their way into the Response. Mr. Pham stated that these errors come from a "grid" of cases, which he kept that was apparently bungled as he began funneling his legal research and deleting some cases. Mr. Pham did not explain how his deletion of cases from this grid could lead to the sorts of mistakes illustrated above: citing to a case reporter that does not exist, having a citation sentence that is incorrect in three distinct respects, and claiming, in multiple instances, a case stands for a proposition that is nowhere in the case cited. Nor can the Court surmise how the introduction of cases like *Bradshaw* and *Mims* can be explained by a botched case grid.

"District courts have an independent duty to maintain the integrity of the judicial process and may impose Rule 11 sanctions where necessary . . . ." *Whitehead v. Food Max of Miss., Inc.*, 332 F.3d 796, 808 (5th Cir. 2003). A court may *sua sponte* order sanctions, such as a public reprimand, under Federal Rule of Civil Procedure 11(c)(3) after issuing "an order to show cause why the conduct described in the order has not violated Rule 11(b)." Rule 11(b) provides in relevant part:

> (b) Representations to Court. **By presenting to the court** (whether by signing, filing, submitting, or later advocating) a pleading, **written motion**, or other paper, an **attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable** under the circumstances,—
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> **(2) the claims, defenses, and other legal contentions therein are warranted by existing law** or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]

FED. R. CIV. P. 11(b) (emphasis added).

[4] Another troubling discovery during this hearing is that Mr. Pham admits to drafting a significant portion of the Response without having signed the Response or having applied *pro hac vice* to practice before this Court at the time the Response was filed.

The Fifth Circuit has interpreted Rule 11 as imposing an affirmative duty on an attorney to certify that he has conducted a reasonable inquiry such that the filing presented embodies "existing legal principles." *Childs v. State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1023–24 (5th Cir. 1994); *Mercury Air Group, Inc. v. Mansour*, 237 F.3d 542, 548 (5th Cir. 2001). Compliance with this duty is measured when the attorney signs or files the document. *Childs*, 29 F.3d at 1024. The purpose of the rule is to "deter baseless filings in district court." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990).

In keeping with the plain text of Rule 11, the Fifth Circuit has found that factual or legal misrepresentations may serve as the basis for sanctions. *Jenkins v. Methodist Hosps. of Dallas, Inc.*, 478 F.3d 255, 265 (5th Cir. 2007) (citing *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1357 (Fed. Cir. 2003) (affirming a sanction for miscitation and mischaracterization of authority "because, in quoting from and citing published opinions, [counsel] distorted what the opinions stated by leaving out significant portions of the citation")). "Whatever the ultimate sanction imposed, the district court should utilize the sanction that furthers the purposes of Rule 11 and is the least severe sanction adequate to such purpose." *Id.* (citation omitted). In *Jenkins*, the Fifth Circuit also said "an admonition by the court may be an appropriate sanction, in instances where the attorney's sanctionable conduct was not intentional or malicious, where it constituted a first offense, and where the attorney had already recognized and apologized for his actions." *Id.* (finding district court did not abuse its discretion when imposing a public reprimand sanction).

Plaintiff's Counsel signed and therefore certified that the Response provided sound legal principles, when the Response did not in fact do so. They have apologized and acknowledged the Response contains bad law. But they have never addressed the elephant in the room: how the false

citations and statements of law made their way into the Response. After providing Plaintiff's Counsel ample opportunity to provide any legitimate explanation for the drafting itself, in the face of a brief that can only otherwise be explained by AI, they could not provide one.

The Court concludes that the Response was drafted using AI without subsequent review by Plaintiff's Counsel. The Court **REPRIMANDS** Plaintiff's Counsel,[5] which is the sanction the Court deems necessary to deter them and others practicing before this Court from using AI without making a reasonable inquiry that the "legal contentions [in their filings] are warranted by existing law." FED. R. CIV. P. 11(b); *accord Jenkins*, 478 F.3d at 265.

Separately, having reviewed the merits of pleading and motion to dismiss briefing, putting aside the erroneous case law cited in the Response, the Court finds that Plaintiff has failed to sufficiently plead her individual and class claims. The Court **DISMISSES WITHOUT PREJUDICE** the Amended Complaint. Plaintiff may file an amended complaint within **forty-five (45) days** of this Order.

SO ORDERED.

SIGNED: August 30, 2024.

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

[5] For the purposes of the sanction, "Plaintiff's Counsel" is comprised of Mr. Earl S. Nesbitt, Mr. Omid Zareh, Mr. Lane M. Webster, and Mr. William Pham. The Court does not include other counsel representing Plaintiff, Mr. Rogge Dunn and Mr. John T. Fant, who signed the Response but apparently did not work on it at all. Former counsel Mr. Pennetti also is not included in this sanction.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

----------X

NORA VARGAS,

Plaintiff,

- against-

PANINI AMERICA, INC.,

Defendant.

----------X

COMPLAINT

Case No.

JURY TRIAL DEMANDED

Plaintiff NORA VARGAS ("Vargas" or "Plaintiff"), by her attorneys complaining of Defendant PANINI AMERICA, INC. ("Panini" or "Defendant"), alleges as follows:

INTRODUCTION

1. This Action arises from the policy and practice of Panini (a sports collectibles company) of discriminating against its non-Caucasian employees for numerous years in violation of 42 U.S.C. §1981 ("Section 1981"), by promoting a racially hostile work environment for non-Caucasian employees and deliberately holding back such employees by denying them the same opportunities of advancement as Panini provides to its Caucasian employees.

2. Panini's discriminatory practices are even more insulting due to the fact that Panini relies heavily upon the success of African-American and other non-Caucasian athletes in the sale of Panini's products (75% or more of Panini's business).

3. Vargas, who is Hispanic, clearly was a victim of Panini's discriminatory practices, including being subject to a racially hostile work environment.

JURISDICTION

4. This Court has original subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, as the claims alleged herein arise under the laws of the United States, namely Section 1981.

5. Venue lies in this District pursuant to 28 U.S.C. § 1391, because Panini resides in Texas, is subject to the personal jurisdiction of Texas courts, and a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District.

6. This Court has personal jurisdiction over Panini because Panini's headquarters are in Texas, and the discriminatory conduct alleged herein took place in Texas. Panini does business in Dallas County, Texas. Its principal place of business is located at 5325 FAA Blvd., Suite 100, Irving, Texas 75061. Panini's contacts with the State of Texas are systematic and continuous, and the acts of discrimination that are the basis for the claims against Panini took place in Dallas County, Texas.

PARTIES

7. Plaintiff is an individual residing in Texas and is Hispanic.

8. Panini is a corporation organized and incorporated under the laws of Delaware with a principal place of business in Irving, Texas.

ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

9. Panini is a company that, among other things, sells trading cards and collectibles using the name and likeness of athletes across the globe.

10. While the backbone of Panini's business centers upon the accomplishments of numerous world-class athletes, most of which are persons of color, it has steadfastly maintained a policy and practice of denying non-Caucasian employees deserved promotions and equal pay as

compared to Caucasian employees, and acquiescing and promoting a racially based hostile work environment for non-Caucasian employees.

11. Furthermore, non-Caucasian employees are noticeably absent from leadership positions at Panini, which only further evidences that Panini has systematically denied career advancement to people of color.

12. Additionally, Panini went to great lengths to physically separate white employees from employees who were people of color. Specifically, Panini had a vast majority of the non-Caucasian employees working in a storage room, while almost all of the white employees worked in normal office space outside of the storage room.

13. Panini management also often labeled non-Caucasian employees as troublemakers who had an "attitude," while never using such derogatory terms when describing white employees.

14. The proof will also show that upper management at Panini was a tight-knit group of white males – the proverbial "good ole boys club," which continuously promoted white employees and kept racial minorities out of management.

15. Notably, Panini also failed to have any discrimination complaint procedures and provided employees with no formal avenues to complain about racial discrimination. Panini also had no anti-discrimination training for employees.

16. In this regard, in May of 2023, the civil rights group Until Freedom and Black Church PAC issued a letter to Panini and the NBA, NFL, MLB, National Women's Soccer League, MLS, and the NHL (the "Open Letter"), which highlighted Panini's discriminatory hiring and employment practices.

17. The Open Letter also demanded that Panini institute employment policies that ensure adequate representation and fair treatment throughout its business structure.

18. Vargas is a Hispanic woman who worked as a Pre-Press Imaging Production Coordinator at Panini from July 2020 to May 2021.

19. After working in that position for eleven months, Vargas applied for the open position of Assistant Soccer Editor in the Photography Department in or about April 2021. At the time of her application to that position, Vargas spoke to the manager of the Photography Department, Chris Wilkins ("Wilkins"), about her application.

20. Wilkins conceded that Vargas was qualified for the position. Indeed, Vargas was qualified for this position, because she had experience assisting the Photography Department that prepared her for the position of Assistant Soccer Editor in that department.

21. However, when she formally applied to that open position, her application was denied and that open position was filled by a Caucasian from outside the company with less experience than Vargas.

22. Such a denial of advancement was due to intentional discrimination. Such discrimination was systematic and pervasive, it detrimentally affected Vargas, and it would have detrimentally affected a reasonable person of Vargas's race under the same circumstances. Such discrimination was part of Panini's overall policy and practice of (a) not promoting racial minorities, and (b) harassing non-Caucasian employees based upon their race. Such discrimination constitutes a continuing violation of Section 1981.

23. But for her race, Vargas would have received the promotion to Assistant Soccer Editor.

24. Vargas also was subjected to a racially hostile work environment. In the Fall of 2020, one of Vargas's supervisors, Robert Greinke ("Greinke"), criticized another Hispanic employee for being distracted by that employee's children. Greinke never criticized Caucasian

employees for being distracted by their children and only criticized such employee for this issue because that employee was Hispanic.

25. Shortly thereafter, Greinke approached Vargas and asked her if she has children and would be similarly distracted by children. Greinke never asked Caucasian employees about having children and being distracted by their children, and only asked Vargas about these issues because she is Hispanic. Greinke assumed she had children and would be distracted because she was Hispanic.

26. Greinke also assigned Vargas an unrealistic amount of work that she could not complete, even if she worked overtime. Greinke did not assign an unrealistic amount of work to Caucasian employees, and only did so with Vargas because she is Hispanic.

27. Greinke also treated Hispanic employees (including Vargas) with far less respect than Caucasian employees, including being overly critical of Hispanic employees while continuously praising Caucasian employees.

28. Furthermore, in 2020 during the COVID-19 pandemic, Panini did not allow Vargas to work from home while it allowed numerous Caucasian employees to work from home. If Vargas were Caucasian, Panini would have permitted her to work from home.

29. But for her race, Vargas would not have suffered such a hostile work environment.

30. In May 2021, after being employed by Panini for numerous months and being denied a promotion due to her race, suffering a racial hostile work environment and witnessing management that was dominated by Caucasians who denied advancement to minorities, Vargas was compelled to quit her job at Panini.

31. Any reasonable person would have felt compelled to resign under the circumstances.

FIRST CLAIM FOR RELIEF

(Hostile Work Environment in Violation of Section 1981)

32. Plaintiff repeats and realleges all of the allegations set forth above as if fully restated in this Paragraph.

33. As set forth in detail above, Defendant discriminated against Vargas and harassed her on the basis of her race (Hispanic).

34. As demonstrated above, the harassment and discrimination suffered by Vargas was intentional and malicious, and it constituted a continuing violation. It was extraordinarily severe and altered the conditions of Vargas's working environment because it created an atmosphere of abuse and intimidation wherein Vargas's own supervisors participated and condoned the racist misconduct, and it led to Vargas's constructive discharge.

35. As described above, Vargas's supervisors used their authority to create and continue the discriminatory abusive working environment and failed to take any appropriate remedial action.

36. As a result, Vargas is entitled to compensatory damages for, *inter alia*, emotional distress, loss of enjoyment of life and other non-pecuniary losses in the maximum amount permitted by the law.

37. Because Defendant acted with malice and reckless indifference to Vargas's federally protected rights, Vargas is entitled to punitive damages in an amount to be determined at trial, but not less than the maximum amount permitted by law.

38. Vargas is also entitled to reasonable attorney's fees and expenses to the extent permitted by law.

39. But for her race, Vargas would not have suffered such a hostile work environment.

SECOND CLAIM FOR RELIEF
(Constructive Discharge in Violation of Section 1981)

40. Plaintiff repeats and realleges all of the allegations set forth above as if fully restated in this Paragraph.

41. As set forth in detail above, Defendant discriminated against Vargas, harassed her on the basis of her race, and created a hostile work environment.

42. In May 2021, after being employed by Panini for numerous months and being denied a promotion due to her race, suffering a racial hostile work environment and witnessing management that was dominated by Caucasians who denied advancement to minorities, Vargas was compelled to quit her job at Panini.

43. Any reasonable person would have felt compelled to resign under the circumstances.

44. But for her race, Vargas would not have suffered such a hostile work environment and constructive discharge.

45. As a result, Vargas is entitled to compensatory damages for, *inter alia*, lost wages and income, emotional distress, loss of enjoyment of life and other non-pecuniary losses in the maximum amount permitted by the law.

46. Because Defendant acted with malice and reckless indifference to Vargas's federally protected rights, Vargas is entitled to punitive damages in an amount to be determined at trial, but not less than the maximum amount permitted by law.

47. Vargas is also entitled to reasonable attorney's fees and expenses to the extent permitted by law.

THIRD CLAIM FOR RELIEF

(Failure to Promote
in Violation of Section 1981)

48. Plaintiff repeats and realleges all of the allegations set forth above as if fully restated in this Paragraph.

49. As set forth in detail above, Plaintiff is a member of a protected class (Hispanic).

50. Vargas worked as a Pre-Press Imaging Production Coordinator at Panini from July 2020 to May 2021.

51. After working in that position for eleven months, Vargas applied for the open position of Assistant Soccer Editor in the Photography Department in or about April 2021. At the time of her application to that position, Vargas spoke to the manager of the Photography Department, Wilkins, about her application.

52. Wilkins conceded that Vargas was qualified for the position. Indeed, Vargas was qualified for this position, because she had performed the tasks of a Assistant Soccer Editor for months prior to this application.

53. However, when she formally applied to that open position, her application was denied and that open position was filled by a Caucasian from outside the company with less experience than Vargas.

54. Such a denial of advancement was due to intentional discrimination. Such discrimination was systematic and pervasive, it detrimentally affected Vargas, and it would have detrimentally affected a reasonable person of Vargas's race under the same circumstances. Such discrimination was part of Panini's overall policy and practice of (a) not promoting racial minorities, and (b) harassing non-Caucasian employees based upon their race. Such discrimination constitutes a continuing violation of Section 1981.

55. But for her race, Vargas would have received the promotion to Assistant Soccer Editor.

56. As a result, Vargas is entitled to compensatory damages for, *inter alia*, lost wages and income, emotional distress, loss of enjoyment of life and other non-pecuniary losses in the maximum amount permitted by the law.

57. Because Defendant acted with malice and reckless indifference to Vargas's federally protected rights, Vargas is entitled to punitive damages in an amount to be determined at trial, but not less than the maximum amount permitted by law.

58. Vargas is also entitled to reasonable attorney's fees and expenses to the extent permitted by law.

WHEREFORE, Plaintiff demands Judgment as follows:

A. Plaintiff's actual damages and punitive damages as determined at trial;

B. Reasonable attorney's fees and expenses;

C. Costs and disbursements; and

D. Such other and further relief as deemed just and proper by this Court.

Dated: December 6, 2023

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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NORA VARGAS, on behalf of herself and others similarly situated,

Plaintiff,

- against -

PANINI AMERICA, INC.,

Defendant.

----------X

COMPLAINT

Case No. 3:23-cv-02689-B

JURY TRIAL DEMANDED

COMPLAINT AND JURY DEMAND

TO THE HONORABLE DISTRICT COURT:

Plaintiff NORA VARGAS ("Vargas" or "Plaintiff"), on behalf of herself and all similarly situated (the "Class Representative") presents this Amended Complaint against Defendant PANINI AMERICA, INC. ("Panini" or "Defendant"), alleges as follows:

INTRODUCTION

1. This Action arises from the policy and practice of Panini (a sports collectibles company) of discriminating against its non-Caucasian employees for numerous years in violation of 42 U.S.C. §1981 ("Section 1981"), by promoting a racially hostile work environment for non-Caucasian employees and deliberately holding back such employees by denying them the same opportunities of advancement as Panini provides to its Caucasian employees.

2. Panini's discriminatory practices are even more insulting due to the fact that Panini relies heavily upon the success of African-American and other non-Caucasian athletes in the sale of Panini's products (75% or more of Panini's business).

3. Vargas, who is Hispanic, clearly was a victim of Panini's discriminatory practices,

including being subject to a racially hostile work environment.

I. PARTIES

4. Plaintiff, Nora Vargas, is an individual residing in Texas and is Hispanic.

5. Defendant, Panini America, Inc. is a corporation organized and incorporated under the laws of Delaware with a principal place of business in Irving, Texas.

II. JURISDICTION AND VENUE

6. This Court has original subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, as the claims alleged herein arise under the laws of the United States, namely Section 1981.

7. Venue lies in this District pursuant to 28 U.S.C. § 1391, because Panini resides in Texas, is subject to the personal jurisdiction of Texas courts, and a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District.

8. This Court has personal jurisdiction over Panini because Panini's headquarters are in Texas, and the discriminatory conduct alleged herein took place in Texas. Panini does business in Dallas County, Texas. Its principal place of business is located at 5325 FAA Blvd., Suite 100, Irving, Texas 75061. Panini's contacts with the State of Texas are systematic and continuous, and the acts of discrimination that are the basis for the claims against Panini took place in Dallas County, Texas.

9. The Northern District of Texas is the most logical forum in which to litigate the claims of the Class Representatives and the proposed class in this case. Class members worked at Defendant's facility in Dallas County, many of whom also reside in the Northern District of Texas.

III. ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

10. Panini is a company that, among other things, sells trading cards and collectibles using the name and likeness of athletes across the globe.

Panini's Systematic Hypocritical Discrimination Against Persons of Color

11. While the backbone of Panini's business centers upon the accomplishments of numerous world-class athletes, most of which are persons of color, it has hypocritically, steadfastly maintained a policy and practice of denying non-Caucasian employees deserved promotions and equal pay as compared to Caucasian employees and acquiescing and promoting a racially based hostile work environment for non-Caucasian employees.

12. Furthermore, non-Caucasian employees are noticeably absent from leadership positions at Panini, which only further evidences that Panini has systematically denied career advancement to people of color.

Panini Segregates Whites from Non-Whites in the Workplace

13. Additionally, Panini went to great lengths to physically separate white employees from employees who were people of color. Specifically, Panini had a vast majority of the non-Caucasian employees working in a storage room, while almost all of the white employees worked in normal office space outside of the storage room.

14. Panini management also often labeled non-Caucasian employees as troublemakers who had an "attitude," while never using such derogatory terms when describing white employees.

15. The proof will also show that upper management at Panini was a tight-knit group of white males – the proverbial "good ole boys club," which continuously promoted white

employees and kept racial minorities out of management.

16. Notably, Panini also failed to have any discrimination complaint procedures and provided employees with no formal avenues to complain about racial discrimination. Panini also had no anti-discrimination training for employees.

Civil Rights Groups Notify Panini of it's Discrimination

17. In this regard, in May of 2023, the civil rights group Until Freedom and Black Church PAC issued a letter to Panini and the NBA, NFL, MLB, National Women's Soccer League, MLS, and the NHL (the "Open Letter"), which highlighted Panini's discriminatory hiring and employment practices.

18. The Open Letter, attached as Exhibit 1, authored by leaders Tamika D. Mallory and Reverend Michael McBride, criticized Panini's glaring lack of black and Latinx leadership. Despite 75% of its business stemming from black and brown athletes, only 3 of Panini's 800 employees on LinkedIn are black. Highlighting this disparity, the letter demanded immediate reforms and threatened potential boycotts. The concerns were also shared with state Attorney Generals in Texas, New York, and California. ***See, e.g., https://finance.yahoo.com/news/until-freedom-co-founder-tamika-130000815.html.***

19. The discriminatory practices highlighted in the Open Letter reflect a larger, systemic issue at Panini, resonating deeply with Vargas's own experiences as a Hispanic employee. These practices were not isolated incidents but indicative of a workplace culture that implicitly and explicitly favors Caucasian employees at the expense of Non-Caucasian employees.

20. Vargas's experiences, along with those noted in the Open Letter, underscore the pervasive discrimination against all Non-Caucasian employees at Panini. This pattern of racial

injustice is not confined to African American employees but extends to other minority groups within the company, further highlighting the extent of the issue.

21. Vargas is a Hispanic woman who worked as a Pre-Press Imaging Production Coordinator at Panini from July 2020 to May 2021.

Panini Denies Hispanic Female a Promotion in Favor of a Less Qualified, White Employee

22. After working in that position for almost eleven months, Vargas applied for the open position of Assistant Soccer Editor in the Photography Department in or about April 2021. At the time of her application to that position, Vargas spoke to the manager of the Photography Department, Chris Wilkins ("Wilkins"), about her application.

23. Wilkins conceded that Vargas was qualified for the position. Indeed, Vargas was qualified for this position, because she had experience assisting the Photography Department that prepared her for the position of Assistant Soccer Editor in that department.

24. However, when she formally applied to that open position, her application was denied and that open position was filled by a Caucasian from outside the company with less experience than Vargas.

25. Such a denial of advancement was due to intentional discrimination. Such discrimination was systematic and pervasive, it detrimentally affected Vargas, and it would have detrimentally affected a reasonable person of Vargas's race under the same circumstances. Such discrimination was part of Panini's overall policy and practice of (a) not promoting racial minorities, and (b) harassing non-Caucasian employees based upon their race. Such discrimination constitutes a continuing violation of Section 1981.

26. Additionally, Ms. Vargas was informed during her training that the department's

norm was to eat lunch while continuing to work, and clocking out was only necessary if leaving the premises to obtain food. This practice, presented as standard within the department, was unlike any she had encountered in previous employment. It reflects a broader culture at Panini America Inc. that undervalues lawful break times, contributing to an environment that disadvantages Non-Caucasian employees.

27. But for her race, Vargas would have received the promotion to Assistant Soccer Editor.

28. Vargas also was subjected to a racially hostile work environment. In the Fall of 2020, one of Vargas's supervisors, Robert Greinke ("Greinke"), criticized another Hispanic employee for being distracted by that employee's children. Greinke never criticized Caucasian employees for being distracted by their children and only criticized such employee for this issue because that employee was Hispanic.

29. Shortly thereafter, Greinke approached Vargas and asked her if she has children and would be similarly distracted by children. Greinke never asked Caucasian employees about having children and being distracted by their children, and only asked Vargas about these issues because she is Hispanic. Greinke assumed she had children and would be distracted because she was Hispanic.

30. Greinke also assigned Vargas an unrealistic amount of work that she could not complete, even if she worked overtime. Greinke did not assign an unrealistic amount of work to Caucasian employees, and only did so with Vargas because she is Hispanic.

31. Moreover, Ms. Vargas experienced significant physical stress manifesting as marks on her back, a direct result of the excessive overtime work required by Panini America Inc. This physical toll, supported by photographic evidence, underscores the severe impact of the company's

demanding work expectations on her health and well-being.

32. Such conditions highlight the discriminatory and inequitable work environment faced by Ms. Vargas and other Non-Caucasian employees.

33. Greinke also treated Hispanic employees (including Vargas) with far less respect than Caucasian employees, including being overly critical of Hispanic employees while continuously praising Caucasian employees.

Remote Working Discrimination

34. Furthermore, in 2020 during the COVID-19 pandemic, Panini did not allow Vargas to work from home while it allowed numerous Caucasian employees to work from home. If Vargas were Caucasian, Panini would have permitted her to work from home.

35. But for her race, Vargas would not have suffered such a hostile work environment.

36. In May 2021, after being employed by Panini for numerous months and being denied a promotion due to her race, suffering a racial hostile work environment and witnessing management that was dominated by Caucasians who denied advancement to minorities, Vargas was compelled to quit her job at Panini.

37. Any reasonable person would have felt compelled to resign under the circumstances.

IV. CLASS ACTION ALLEGATIONS

A. Class Definition

38. The Class Representative seeks to maintain claims on her own behalf and on behalf of a class of current and former employees of Defendant.

39. The intended class consists of Non-Caucasian Employees who are, or have been employed by Defendant and experienced racial discrimination at any time during the applicable liability period or have experienced retaliation for reporting or opposing racial discrimination.

40. Vargas, as Class Representative, is representative of the class. Upon information and belief, there are several hundred members of the proposed class.

41. Additional classes may come forward in response to this complaint, and the Class Representative and her counsel will apprise the Court, including potentially through one or more amended complaints, if such additional classes arise.

B. Efficiency of Class Prosecution of Common Claim

42. Certification of a class of employees similarly situated to the Class Representative offers the most efficient and economical means of resolving the questions of law and fact common to the claims of the Class Representative and the proposed class.

43. The individual claims of the Class Representative require resolution of the common question of whether Defendant engaged in a systemic pattern or practice of race discrimination against Non-Caucasian Employees or of retaliation for reporting or opposing race discrimination.

44. The Class Representative seeks remedies to eliminate the adverse effects of such discrimination in her own life, career, and working conditions and in the lives, careers, and working conditions of the proposed class members, and to prevent continued racial discrimination and retaliation in the future.

45. The Class Representative has standing to seek such relief because of the adverse effect that such discrimination has had on her individually, and on Non-Caucasian Employees and those who opposed or reported racial discrimination, generally.

46. To gain such relief for herself, as well as for the putative class members, the Class

Representative will first establish the existence of systemic racial discrimination and retaliation as the premise for the relief she seeks. Without class certification, the same evidence and issues would be subject to re-litigation in a multitude of individual lawsuits, with an attendant risk of inconsistent adjudications and conflicting obligations. Certification of the proposed class of Non-Caucasian Employees and those who have reported or opposed racial discrimination, who have been affected by these common questions of law and fact, is the most efficient and judicious means of presenting the evidence and arguments necessary to resolve the questions for the Class Representative, the proposed class, and Defendant.

47. The Class Representative's individual and class claims are premised upon the traditional bifurcated method of proof and trial for disparate impact and systemic disparate treatment claims of the type at issue in this case. A bifurcated method of proof and trial is the most efficient method of resolving such common issues.

C. Numerosity and Impracticality of Joinder

48. The class which the Class Representative seeks to represent is too numerous to make joinder practicable. The proposed class consists of hundreds of current and former Non-Caucasian Employees and those who opposed or reported race discrimination during the liability period.

D. Common Questions and Law and Fact

49. The prosecution of the claims of the Class Representative will require the adjudication of numerous questions of law and fact common to both their individual claims and those of the putative class they seek to represent.

50. The common questions of law include, inter alia, whether Defendant engaged in unlawful, systemic race discrimination and retaliation in its selection, promotion, advancement, transfer, training, and discipline policies, practices or procedures, and in the general terms and

conditions of work and employment; whether Defendant is liable for a continuing systemic violation of Section 1981; and a determination of the proper standards for proving a pattern or practice of discrimination or retaliation by Defendant against its Non-Caucasian Employees or those who oppose or report racial discrimination.

51. The common questions of fact would include, inter alia: whether Defendant has, through its policies, practices or procedures, (a) denied or delayed the promotion of Non-Caucasian Employees, or those who opposed or reported racial discrimination; (b) precluded Non-Caucasian Employees or those who opposed or reported racial discrimination from eligibility for promotions, by denying them training which employees who are Caucasian or those who did not oppose or report racial discrimination are granted; (c) paid Non-Caucasian Employees or those who opposed or reported racial discrimination at a disparate level; (d) subjected Non-Caucasian Employees, or those who opposed or reported racial discrimination, to differential treatment, including, but not limited to, less preferable work assignments, inequitable evaluations and stricter disciplinary policies, practices or procedures; and (e) subjected Non-Caucasian Employees, or those who opposed or reported racial discrimination, to hostility or a hostile work environment.

52. The employment policies, practices and procedures to which the Class Representative and the class members are subject are set at Defendant's corporate level and apply universally to all class members throughout the world. These employment policies, practices and procedures are not unique or limited to any one department; rather, they apply to all departments, and, thus, affect the Class Representative and proposed class members in the same ways no matter the district, division, or position in which they work.

53. Throughout the liability period, a disproportionately large percentage of the managers and supervisors at Defendant have been Caucasian or those who do not oppose or report

race discrimination.

54. Discrimination in selection, promotion and advancement occurs as a pattern and practice throughout all levels and all divisions of Defendant. Selection, promotion, and advancement opportunities are driven by personal familiarity, subjective decision-making, preselection and interaction between Caucasian managers, supervisors, and subordinates and those who have not opposed or reported retaliation rather than by merit or equality of opportunity.

55. As a result, employees who are not Non-Caucasian Employees or who have not opposed or reported race discrimination have advanced, and continue to advance, more rapidly to better and higher paying jobs than do Non-Caucasian Employees or those who opposed or reported racial discrimination.

56. Defendant's policies, practices and procedures have had an adverse impact on Non-Caucasian Employees or those who opposed or reported racial discrimination seeking selection for, or advancement to, better and higher paying positions. In general, within Defendant's employment structure, a higher level of job classification correlates with a lower percentage of Non-Caucasian Employees or those who opposed or reported racial discrimination employees holding those positions.

49. In short, the greater a job's seniority or benefits, the less likely a Non-Caucasian Employee, or one who opposed or reported racial discrimination, holds that position.

E. Typicality of Claims and Relief Sought

57. The claims of the Class Representative are typical of the claims of the proposed class. The Class Representative asserts claims in each of the categories of claims asserted on behalf of the proposed class. The relief sought by the Class Representative for racial discrimination against Non-Caucasian Employees or those who opposed or reported racial discrimination

complained of herein is also typical of the relief which is sought on behalf of the proposed class.

58. The Class Representative was, like the members of the proposed class, an employee who worked for the Defendant during the liability period.

59. Discrimination in selection, promotion, advancement, and training affects the compensation of the Class Representative and all the class members in the same ways.

60. Differential treatment between employees based on race or those who opposed or reported racial discrimination occurs as a pattern and practice throughout all levels and departments of Defendant. For example, Defendant predominantly holds Non-Caucasian Employees and those who opposed or reported racial discrimination, including both the Class Representative and class members, to stricter standards than employees who are not. Non-Caucasian Employees and those who have opposed or reported racial discrimination often receive lower performance appraisals than others despite performing equally well or better. Non-Caucasian Employees and those who opposed or reported racial discrimination are also disciplined, formally and informally, more frequently and severely than their Caucasian counterparts. Additionally, employees outside these categories—i.e., employees who are Caucasian and have not opposed or reported racial discrimination—more often receive preferable work assignments and other preferential treatment.

61. Discrimination in the form of a hostile work environment occurs as a pattern and practice throughout all levels and departments of Defendant and affects the Class Representative and the members of the class in the same ways. Supervisors and employees have made racially hostile comments; harassed and intimidated Non-Caucasian Employees and those who opposed or reported racial discrimination; have made it clear in various ways that they favor employees who are Caucasian or those who have not opposed or reported racial discrimination; and otherwise have

created a working environment hostile to Non-Caucasian Employees or those who opposed or reported racial discrimination.

62. The Class Representative, and other employees, has complained to Defendant's management and human resources personnel about race discrimination and a racially hostile work environment, as well as retaliation for those who opposed or reported racial discrimination. Defendant's investigations into these complaints have been inadequate or superficial, to the extent Defendant has investigated at all.

63. The Class Representative and the class members have been affected in the same ways by Defendant's failure to implement adequate procedures to detect, monitor, and correct its pattern and practice of discrimination.

64. Defendant failed to create adequate incentives for its managers to comply with equal employment opportunity laws regarding each of the employment policies, practices and procedures referenced in this Complaint and have failed to discipline adequately its managers and other employees when they violate the anti-discrimination and anti-retaliation laws. These failures have affected the Class Representative and the class members in the same ways.

65. The relief necessary to remedy the claims of the Class Representative is exactly the same as that necessary to remedy the claims of the proposed class members in this case.

66. The Class Representative seeks the following relief for her individual claims and for those of the members of the proposed class:

(a) a declaratory judgment that Defendant has engaged in systemic racial discrimination against Non-Caucasian Employees and those who opposed or reported racial discrimination by, inter alia, limiting their ability to be promoted to better and higher paying positions, limiting their employment opportunities to lower and less desirable classifications, limiting their training and

transfer opportunities, exposing them to differential treatment, and subjecting them to hostility at work;

(b) a permanent injunction against such continuing discriminatory or retaliatory conduct;

(c) injunctive relief to require restructuring of Defendant's promotion, transfer, training, performance evaluation, compensation, work environment, and discipline policies, practices and procedures so Non-Caucasian Employees and those who opposed or reported racial discrimination will be able to compete fairly in the future for promotions, transfers, and assignments to better and higher paying classifications with terms and conditions of employment traditionally enjoyed by other employees;

(d) injunctive relief to require a restructuring of the Defendant's workforce so Non-Caucasian Employees and those who opposed or reported racial discrimination are promoted into higher and better paying classifications which they would have held in the absence of Defendant's past racial discrimination or retaliation;

(e) back pay, front pay, and other equitable remedies necessary to make Non-Caucasian Employees and those who opposed or reported racial discrimination whole from the Defendant's past discrimination;

(f) compensatory damages;

(g) punitive and nominal damages to prevent and deter Defendant from engaging in similar discriminatory or retaliatory practices in the future; and

(h) attorneys' fees, court costs, and expenses.

F. **Adequacy of Representation**

67. The Class Representative's interests are co-extensive with those of the members of the proposed class, which she seeks to represent in this case. The Class Representative seeks to

remedy Defendant's discriminatory and retaliatory employment policies, practices and procedures so that Non-Caucasian Employees and those who have opposed or reported racial discrimination will no longer be prevented from advancing into higher paying and more desirable positions, will not receive disparate pay and differential treatment, and will not be subjected to racial hostility at work. The Class Representative is willing and able to represent the proposed class fairly and vigorously as they pursue their similar individual claims in this action.

68. The Class Representative has retained counsel who are qualified, experienced, and able to conduct this litigation and to meet the time and fiscal demands required to litigate an employment discrimination class action of this size and complexity through trial and final judgment. The combined interests, experience, and resources of the Class Representative and her counsel to litigate competently the individual and class claims at issue in this case clearly satisfy the adequacy of representation requirement of Federal Rule of Civil Procedure 23(a)(4).

69. Specifically, Mr. Dunn has litigated matters in more than 30 states nationwide and handled numerous class actions/MDL on both sides of the docket. Dunn's class actions, mass actions, and collective actions also provide multi-disciplinary experience. Mr. Dunn has handled class actions involving overtime and other wage and hour claims, overbilling consumers with inappropriate tax charges, workers' compensation insurance carriers' failure to notify workers of the hazards of asbestos, and misleading homeowners with regard to refinancing mortgages. He has handled mass actions involving change-in-control benefits and roofing workers exposed to asbestos. He has also handled mass torts actions involving Roundup. Mr. Dunn obtained board certification in labor and employment law in 1993. He became board certified in civil trial law in 2002.

70. Additionally, Mr. Pennetti has represented plaintiffs and defendants in complex

litigation and class actions in state and federal courts throughout the country. Mr. Pennetti is currently litigating other class action matters on behalf of individuals. Mr. Pennetti has litigated and is currently litigating numerous employment discrimination matters in state and federal courts in Texas and throughout the United States.

V. CLASS CLAIMS

71. The Class Representative and the putative class she seeks to represent have been subjected to a systemic pattern and practice of race discrimination or retaliation involving a battery of practices which have also had an unlawful, disparate impact on them and their employment opportunities.

72. The discrimination at issue includes adhering to a policy and practice of restricting the promotion and advancement opportunities of Non-Caucasian Employees, and those who have opposed or reported racial discrimination, so that such employees remain in lower classification and compensation levels, as well as terminating Non-Caucasian Employees because of their race. Defendant in effect bars Non-Caucasian Employees from better and higher paying positions which have traditionally been held by other employees, and selectively terminates their employment. Defendant's systemic means of accomplishing such racial stratification include, but are not limited to, Defendant's promotion, training and performance evaluation policies, practices and procedures.

73. Defendant's promotion, advancement, training, and performance evaluation policies, practices and procedures incorporate the following discriminatory practices:

(a) relying upon subjective judgments, procedures, and criteria which permit and encourage the incorporation of racial stereotypes and bias by Defendant's predominately non-minority managerial and supervisory staff in making promotion, training, performance evaluation,

compensation, and termination decisions;

(b) refusing or failing to provide equal training opportunities to Non-Caucasian Employees;

(c) refusing or failing to provide Non-Caucasian Employees with opportunities to demonstrate their qualifications for advancement;

(d) refusing or failing to establish and follow policies, practices, procedures, or criteria that reduce or eliminate disparate impact or intentional racial bias;

(e) using informal, subjective selection methods which allow for rampant racial discrimination;

(f) disqualifying Non-Caucasian Employees for vacancies by unfairly disciplining them;

(g) discouraging applications and expressions of interest by Non-Caucasian Employees;

(h) penalizing Non-Caucasian Employees for exercising the rights afforded to them by Section 1981;

(i) subjecting Non-Caucasian Employees to overt and implicit racial hostility in the work environment; and

(j) selectively terminating the employment of Non-Caucasian Employees.

74. Defendant's promotion policies, practices and procedures have had a disparate impact on the Class Representative and the class members. The policies, practices, and procedures are not valid, job-related, or justified by business necessity. There are alternative objective and more valid selection procedures available to the Defendant that are more closely related to the actual responsibilities of the positions, and which would have less of a disparate impact on Non-Caucasian Employees. However, the Defendant has failed or refused to use such alternative procedures.

75. Defendant's promotion, training, performance evaluation, compensation, and transfer policies, practices and procedures are intended to have a disparate impact on the Class

Representative and the class she seeks to represent. The practices form a part of the Defendant's overall pattern and practice of keeping Non-Caucasian Employees in lower job classifications, which have fewer desirable terms and conditions of employment, and causing termination of their employment.

76. Because of Defendant's systemic pattern and practice of racial discrimination, the Class Representative and class she seeks to represent have been adversely affected and have experienced harm, including the loss of compensation, wages, back pay, and employment benefits.

77. The Class Representative and the class she seeks to represent have been subjected to racial hostility or retaliation at work, both severe and pervasive, which affected the terms and conditions of his employment. The Defendant's actions and inactions encourage this behavior by its Caucasian employees.

78. The individual Plaintiffs have no plain, adequate, or complete remedy at law to redress the rampant and pervasive wrongs alleged herein, and this suit is their only means of securing adequate relief. The Plaintiffs are now suffering irreparable injury from Defendant's unlawful policies, practices and procedures as set forth herein, and will continue to suffer unless those policies, practices and procedures are enjoined by this Court.

VI. CAUSE OF ACTION (Section 1981)

79. Plaintiff alleges that Defendant discriminated and retaliated against all members of the proposed class by treating them differently from and less preferably than similarly situated Caucasian employees and subjecting them to discriminatory denials of promotions, discriminatory denials of pay raises, discriminatory performance evaluations, discriminatory subjection to disciplinary procedures, disparate terms and conditions of employment, harassment, hostile work

environments, termination, and other forms of discrimination in violation of Section 1981.

80. Defendant's conduct has been disparate, intentional, deliberate, willful and conducted in callous disregard of the rights of the Class Representative and the members of the proposed class.

81. Defendant's policies and practices have produced a disparate impact against the Class Representative and the class members with respect to the terms and conditions of employment.

82. By reason of the continuous nature of Defendant's discriminatory conduct, persistent throughout the employment of the Class Representative and class members, the Class Representative and class members are entitled to application of the continuing violation doctrine to all of the violations alleged herein.

83. By reason of the discrimination suffered at Defendant's hands, the Class Representative and the members of the proposed class are entitled to all legal and equitable remedies available under Section 1981.

VII. JURY DEMAND

84. The Class Representative requests a trial by jury to the extent allowed by law.

85. WHEREFORE, the Class Representative, on behalf of herself and the members of the class whom they seek to represent, request the following relief:

86. Certification of the case as a class action maintainable under Federal Rules of Civil Procedure 23(a), (b)(2) or (b)(3), on behalf of the proposed Plaintiff class, and designation of the Class Representative as representative of this class and her counsel of record as class counsel;

87. Declaratory judgment that Defendant's employment policies, practices and/or

procedures challenged herein are illegal and in violation of Section 1981;

88. A permanent injunction against Defendant and their partners, officers, owners, agents, successors, employees and representatives and any and all persons acting in concert with them, from engaging in any further unlawful practices, policies, customs, usages, or other actions constituting racial discrimination as set forth herein;

89. An Order requiring Defendant to initiate and implement programs that (i) will provide equal employment opportunities for Non-Caucasian Employees; (ii) will remedy the effects of the Defendant's past and present unlawful employment policies, practices or procedures; and (iii) will eliminate the continuing effects of the discriminatory and retaliatory practices described.

90. An Order requiring the Defendant to initiate and implement systems of assigning, training, transferring, compensating, and promoting Non-Caucasian Employees in a non-discriminatory manner;

91. An Order establishing a task force on equality and fairness to determine the effectiveness of the programs described in (B) through (E) above, which would provide for (i) monitoring, reporting, and retaining of jurisdiction to ensure equal employment opportunity, (ii) the assurance that injunctive relief is properly implemented, and (iii) a quarterly report setting forth information relevant to the determination of the effectiveness of the programs described in (B) through (E), above;

92. An Order directing Defendant to adjust the wage rates and benefits for the class members to the level they would be enjoying but for the Defendant's discriminatory policies, practices and/or procedures;

93. An award of back pay, front pay, lost benefits, preferential rights to jobs and other

damages for lost compensation and job benefits suffered by the Class Representative and the class members to be determined at trial;

94. Any other appropriate equitable relief in favor of the Class Representative and class members;

95. An award of compensatory, nominal and punitive damages to Plaintiffs;

96. An award of litigation costs and expenses, including reasonable attorneys' fees, to the Plaintiffs and class members;

97. Pre-judgment interest;

98. Such other and further relief as the Court may deem just and proper; and

99. Retention of jurisdiction by the Court until such time as the Court is satisfied that the Defendant has remedied the practices complained of herein and are determined to be in full compliance with the law.

FIRST CLAIM FOR RELIEF
Hostile Work Environment in Violation of Section 1981

100. Plaintiff repeats and realleges all of the allegations set forth above as if fully restated in this Paragraph.

101. As set forth in detail above, Defendant discriminated against Vargas and harassed her on the basis of her race (Hispanic).

102. As demonstrated above, the harassment and discrimination suffered by Vargas was intentional and malicious, and it constituted a continuing violation. It was extraordinarily severe and altered the conditions of Vargas's working environment because it created an atmosphere of abuse and intimidation wherein Vargas's own supervisors participated and condoned the racist misconduct, and it led to Vargas's constructive discharge.

103. As described above, Vargas's supervisors used their authority to create and continue the discriminatory abusive working environment and failed to take any appropriate remedial action.

104. As a result, Vargas is entitled to compensatory damages for, *inter alia*, emotional distress, loss of enjoyment of life and other non-pecuniary losses in the maximum amount permitted by the law.

105. Because Defendant acted with malice and reckless indifference to Vargas's federally protected rights, Vargas is entitled to punitive damages in an amount to be determined at trial, but not less than the maximum amount permitted by law.

106. Vargas is also entitled to reasonable attorney's fees and expenses to the extent permitted by law.

107. But for her race, Vargas would not have suffered such a hostile work environment.

SECOND CLAIM FOR RELIEF
Constructive Discharge
in Violation of Section 1981

108. Plaintiff repeats and realleges all of the allegations set forth above as if fully restated in this Paragraph.

109. As set forth in detail above, Defendant discriminated against Vargas, harassed her on the basis of her race, and created a hostile work environment.

110. In May 2021, after being employed by Panini for numerous months and being denied a promotion due to her race, suffering a racial hostile work environment and witnessing management that was dominated by Caucasians who denied advancement to minorities, Vargas was compelled to quit her job at Panini.

111. Any reasonable person would have felt compelled to resign under the circumstances.

112. But for her race, Vargas would not have suffered such a hostile work environment and constructive discharge.

113. As a result, Vargas is entitled to compensatory damages for, *inter alia*, lost wages and income, emotional distress, loss of enjoyment of life and other non-pecuniary losses in the maximum amount permitted by the law.

114. Because Defendant acted with malice and reckless indifference to Vargas's federally protected rights, Vargas is entitled to punitive damages in an amount to be determined at trial, but not less than the maximum amount permitted by law.

115. Vargas is also entitled to reasonable attorney's fees and expenses to the extent permitted by law.

THIRD CLAIM FOR RELIEF
Failure to Promote
in Violation of Section 1981

116. Plaintiff repeats and realleges all of the allegations set forth above as if fully restated in this Paragraph.

117. As set forth in detail above, Plaintiff is a member of a protected class (Hispanic).

118. Vargas worked as a Pre-Press Imaging Production Coordinator at Panini from July 2020 to May 2021.

119. After working in that position for eleven months, Vargas applied for the open position of Assistant Soccer Editor in the Photography Department in or about April 2021. At the time of her application to that position, Vargas spoke to the manager of the Photography

Department, Wilkins, about her application.

120. Wilkins conceded that Vargas was qualified for the position. Indeed, Vargas was qualified for this position because her prior experience, including assisting the Photography Department, provided her with skills and tasks similar to those required for the Assistant Soccer Editor position, albeit not identical, underscoring her capability and readiness for the role.

121. However, when she formally applied to that open position, her application was denied and that open position was filled by a Caucasian from outside the company with less experience than Vargas.

122. Such a denial of advancement was due to intentional discrimination. Such discrimination was systematic and pervasive, it detrimentally affected Vargas, and it would have detrimentally affected a reasonable person of Vargas's race under the same circumstances. Such discrimination was part of Panini's overall policy and practice of (a) not promoting racial minorities, and (b) harassing non-Caucasian employees based upon their race. Such discrimination constitutes a continuing violation of Section 1981.

123. But for her race, Vargas would have received the promotion to Assistant Soccer Editor.

124. As a result, Vargas is entitled to compensatory damages for, *inter alia*, lost wages and income, emotional distress, loss of enjoyment of life and other non-pecuniary losses in the maximum amount permitted by the law.

125. Because Defendant acted with malice and reckless indifference to Vargas's federally protected rights, Vargas is entitled to punitive damages in an amount to be determined at trial, but not less than the maximum amount permitted by law.

126. Vargas is also entitled to reasonable attorney's fees and expenses to the extent

permitted by law.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment in its favor and grant the following relief:

A. Plaintiff's actual damages and punitive damages as determined at trial;

B. Reasonable attorney's fees and expenses;

C. Costs and disbursements; and

D. Such other and further relief as deemed just and proper by this Court.

E. a permanent injunction against such continuing discriminatory or retaliatory conduct;

F. injunctive relief to require restructuring of Defendant's promotion, transfer, training, performance evaluation, compensation, work environment, and discipline policies, practices and procedures so Non-Caucasian Employees and those who opposed or reported racial discrimination will be able to compete fairly in the future for promotions, transfers, and assignments to better and higher paying classifications with terms and conditions of employment traditionally enjoyed by other employees;

G. injunctive relief which effects a restructuring of the Defendant's workforce so that Non-Caucasian Employees or those who opposed or reported racial discrimination are promoted into higher and better paying classifications which they would have held in the absence of Defendant's past racial discrimination or retaliation;

H. back pay, front pay, and other equitable remedies necessary to make Non-

Caucasian Employees and those who opposed or reported racial discrimination whole from the Defendant's past discrimination;

I. compensatory damages;

Dated this 18th day of March, 2024.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF
NORA VARGAS

EXHIBIT 1

Sports Collectibles Company Panini Under Fire For Zero Black Leadership, Boycott Demand of NBA, NFL, FIFA & More by Until Freedom

PR Newswire
May 16, 2023 2 min read

Tamika D. Mallory & Rev. Michael McBride Also Shared Diversity Demands With Attorney Generals of Texas, New York, California

NEW YORK, May 16, 2023 /PRNewswire/ -- Today, Until Freedom co-founder Tamika D. Mallory and Black Church Political Action Committee co-founder Reverend Michael McBride announced that they penned a letter to sports and entertainment collectibles organization Panini, criticizing the company's lack of black leadership team and demanding immediate reform of its hiring practices.

Mallory and McBride issued the letter to Panini America CEO Mark Warsop on Monday, noting that while 75 percent of the organization's business is dependent on black and brown athletes, the company's leadership team doesn't reflect its diverse athletes at all.

The fact there is zero black leadership is more appalling, considering Panini has generated billions in revenue off the backs of black and brown athletes. Furthermore, of the organization's 800 employees listed on LinkedIn, only 3 are black employees. The disparity reaffirms that Panini has little to no black employees throughout its entire company.

As a result, Mallory and McBride gave the organization an ultimatum to take corrective action and hire black leadership to key positions immediately. If not, they plan to collectively urge Panini's partners and its athletes - which include the likes of FIFA, NBA, NFL, NBA Players Association, NFL Players Association and English Premier League - to boycott the company.

They also shared their demands for diversity with Texas Attorney General Ken Paxton, New York Attorney General Letitia James and

exclusion of black people from its leadership on the other hand, is unacceptable."

Mallory is a nationally recognized civil rights activist and co founded Until Freedom, which is an intersectional social justice organization rooted in the leadership of diverse people of color to address systemic and racial injustice. She served as the youngest ever Executive Director of the National Action Network and was the co chair of the Women's March on Washington - the largest single day demonstration in U.S. history. In the wake of the murder of George Floyd, Mallory delivered a powerful speech that was dubbed by many as "the speech of a generation."

McBride co-founded Black Church PAC, which is a strategic initiative answering the call to elect leaders committed to ending mass incarceration, defending the right to vote, curbing gun violence, and representing the equitable treatment of Black and Brown communities.

CONTACT: organizing@until freedom.com

View original content:https://www.prnewswire.com/news-releases/until freedom co founder tamika d mallory black church pac co founder rev dr michael mcbride pen letter to pamm criticizing lack of black leadership demanding immediate reform of hiring practices 301825908.html

SOURCE Until Freedom

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

----------X

NORA VARGAS, on behalf of herself
and others similarly situated,

Plaintiff, Case No. 3:23-cv-02689-B

v.

PANINI AMERICA, INC.,

Defendant.

----------X

UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiff Nora Vargas ("Plaintiff" or "Vargas") files this Unopposed Motion for Extension of Time to File Response to Defendant's Motion to Dismiss and would show the Court as follows:

Defendant Panini America, Inc. ("Defendant" or "Panini") filed Defendant's Partial Motion to Dismiss Plaintiff's Amended Complaint ("Defendant's Motion to Dismiss") on May 9, 2024. Per local rule 7.1.e, Plaintiff's response to the Defendant's Motion to Dismiss is due on Thursday, May 30, 2024. Plaintiff seeks a 27-day extension to respond to Defendant's Motion to Dismiss, until Wednesday, June 26, 2024. Counsel for Defendant Panini is unopposed to this motion and the requested extension.

Plaintiff Vargas need and seeks this extension because lead counsel for Plaintiff in this lawsuit, Rogge Dunn, has been in a AAA arbitration this week (May 21 – 24, 2024, *Kevin Neal v. Trinsic Residential Group GP, LLC, et. al.,* AAA 01-22-0002-9034) and is scheduled to start a three (3) week FINRA arbitration in San Francisco, California on Monday, June 3, 2024 (*Meyers*

v. Credit Suisse Securities (USA), LLC, FINRA No. 19-03481, the "Meyers Arbitration"). Attorney Dunn is lead counsel in both of these arbitrations.

Until he left Rogge Dunn Group, PC for another opportunity, the attorney that was working directly with Mr. Dunn in representing Plaintiff Vargas in this lawsuit, was Alex Pennetti. Mr. Pennetti is the attorney that was most familiar with the case. Mr. Pennetti's last day at Rogge Dunn Group was Friday, May 10, 2024, the day after Defendant's Motion to Dismiss was filed.

Additionally, the attorney that was previously working on the Meyers Arbitration, and who was scheduled to participate in the 3-week arbitration in San Francisco commencing June 3, 2024, along with Mr. Dunn, was Anna Richardson. Ms. Richardson has also recently left the firm for another opportunity. Her last day with the Firm was May 3, 2024.

As a result of the departures of Attorney Pennetti and Attorney Richardson, the undersigned attorney, Earl S. Nesbitt, has taken over as counsel in both the Meyers Arbitration and this, the Vargas Case.[1] To be clear, Mr. Dunn remains as lead counsel in both matters, but it is anticipated that the bulk of the legal work on both matters will be the primary responsibility of Mr. Nesbitt going forward.

Mr. Nesbitt's new responsibilities in the Meyers Arbitration are especially challenging, since that FINRA arbitration is set to start on June 3, 2024 and will last for 3 weeks. Mr. Nesbitt has been working diligently for the past 2-3 weeks to get up to speed in the Meyers Arbitration. The case is complicated and involves thousands of pages of documents and numerous witnesses.

[1] After Mr. Pennetti and Ms. Richardson left the Firm, 5-6 other cases (in addition to this case and the Meyers Arbitration), were also reassigned to Mr. Nesbitt. In these other, newly reassigned matters, Mr. Nesbitt was compelled to reschedule a deposition, was able to respond to written discovery in another one, and, working with co-counsel, was able to complete a response to a motion to dismiss in another. Thankfully, the other pressing deadlines in these other, reassigned matters, and Mr. Nesbitt's pre-existing docket, are not until July and/or were rescheduled/extended by agreement with various counsel.

It is anticipated that Claimant Meyers, whom we represent, will call 12-15 witnesses, including 3 experts, to testify in the arbitration. It is unknown how many witnesses Respondent will call, but it is expected that number will be at least 10, including several experts. The parties, and others, have produced around 20,000 pages of documents in the arbitration, which Mr. Nesbitt is reviewing and digesting as quickly as possible. Pre-arbitration materials, including the exhibit list, witness list, and briefing are due on May 24, 2024 and that process is taking up almost all of counsel's time.

Mr. Nesbitt has had to put almost all of his other matters on the backburner as he spends most of his time on getting up to speed on the Meyers Arbitration and preparing for the June 3 arbitration. Mr. Dunn, Mr. Nesbitt, and a paralegal will be leaving for California on Friday, May 31, 2024 / Saturday, June 1, 2024 and do not expect to return to Texas until at least Friday, June 21, 2024.

As a result of the departure of these two attorneys (Ms. Richardson and Mr. Pennetti), and the resulting transfer of these pressing cases/matters (the Meyers Arbitration, primarily, and this, the Vargas case) to Mr. Nesbitt, he has been unable to devote sufficient time to learn about this case, in general, and to respond to Defendant's Motion to Dismiss by May 30, 2024. Mr. Nesbitt was also scheduled to start a week-long vacation with his wife, celebrating their 34th wedding anniversary, on May 22, 2024, but had to cancel that vacation when the Meyers Arbitration and the Vargas case, and others, landed on his desk.

Plaintiff therefore seeks an extension of her deadline to respond to the Defendant's Motion to Dismiss, until June 26, 2024. This extension is not sought solely for delay, but rather to enable counsel for Plaintiff to get up to speed on the case and devote sufficient time to properly respond to Defendant's Motion to Dismiss.

Dated: May 23, 2024

Respectfully submitted,

/s/ Rogge Dunn
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State Bar No. 06249500
Email: Dunn@trialtested.com

EARL S. NESBITT
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ATTORNEYS FOR PLAINTIFF
NORA VARGAS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this pleading was served on counsel of record for Defendant Panini, Inc. on this the 23rd day of May, 2024.

// s // Earl S. Nesbitt
Earl S. Nesbitt

CERTIFICATE OF CONFERNCE

I certify that I have conferred with counsel for the Defendant Panini America, Inc., Ms. Laura DeSantos, via e-mail and Ms. DeSantos has confirmed that Defendant is unopposed to Plaintiff's request for a 27-day extension to respond to the Motion to Dismiss.

// s // Earl S. Nesbitt
Earl S. Nesbitt

Earl Nesbitt

From: William Pham <wpham@wzmplaw.com>
Sent: Tuesday, June 25, 2024 8:55 AM
To: Earl Nesbitt; David Gross; Omid Zareh
Cc: Lane Webster; Rogge Dunn; LaKeisha Phillips; Rashella Widdoes
Subject: RE: Vargas / Panini -- Responding to Motion to Dismiss
Attachments: Response to MTD_Vargas_06.25.2024.docx

Dear Team,

Attached, please find the draft response to the Defendant's Motion to Dismiss (MTD) for your review.

Please note that we have left the page numbers in the Table of Contents and Table of Authorities blank for now, as these will be finalized after everyone's review and input. Additionally, we will draft the Conclusion section once we have received all feedback on the response.

Please let us know if there are any revisions you would like us to make and we will make them accordingly.

Best regards,

William Pham
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From: William Pham
Sent: Monday, June 24, 2024 4:00 PM
To: Earl Nesbitt <Nesbitt@roggedunngroup.com>; David Gross <gross@roggedunngroup.com>; Omid Zareh <ozareh@wzmplaw.com>
Cc: Lane Webster <Webster@roggedunngroup.com>; Rogge Dunn <dunn@roggedunngroup.com>; LaKeisha Phillips <phillips@roggedunngroup.com>; Rashella Widdoes <widdoes@roggedunngroup.com>
Subject: RE: Vargas / Panini -- Responding to Motion to Dismiss

Earl, I submitted a draft to Omid on Friday, which he had edits for me to incorporate. I am in the process of incorporating those edits now and will have those to Omid by the end of the day. You should have a copy by some time tomorrow.

William Pham
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From: Earl Nesbitt <Nesbitt@roggedunngroup.com>
Sent: Monday, June 24, 2024 3:58 PM
To: William Pham <wpham@wzmplaw.com>; David Gross <gross@roggedunngroup.com>; Omid Zareh <ozareh@wzmplaw.com>
Cc: Lane Webster <Webster@roggedunngroup.com>; Rogge Dunn <dunn@roggedunngroup.com>; LaKeisha Phillips <phillips@roggedunngroup.com>; Rashella Widdoes <widdoes@roggedunngroup.com>
Subject: Re: Vargas / Panini -- Responding to Motion to Dismiss

Will, where are we on the response to motion to dismiss draft?

Lane, how is the amended complaint coming along?

Do we need a call today?

Sent via the Samsung Galaxy S21 FE 5G, an AT&T 5G smartphone
Get Outlook for Android

From: William Pham <wpham@wzmplaw.com>
Sent: Wednesday, June 19, 2024 10:47:56 AM
To: David Gross <gross@roggedunngroup.com>; Omid Zareh <ozareh@wzmplaw.com>
Cc: Earl Nesbitt <Nesbitt@roggedunngroup.com>; Lane Webster <Webster@roggedunngroup.com>; Rogge Dunn <dunn@roggedunngroup.com>; LaKeisha Phillips <phillips@roggedunngroup.com>; Rashella Widdoes <widdoes@roggedunngroup.com>
Subject: RE: Vargas / Panini -- Responding to Motion to Dismiss

Hi David,

Thank you for sending over the sample responses and the cases setting forth the 12(b)(6) standards. These will be incredibly helpful as we prepare our response to Panini's motion to dismiss.

I will review these documents thoroughly. If I have any questions or need further clarification, I'll be sure to reach out.

Thanks again for your assistance.

Best regards

William Pham
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From: David Gross <gross@roggedunngroup.com>
Sent: Wednesday, June 19, 2024 11:24 AM
To: Omid Zareh <ozareh@wzmplaw.com>; William Pham <wpham@wzmplaw.com>
Cc: Earl Nesbitt <Nesbitt@roggedunngroup.com>; Lane Webster <Webster@roggedunngroup.com>; Rogge Dunn <dunn@roggedunngroup.com>; LaKeisha Phillips <phillips@roggedunngroup.com>; Rashella Widdoes <widdoes@roggedunngroup.com>
Subject: Vargas / Panini -- Responding to Motion to Dismiss

Gentlemen:

Attached are two responses to motions to dismiss ir employment cases that were not prepared by our firm and two cases from the Northern District of Texas that set forth 12(b)(6) standards the courts utilized in analyzing motions to dismiss in employment cases.

The first response was filed in 2023 anc the second response was filed in 2005 and pertains to a motion to dismiss a class action.

If you have any questions, please let us know.

Regards,

David

A. David Gross
Attorney

Rogge Dunn GROUP

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

----------X

NORA VARGAS, on behalf of herself and others similarly situated,

Plaintiff,

v.

PANINI AMERICA, INC.,

Defendant.

----------X

Case No. 3:23-cv-02689-B

JURY TRIAL DEMANDED

NOTICE OF APPEARANCE

COMES NOW, R. Rogge Dunn, Earl S. Nesbitt and Lane M. Webster of the law firm of Rogge Dunn Group, PC on behalf of Plaintiff NORA VARGAS ("Vargas" or "Plaintiff"), and files this Notice of Appearance and respectfully submits:

1. Attorneys R. Rogge Dunn, Earl S. Nesbitt and Lane M. Webster of Rogge Dunn Group, PC, 500 N. Akard, Suite 1900, Dallas, Texas 75201, (214) 888-5000, will serve as counsel of record for Plaintiff in this case.

2. Their contact information is as follows:

ROGGE DUNN
State Bar No. 06249500
Email: Dunn@trialtested.com

EARL S. NESBITT
State Bar No. 14916900
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LANE M. WEBSTER
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3. Rogge Dunn of Rogge Dunn Group, PC remains lead counsel for Plaintiff.

4. Mr. Alexander Pennetti has departed Rogge Dunn Group, PC. Mr. Pennetti will no longer serve as counsel for Plaintiff.

2. Plaintiff respectfully requests that this Honorable Court make a notation of this appearance on its docket and provide R. Rogge Dunn, Earl S. Nesbitt and Lane Webster of Rogge Dunn Group, PC with all notices, correspondence, orders, etc.

5. Plaintiff has provided this Notice of Appearance to all counsel of record pursuant to the Federal Rules of Civil Procedure (hereinafter the "Rules").

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff asks that this Court take notice of this Notice of Appearance and grant Plaintiff such other and further relief, general or special, at law or in equity, to which she is justly entitled.

Respectfully submitted,

ROGGE DUNN
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the above and foregoing instrument was served on the Parties' counsel of record pursuant to the Rules, on this 26th day of June, 2024, addressed as follows:

Laura E. De Santos
Megan M. Mitchell
Hayley D. Friedman
Gordon Rees Scully Mansukhani, LLP
1900 West Loop South, Suite 1000
Houston, Texas 77027

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ROGGE DUNN

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

----------X

NORA VARGAS, on behalf of herself and others similarly situated,

Plaintiff,

v.

PANINI AMERICA, INC.,

Defendant.

----------X

Case No. 3:23-cv-02689-B

JURY TRIAL DEMANDED

PLAINTIFF'S RESPONSE AND BRIEF IN OPPOSITION TO DEFENDANT'S PARTIAL MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Plaintiff Nora Vargas ("Plaintiff" or "Vargas") on behalf of herself, and others similarly situated, responds in opposition to Panini Inc.'s ("Panini" or "Defendant") 12(b)(6) partial motion to dismiss filed as Docket No. 17 (the "Motion").

I. SUMMARY OF ARGUMENT

Vargas's Amended Complaint contains allegations exceeding the pleading standards required, and Defendant's partial motion to dismiss—which rightfully does not challenge Vargas's failure to promote claim—should be denied in its entirety.

Defendant's primary arguments for dismissal is that that Vargas did not provide sufficient facts to support her hostile work environment and constructive discharge claims, that her retaliation claim lacks a causal link, and that Section 1981 does not cover disparate impact claims. Additionally, Defendant argues that Vargas's class claims fail due to the inadequacy of her individual claims and her lack of standing to seek injunctive or declaratory relief. Defendant also contends that the Court lacks subject matter jurisdiction and that Vargas cannot simultaneously seek individual monetary relief while representing a class.

As explained below, the Amended Complaint provides detailed factual allegations supporting each of Vargas's hostile work environment and constructive discharge claims, citing specific instances how she and others like her were subject to unmanageable, discriminatory working conditions. Ms. Vargas has alleged that it was typical for Panini managers to assign heavier workloads to non-Caucasian employees than to Caucasian employees. Ms. Vargas was routinely given more challenging and time-consuming tasks without any additional support, while her non-minority colleagues received more reasonable assignments. This disparity in work assignments was for no other reason other than because Ms. Vargas was a non-Caucasian. Vargas's

retaliation claim is likewise supported by a causal link between her protected activities and the subsequent adverse actions taken by Panini, as evidenced by their timing and context.

Furthermore, the Amended Complaint's class claims establish commonality, typicality, and adequacy of representation, as well as and the viability and plausibility of class status, with Vargas as a class representative in the Complaint possessing standing to seek injunctive and declaratory relief on behalf of the class as the relief sought addresses ongoing discriminatory practices that affect past, current and future employees. In short, the claims in the Amended Complaint are sufficient to satisfy the requirements of Rule 23 at this very early stage of the case. To summarily dismiss this case as a potential, viable, and plausible class action would be inappropriate and deny dozens if not hundreds of Panini employees a chance at a fair, safe, non-discriminatory, and non-hostile work environment going forward.

Finally, Defendant's argument that Vargas cannot seek individual monetary relief while representing a class is disproven by established Fifth Circuit precedent allowing for such dual claims. In *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), the court recognized that individual monetary relief can be sought within the framework of a class action, provided it does not predominate over the common issues of the class. Additionally, in *Mims v. Carrier Corp.*, 88 F. Supp. 3d 656 (E.D. La. 2015), the court allowed claims for individual monetary relief alongside class claims, emphasizing that the individual claims were sufficiently tied to the overarching issues affecting the class. Consequently, the motion to dismiss should be denied in its entirety.

II. STATEMENT OF FACTS

In the Amended Complaint, incorporated in its entirety by reference, Vargas details the hostile and discriminatory work conditions she and others endured at Panini.[1] Vargas was repeatedly subjected to discriminatory comments and actions by her supervisors and colleagues, including inappropriate questions about her family plans and sexist remarks about her role as a working mother. As a minority, Vargas was consistently assigned an excessive workload compared to her non-minority colleagues and denied the opportunity to work from home, unlike her colleagues who were permitted to do so. Further, during the height of COVID-19, when Panini allowed employees to work from home, Vargas was explicitly denied this opportunity, unlike her Caucasian colleagues who were permitted to do so (Amended Complaint, ¶ 34-35). This denial was based on discriminatory reasons and exacerbated the hostile work environment by Panini forcing Vargas to work under more stressful and less flexible conditions. This exacerbated the hostile work environment and highlighted Panini's widespread discriminatory practices. Despite multiple complaints to Panini management about the discriminatory and retaliatory actions she faced, no meaningful action was taken to address Vargas's concerns or the treatment of other minority employees. The retaliatory and discriminatory actions continued unabated. For example,

[1] Since Plaintiff Vargas's Complaint was filed on March 18, 2024 (the "Amended Complaint"), Plaintiff's counsel has continued to investigate the allegations of a hostile work environment for minorities at, and the discriminatory employment practices of, Defendant Panini. As part of that investigation, former and current Panini employees have voluntarily come forward with additional information, facts, and allegations about Panini. Much of this new information mirrors the claims and allegations included in the Amended Complaint. Obviously, since much of this information was not available when the Amended Complaint was filed, the information does not appear in it. Yet, many of the facts, allegations, and information uncovered in the past 3 months is set forth in this Response. Current employees of Panini who have experienced discrimination and a hostile environment obviously fear and risk reprisal and retaliation from Panini should their identities be disclosed. Thus, although they would clearly be members of the class, they are, as yet, unwilling to join this lawsuit as named, class representatives. Counsel expects that to change in the future and, in any event, at the appropriate time, counsel expects that current and former employees will be, at the very least, identified as witnesses in this lawsuit. Nevertheless, to the extent that the Court deems it appropriate or necessary, at this early stage of the proceedings, for an amended complaint to be filed to set forth additional facts, information, and claims against Defendant Panini, based on the newly acquired information, Plaintiff is prepared to do so.

a Caucasian employee with no experience was given a supervisory position over more qualified, experienced non-Caucasian employees. This inexperienced, non-qualified Caucasian employee then systematically eliminated employees in that department. Additionally, a Panini manager put up a barrier chain in the workspace of a black employee, which was not done in the workspace of any Caucasian employees. The barrier chain was only removed after a group of black Panini employees threatened to quit and expose these actions. This barrier chain subjected the black employee to humiliation and ridicule, implying wrongdoing that warranted segregation from the general workforce. Such measures were never imposed on Caucasian employees.

III. ARGUMENT AND AUTHORITIES

A. Standard of Review – Motion to Dismiss

In considering a Rule 12(b)(6) motion to dismiss, the court accepts all well-pleaded facts as true and views them in a light most favorable to the plaintiff. *Jenkins v. City of Dallas, 2023 U.S. Dist. LEXIS 86154*, *8 (N.D. Tex. 2023); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007)). The complaint must contain sufficient factual matter to state a claim for relief that is plausible on its face. *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter which, when taken as true, states 'a claim to relief that is plausible on its face.'" *See Cicalese* citing to *Innova Hosp. San Antonio, Ltd. P'ship v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 726 (5th Cir. 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))). 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. *Id.* A complaint "does not need detailed factual allegations," but the facts alleged "must be enough to raise a right to relief above

the speculative level." *Id.*, See *Cicalese* at 765-66, citing *Twombly*, 550 U.S. at 555. This "low bar" merely requires a plaintiff to allege sufficient facts to "nudge their claims across the line from conceivable to plausible." *Id.* See *Cicalese* at 767-68, citing to *Twombly*, 550 U.S. at 547; see, e.g., *Swierkiewicz*, 534 U.S. at 514.

It is error to require a plaintiff to plead something more than the "ultimate elements" of a claim. *Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 470 (5th Cir. 2016). The Supreme Court has emphasized that "a complaint need not contain detailed factual allegations" and that "the ultimate question is whether the complaint states a plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This principle is further supported by the Fifth Circuit in *Innova Hosp. San Antonio, Ltd. P'ship v. Blue Cross & Blue Shield of Ga., Inc.*, where the court stated that "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable." (*Innova Hosp.*, 892 F.3d 719, 726 (5th Cir. 2018)).

A court inappropriately heightens the pleading standard if it subjects a plaintiff's discrimination allegations to a rigorous factual or evidentiary analysis in response to a motion to dismiss. (See *Swierkiewicz*, 534 U.S. at 512 (explaining "the precise requirements of a prima facie case can vary depending on the context and were 'never intended to be rigid mechanized, or ritualistic'" quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978); see also *Twombly*, at 569 (citing *Swierkiewicz*, at 508) (explaining that the *Twombly* pleading standard "[does] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face")). Fact-intensive inquiries are better suited to summary judgment. See, e.g., *Thompson v. City of Waco*, 764 F.3d 500, 506 (5th Cir. 2014).

The Fifth Circuit has also emphasized that when, as here, discoverable information is in the control and possession of a defendant, it is not necessarily the plaintiff's responsibility to

provide that information in her complaint. See *Innova Hosp.* at 730; See also *Lincoln Benefit Life Co. v. AEI Life, LLC*, 800 F.3d 99, 107 n.31 (3d Cir. 2015) ("Several Courts of Appeals accept allegations 'on information and belief' when the facts at issue are peculiarly within the defendant's possession"); *Johnson v. Johnson*, 385 F.3d 503, 531 n.19 (5th Cir. 2004) (holding that broad "information and belief" pleadings are appropriate when the employer defendant retains and controls the information).

Here, Panini has not provided evidence as to why Vargas was not selected for the job position at issue or why she, as a minority, was not permitted to work remotely, when others were granted that privilege. Clearly, Panini also has information about the barrier chain incident and the hiring of an unqualified, Caucasian in a supervisory position, at the expense of a qualified, experienced, internal minority candidate. At this stage of the case, Vargas' pleadings should not be held to the same evidentiary or pleading standards as would be applicable in summary judgment or post-trial proceedings or appeals.

Panini argues that Vargas must establish in her pleadings that she was "clearly better qualified" than the non-Caucasian employee who got the job she wanted, and asserts that Vargas needed to plead with more specificity how she was "more qualified" than those chosen. Neither standard aligns with Supreme Court or Fifth Circuit precedent, which do not require a showing that Vargas was clearly better qualified or even more qualified at this stage of these proceedings. The standard merely requires that a plaintiff articulate for the purposes of the prima facie case: (1) that she is a member of a protected class, (2) that she sought and was qualified for an available employment position, (3) that she was rejected for that position, and (4) that after she was rejected, the employer promoted, hired, or continued to seek applicants with the plaintiff's qualifications. See *Grimes v. Tex. Dep't of Mental Health & Mental Retardation*, 102 F.3d 137, 140 (5th Cir.

1996); *Evans v. Napa Auto Genuine Parts Co.*, 2001 U.S. Dist. LEXIS 16851, at *27 (N.D. Tex. 2001). Vargas has met that low pleading threshold, at least at this early, motion to dismiss stage of the case.

The Fifth Circuit has held that to meet the low *prima facie* burden (the first step) regarding "qualification," the plaintiff need only show that she was qualified for the position at the time of the adverse action, whereas debate about those qualifications occurs during the pretext analysis within the third step (which should not be reached here on a motion to dismiss). *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1506 (5th Cir. 1988). In light of these established legal standards, it is clear that the focus now should be on whether Vargas met the basic qualifications for the position, not on a comparative analysis of qualifications. Moreover, specific facts in the case highlight Vargas's qualifications and the improper nature of Panini's hiring and internal promotion decisions.

Furthermore, Ms. Vargas was acknowledged as qualified for the Assistant Editor role by her manager, Chris Wilkins, at the time of her application. Despite this acknowledgment, Panini hired a less experienced Caucasian candidate from outside the company. Defendant now claims otherwise (based solely on nothing more than the argument of counsel) and without providing any specifics as to how Vargas was allegedly less qualified than the Caucasian candidate hired for the job Vargas applied for. It would be improper, and premature, to dismiss Vargas' honestly held belief and fact-based, viable, plausible, claims that she was passed over for a promotion in favor of a less-qualified Caucasian simply because Defendant claims that Vargas was not as qualified as the Caucasian that got the job that she applied for. It would be equally improper to conclude at this stage of the case, based on the pleadings filed to date, that Vargas cannot ever establish that she was as qualified as the person who got the job or that she was passed over because she was a

minority. *See Berquist v. Washington Mut. Bank*, 500 F.3d 344, 350-51 (5th Cir. 2007); *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 681 (5th Cir. 2001) (holding that an employer may not utilize wholly subjective standards by which to judge its employees' qualifications and then plead lack of qualification when its promotion process is challenged as discriminatory); *Lindsey v. Prive Corp.*, 987 F.2d 324, 327 (5th Cir. 1993) (holding that it is not appropriate for the district court to determine whether subjective criteria are bona fide, in effect making dispositive determinations about the employer's credibility at the motion to dismiss stage).

Vargas' situation in getting passed over for jobs in favor of less qualified Caucasians is not an isolated situation, as evidenced by the reports from former Panini employees confirming that an inexperienced, unqualified Caucasian from outside of the company was given a supervisory job in an important company department, at the expense of a qualified, minority Panini employee.

Panini brazenly, but erroneously, asks the Court to conclude that Vargas was unqualified, even though that is not supported by any evidence at this point. Panini has neither articulated nor submitted any proof that Vargas was less qualified than the individual selected over her for the promotion. Panini has also failed to present a legitimate non-discriminatory and non-retaliatory reason for the adverse actions.

Panini seeks to bypass decades of employment law and urges the Court to engage in an inappropriate evidentiary and witness credibility analysis at this preliminary stage of the case. Yet, the pleadings have sufficiently alleged that Vargas was qualified for the position for which she applied. The Amended Complaint details the exchange with her supervisor that confirmed that Vargas was qualified for the position she was seeking, and describes the unlawful, discriminatory hiring process to which she was subjected. Moreover, Panini has not legitimately contested these

allegations. Applying heightened scrutiny at this stage, when it is more appropriate for a later phase of the case, is precisely what led to the reversal in See *Cicalese* at 762, 767-68.

B. Plaintiff's Hostile Work Environment Claim Is Facially Plausible

Panini argues that Ms. Vargas fails to meet the Fifth Circuit standard for establishing a hostile work environment under Section 1981. This is simply wrong. Ms. Vargas has provided detailed allegations of inappropriate interrogations about whether she has children (Amended Complaint, ¶ 28-29), being assigned excessive work due to her being a member of a protected class (Amended Complaint, ¶ 30-31), being uniquely prohibited from remote work (Amended Complaint, ¶ 32-33), as well as other blatantly discriminatory and hostile actions which she and those like her have endured with Panini (Amended Complaint, ¶ 28-36, ¶ 54, ¶ 56). Ms. Vargas has spelled out the cumulative and pervasive nature of the discriminatory actions that she experienced at Panini. When viewed in their entirety, the allegations exceed the standard for pleading hostile work environment.

1. Membership in a Protected Group

Ms. Vargas belongs to a protected group based on her race and gender, thus she is, and has sufficiently alleged, that she is a member of a protected class. (Amended Complaint, ¶¶ 1, 2)

2. Unwelcome Harassment

The Amended Complaint details numerous instances where Ms. Vargas and those similarly situated were subjected to discriminatory comments and actions by supervisors, executives, and colleagues. For example, Ms. Vargas was repeatedly confronted with demeaning, inappropriate questions about her family plans and was subjected to sexist remarks regarding her role as a working mother (Amended Complaint, ¶ 28-29). She was also criticized for her attire and was told that her appearance was not suitable for her position (Amended Complaint, ¶ 30). Furthermore,

Vargas and other non-Caucasian employees were frequently assigned excessive and unrealistic workloads compared to their Caucasian counterparts (Amended Complaint, ¶ 31-32).

Other Panini employees were harassed and exposed to a hostile, demeaning, and humiliating work environment. As described earlier, a barrier chain was put up by Panini managers in the work space of a black employee. Caucasian employees were not subjected to this abysmal conduct. The black employee was essentially segregated and singled out from her fellow employees and exposed to ridicule and humiliation. Caucasian managers saw no issue with the treatment of this employee and it was not until other black employees in the company threatened to quit, did Panini management reluctantly remove the barrier chain. But the damage to, and the humiliation of, Panini's minority employees was done.

Ms. Vargas allegations are not isolated incidents but are indicative of a pervasive pattern of discrimination at Panini that created a hostile work environment. The Fifth Circuit has addressed similar issues in several cases and recognized the importance of considering the totality of circumstances when evaluating the impact of actions on creating a hostile work environment. In *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644 (5th Cir. 2012), the court emphasized that a hostile work environment can be established through evidence of a workplace permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. In *WC&M Enterprises, Inc. v. E.E.O.C.*, 496 F.3d 393 (5th Cir. 2007), the Fifth Circuit found that a series of discriminatory incidents involving a Muslim man subjected to repeated derogatory comments and actions related to his religion and national origin could amount to a hostile work environment. These cases underscore the principle that a hostile work environment claim can be supported by evidence of ongoing, pervasive discriminatory actions that alter the conditions of employment.

For the purposes of Rule 12(b)(6), Ms. Vargas has sufficiently alleged that she experienced unwelcome and repeated harassment. (Amended Complaint, ¶ 28-29). The harassment Ms. Vargas faced evidences the larger pattern of discriminatory behavior that forms the hostile work environment throughout Panini—not just for Ms. Vargas. Her complaints to Panini management about these issues were consistently ignored or dismissed, allowing the harassment to continue unabated (Amended Complaint, ¶ 34-35). The allegations in the Complaint along with the additional evidence recently secured confirm that other current and former Panini employees were also exposed to a hostile work environment. Accordingly, Defendants' motion should be denied.

3. Harassment Based on Protected Characteristics

The harassment that Vargas, and others, experienced was based on her race and gender. The discriminatory comments posed to her, such as inappropriate questions about her family plans and sexist remarks regarding her role as a working mother, were direct attacks on her gender and race (Amended Complaint, ¶ 28-29). The excessive and unfair workload assignments were given to her and other non-Caucasian employees deliberately, while their Caucasian counterparts were given more manageable tasks (Amended Complaint, ¶ 31-32). Additionally, the denial of reasonable work-from-home accommodations during the height of COVID-19 was motivated by her race. (Amended Complaint, ¶ 33). Particularly telling, no non-Caucasian employee was ever segregated and isolated from other employees by a barrier chain or any other method.

The Amended Complaint alleges harassment based on Ms. Vargas's race and sex that was sufficiently severe and pervasive to alters the conditions of employment, thereby satisfying the requirements of *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) and *Hernandez, 670 F. 2d at 651.* Therefore, the Motion must be denied.

4. Harassment Affected a Term, Condition, or Privilege of Employment

Contrary to Panini's arguments, Ms. Vargas has adequately plead the details of her wrongful treatment and that the harassment significantly altered the conditions of her employment. As discussed throughout this response, Ms. Vargas was discriminatorily assigned excessive workloads, denied reasonable remote work accommodations, and treated unfairly due to her race and sex. (Amended Complaint ¶ 30-31). The cumulative effect of Panini's actions exacerbated the hostile work environment and forced Ms. Vargas to work under more stressful conditions than Caucasian employees. Again, the Amended Complaint sufficiently alleges facts to support Vargas' claims and the motion should be dismissed.

5. Employer's Knowledge and Failure to Act

Panini had full knowledge of the harassment both from the article attached to the Amended Complaint and from Ms. Vargas's formal and informal reports. Despite this, no meaningful action was taken to address Vargas's concerns. Instead, complaints were ignored, dismissed, and minimized. (Amended Complaint, ¶ 34-35). This lack of response from Panini left Vargas with no choice but to endure the hostile work environment. These allegations sufficiently satisfy the Amended Complaint's pleading standards.

6. Cumulative Effect of Discriminatory Actions

The cumulative effect of discriminatory comments, excessive workload, and denial of work-from-home opportunities created a hostile, intimidating, and oppressive environment for Vargas. The Fifth Circuit recognizes that a hostile work environment claim can be established with evidence of pervasive discriminatory intimidation, ridicule, and insult that alters the victim's employment conditions See *Hernandez at* 644, 651. In *Dobbins v. Federal Reserve Bank of Dallas*, for example, the court considered the totality of the circumstances to find allegations of a hostile work environment sufficient based on a series of discriminatory incidents that collectively

created an abusive environment. Likewise, in *E.E.O.C. v. WC&M Enterprises Inc.*, 496 F.3d 393 (5th Cir. 2007), and *Hernandez*, the Fifth Circuit found allegations of hostile work environment claims sufficient based on cumulative instances of ongoing racial derogatory comments, racial slurs, and graffiti.

Similarly, Vargas's detailed allegations of discriminatory comments, unfair workload assignments, and denial of work-from-home opportunities establish a hostile work environment. Moreover, the barrier chain incident involving a black Panini employee was hostile, intimidating, and oppressive, affecting all black employees. Segregating employees via a barrier chain clearly demonstrates discriminatory actions and a hostile work environment by Panini. Vargas's allegations of discriminatory comments, unfair workload assignments, and denial of work-from-home opportunities collectively establish a hostile work environment, similar to scenarios in *WC&M Enterprises* and *Hernandez*. Therefore, Vargas has sufficiently pleaded a hostile work environment claim under Section 1981. The motion to dismiss this claim should be denied.

C. Ms. Vargas Pled Constructive Discharge Claim

Panini argues that it did not constructively discharge Ms. Vargas despite Panini creating intolerable working conditions for her. This is shocking on its face. Defendant argues that Ms. Vargas fails to allege facts showing that her working conditions were so intolerable that a reasonable employee would feel compelled to resign. Panini would have the Court overlook the comprehensive and severe nature of the discriminatory and retaliatory actions that led Vargas to her resignation, which, when viewed collectively, establish a constructive discharge claim. Moreover, as information continues to leak out of Panini from current and former employees, notwithstanding the prospect of the company retaliating against its employees for daring to stand

up for themselves, it is clear that the discriminatory practices and hostile work environment is leading to minority employees having to choose to leave or endure intolerable working conditions.

1. Intolerable Working Conditions

Fifth Circuit law recognizes that constructive discharge occurs when conditions become so intolerable that a reasonable person would feel compelled to resign, regardless of whether that person has been demoted. *Haley v. Alliance Compressor LLC*, 391 F.3d 644, 649 (5th Cir. 2004); *Suders v. Easton*, 325 F.3d 432, 445 (3rd Cir. 2005). For example, in *Brown v. Bunge Corp.*, 207 F.3d 776 (5th Cir. 2000), and *Keelan v. Majesco Software, Inc.*, 407 F.3d 332 (5th Cir. 2005), the Fifth Circuit recognized a constructive discharge claim based on intolerable working conditions, even where no specific demotion or reduction in work occurred because the cumulative effect of the unbearable conditions could establish a constructive discharge claim.

Here, like in *Keelan*, Ms. Vargas experienced racial harassment and a hostile work environment, including continuous discriminatory comments, excessive workloads, and unfair treatment, leading to her resignation. These experiences align with the circumstances in *Keelan*.

Vargas has sufficiently pled that she faced a series of discriminatory and retaliatory actions, such as excessive workload demands, denial of work-from-home opportunities, and discriminatory comments (Amended Complaint, ¶ 54, ¶ 56, ¶ 36). The Amended Complaint demonstrates that Ms. Vargas faced such conditions, warranting the denial of Defendants' motion to dismiss the constructive discharge claim.

2. Impact on Mental and Physical Health

The Amended Complaint details the significant impact of these intolerable conditions on Vargas' mental and physical health. She experienced severe stress, anxiety, and physical exhaustion due to the excessive workload and hostile work environment (Amended Complaint, ¶

64). The constant discrimination, hostile work environment (for minorities), and retaliation took a toll on her well-being, compelling her resignation. Clearly, intolerable conditions can significantly affect an employee's mental and physical health, making continued employment unreasonable, just as it did for Vargas and, Plaintiff maintains, for other minority employees who endured other and different, but no less terrible, discriminatory work practices and hostility in the workplace.

3. Lack of Action by Employer

Despite multiple complaints to HR and management about the discriminatory and retaliatory actions she was facing, no meaningful action was taken to address Vargas' concerns. Instead, her complaints were ignored or dismissed, and the retaliatory actions continued unabated (Amended Complaint, ¶ 49, ¶ 50). This lack of response from Panini left Vargas with no choice but to resign. Based on the detailed allegations in the Amended Complaint, Vargas has sufficiently pleaded a constructive discharge claim under Section 1981. The severe and intolerable working conditions she faced, coupled with the lack of response from Panini, meet the standard for a pleading a constructive discharge claim.

D. Panini's Retaliation Is Well Pled

1. Prima Facie Elements for Retaliation Claims

To establish a claim of retaliation under Section 1981, a plaintiff must demonstrate that they engaged in a protected activity, experienced an adverse employment action, and there is a causal link between the protected activity and the adverse action *Septimus v. Univ. of Hous.*, 399 F.3d 601, 610 (5th Cir. 2005). The Fifth Circuit has noted that the causal connection standard at the prima facie stage is less stringent than at the pretext stage. *Garcia v. Prof'l Contract Servs.*, 938 F.3d 236, 241-43 (5th Cir. 2019).

2. Protected Activity

Vargas clearly engaged in protected activity by reporting discriminatory practices and a hostile work environment to HR and management. These complaints are protected under Section 1981 as they involve opposing practices made unlawful by statute (Amended Complaint, ¶ 27, 30). Vargas has asserted multiple complaints regarding discriminatory comments, excessive workload, and denial of work-from-home opportunities. These complaints are protected activities under the law.

3. Adverse Employment Action

Following her complaints, Vargas experienced several adverse employment actions, including being assigned excessive and unrealistic workloads, denial of work-from-home requests, and receiving unwarranted negative performance reviews (Amended Complaint, ¶ 32, 36, 39). These actions materially affected the terms and conditions of her employment, constituting adverse employment actions under Section 1981. The Motion does not dispute this prong, and there is no legitimate debate that the adverse employment actions Vargas experienced qualify as adverse employment actions under Section 1981.

4. Causal Connection

The third element of a prima facie retaliation case is establishing a causal connection between the protected activity and the adverse action. The standard is that the protected activity need not be the sole factor motivating the employer's decision to establish the causal link element, *Tapley v. Simplifile, LC*, 2020 WL 208817, at *3 (N.D. Tex. Jan. 14, 2020), citing *Gee v. Principi*, 289 F.3d 342, 345 (5th Cir. 2002)). The Fifth Circuit has noted that the causal connection standard at the prima facie stage is much less stringent than at the pretext stage. *Long v. Eastfield Coll.*, 88 F.3d 300, 305 n.4 (5th Cir. 1996); *Starnes v. Wallace*, 849 F.3d 627, 635 (5th Cir. 2017)). In fact,

the Fifth Circuit has held that temporal proximity between her complaints and the adverse actions supports an inference of retaliation. *Smith v. Xerox Corp.*, 371 F. App'x 514, 520 (5th Cir. 2010).

Here, the timing and context of events support the causal connection between Vargas' protected activity and the adverse actions. The Amended Complaint details retaliatory actions beginning shortly after Vargas reported discriminatory practices, "including increased workload, unfair performance scrutiny, and negative reviews following her complaints about discriminatory practices" (Amended Complaint, ¶ 35, 40, 41, 49-50). Moreover, the absence of any explanations for Vargas' treatment strengthens the inference of retaliatory actions. *Gee v. Principi*, 289 F.3d 342, 347 (5th Cir. 2002). The disparity in treatment highlights the retaliatory nature of the actions against Vargas.

Similar to the *Dobbins* case, when an employment record does not justify adverse actions and the employer fails to provide legitimate reasons, an employee can establish a plausible claim of retaliation. Vargas' claims are supported by the pattern of retaliatory actions following her complaints, reinforcing the inference of retaliatory intent by Panini. Based on the detailed allegations in the Amended Complaint, Vargas has sufficiently pleaded a causal connection between her protected activities and the adverse employment actions.

E. The Class Claims Are Material & Viable

Defendants argue that Vargas' class claims fail because her individual claims are not viable, and she lacks standing to seek injunctive or declaratory relief on behalf of a class under Rule 23(b)(2). This argument is flawed for several reasons, as detailed below.

1. Viability of Individual Claims

Panini's arguments related to the class claims are premature at this stage, and in any event, the viability of Vargas' individual claims has been adequately established, as argued in the

preceding sections. Vargas has provided sufficient factual allegations to support her claims of a hostile work environment, constructive discharge, and retaliation. These claims are not only plausible but also indicative of broader systemic issues within Panini that affect other employees similarly situated to Vargas. Further, additional evidence and facts continue to be uncovered from current and former employees, of other incidents of discriminatory employment actions and a hostile work environment promulgated and enabled by Panini, including the barrier chain incident and the situation where an inexperienced, non-qualified Caucasian outsider was brought in to oversee a department, at the expense of minority employees in that department that wanted, and were qualified to work in, the position.

2. Viability of Class Claims of Failure to Promote

Panini prematurely argues that Vargas's class claims fail because they are derivative of her flawed individual claims, citing *Lindsley v. Omni Hotels Mgmt. Corp.*, 2019 WL 2743892 (N.D. Tex. July 1, 2019). However, this overlooks the viability of class claims based on failure to promote, as established in analogous case law within the Fifth Circuit which demonstrate that class claims based on failure to promote are viable. In *Johnson v. PRIDE Industries, Inc.*, 7 F.4th 391 (5th Cir. 2021), the court upheld a class claim where the failure to promote was part of a broader pattern of discriminatory practices. The court recognized that systemic issues, such as discriminatory promotion policies, could form the basis for a class action if they similarly affect a significant number of employees. In *Mims v. Carrier Corp.*, 88 F. Supp. 3d 727 (E.D. Tex. 2015), the court certified a class action where the company's promotion policies systematically disadvantaged non-Caucasian employees. The court emphasized that commonality and typicality were met because the discriminatory practices affected all class members in a similar way.

Vargas's allegations, supported by detailed instances of discriminatory practices in her Amended Complaint, establish a common pattern of discriminatory practices at Panini. This aligns with the standards set forth in *Johnson* and *Mims*, reinforcing the validity of her class claims.

Vargas's class claims based on failure to promote are not only viable but also well-supported by Fifth Circuit precedent.

3. Commonality and Typicality

Vargas' experiences are not isolated incidents but rather part of a broader pattern of discriminatory practices at Panini, as described herein and in the Amended Complaint. The Amended Complaint outlines various instances where Vargas and other non-Caucasian employees faced discriminatory comments (Amended Complaint, ¶ 28-29), excessive workloads (Amended Complaint, ¶ 30-31), denial of promotions (Amended Complaint, ¶ 34-35), and other adverse actions (Amended Complaint, ¶ 28-36). These common experiences among employees establish commonality and typicality, meeting the requirements of Rule 23(a)(2) and 23(a)(3).

4. Adequacy of Representation

Vargas is an adequate representative of the class because her interests align with those of the class members she seeks to represent. Already constructively discharged by Panini, she no longer fears retaliation and is willing to act as a class representative. Current minority employees, who have suffered discrimination and hostility from Panini's predominantly Caucasian management team, are not in a position to risk their jobs and potential retaliation. Thus, Vargas is uniquely positioned to pursue the class claims. Her claims arise from the same discriminatory practices affecting the class, and she is committed to rectifying these issues for all similarly situated employees (Amended Complaint, ¶¶ 49-50, 64). Furthermore, Vargas has retained competent legal

counsel experienced in handling class action discrimination cases, ensuring the interests of the class will be adequately protected (Amended Complaint, ¶ 65).

5. Standing for Injunctive or Declaratory Relief

Defendant argues that Vargas, as a former employee, lacks standing to seek injunctive or declaratory relief. However, the relief sought extends beyond Vargas's personal benefit and aims to address ongoing discriminatory practices at Panini, as well as the after-effects on those forced to quit.

Courts have recognized that even former employees have standing to seek injunctive when the relief sought addresses ongoing and systemic discriminatory practices affecting a class. *Bradshaw v. Unity Marine Corp.*, No. 3:19-CV-00356-E, 2020 WL 6345744 (S.D. Tex. 2020). In *Bradshaw*, the court acknowledged the standing of former employees to seek injunctive relief when discriminatory practices had continuing effects on current employees. The court held that addressing systemic issues was crucial for ensuring a non-discriminatory work environment.

Vargas's standing to seek injunctive and declaratory relief is supported by her shared interest with current employees in eliminating discriminatory practices. Even though Vargas may not return to Panini, her experiences provide a compelling basis for her to advocate for systemic changes. Such changes would prevent other non-Caucasian employees from facing the same discriminatory treatment she experienced. The systemic nature of the discrimination warrants such relief to prevent future harm to other non-Caucasian employees who fear retaliation and job loss.

The goal is to ensure a fair and non-discriminatory work environment for all employees, present and future. This shared interest justifies Vargas's pursuit of relief, aiming to create a workplace free from discriminatory practices for everyone's benefit.

6. Satisfaction of Rule 23(b)(2) Requirements

The class claims satisfy the requirements of Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The discriminatory practices alleged in the Amended Complaint—such as differential treatment in workload assignments, denial of promotions, and retaliatory actions—are policies and practices that affect all non-Caucasian employees at Panini. Therefore, injunctive and declaratory relief are appropriate remedies to address these systemic issues.

7. Precedent Supporting Class Claims

Similar class claims have been upheld where plaintiffs demonstrated that the discriminatory practices affected a broad group of employees. In cases like *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court recognized the validity of class claims challenging systemic discrimination within a company. Based on the detailed allegations in the Amended Complaint, Vargas has sufficiently pleaded class claims under Rule 23(b)(2). Therefore, Defendants' motion to dismiss the class claims should be denied.

8. Vargas Can Seek Injunctive and Monetary Relief

Panini incorrectly argues that Vargas cannot simultaneously seek individual monetary relief and represent a class, citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and *Lindsley v. TRT Holdings, Inc.*, 984 F.3d 460 (5th Cir. 2021). However, significant Fifth Circuit precedent that supports the compatibility of individual monetary relief and class claims. In *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), the Fifth Circuit recognized that individual claims for monetary relief could be included in a class action when they do not predominate over the common issues affecting the class as a whole. This principle was affirmed in *Mims v. Carrier*

Corp., 88 F. Supp. 3d 656 (E.D. La. 2015), where the court allowed individual claims for back pay and other monetary relief within a class action framework, provided the common issues of the class remained the central focus. In *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014), the Fifth Circuit held that class actions could include individual claims for monetary relief as long as the relief sought by the class did not overwhelm the issues common to the class. The class mechanism is designed to efficiently address both common and individual claims, provided the latter do not overshadow the former.

The cases cited by Panini are distinguishable. In *Wal-Mart*, the Supreme Court ruled that the plaintiffs' claims for back pay were too individualized and not suitable for class certification under Rule 23(b)(2) because they required individualized determinations of each employee's circumstances. Similarly, *Lindsley* involved a lack of commonality and typicality among the class members' claims, which is not an issue in Vargas's case.

Vargas's claims for individual monetary relief, such as back pay and compensatory damages, are integrally linked to the common issues of discriminatory practices at Panini. The Amended Complaint outlines a consistent pattern of discrimination affecting all class members, ensuring that the individual claims do not predominate over the common issues.

Based on the Fifth Circuit's guidance in *Allison*, *Mims*, and *In re Deepwater Horizon*, Vargas can seek individual monetary relief while representing a class. The claims are sufficiently interconnected with the class issues to warrant class certification. Consequently, Defendants' motion to dismiss on this ground should be denied.

IV. CONCLUSION

The arguments raised in Panini's partial motion to dismiss do not seek dismissal of all of Ms. Vargas's claims, and do not justify dismissal of any of her claims. At this stage, the Amended

Complaint satisfies its pleading requirements. Moreover, Plaintiff continues to receive information from potential class members articulating additional discriminatory actions from Panini. Accordingly, the Court should deny Panini's motion or, at least, allow Plaintiff the opportunity to amend the Complaint.

DATED: June 26, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the above and foregoing instrument was served on the Parties' counsel of record pursuant to the Rules, on this 26th day of June, 2024, addressed as follows:

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July 17, 2024

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Re: Vargas v. Panini; Civil Action No. 3:23-cv-02689-B

Dear Judge Boyle,

We write, first and foremost, to formally and humbly apologize to the Court, Court personnel, and opposing counsel for submitting a sloppy Response to Plaintiff's Motion to Dismiss (the "Response," Document 22, filed June 26, 2024). Admittedly, there was a failure on the part of our Firm and our co-counsel (Omid Zareh and William Pham of the law firm of Weinberg Zareh Malkin Price LLP ["WZMP") to prepare and file with the Court a quality, thoroughly reviewed, and 100% accurate Response. To say the least, and we speak for our co-counsel, this was not our best work or our finest hour as attorneys.

If there was ever a time for a professional *mea culpa,* in the context of the submission of pleadings to a court, then this is it and we humbly offer it here, along with an explanation as to what occurred. We take personal responsibility; there is no excuse for the shoddy Response that was filed.

We also write to address certain issues and allegations raised in Defendant's Reply Brief in support of their Motion to Dismiss (the "Reply, Document 23 Filed 07/10/24) regarding the alleged use of artificial intelligence (AI) in preparing the Response. To be clear, this

letter is not an attempt at a sur-reply, however, we take the allegations regarding the use of AI seriously and consider the issue one aimed directly at the integrity of the attorneys involved in preparing the Response. Thus, that allegation must be directly addressed.

The Response was the Product of Multiple Lawyers/Law Firms

Rogge Dunn Group ("RDG") was engaged by WZMP and Nora Vargas to act as Texas counsel, and co-counsel, in representing Ms. Vargas, a former employee of Defendant Panini, Inc. ("Panini"), and other aggrieved employes of Panini in this lawsuit.

WZMP does have a Texas presence, through their lawyer John T. Fant ("Mr. Fant"), who is a Texas bar member and is physically present and working in Texas. Unfortunately, we have learned since the filing of the Response that Mr. Fant is not admitted to practice before the United States District Court for the Northern District of Texas. The inclusion of WZMP and Mr. Fant in the signature block before first filing an application for *pro hac vice* was an oversight. The intent was to have WZMP lawyers admitted *pro hoc vice* so that they could formally appear in the case. We apologize for the oversight.

Prior to accepting this engagement, RDG and WZMP took steps to satisfy themselves that the law firms and attorneys involved in the case could collaborate and work effectively. RDG also spoke directly to Ms. Vargas to ensure that she was comfortable with the co-counsel arrangement.

When it came to working on the Response, areas of responsibility were divided up amongst counsel. There was an attempt to merge the work product of different attorneys into a single pleading. Mistakes were made in preparing the brief due not only to administrative and logistical issues, but also a lack of familiarity amongst counsel, siloed research and knowledge, and poor integration of the work product of multiple attorneys. This lack of familiarity led to typos and mis-citations.

Again, for this, we apologize to this Court and opposing counsel.

However, this is a far cry from the improper use of AI and providing fabricated precedents. In retrospect, the approach that was taken in preparing the Response was flawed, and will not happen again, but it was neither intentional nor malicious.

Artificial Intelligence Was Not Used in Preparing the Response

In the Reply, Defendant writes "Plaintiff's Response bears the hallmarks of a filing created with generative artificial intelligence ('AI') without any review of the AI output by counsel." (Defendants' Response, p. 5).

All attorneys whose names appear on, and who worked on, the Response state unequivocally and without reservation or hesitation that no artificial intelligence was used, relied on, or accessed in preparing the response. Any suggestion or accusation to the contrary is simply not accurate or true.

Defendant Panini made its AI accusation without citing to any hard evidence to support same. Defendant cited to no hard evidence because there is none, because AI was not used.

It would have been our preference, and would generally be the practice at our Firm had the shoe been on the other foot, to pick up the phone and call opposing counsel, or at least send an e-mail, had we suspected any opposing counsel of using AI in the preparation of a pleading. Counsel for Defendant chose not to do so.[1]

Had opposing counsel placed a call and provided us the opportunity to address their AI concerns before filing the Reply, we would have taken the necessary steps to alleviate those concerns. Moreover, Defendant's counsel would have understood that this was an erroneous cite, not AI and we would have promptly taken steps to address and correct the citation error.

We have attached declarations from WZMP attorneys confirming that they used no AI in preparing the Response. (Because Messrs. Zareh and Pham are not yet admitted to formally appear before this Court, we felt it appropriate to provide declarations.) The lawyers from RDG, by signing this letter, hereby confirm, as members of the Texas Bar, admitted to practice before this Court, and as officers of the court, that no AI was used by RDG lawyers who worked on the Response. (If the Court desires to receive formal declarations from the RDG lawyers, they will be provided.)

By way of an explanation confirming that no AI was used, we would point the Court to the cite in the Response that led Defendants' counsel to erroneously make the AI accusation, which was:

> The Supreme Court has emphasized that "a complaint need not contain detailed factual allegations" and that "the ultimate question is whether the complaint states a plausible claim for relief." (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009))

---

[1] We are not suggesting that counsel for Panini was "legally obligated" to discuss with our Firm their AI suspicions before filing their Reply. We understand that AI is a serious issue in the legal profession and understand the concern of any attorney who suspects AI has been used in a pleading. Perhaps in a different time or under different circumstances, a telephone call would have been made, as a professional courtesy, to address the issue. But lots of things have changed in the practice of law in recent years. We are also not suggesting that counsel for Defendant Panini was responsible for the erroneous cite.

To be sure, this excerpt from the Response was improperly cited, as it was not a direct quote, BUT it was NOT AI and the legal propositions which are set forth are accurate and consistent with the *Ashcroft* case.

The citation was included to confirm that the United States Supreme Court has confirmed that a complaint need not contain detailed factual allegations and that the question, in the context of a motion to dismiss, is whether the complaint states a plausible claim for relief.

The exact (relevant) text from the *Ashcroft v. Iqbal* case is as follows:

> As the Court held in *Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.*, at 555, 127 S.Ct. 1955 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)).
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.*, at 570, 127 S.Ct. 1955.
>
> Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*, at 556, 127 S.Ct. 1955.
>
> While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 677-679 (2009) (emphasis added).

To be sure, the citation appearing in the Response was technically deficient, but it was not intentionally misleading, nor was the legal proposition wrong or inaccurate. Moreover, it was most certainly not AI.

To the extent that the form of the citation left the impression that it was an exact quote of the Supreme Court's opinion in *Ashcroft v. Iqbal,* that was a typographical mistake and unintentional. The language should have been included in a parenthetical, rather than a quotation. We likely should have also cited to *Twombly* (*Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007)) since much of the quoted language in *Ashcroft v. Iqbal* came from that case. Perhaps the cite should have been a "*see Ashcroft....*" citation, followed by "other citations omitted." But, again, the legal propositions were sound and AI was not used to generate this citation.

We believe that most attorneys who read pages 677-79 of *Ashcroft v. Iqbal,* and compared it to the citation in the Response, would not jump to the conclusion that it was the product of AI. Sloppy, yes. Inconsistent with the Bluebook, Uniform System of Citation, sure. But not AI.

AI is a hot button in the legal profession now. We are well aware of the dangers and legal/ethical issues relating to the use of AI in a pleading or brief. We understand that using AI in place of attorney research, analysis, and writing is verboten. Moreover, we are simply not that stupid, or that lazy, that we would use AI. And this Firm and WZMP did not use AI in any way, shape, or form in the Response. Any allegation that we used AI is misplaced.

Mistakes Were Made in the Response

Even though Defendant Panini's "AI accusations" are without merit, we clearly messed up. We acknowledge that citation mistakes were made in the Response and accept personal responsibility for those mistakes. Those mistakes resulted from lapses in coordination amongst Texas and New York counsel, and faulty integration of work product from multiple attorneys. The mistakes are embarrassing and will not happen again.

Four cases (*Bradshaw*[2], *Mims*[3], *Johnson*[4], and *Dobbins*[5]) should not have made their way into the Response. They are real cases, but are unfortunately inapplicable to the relevant issues in this case.

And while counsel for the parties have different interpretations about the impact of other cited cases, there was no intention to mislead the Court or opposing counsel or "fabricate" precedents.

Mims was incorrectly cited for the proposition that claims for individual monetary relief are permitted alongside class claims. As Defendant Panini has correctly pointed out, *Mims* was not a class action case.

However, in the same paragraph in which the *Mims* cite appeared, Plaintiff cited to *Allison Corp. v. Citgo Petroleum Corp.,* 151 F. 3d 402 (5th Cir. 1998). *Allison* was correctly cited

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[2] The correct citation is *Bradshaw v. Unite Marine Corp.,* 147 F. Supp 2d 668, 2001 U.S. Dist. LEXIS 8962 (S.D. Tx. 2001)

[3] *Mims v. Carrier Corp.,* 88 F. Supp 2d 706 (E.D. Tex. 2000). *Mims* was miscited as 88 F. Supp. 3d as being from the Eastern District of Lousiaina.

[4] *Johnson v. PRIDE Industries,* 7 F. 4th 392 (5th Cir. 2021) miscited in the Response as 7 F.4th 391. *Johnson* was a race discrimination, retaliation, hostile work environment, and constructive discharge case, but Defendant Panini has correctly noted that it was not a class action case.

[5] *Dobbins v. Federal Reserve Bank of Dallas,* 2020 WL 9071686 (N.D. Tex. 2020)

for essentially the same proposition as the incorrect *Mims* cite. The Fifth Circuit recognized in *Allison* that individual monetary relief can properly be sought within the framework of a class action, provided that the individual monetary relief does not predominate over the common issues of the class. ("We [the 5th Circuit], like nearly every other circuit, have adopted the position taken by the advisory committee that monetary relief may be obtained in a (b)(2) class action so long as the predominant relief sought is injunctive or declaratory relief." *Allison,* 151 F. 3d at 411 [numerous other citations from other Circuit Courts of Appeal omitted]).[6] In *Allison,* the 5th Circuit reviewed the decision of a District Court in Louisiana, after (it appears some discovery) and an evidentiary hearing, denying certification of a class. In a lengthy opinion, a 2-1 decision, the 5th Circuit affirmed, following an in depth analysis of the "predomination requirement" (*See e.g. Allison,* 151 F. 3d at 414-415), finding that the District Court applied the correct legal standard, and concluding that the District Court's finding that the plaintiffs' claims for compensatory and punitive damages were not sufficiently incidental to the injunctive and declaratory relief being sought by Plaintiff in the case. *Id* at 416.

Allison clearly supports the legal positions for which it was correctly cited in the Response and for which *Mims* was incorrectly cited. The correct cite to *Allison* does not excuse the incorrect citation to *Mims,* but the "precedent" of *Allison* is clearly NOT fabricated. Furthermore, it should be noted, that *Allison* was not decided at the motion to dismiss stage, rather class certification was denied after an evidentiary hearing at the class certification stage.

Dobbins was also miscited in the response. *Dobbins* is a real discrimination case (TCHRA and ADA claims) from the Northern District of Texas which addressed a 12(b)(6) motion to dismiss and cited to the *Twombly* and *Ashcroft.* The intent was to include this cite in the discussion surrounding these two Supreme Court cases, to demonstrate that the Northern District follows those cases in a Rule 12(b)(6) analysis relative to discrimination claims. But, again, while we acknowledge that the case was cited for the wrong premise, it was not a fabricated precedent.

These case cites were erroneous. With much professional embarrassment and regret, we admit to, and accept responsibility for, these mistakes. The propositions of law for which these cases were mis-cited are not controversial points of law, requiring the use of AI.

There was a poor attempt to combine the work product of multiple attorneys, as well as some administrative and typographical errors and logistical challenges. There were simply too many cooks in the kitchen who were not properly coordinating. Such sloppiness and inattention to important details is embarrassing and humiliating. We are profoundly apologetic to this Court and opposing counsel.

---

[6] Ironically, Defendant Panini also cites to *Allison.*

It will not happen again.

Defendants' Counsel Has Not Conferred Regarding Their "Motion" For Sanctions

Defense counsel requests the court to "enter an Order requiring Plaintiff's counsel to show cause why the Court should not find the Response to violate Rule 11." Defendant's Reply, p. 10. Clearly, the basis of this request [motion] for Rule 11 sanctions is Defendant's meritless claim that AI was used in preparation of the Response. Sanctions are neither warranted nor appropriate.

It should also be noted that Defendant has not conferred with Plaintiffs' counsel relative to its "Motion for Sanctions," as required by Local Rule 7.1(a), nor did the Reply, which deftly includes a motion for sanctions disguised as a request for an order to show cause, include a certificate of conference, as required by Local Rule 7.1(b).

Had Defendant's counsel contacted the undersigned, they would have been informed that no AI was used in preparing the Response and they would have received a swift and unequivocal apology for the inaccurate citations and a commitment to promptly remedy the problem. In fact, Plaintiff Vargas will be seeking leave of court to file a corrected Response and, before doing so, will confer with Defendants' counsel as required by Local Rules.

Again, the lawyers for Plaintiff Vargas, from RDG and WZMP, profoundly apologize to the Court and opposing counsel for the sub-par brief. We are prepared to take appropriate action to remedy the issue with a corrected submission and ask the Court for the opportunity to make this right.

Respectfully submitted,

Counsel for Plaintiff Nora Vargas

Rogge Dunn Lane Webster Earl S. Nesbitt

DECLARATION OF OMID ZAREH

STATE OF NEW YORK §

§

COUNTY OF NEW YORK §

1. My name is Omid Zareh. I am over twenty-one (21) years of age, I am of sound mind and body, and I have never been convicted of a felony or offense involving moral turpitude. I am fully competent to make this Declaration. I have personal knowledge of the facts stated herein.

2. I am a partner with the law firm of Weinberg Zareh Malkin Price LLP ("WZMP"). I am a member in good standing of the State Bar of New York and I am admitted to practice before the United States District Courts for the Southern District of New York, Eastern District of New York, District of New Jersey, and the Second Circuit.

3. I was first licensed to practice law in New York and New Jersey in 1996.

4. WZMP engaged Rogge Dunn Group to assist us in the representation of Nora Vargas in a lawsuit filed against Panini, Inc. I worked on Plaintiff's Response and Brief in Opposition to Defendant's Motion to Dismiss (the "Response") filed on behalf of Ms. Vargas in a case styled *Nora Vargas v. Panini, Inc.*, Case No. 3:23-cv-2689-B, in the United States District Court for the Northern District of Texas on June 26, 2024.

5. I did not use, access, or rely on artificial intelligence, or any artificial intelligence application, in working on and preparing the Response. To the best of my knowledge, none of the attorneys or other legal personnel at WZMP used or accessed artificial intelligence, or any artificial intelligence application in working on the Response.

6. My name is Omid Zareh, my date of birth is December 3, 1970, and my business address is 45 Rockefeller Plaza, 20th Floor, New York, NY 10111, United States of America. I declare under penalty of perjury that the foregoing is true and correct.

7. Executed in the County of New York, on the Seventeenth day of July, 2024.

FURTHER DECLARANT SAYETH NOT.

Omid Zareh

EXHIBIT A

DECLARATION OF WILLIAM PHAM

STATE OF NEW YORK §

§

COUNTY OF NEW YORK §

1. My name is William Pham. I am over twenty-one (21) years of age, I am of sound mind and body, and I have never been convicted of a felony or offense involving moral turpitude. I am fully competent to make this Declaration. I have personal knowledge of the facts stated herein.

2. I am an associate with the law firm of Weinberg Zareh Malkin Price LLP ("WZMP"). I am a member in good standing of the State Bar of New York, admitted in the 3rd Appellate Division, and also the state of New Jersey. I was first licensed to practice law in New York in 2012 and New Jersey in 2011.

3. WZMP engaged Rogge Dunn Group to assist us in the representation of Nora Vargas in a lawsuit filed against Panini, Inc. I worked on Plaintiff's Response and Brief in Opposition to Defendant's Motion to Dismiss (the "Response") filed on behalf of Ms. Vargas in a case styled *Nora Vargas v. Panini, Inc.*, Case No. 3:23-cv-2689-B, in the United States District Court for the Northern District of Texas on June 26, 2024.

4. I did not use, access, or rely on artificial intelligence, or any artificial intelligence application, in working on and preparing the Response. To the best of my knowledge, none of the attorneys or other legal personnel at WZMP used or accessed artificial intelligence, or any artificial intelligence application in working on the Response.

5. My name is William Pham, my date of birth is March 13, 1981, and my business address is 45 Rockefeller Plaza, 20th Floor, New York, NY 10111, United States of America. I declare under penalty of perjury that the foregoing is true and correct.

6. Executed in New Jersey, on the 17th day of July 2024.

FURTHER DECLARANT SAYETH NOT.

William Pham

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NORA VARGAS, on behalf of herself and others similarly situated,	§	
Plaintiff,	§	
v.	§	3:23-CV-02689-B
PANINI AMERICA, INC.,	§	
Defendant.	§	

ORDER TO SHOW CAUSE

In its Reply in Support of its Partial Motion to Dismiss (Doc. 23), Defendant Panini America, Inc. ("Panini") raised several instances in which Plaintiff's Response to the Partial Motion to Dismiss (Doc. 22) appears to misstate a legal proposition or assert unsupported legal propositions. Having reviewed the examples raised, the Court agrees that Plaintiff's Response indeed contains misstatements of law and provides unsupported legal propositions. Panini concluded such errors in the Response showed signs of AI-generated argument. Additionally, Panini alerted the Court that one of the signatories of the Response to the Partial Motion to Dismiss, John T. Fant, has neither shown he is admitted to practice in the Northern District of Texas nor sought leave to appear before the Court under this District's Local Rules. John T. Fant is a lawyer from the law firm Weinberg Zareh Malkin Price LLP ("WZMP"), which is one of the two firms representing Vargas and the purported class. None of the WZMP attorneys—Omar Zareh, William Pham, John Fant—have entered an appearance or otherwise submitted an application to appear *pro hac vice* in this case

although they have all sworn to have worked on the Response. *See* L.R. 83.9; Doc. 22, Resp., 3; Doc. 24, Ltr., Exs. A & B.

On July 17, 2024, Plaintiff's Dallas-based counsel, Rogge Dunn Group, filed a letter addressing the issues Panini raised ("Letter"). Doc. 24, Ltr. Plaintiff's counsel denies having used AI: "All attorneys whose names appear on, and who worked on, the Response state unequivocally and without reservation or hesitation that no artificial intelligence was used, relied on, or accessed in preparing the response." *Id.* at 3. The attorneys whose names appear on the Response are Rogge Dunn, Lane Webster, Earl S. Nesbitt, and John T. Fant. However, the Letter is only signed and sworn by the first three attorneys. John T. Fant has not attested to his use of AI one way or another. Rogge Dunn Group submits two attorney declarations from WZMP's Zareh and Pham, who both attest that they worked on the Response but did not use AI. *Id.* at 8–9. Rogge Dunn Group does not explain why neither of these WZMP attorneys was cited as an author of the Response, especially given that Mr. Fant, the junior-most WZMP attorney on this case, was included in the signature block. That Rogge Dunn intended to first file a *pro hac vice* application for Mr. Fant does not explain the decision to hide from the Court two more senior attorneys' role in authoring the Response. Neither have any Plaintiff's counsel explained why no WZMP attorney is in compliance with Local Rule 83.9.

As for the substance of their Response, Rogge Dunn Group chalks up the entirety of the miscited law and unsupported legal propositions to "mistakes . . . a lack of familiarity amongst counsel, siloed research and knowledge, and poor integration of the work product of multiple attorneys." *Id.* at 2. While Plaintiff's counsel apologizes for its "typos and mis-citations," the Court does not find its excuse to adequately explain how the Response ended up citing to cases that do

not stand for the propositions they are cited for. Coordinating and merging work product across multiple attorneys is not new, nor does it explain the sheer level of misrepresentation that results from reading the Response on its face. Plaintiff's counsel acknowledge that at least four cases "should not have made their way into the Response" without explaining how they got there in the first place. *Id.* at 5. Perhaps "sloppiness and inattention" can explain the incorrect case citations and quotes, but the Court is not convinced it explains multiple instances of incorrectly supported legal propositions. *Id.* at 6. Notwithstanding the unresolved concern that Plaintiff's counsel used AI to draft the Response, the incorrectly stated or unsupported legal propositions raise serious concerns about representations to the Court.

Accordingly, on or before **July 24, 2024**, all WZMP attorneys working on this case, including but not limited to Mr. Fant, Mr. Zareh, and Mr. Pham, are **ORDERED** come into compliance with Local Rule 83.9. Additionally, on or before **July 26, 2024,** all Plaintiff's counsel—from Rogge Dunn Group and WZMP—is **ORDERED** to do the following:

1. Review the legal authorities in the Response that the Letter has not already touched upon and **CONFIRM IN WRITING** to the Court whether there are any other authorities cited that do not stand for the legal or factual proposition offered;
2. **SHOW CAUSE** in writing (i) why they should be not sanctioned for violating Federal Rule of Civil Procedure 11 and Texas Disciplinary Rule of Professional Conduct 3.03, and (ii) why John T. Fant has not sworn a declaration concerning his use of AI, or lack thereof, in drafting the Response. Failure to do so will result in sanctions.

SO ORDERED.

SIGNED: July 19, 2024.

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NORA VARGAS, on behalf of herself and others similarly situated,

Plaintiff,

vs. 3:23-CV-02689-B

PANINI AMERICA, INC.,

Defendant.

SHOW CAUSE HEARING
BEFORE THE HONORABLE JANE J. BOYLE
UNITED STATES DISTRICT JUDGE
AUGUST 28, 2024

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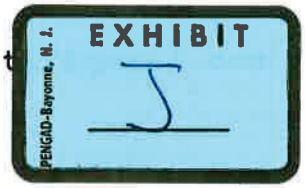

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(In open court at 10:28 a.m.)

THE COURT: This is Case Number 3:23-CV-2689-B, Nora Vargas versus Panini America, Inc.

We are here this morning for an unusual hearing, because of the allegations of the AI brief. We'll get into that in a minute. But I would like to have each side introduce themselves, state who they are and who they represent, and I will start with counsel for the Plaintiff.

MR. NESBITT: Earl Nesbitt with Rogge Dunn Group representing the plaintiff.

THE COURT: Okay.

MR. ZAREH: Good morning, Your Honor. Omid Zareh with Weinberg, Zareh, Malkin, Price, also for the plaintiff.

MR. WEBSTER: Lane Webster with the Rogge Dunn Group, as well on behalf of the plaintiff.

THE COURT: Okay. Anybody else?

MR. FANT: John Fant with Weinberg, Zareh, Malkin, Price --

THE COURT: I'm sorry, I can't hear you.

MR. FANT: John Fant with Weinberg, Zareh, Malkin, Price.

THE COURT: All right. Is everybody here

with Rogge Dunn?

MR. PENNETTI: Alex Pennetti.

THE COURT: Okay. Tell me who you're with.

MR. PENNETTI: I'm with Thompson Coburn.

THE COURT: Wait, no. You right here.

MR. PHAM: William Pham.

THE COURT: Mr. Nesbitt.

MR. NESBITT: Yeah, I'm sorry, Rogge Dunn Group.

THE COURT: Okay. And you are Mr. Zareh. And you are with?

MR. ZAREH: Weinberg Zareh.

THE COURT: And I know you are with Rogge Dunn and -- go ahead.

MR. PHAM: William Pham, Weinberg Zareh --

THE COURT: Okay.

MR. PHAM: -- for the plaintiff.

MR. PENNETTI: Alex Pennetti, Your Honor. I was formerly with Rogge Dunn Group.

THE COURT: Yes. Thank you.

MR. FANT: John Fant, Weinberg Zareh.

THE COURT: Thank you very much. And for the defense?

MS. DE SANTOS: Good morning, Your Honor,

Laura De Santos on before of Panini America. I'm with Gordon & Rees, Scully, Mansukhani.

THE COURT: Okay. You're with Gordon & Rees?

MS. DE SANTOS: Scully Mansukhani.

MS. MITCHELL: Good morning, Your Honor. Megan Mitchell, also with Gordon & Rees Scully Mansukhani.

THE COURT: Okay.

MR. ROBERTS: Good morning, Your Honor. Seth Roberts with Locke Lord here in Dallas representing Panini America.

THE COURT: Okay. And the other firm is out of town? The firm -- they're not from Dallas, they are from out of town?

MS. DE SANTOS: Correct, well, Houston and Dallas.

THE COURT: Okay. Thank you.

Go ahead.

MR. GREGORY: David Gregory with Locke Lord, from the Houston office of Locke Lord.

THE COURT: Okay. Thank you-all very much.

Okay. This is a defense motion. And I have read all through the motion a couple of times

and read all the cases and read the cases that were cited by the plaintiffs.

So let's begin by having the defense come up here and give me their best case. Come on up.

Who is going to speak for the defense?

MS. DE SANTOS: I'm happy to, Your Honor.

THE COURT: Come on up here.

MS. DE SANTOS: And by "here," I hope you mean here.

THE COURT: Right there, yes.

MS. DE SANTOS: I really will actually just keep my comments brief, Your Honor. Because I think the Court has identified in its show cause order and in Document Number 36 that was issued just last week, the -- has put its finger on the issues that have caused a bit of confusion, certainly on the defense side and for the Court.

The plaintiff's response to the motion to dismiss contained, as the Court is well aware, a number of cases that were represented to address and rebut specific legal arguments that were made with regards to the individual claims that Ms. Vargas brings and the class representative claims that she brings.

Often those claims or the representations

that were made and the cases that were cited --

THE COURT: Slow down. Slow down. The cases that were cited.

MS. DE SANTOS: The cases that were cited does not stand for the proposition, in fact, that they were representative.

THE COURT: Go ahead.

MS. DE SANTOS: In addition, there were cases cited that were, in fact, legitimate cases containing, perhaps, citation errors, but legitimate cases that did not hold for the proposition for which they were represented.

As a result, the defendants filed a reply brief identifying each of these issues. There was -- and in our reply brief, of course, we contend and surmise that the briefing appears to have --

THE COURT: AI.

MS. DE SANTOS: -- AI, yeah. I'm struggling with another explanation for it.

To suggest that two law firms with competent lawyers worked together to file this brief did not make it better but, in fact, made it worse.

THE COURT: How do you mean made it worse? How did they make it worse?

MS. DE SANTOS: My understanding from the

plaintiff's response is that the errors that are identified were a result of merging work product.

THE COURT: Yeah, and then -- I was thinking you were saying when they filed the response to the show cause order.

MS. DE SANTOS: All right. So I was addressing the initial response, Your Honor.

Nonetheless, I think the show cause order requested very specific information, most notably -- or at least what I picked up on, Your Honor -- is the Court's request for information as to how -- how those cases got into the brief to begin with.

I don't believe that has been fully explained. We have identified in both our reply brief and in our response -- or response to the plaintiff's response to the show cause order that there are still issues that haven't been fully addressed.

For example, how did the *Bradshaw*, the *Mims*, the *Dobbins*, the *Johnson v. Pride* case, how did those cases get into the brief? And how did the representation come to be that they held for a specific proposition that conveniently rebutted a specific legal issue that we raised with regards to our opening motion to dismiss?

THE COURT: But they didn't.

MS. DE SANTOS: They didn't. And although there has been an abundance of *mea culpa* associated with the briefing, there hasn't been the underlying explanation as to how that happened.

I believe that's really, I think, one of the central issues of why we are here and why we believe the show cause issue has not been fully addressed for the Court and for the parties in the case.

THE COURT: Okay.

MS. DE SANTOS: We are not seeking -- and in case there is any specific doubt, we are not seeking any attorney's fees. We are not seeking any sanctions in the form of attorney's fees to the defendants. We will leave it to the Court to make whatever remedial action it feels is appropriate under the circumstances. We are not seeking that here.

I think -- I got up here and said I was going to be brief, and I'm not being brief.

THE COURT: No, no, take your time. I want to hear all of this.

MS. DE SANTOS: I think the Court has -- we have filed in our response to the plaintiff's

filing, Document Number 43.

THE COURT: Yeah, I've got it.

MS. DE SANTOS: I think I've addressed the fact that we're still struggling to understand how those got into the brief. It doesn't make sense that the merging of work product from two different firms resulted in a misrepresentation of what those cases held.

I certainly, I'm sure, in -- in editing briefs, have made typos, meant to cite F.Supp. and accidentally cited F.2d. Certainly that's a very common error. And I'm certainly not going to suggest that this is just a typo. These are more than just typos. These are more than, We just cited the wrong volume or page number or had poor Blue Book citation.

These are fundamental representations to the Court rebutting specific legal arguments that are, in fact, either untrue or misstated, grossly misstated in some instances, and just plain false. And it's hard for us to see how those don't arise outside of the AI context.

I think I have also addressed the fact that the Court's show cause order specifically requested that explanation. That has not been

provided.

The third issue I want to raise is that the plaintiffs, in their response to the Court's request on the show cause order, almost doubles down on the response to the motion to dismiss and continues to take the position that their legal positions are warranted, when a review of their briefing suggests that that's, I think, a further representation that I think lacks good faith in suggesting that their response to the motion to dismiss ought to win them the day and that the motion to dismiss ought to be denied.

In fact, a careful look at those, the deficiencies and those cases that do not, in fact, hold what they represent, leaves them without response at all to our motion to dismiss in a lot of instances.

In fact, I would argue the class claims can be dismissed because they have not presented any real authority to rebut those allegations. And the individual claims for hostile work environment, wrongful discharge and retaliation similarly lack, frankly, any response that is legitimate.

And I think the plaintiff's arguments, further, with regards to both *Allison* and the

Deepwater Horizon case, as represented, don't fully address what the Court's holdings have been in that case. And because of that, just to circle back to those class claims, those, too, should fail.

So my -- I think my final point here, Your Honor, is, I don't think the plaintiffs have come forward with sufficient information to rebut the motion to dismiss. The motion to dismiss should be granted.

And in response to the Court's request that they explain how those misrepresentations got into the record, got into their brief, has not been sufficient. And for that reason, I think they have failed to meet the Court's -- the Court's request to show cause.

THE COURT: Well, thank you very much, Ms. De Santos. Do you have anything else to say?

Okay. Who is going to speak for the defense?

MR. NESBITT: Your Honor, I'm going to start off, but also Mr. Zareh would like to address the Court.

THE COURT: Where is Mr. Dunn, Rogge Dunn?

MR. NESBITT: He's out of the country, Your Honor.

THE COURT: Okay.

MR. NESBITT: He did not work on the brief at all.

THE COURT: Okay. Okay. All right.

Mr. Pham, then, go ahead, come on up.

MR. NESBITT: Mr. Nesbitt.

THE COURT: I'm sorry, Mr. Nesbitt. Yes, yes.

But let me say first, just be very careful about what you say here. Because, you know, to me it's very clear this is an AI brief. I will hear from you, and maybe I will change my mind. But I just want to make sure that you don't get up there and double down on something that is just not true. Just fall on your sword, please tell me the truth. But I'm going to have a hard time finding this is not an AI brief.

Go ahead.

MR. NESBITT: Understand, Your Honor. I'm going to go ahead and start off and say that -- and I think Mr. Zareh will address it from the standpoint of what I am going to call our New York co-counsel -- this was not an AI brief from Rogge Dunn Group. We've been assured by co-counsel it was not an AI brief from them.

THE COURT: Well, you know, did you-all work on it?

MR. NESBITT: Did Rogge Dunn work on it?

THE COURT: No, did Rogge Dunn work on it?

MR. NESBITT: Rogge Dunn Group attorneys, myself and Mr. Webster, yes, we worked on it.

THE COURT: Are you the main ones that worked on it?

MR. NESBITT: I would not say we were the main ones. The original product came from our co-counsel in New York. And then we worked to revise it and --

THE COURT: Okay. Well --

MR. NESBITT: But what I can say unequivocally is that -- and I think Mr. Webster will -- if he needs to, will address the Court, is I wouldn't know how to use AI in a brief, to be honest, and I did not use AI on this brief.

THE COURT: Well, somebody did, because it -- it just -- it would be too hard to make these mistakes so consistently through the brief that -- on your own just make those stupid mistakes, because it's not even lawyering. It's just bad, bad briefing.

And so I say that because I think one or

two mistakes like that would be fine, but all the way through, and it's just consistent. And I think it would be so much harder to make a brief like that rather than a good brief to get that right. I mean, all those wrong cites to put that down in writing and make that your presentation.

MR. NESBITT: I can agree with the Court on a couple of things. Number one is that it's a bad brief. And number two, it has wrong case citations.

I can also agree that it was -- it would be -- it would seem to be and appear to be a lot more difficult to prepare this bad brief rather than a good brief. I agree with you.

THE COURT: Yes, exactly.

MR. NESBITT: But I can assure you that that was not the intention. And I can only speak for myself and the people that worked on it at our firm, and I believe Mr. Zareh will address it from his.

THE COURT: Did Mr. Webster primarily work on it or who?

MR. NESBITT: I would say it was me and Mr. Webster together.

THE COURT: Okay.

MR. NESBITT: And neither one of us used AI. And he can certainly address that with the Court.

With respect to the miscites and procedurally -- and I think I need to address that -- is the Court indicated that we were here on defendant's motion. And as counsel has suggested, they don't have a motion.

THE COURT: I know.

MR. NESBITT: We are here to address the order to show cause, and we felt like we addressed the order to show cause in the reply brief.

THE COURT: But you didn't, because even when you did, you cited to a case that didn't stand for that proposition. I'm trying to find it, where I found it, but -- just a minute.

MR. NESBITT: Sure.

THE COURT: I can't find it right now -- oh, yeah, yeah, response to the OSC contained -- I don't have it right here. Yeah.

MR. NESBITT: Well, I can --

THE COURT: Anyway, there's a miscited case in the response to the OSC.

MR. NESBITT: I -- I've looked at all of those cases before and last night, and from our

perspective, the response that they filed was -- falls into -- with respect to their criticism of the case --

THE COURT: Their response or your response?

MR. NESBITT: Sorry. Their response to our response. And that was a little confusing, because we were responding to the order to show cause. I'm not sure what they were responding to.

THE COURT: Well, they were putting their two cents in, which they are entitled to.

MR. NESBITT: Exactly.

Their criticism of our response to the order to show cause relative to the specific cases falls into two categories. And one was that we didn't go far enough in explaining it. And for instance, in the *Allison* case, they -- we did cite it for the proposition that the 5th Circuit had recognized that individual monetary relief can be --

THE COURT: Slow down. Slow down. Go ahead.

MR. NESBITT: Sorry.

THE COURT: Go ahead.

MR. NESBITT: Sorry -- recognized that individual monetary relief can be sought within the

framework of a class action provided it does not predominate over the common issues of fact. That is in that case, and it says that exactly.

Their criticism was that we did not set forth that in *Allison* the Court did not find that the individuals predominated.

But, in fact, in our *mea culpa* letter, we acknowledged that very fact.

THE COURT: That's fine. So you did that. What about *Mims*? What about these other cases, where they had absolutely nothing to do with -- either the case cite was wrong or it cited a proposition that didn't exist for that case?

MR. NESBITT: That was the cases that we addressed in the *mea culpa* letter.

THE COURT: Go ahead and tell me about them.

MR. NESBITT: They were wrongly cited. They do not stand for the proposition, and we fessed up to that.

THE COURT: But how can a lawyer who has practiced for how many years -- short time, Mr. Webster, but he's five or six years now -- and you cite so many wrong cases? How do you do that? How do you go through that legal research and cite

that like that?

MR. NESBITT: We were relying on -- when the brief came to us and had those in there -- and I will acknowledge right here, I did not do a good job of reading each and every case that was cited in it. That was my responsibility, and I failed on that responsibility.

I think probably the other lawyers who were involved in this will say the same thing. But that does not AI make. That means the case was cited wrongly.

Now, the Court may be of the opinion that it was cited wrongly because of AI. I don't believe it was. It certainly wasn't by us. But what I can say is it was wrongly cited because it doesn't stand for the proposition, which means I didn't do my job as a senior lawyer -- the Texas senior lawyer on the case.

THE COURT: But it's not even close. See, that's a problem. It's not even like I can see this as a typical lawyer's mistake, you know, even an egregious mistake. It's just such a pattern throughout the brief. I just can't figure out what else it would be. I mean, you have to spend more time, as I said, filing a brief like this than

filing a good brief.

MR. NESBITT: And I don't disagree with that.

THE COURT: So what happened? How many years have you been practicing?

MR. NESBITT: Thirty-four years.

THE COURT: How could you do that? How could you possibly do that?

MR. NESBITT: Not read the case.

THE COURT: Yeah.

MR. NESBITT: Pressed for time. I was new to the case. I relied on others. It was all bad lawyering.

THE COURT: But you said you worked on the brief.

MR. NESBITT: I did.

THE COURT: So how did you work on the brief?

MR. NESBITT: I was focused on -- I had interviewed witnesses, and I was focused on the factual side of the brief and not focused so much on the law side of the brief. It's no excuse, but you asked me why.

THE COURT: What about Mr. Webster?

MR. NESBITT: I believe he did mostly the

same thing that I did and ensuring compliance with local practice. Mr. Webster can certainly address that.

But our -- but at the time -- how it came about was, the brief was provided to us, we started revising and exchanging. We asked for additional research. We worked with counsel for New York on areas we needed to beef up the brief on the research. But at the end of the day, the bad cases made it into it.

THE COURT: Like *Bradshaw v. Unity Marine*, how did that even make it into the brief? It was the one about class actions.

MR. NESBITT: Yes, ma'am. I can't answer that question. I didn't put it in the brief, and I didn't catch that. It shouldn't have been there.

THE COURT: The wrong legal reporter, the wrong district court and the wrong year, not only that.

MR. NESBITT: I acknowledge all of those things, as we did in our letter and as we did in our response to the order to show cause. It should not have been in the brief. It was miscited, and we asked for permission to correct that brief.

And, quite frankly, had counsel -- now,

they say today they didn't move for sanctions, but, in fact, they did move for sanctions in the reply, and they didn't follow the rule.

If they called us and said, Hey, Earl, is this AI?

I don't know. It shouldn't be, I'll look into it. I would have got back to them.

Hey, Earl, these cites don't say what they do. We would have complied.

Now, is that their legal obligation? No, it's not their legal obligation in filing a reply. It is their legal obligation under the *Horton* case and Rule 11 --

THE COURT: Rule 11, but there's Section 1927 of Title 28. There's the Court's inherent authority. There's all sorts of stuff that this brief would attach to.

MR. NESBITT: This Court has the authority to penalize us, for sure. Not our client, if it's under 11(b)(2) or whatever, but certainly the lawyers. And we understand and accept that. But I would simply say, if you are going to punish us, punish us for the right reasons, which is sloppy lawyering, bad lawyering, but not AI.

THE COURT: Well --

MR. NESBITT: I would like for -- if the Court would indulge, I would like for Mr. Zareh to have the opportunity to address the Court.

THE COURT: Yes, go ahead, please, Mr. Zareh.

MR. NESBITT: And if you have any questions for any of the lawyers --

THE COURT: I want to talk to Mr. Pennetti in a minute.

Go ahead.

MR. ZAREH: Good morning, Judge Boyle.

THE COURT: Good morning. Please, please, be honest with me. It's okay if you did AI this time. We'll put it aside as a mistake, but I can't believe this brief is not AI.

MR. ZAREH: And I appreciate that, Judge, and I want to address that directly.

First of all, good morning, Judge. Thank you for letting me into your courtroom.

THE COURT: Sure.

MR. ZAREH: I wish it was under better circumstances, number one.

Number two, I am not -- I'm in this wonderful position where I can confess to Your Honor and come clean. My name is on the firm. I had a

junior associate who was going through some personal crises that he didn't talk to us about.

THE COURT: Mr. Pennetti?

MR. ZAREH: No, ma'am. Mr. Pham is here. He's got the flu, which is why he has the mask on.

THE COURT: I know, but I'm going to have him talk.

MR. ZAREH: And Your Honor, please do. But the fact of the matter is --

THE COURT: Who was the junior associate that wasn't him that worked on the brief?

MR. ZAREH: Mr. Pham worked on the brief with me.

THE COURT: Was it --

MR. ZAREH: Mr. Fant, Mr. John Fant.

THE COURT: And Mr. Fant is here.

MR. NESBITT: Mr. Fant is here. He didn't work on the brief, but he talked to several witnesses.

THE COURT: Who was the young associate that you said --

MR. ZAREH: It was Mr. Pham, William Pham.

THE COURT: So he primarily worked on the brief?

MR. ZAREH: William and I worked on this

brief together. The first brief that William wrote, which I reviewed extensively, was an opposition to a motion for summary judgment.

THE COURT: What about Mr. Pennetti?

MR. ZAREH: Mr. Pennetti is not at my firm. I don't think Mr. Pennetti worked on the brief at all.

MR. NESBITT: Your Honor, Mr. Pennetti was formerly on the pleadings when he was at the Rogge Dunn Group. He left in May when the -- the day the motion to dismiss was filed. He did not have any involvement or -- any involvement whatsoever in the response.

THE COURT: Okay. That's fine. That's all I need to hear.

MR. NESBITT: I'm sorry.

THE COURT: And Mr. Pennetti, come up real quick.

Mr. Pennetti, did you do anything to the brief at all?

MR. PENNETTI: No, Judge.

THE COURT: Okay. Thank you. Go ahead and sit down.

Okay. So Mr. Pham.

MR. ZAREH: We will refer to him as

William.

THE COURT: Okay. No, let's refer to him by his last name.

MR. ZAREH: Mr. Pham.

THE COURT: How do you spell it?

MR. ZAREH: Pham, P-H-A-M.

THE COURT: Okay. Okay.

MR. ZAREH: Mr. Pham and I worked on the brief together.

THE COURT: Who worked on it the most? Always somebody works on it the most.

MR. ZAREH: Mr. Pham worked on it the most. I am the senior lawyer. I reviewed it. I gave him my first set of comments, which was to rewrite the brief, which he did. He rewrote the brief. I looked at it a second time. We had some comments on some of the propositions. I read a few of the cases that I thought were controversial propositions, and I thought they were fine. And we sent our part of the brief to Texas.

What I remember, Texas had their part of the brief, and they were merged. And at some point, Texas deferred to New York and said, We're not going to read the cases, we assume the New York guys got the cases right.

THE COURT: So Texas told you they didn't read the cases?

MR. ZAREH: After the fact, after we got the --

THE COURT: Show cause order.

MR. ZAREH: No, no, Your Honor. When we got their reply that accused us of using artificial intelligence, my first response was to call William and say -- Mr. Pham -- Did you use AI?

His response was, Hell, no. It may be wrong, but we certainly did not use AI.

And if you want -- and forgive me, Judge, I'm also new to this. But my teenage daughter tells me that her teacher can run things through an AI tester to see how much of something is AI. So if this was really an issue, if they really thought that we were using artificial intelligence, they could have called us and asked us that. They could have shown Your Honor some kind of test to show that.

And, Judge, you don't know me. I've never been before Your Honor.

THE COURT: I know. I'm sure you're a straightlaced guy.

MR. ZAREH: When Your Honor starts off the

hearing with, "I find it hard to believe that this was AI --"

THE COURT: Yeah.

MR. ZAREH: -- let me assure Your Honor, we don't need artificial intelligence to be this bad. This was human misintelligence to be completely wrong, and it will not happen again.

THE COURT: I know it won't happen again. But like I said to him, Mr. Nesbitt, you have to work really hard to get a brief this bad. And I don't think you can do it just by messing up and making mistakes, negligence. I think it has to be some --

MR. ZAREH: But --

THE COURT: Nope -- some organized way of misrepresenting everything.

MR. ZAREH: Your Honor, if this was an organized misrepresentation, we would not have been so surprised when we got their reply.

THE COURT: Well, maybe Mister --

MR. ZAREH: If I can -- forgive me.

If I can just address the perfect storm, that was this brief. And I'm not offering this as an excuse at all. Mr. Pham had some remarkable personal crises he was going through. That led him

to do some errors on our brief.

The attorney at the Rogge Dunn Group who was previously on the case had gone off the case. So Mr. Nesbitt had been on the --

THE COURT: That's Mr. Pennetti.

MR. PINNETTI: Yes, Your Honor.

MR. ZAREH: I think Mr. Nesbitt had been on for half an hour on the case, although it's been a pleasure working with him.

Look, these cases, the vast majority of them came from our firm, it came from my watch. And whatever William was going through at the time, it rests with me.

I did not use artificial intelligence. Nobody at my firm uses artificial intelligence. And, quite frankly, when an attorney has a personal crises and they just do a bad job as an attorney, one of the things I would ask Your Honor to do is to allow us to attend to the crisis and refile.

THE COURT: Yeah, yeah, I may do that, but is there anything else that you have?

MR. ZAREH: Yes, Your Honor. There's two other things.

To the extent that there are specific cases that made it that shouldn't have made it --

THE COURT: Like *Johnson v. Pride* has nothing to do with the class action, found its way into your response for the proposition that it upheld a class action claim.

MR. ZAREH: Your Honor, so I asked that question specifically. How did this happen? Your Honor, I've got one better for you. When you have things in quotation marks, those should be in the citation, right? Our original brief didn't do that.

THE COURT: I know. I mean, I know that. I've seen all of the mistakes.

MR. ZAREH: Your Honor, forgive me, if I can just share with the Court. I appreciate the fact that Your Honor wants us here to explain why this happened, how it happened, and I am trying to tell you as best I can.

Every time we needed a citation for something, I asked William to look it up, and he made an error and I didn't proof it. It's on my watch, and I take full responsibility.

THE COURT: I appreciate that very much. But Mr. Pham has to -- is it Mr. Pham?

MR. ZAREH: Yes, Your Honor.

THE COURT: -- Mr. Pham has to speak for himself.

MR. ZAREH: Of course he does, and of course he will. I'm happy to do that, Your Honor.

The one thing I would ask -- and we do this all the time when an attorney is going through a personal crises -- is please put it in context.

THE COURT: What do you mean? Oh, put it in context with his crisis, yes.

MR. ZAREH: Okay.

THE COURT: Thank you.

MR. ZAREH: Unless Your Honor has anything more -- and really, Your Honor, I am here to look this Court in the eyes and explain anything and everything to Your Honor.

THE COURT: I know you are.

MR. ZAREH: Okay. Thank you, Your Honor.

THE COURT: All right, Mr. Pham, come on up here.

MR. ZAREH: And Your Honor, Mr. Pham is dealing with an illness.

THE COURT: Mr. Pham, will you take your mask off, please?

All right. Now, I'm going to tell you, no matter how badly you're feeling, and you're looking like you feel pretty bad, and I don't know if that's because of this or your sickness.

Mr. Pham, I just want you to fess up if this was AI -- and I think it was -- come on, stop that. Come on, stop that.

Now, I think this was an AI brief partially. And you can tell me it wasn't, but I'm not going to believe you. But go ahead, tell me what it was.

MR. PHAM: No, Your Honor. Like Mr. Zareh had mentioned, I was going through a lot of personal --

THE COURT: Speak up.

MR. PHAM: I was going through a lot of personal issues at the time. And the way that I organized the brief, it was left subject to a lot of error if I were to make edits to it, which is what happened.

THE COURT: You know, edits to it. It's not even -- but it's cases that don't even stand for the proposition that you've cited them for. Where did you pull up *Johnson v. Pride Industries*?

MR. PHAM: So, Your Honor, how -- unfortunately, how I organized the brief writing, I pulled many more cases that -- many more cases that ultimately --

THE COURT: Speak up. Speak up. You

know, I'm sure you're sick, but you don't -- it seems like you're more sick because of this situation. So speak up, please.

MR. PHAM: So the cases that I pulled for the response, there were a lot more cases.

THE COURT: The cases you pulled were what?

MR. PHAM: There were a lot more cases I found that ultimately were whittled down. I think there were 40, in the neighborhood of 40 cases that were in the response. I had originally pulled close to about 80 to 90, I believe.

And the way that I organized what I needed to put into the brief and what I wanted certain cases to say, by putting in -- by making edits to that grid, it shifted down a lot and led to a lot of mis-organization, and I apologize for it.

THE COURT: I mean, did you even proofread it?

MR. PHAM: I did. And unfortunately, you know, my personal issues kind of got in the way --

THE COURT: Yeah, I mean --

MR. PHAM: -- of being more accurate.

THE COURT: I just can't believe this isn't an AI brief, I can't.

Anything else?

MR. PHAM: No, Your Honor.

THE COURT: All right. Sit down.

What do you want me to ask him? Do you want me to ask him something else? Because he says it's not an AI brief, and that's all I need to hear from him.

MR. ZAREH: Your Honor --

THE COURT: Come on up. Come on up.

MR. ZAREH: -- I think what Mr. Pham was trying to tell the Court is he organized 80 or 90 cases in a grid on a spreadsheet. When he realized some of the cases weren't appropriate, he deleted some of those and it got misaligned.

Judge, I appreciate the fact that Your Honor thinks this is an AI brief, and there's nothing we can say.

THE COURT: There's something you can say, but you haven't said it yet.

MR. ZAREH: Judge, what else can I tell you?

THE COURT: I mean. . .

MR. ZAREH: I didn't use it. My associate didn't use it. Our firm didn't use it. The Rogge Dunn Group has told you they didn't use it. We have

sworn to it before, Your Honor. If Your Honor wants to take on some kind of technology to review the brief to see what score it gets --

THE COURT: Wait a minute. I did, on ChatGPT, an AI search engine, and I found this *Johnson v. Pride Industries* cited in the same erroneous manner in which your response cited it.

MR. ZAREH: That's hardly a scientific analysis of the brief --

THE COURT: No, no --

MR. ZAREH: -- respectfully. And if I may, if my 13-year-old can be cited by her English teacher for using AI and go do it over again, because I ran it through some kind of a search filter to see if you used AI, then, respectfully, we can do that here.

THE COURT: I said, my clerk found it in ChatGPT, an AI search engine that describes *Johnson v. Pride Industries* in the same erroneous manner that the response does.

MR. ZAREH: Your Honor, respectfully.

THE COURT: No, no. Are you listening to me?

MR. ZAREH: I am.

THE COURT: Okay.

MR. ZAREH: May I respond?

THE COURT: Yes.

MR. ZAREH: I teach CLEs for Ethics --

THE COURT: I don't want to hear about that.

MR. ZAREH: -- and one of the things that we constantly tell lawyers is that the trouble with AI is it takes some amount of truth and puts some amount of fabrication. And just because Your Honor found a similar citation, one, or your clerk, using ChatGPT for this specific case hardly proves that we did artificial intelligence.

THE COURT: I just think that your arm's length dealing with Mr. Pham -- and I think it was, because it wasn't right on him or you would have caught these things -- is it's just you're trying to go down with the ship, as a captain would, and I understand that. But I just want to hear that somebody around here thinks this is an AI brief besides the defense.

MR. ZAREH: I do not. I have sworn against that.

THE COURT: Okay.

MR. ZAREH: I will go down with the ship. Bring me a stack of Bibles, I will swear to it. We

did not use artificial intelligence.

THE COURT: Okay.

MR. ZAREH: And, Your Honor, if you think we did, there's a very easy way to prove it. We can run the brief through an algorithm and report back to Your Honor how much of it is.

THE COURT: No, that's all right.

Anything else from the defense -- from the plaintiffs?

How about the defense, Ms. DeSantos, anything else?

MS. DE SANTOS: I think really, just to put a bit of a fine point on that pencil, Your Honor, Mr. Zareh said that he worked with Mr. Pham on preparing this response to the motion to dismiss; that he read the cases, reviewed/edited the brief, gave comments on the draft.

I lost -- I -- just quickly, one, two, three, four, five, six, at least six cases, there's more --

THE COURT: There are at least ten.

MS. DE SANTOS: At least. But some of the ones that are much more egregious in misrepresenting to the Court what the legal holdings of those cases are, are significant.

I could not agree more with the Court -- and we argue this in our response to their OSC response -- this kind of mistake doesn't happen repeatedly over and over.

And one additional note -- and I think it's really clear and really important -- the errors that were made, the really substantive errors that were made in the representation to the Court of what those cases held coincidentally go directly to rebut a specific legal issue that we raised in our motion to dismiss.

THE COURT: Um-hum. Um-hum.

MS. DE SANTOS: Standing. Oh, there's two cases that specifically --

THE COURT: That don't stand for standing.

MS. DE SANTOS: -- that don't stand for that standing proposition in a class certification case.

The hostile work environment argument. The totality of the circumstances absent some other specific evidence to rise to this severe pervasive level can support a hostile work environment claim. Two cases that they cite for that, *Brown* and *Keeling* don't say that. In fact, they have the exact reverse holding.

Those two issues make it very hard for me to question that this is not an AI brief; that the error occurred over and over and over again, and that it coincidentally also addresses a specific substantive legal issue --

THE COURT: Yeah, the issue.

MS. DE SANTOS: -- that rebuts or purports to rebut one of the issues that we raised.

So that's really the only other item I wanted to point out to the Court.

THE COURT: Okay. Thank you.

You know, this is the beginning of this, this AI stuff, and I think it's very interesting. I can't believe people are using it. But Mr. Zarah, I don't think you probably used it, I don't think you did, but I think Mr. Pham did. He's over there acting all sick, and I don't think he's really that sick.

But, you know, you need to address -- can you look at me, please, sir? You. Mr. Zareh. Mr. Zareh, you need to look at me.

I think you need to address his problems in-house and deal with that, whatever it was, but I think we have an AI brief here. And I don't think that you knew about it. I agree that you didn't

probably know about it. And I can't believe the Dallas lawyers did not look at this brief any more closely than they did. But I think it's an AI brief, and I think Mr. Pham knows, and that's why he's sick today.

So I think what I'm going to do is this. I am going to grant the motion to dismiss, not on the AI brief, not on the AI stuff, but on the allegations and the response the way it was. They don't -- you know, it's impossible to -- I mean, I'm going to grant the motion to dismiss, but I'm going to give you another chance to re-brief it. Okay?

So you can file -- we're going to grant the motion to dismiss on the pleadings, themselves, not on the AI portion of it. But I do think the AI portion is appropriately addressed, and I am going to do a public reprimand, because I find it's bad faith.

And I'm sorry, Mr. Zareh, because I don't know how much you were involved with this, Mr. Pham knows and it was bad faith to file this brief and then to come back and defend it. And I think for that, I'm going to do a public reprimand. That's all I'm going to do, and then I will move on with this case.

I probably wouldn't have done a public reprimand if you-all -- well, I wouldn't have done one if you-all had just agreed that this is an AI brief, but maybe you don't know. Maybe you don't know. Maybe you do know, I don't know.

So that's what I'm going to do. And we will get a scheduling order out -- a scheduling for the briefing out soon.

Is there anything else, Mr. Zareh, Mr. Nesbitt?

MR. NESBITT: Just one point of clarification on your ruling, Your Honor.

Did I understand that the Court is going to grant the motion to dismiss but give us a chance to replead the complaint? Or do you want to us respond --

THE COURT: No, no, I want you to respond to the motion to dismiss, yeah.

MR. NESBITT: Okay.

THE COURT: Yes, the motion to dismiss, yes.

MR. NESBITT: Appropriately.

THE COURT: All right. We will see what happens, and I trust this won't happen again.

MR. ZAREH: No, Your Honor.

THE COURT: I know.

All right. Anything else?

MS. DE SANTOS: So just to make sure I understood that, the motion to dismiss is granted.

THE COURT: Yes. It's granted without prejudice for them to, you know, file it -- file another one -- I mean, yeah, start again. So you would file the motion to dismiss. Right? No, you would file a response to motion to dismiss.

MR. ZAREH: We're filing another response to --

THE COURT: I gotcha. I gotcha.

MR. NESBITT: And the Court is going to tell us when that's due?

THE COURT: Yes, I will, in the next couple of days, I'll draft it in an order.

MR. NESBITT: Just one personal request, Mr. Webster and myself are leaving the country tonight, and we're not back for ten days.

THE COURT: That's okay. I will give you 30 days, 40 days, something like that -- plenty of time.

MR. NESBITT: Thank you. I appreciate it.

MS. DE SANTOS: Is the response that they're going to file going to be essentially a

request for a rehearing or --

THE COURT: No, it's going to be a response to your motion to dismiss. That's all it is, and you can file a reply.

MS. DE SANTOS: On a motion that's already been granted.

THE COURT: Okay. That's right. Yeah. So we've got the motion to dismiss resolved, and now we need another motion to dismiss. So how are we going to do this?

MS. DE SANTOS: The motion to dismiss addressed the class issues, which we argue cannot be sustained.

THE COURT: I'm going to let them do that again.

MS. DE SANTOS: So why don't -- if the Court is going to grant the motion to dismiss, perhaps, then, what the plaintiffs ought to do is file a motion to reconsider and argue the basis of that and whatever legal -- legitimate legal citations support a motion to reconsider the Court's order on the motion to dismiss.

THE COURT: Or you could just amend the complaint and somehow -- I think we start over again. You amend the complaint and take anything

out of the there that doesn't belong there, but I don't know that there is anything. And then you file a motion to dismiss, second motions to dismiss.

All right?

MR. NESBITT: That's what Mr. Webster had suggested, and we will offer to do that.

MS. DE SANTOS: On a third amended.

THE COURT: Yes. Well, I don't know what it is right now, second amended, third amended, whatever it is. That's the way we will do it. All right?

And I appreciate so much that you-all did all this work on that. I think you're absolutely bulls eye right about this AI brief. And I hope -- I don't think we will see it again. We will see if we do. All right? But in the meantime, you haven't asked for sanctions. I gave you a sanction anyway. That's all. Okay?

Anything else?

MR. NESBITT: Our apologies to the Court and Counsel.

THE COURT: We will be in recess.

(Court in recess at 11:12 a.m.)

C E R T I F I C A T E

I, Shawnie Archuleta, CCR/CRR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

This 20th day of November 2024.

s/Shawnie Archuleta
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