EXHIBIT
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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. PANINI AMERICA, INC., Defendant.	§ § § § § § § § §	Civil Action No. 3:23-CV-02689-B

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

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

Plaintiff,

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

v.

JURY TRIAL DEMANDED

PANINI AMERICA, INC.,

Defendant.

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

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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 8615*4, *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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EXHIBIT 3

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.,	§	**JURY TRIAL DEMANDED**
Defendant.	§	

REPLY BRIEF
IN SUPPORT OF DEFENDANT'S PARTIAL MOTION TO DISMISS

After receiving a twenty-eight day extension, Plaintiff filed a Response in Opposition ("Response," Doc. 22) to Defendant's Partial Motion to Dismiss on June 26, 2024. Stunningly, her Response not only fails to rebut the merits of Defendant's Motion, but flagrantly violates FED. R. CIV. P. 11(b)(2). Defendant's Motion to Dismiss should be granted. Additionally, Defendant requests the Court enter an Order requiring Plaintiff's counsel to show cause why the Court should not determine her Response violates Rule 11 for citing and relying on non-existent legal authority, demonstrate how Plaintiff's Response complies with counsel's ethical obligation of candor to the Court, and why the Court should not enter sanctions against Plaintiff's counsel for violating Rule 11 and award Defendant's attorneys' fees incurred in addressing Plaintiff's Response.

I. PLAINTIFF'S RESPONSE VIOLATES RULE 11

Plaintiff's Response either cites case law that does not exist or, when it does exist, even a cursory review of the case reveals it does not support the legal proposition cited by Plaintiff. The misrepresentations within Plaintiff's Response are egregious and are not limited to responding to the substantive arguments of Defendant's Motion. Indeed, Plaintiff's Response goes so far as to

invent case law quotations and, in some of those instances of fiction, falsely attributes the invented quotes to the well-known, and often cited, *Ashcroft v. Iqbal*:

> 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.*

Doc. 22, p. 5 (emphasis added). Plaintiff's quoted language appears nowhere in *Iqbal*. *See generally*, *Iqbal*, 556 U.S. 662 (2009).[1] Plaintiff's Response bears the hallmarks of a filing created with generative artificial intelligence ("AI") without any review of the AI output by counsel.

One Court in this District requires certifications concerning the use of AI in court filings.[2] "But such a rule is not necessary to inform a licensed attorney, who is a member of the bar of this Court, that she must ensure that her submissions to the Court are accurate." *Park v. Kim*, 91 F.4th 610, 615 (2d Cir. 2024) (referring an attorney to the Second Circuit's Grievance Panel for investigation for submitting a brief that relied on "non-existent" case law generated by ChatGPT).

II. NY COUNSEL NOT ADMITTED TO PRACTICE BEFORE THIS COURT

In addition to the false citations, Plaintiff's Response lists, for the first time, the New York law firm of Weinberg Zareh Malkin Price LLP as additional counsel for Plaintiff. See Doc. 22, p. 23 (signature block). No attorney from the Weinberg law firm has filed a notice of appearance, nor is there an indication that any Weinberg attorney is admitted to practice in the Northern District of Texas as required by the Local Rules. *See* LR 83.9.[3]

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[1] A Westlaw search for the phrase "the ultimate question is whether the complaint states a plausible claim for relief" within all federal cases returns exactly zero results.

[2] *See* Mandatory Certification Regarding Generative Artificial Intelligence (Starr, J.), available at https://www.txnd.uscourts.gov/judge/judge-brantley-starr.

[3] The Weinberg firm filed a similar purported class action lawsuit against Panini earlier this year. *See Dulce Huerta v. Panini America, Inc.*, 3:23-cv-2529-K (N.D. Tex.) (Doc. 7). However, after Panini's counsel served the Weinberg firm with a Rule 11 motion demonstrating the allegations in that lawsuit were demonstrably false, the Weinberg firm voluntarily dismissed that lawsuit.

III. DEFENDANT'S MOTION IS EFFECTIVELY UNOPPOSED

As to the "substance" of Plaintiff's Response, Plaintiff fails to put forth any arguments supported by binding legal precedent that defeats Defendant's Motion. Defendant's Motion is effectively unopposed and should be granted in its entirety.

A. Fabricated Precedents within Substantive Arguments.

In addition to errors in the precedent Plaintiff cites regarding Rule 12, Plaintiff cites this Court to a number of non-existent or egregiously misrepresented cases in support of her substantive arguments. Defendant could dedicate many additional pages of briefing detailing all of the ways the "cases" and "authority" within Plaintiff's Response are fictitious but, by way of example, points the Court to just a few examples of how Plaintiff's Response violates Rule 11.

Plaintiff relies upon a case purportedly styled *Bradshaw v. Unity Marine Corp.*, No. 3:19-CV-00356-E, 2020 WL 6345744 (S.D. Tex. 2020) claiming former employees have standing to seek injunctive relief against a former employer. Doc. 22, p 20 ("In *Bradshaw*, the court acknowledged the standing of former employees to seek injunctive relief when discriminatory practices had continuing effects on current employees.") *Bradshaw* does not exist as cited.[4] The Westlaw citation given (2020 WL 6345744) is not associated with any case. The case number (3:19-CV-00356) is associated with a case, but that case is workplace injury case styled *Coleman v. Arena Energy, LP*, that does not involve class claims nor claims of racial discrimination.[5]

Plaintiff also purports to analyze Fifth Circuit law concerning certification of failure to

[4] Panini has been able to locate one case in the Fifth Circuit captioned *Bradshaw v. Unity Marine Corp.* and it deals with a single employee's personal injury claim under the Jones Act. Ironically, the *Bradshaw* court observed it was "almost as if Plaintiff's counsel chose the opinion by throwing long range darts at the Federal Reporter (remarkably enough hitting a nonexistent volume!)" and hoped "the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed." *Bradshaw*, 147 F. Supp. 2d 668, 670 & 671 (S.D. Tex. 2001). This appears to be what has happened here, but with an AI generated dartboard, and the "daunting task of deciphering" Plaintiff's submission left to both Defendant's counsel and the Court. *Id*. at 670.

[5] Cause No. 3:19-cv-00356, in the United States District Court for the Southern District of Texas, Galveston Division.

promote classes, discussing two cases where certification was purportedly granted or upheld:

> 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 patter of discriminatory practices. The court recognized that system issues, such as discriminatory promotion policies, could form the basis for a class action if they similarly affected 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.

Doc. 22, pp. 18-19 (emphasis added). *Johnson* and *Mims* are not class action cases and neither discusses class certification. *See Johnson*, 7 F.4th 391 (5th Cir. 2021) and *Mims*, 88 F.Supp. 2d 706 (E.D. Tex. 2000). Further, the *Mims* case does not exist as cited—88 F. Supp. 3d 727 (Plaintiff's citation) is not associated with any case.[6] Panini's counsel has only been able to locate one case in the Fifth Circuit captioned *Mims v. Carrier Corp*.[7] That case involved neither class claims, nor claims of racial discrimination, and was decided in 2000, not 2015.

Elsewhere, Plaintiff relies on a case called *Dobbins v. Federal Reserve Bank of Dallas* (but failing to provide a case citation). Plaintiff claims the *Dobbins* 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." Doc. 22, pp 12-13. Panini's counsel has been able to locate one case in the Fifth Circuit captioned *Dobbins v. Federal Reserve Bank of Dallas*.[8] But *Dobbins* was an Americans with Disabilities Act case that had nothing to do with allegations of a hostile work environment. 2020 WL 9071686 at *1.

[6] Plaintiff sometimes cites *Mims* as a Louisiana case (pages 2 and 22), and other times cites as a Texas case (page 18). In each instance, Plaintiff cites *Mims* as published in the Third Volume of the Federal Supplement (not the Second Volume, where a case captioned *Mims v. Carrier Corp*. actually appears). And Plaintiff inconsistently cites *Mims* as appearing on either page 656, or page 727, of that Volume.
[7] *Mims v. Carrier Corp.*, 88 F.Supp. 2d 706 (E.D. Tex. 2000).
[8] 2020 WL 9071686 (N.D. Tex. 2020).

As a NY District court faced a similar issue recently noted, "[m]any harms flow from the submission of fake opinions." *Mata v. Avianca, Inc.*, No. 22-cv-1461, 2023 WL 4114965, at *1 (S.D.N.Y. June 22, 2023) (imposing sanctions when counsel "submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT").

IV. THE COURT SHOULD DISMISS PLAINTIFF'S CLASS CLAIMS

Turning to Plaintiff's substantive Response, Plaintiff's arguments and "authority" as to her class and individual claims carry no weight and fail to defeat Defendant's Motion. The Court should grant Defendant's Motion to Dismiss and enter an order dismissing Plaintiff's class action allegations under Rule 23(b)(2) and (b)(3).[9] To certify a class under Rule 23, a plaintiff must show that the proposed class meets all the requirements of Rule 23(a) and the requirements of at least one category of classes listed under Rule 23(b). "The different types of class actions [under Rule 23(b)] are categorized according to the nature or effect of the relief being sought." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 412 (5th Cir. 1998).

Plaintiff seeks to certify this class under Federal Rules of Civil Procedure 23(b)(2) and/or (b)(3). As a former employee, Plaintiff Vargas lacks standing to pursue injunctive or declaratory relief under Fed. R. Civ. P. 23(b)(2). *Wal-Mart Stores*, 564 U.S. at 365. Under binding Fifth Circuit precedent, Plaintiff's Section 1981 claim for intentional discrimination cannot be certified as a class under Fed. R. Civ. P. 23(b)(3). *Allison*, 151 F.3d at 419; *see also Lindsley v. Omni Hotels Mgmt. Corp.*, No. 2019 WL 2743892, at *14 (N.D. Tex. July 1, 2019) (Boyle, J.).

[9] "District courts are permitted to make such determinations on the pleadings and before discovery is complete when it is apparent from the complaint that a class action cannot be maintained." *Elson v. Black*, 56 F.4th 1002, 1006 (5th Cir. 2023) (affirming motion to strike class allegations filed under Rules 12(f) and 23(d)). The Fifth Circuit has long held it may be appropriate to deny class certification on the pleadings alone. *See John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("Where it is facially apparent from the pleadings that there is no ascertainable class, a district court may dismiss the class allegation on the pleadings.").

A. Plaintiff Lacks Standing Under Rule 23(b)(2).

Plaintiff (as a former employee) lacks standing to seek injunctive or declaratory relief for a discrimination claim under Rule 23(b)(2). *See* Doc. 17, p. 15 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 365 (2011)). In response this argument, Plaintiff relies on *Bradshaw* for the proposition that "former employees have standing to seek injunctive [sic] when the relief sought addresses ongoing and systemic discriminatory practices affecting a class." Doc. 22, p. 20 (citing *Bradshaw v. Unity Marine Corp.*, 2020 WL 6345744 (S.D. Tex. 2020)). As explained *supra*, Plaintiff's *Bradshaw* case seems not to exist. The only *Bradshaw* opinion Panini has been able to locate was a personal injury case dismissed on limitations grounds.[10]

Plaintiff cites no legal authority indicating the Supreme Court has overruled its key holding in *Wal-Mart* that former employees (like Plaintiff) lack standing under Rule 23(b)(2).[11] Because Plaintiff failed to address this argument in any meaningful way, and *Wal-Mart* is still good law, the Court should dismiss all class claims brought under Rule 23(b)(2).

B. *Allison* Forecloses Certification Under Rule 23(b)(3).

Fifth Circuit precedent forecloses Plaintiff's class claims for individual monetary relief under Rule 23(b)(3). *See* Doc. 17, p. 16 (citing *Allison*, 151 F.3d at 418). Plaintiff responds by pointing the Court to *Mims v. Carrier*, 88 F. Supp. 3d 656 (E.D. La. 2015), where the court there allegedly "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." Doc. 22, p. 22. Plaintiff's version of *Mims* is another case that seems not to exist.

[10] 147 F. Supp. 2d 668 (S.D. Tex. 2001).
[11] Plaintiff cites a 1977 case under the heading "Precedent Supporting Class Claims." Doc. 22, p. 21 (citing *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). But I*nt'l Brotherhood* was decided thirty-four years before *Wal-Mart*, and adds nothing to this Court's analysis.

Plaintiff also cites *Allison* (without any pinpoint) for a similar proposition as that from the non-existent *Mims*, claiming *Allison* also provides "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." Doc. 22, pp. 2, 22. This is a gross distortion of *Allison*, which, as Defendant's Brief explains, effectively foreclosed class certification for workplace discrimination claims under Rule 23(b)(3).[12] In *Allison*, the Fifth Circuit reviewed the use of class actions concerning "widespread or institutional-scale discrimination" in the employment context, for both disparate impact and pattern or practice claims of intentional discrimination. *Allison*, 151 F.3d at 409. The Court noted Section 1981 claims fundamentally alter the class action analysis because claims for compensatory and punitive damages increase the "complexity and diversity of the issues to be tried." *Id*. at 410.[13]

The *Allison* court denied certification under Rule 23(b)(3) because the individual determinations necessary for compensatory and punitive damages meant that (1) class issues do not predominate, and (2) class treatment is not a superior method for resolving discrimination claims. *Id*. at 419 ("The predominance of individual-specific issues relating to the plaintiff's claims for compensatory and punitive damages in turn detracts from the superiority of the class action device in resolving these claims."). The *Allison* court ultimately rejected any argument about "overarching issues" of "plant-wide racially discriminatory practices" because the argument "fails to appreciate the overwhelming number of individual-specific issues." *Id*. at 420 ("The success of these claims will turn ultimately on the special circumstances of each individuals' case."). *Allison*

[12] *See Lindsley v. Omni Hotels Mgmt. Corp.*, 2019 WL 2743892, at *14 ("few employment discrimination class actions have been certified in the Fifth Circuit" post-*Allison*, and "it seems that most employment discrimination classes that are certified are done so under Rule 23(b)(2) [not Rule 23(b)(3)], where final injunctive or declaratory relief is requested.").

[13] Although *Allison* held that plaintiffs could potentially recover "incidental" monetary relief under a properly certified 23(b)(2) class, the Supreme Court called even this ruling into question in *Wal-Mart*. 564 U.S. at 367 (questioning whether any form of monetary relief could be recovered by a 23(b)(2) class, and specifically rejecting class certification where plaintiffs seek individual monetary relief such as backpay or front pay).

does not support Plaintiff's argument; it requires dismissal under Rule 23(b)(3).

V. THE COURT SHOULD DISMISS PLAINTIFF'S INDIVIDUAL CLAIMS

A. Plaintiff Does Not Respond as to Disparate Impact Claim.

Panini moved to dismiss Plaintiff's Section 1981 disparate impact claim because disparate impact is only viable under Title VII. Doc. 17, pp. 12-13. Plaintiff fails to address this basis for dismissal and, because Defendant's Motion on this issue is well-supported and was unrebutted by Plaintiff, the Court should dismiss Plaintiff's Section 1981 disparate impact claim.[14]

B. No Viable Hostile Work Environment or Constructive Discharge Claims.

Panini's Brief explains why the allegations in Plaintiff's Amended Complaint, even if taken as true, do not meet the "objectively offensive behavior" standard required to state a hostile work environment claim. Doc. 17, pp. 8-9. Similarly, Panini's Brief explains how Plaintiff fails to plead facts supporting a constructive discharge claim, which requires allegations of even "greater severity or pervasiveness" than are required for a hostile work environment claim. Doc. 17, p. 10.

Plaintiff responds by making brand new allegations concerning some sort of "barrier chain in the workspace of a black employee." Doc. 22, pp. 4, 6, 10, 11, 13. Plaintiff does not mention the alleged "barrier chain" anywhere in her Amended Complaint and, as the Court well knows, Plaintiff cannot rely on allegations not contained within her Complaint to avoid dismissal. *Edwards v. Burwell*, 2015 WL 4131616, *2 (N.D. Tex. July 8, 2015) (Boyle, J.) ("The court will 'not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts.'") Even if she could, as a Hispanic woman (Doc. 9, ¶4), Plaintiff cannot rely on an alleged example of harassment directed toward an African-American employee to support her

[14] Plaintiff's Response purports to rebut arguments never raised in Panini's Motion. For example, Plaintiff acknowledges that Panini's Motion "does not challenge Vargas's failure to promote claim" (pg. 1), but then devotes three pages of her Response (pgs. 6-9) to defending that claim. Plaintiff also purports to defend claims of gender and sex discrimination, which were never alleged in her Complaint.

claim. *Hernandez v. Yellow Transp., Inc.*, 679 F.3d 644, 653-54 (5th Cir. 2012) (affirming that "examples of harassment towards African-American employees could not support the claim that there was a hostile work environment for Hispanic employees.").[15] Plaintiff's Response amounts to nothing more than the unsupported assertion that Vargas "worked in a hostile work environment because she worked in a hostile work environment."

Plaintiff also purports to rely on *Brown* and *Keelan* as examples of cases where the Fifth Circuit has "recognized a constructive discharge claim based on intolerable working conditions, even where no specific demotion of reduction in work occurred because the cumulative effect of the unbearable conditions could establish a constructive discharge claim."[16] The Fifth Circuit did no such thing in either case. To the contrary, the Fifth Circuit affirmed summary judgment dismissing constructive discharge claims in both cases. *Brown*, 207 F.3d at 783 ("[W]e cannot conclude that Brown's working conditions were so intolerable that a reasonable employee would have felt compelled to resign."); *Keelan*, 407 F. 3d at 342-43 ("[W]e agree with the district court that [the plaintiff] did not meet his burden of showing constructive discharge" and finding "none of [the complained of] working conditions constitutes a 'greater degree of harassment than that required by a hostile environment claim.'"). Plaintiff confusingly argues that her "experiences align with the circumstances in *Keelan*" (where the plaintiff's constructive discharge claim failed). Doc. 22, p. 14. Plaintiff's claim fails in this case, just as it failed in *Keelan*.

Plaintiff's hostile work environment and constructive discharge claims must be dismissed.

[15] Plaintiff claims she was "criticized for her attire," citing ¶ 30 of her Amended Complaint. Doc. 22, p. 9. But ¶ 30 makes no mention of this, and Panini could find no such reference anywhere in the Amended Complaint. Doc. 9.
[16] Doc. 22, p. 19 (citing *Brown v. Bunge Corp.*, 207 F.3d 776 (5th Cir. 2000) and *Keelan v. Majesco Software, Inc.*, 407 F. 3d 332 (5th Cir. 2005)).

C. The Court Should Dismiss Plaintiff's Retaliation Claim.

Plaintiff's Amended Complaint fails to allege any facts supporting she engaged in protected activity in the first place, much less pleading a connection between that alleged protected activity and any adverse action, and thus fails to state a retaliation claim. *See* Doc. 17, p. 11. Plaintiff points the Court to paragraphs 27 and 30 of the Amended Complaint in support of her argument that she did in fact plead engagement in protected activity. Doc. 22, p. 16. Neither paragraph asserts facts that have *anything* to do with alleged complaints Vargas made during her employment, much less facts akin to protected activity. Doc. 9, ¶¶ 27 & 30. After pointing the Court to these two irrelevant paragraphs, Plaintiff summarily concludes her Amended Complaint asserts facts supporting a causal connection sufficient to state a retaliation claim because "the timing and context of events support the causal connection between Vargas' protected activity and the adverse actions." Doc. 22, p 17. But, this conclusion is based on the flawed premise that Plaintiff pleads facts supporting protected activity. She does not, and her Response fails to identify any facts showing she suffered any retaliation in response to alleged complaints – or that any specific act of discrimination occurred after she allegedly engaged in protected activity. Conclusory allegations of retaliation (without supporting facts) do not support a cause of action.

VI. CONCLUSION

Defendant requests the Court grant its Motion to Dismiss, enter an Order requiring Plaintiff's counsel to show cause why the Court should not find the Response violates Rule 11 because it relies on non-existent legal authority, and order any appropriate additional relief to Defendant it deems Defendant to be entitled to, including but not limited to an award of attorneys' fees incurred in connection with responding to Plaintiff's brief.[17]

[17] Defendant's counsel are prepared to provide information regarding fees incurred in responding to Plaintiff's Brief.

Date: July 10, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system that will automatically send notification of such filing to counsel(s) and parties of record.

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EXHIBIT
4

July 17, 2024

Honorable Jane J. Boyle
United States District Court
Northen District of Texas
1100 Commerce Street, Room 1520
Dallas, Texas 75242-1003

☑ **VIA ECF**
☐ **VIA OVERNIGHT**
☐ **VIA HAND DELIVERY**
☐ **VIA FIRST CLASS MAIL**
☐ **VIA FAX:**
☐ **VIA E-MAIL:**
☐ **VIA CERTIFIED MAIL/RRR**

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.

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[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.

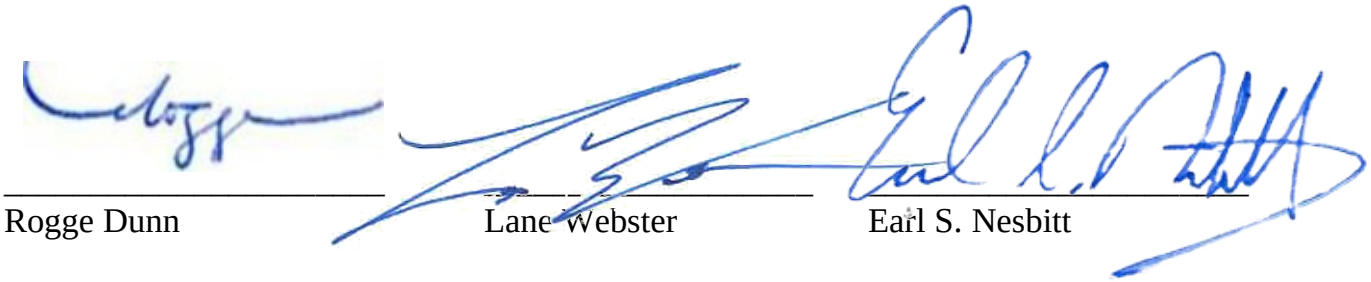
It should also be noted that Defendant has not conferred with Plaintiffs' counsel relative to its "Motion for Sanctions," as required by Local Rule 7.1(a), nor did the Reply, which deftly includes a motion for sanctions disguised as a request for an order to show cause, include a certificate of conference,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

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

EXHIBIT
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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. PANINI AMERICA, INC., Defendant.	§ § § § § § § § § §	3:23-CV-02689-B

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

EXHIBIT
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BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS

IN THE MATTER OF	§	
WILLIAM TIMOTHY LADYMAN,	§	**CAUSE NO. 69412**
STATE BAR CARD NO. 11787900	§	

AGREED JUDGMENT OF PUBLIC REPRIMAND

On this day the above-styled and numbered reciprocal disciplinary action was called for hearing before the Board of Disciplinary Appeals. Petitioner appeared by attorney and Respondent appeared in person as indicated by their respective signatures below and announced that they agree to the findings of fact, conclusions of law, and orders set forth below solely for the purposes of this proceeding which has not been fully adjudicated. Respondent waives any and all defenses that could be asserted under Rule 9.04 of the Texas Rules of Disciplinary Procedure. The Board of Disciplinary Appeals, having reviewed the file and in consideration of the agreement of the parties, is of the opinion that Petitioner is entitled to entry of the following findings, conclusions, and orders:

Findings of Fact. The Board of Disciplinary Appeals finds that:

(1) Respondent, William Timothy Ladyman, Bar Card number 11787900, is an attorney licensed and authorized by the Supreme Court of Texas to practice law in the State of Texas.

(2) On or about February 8, 2024, an Order was entered in a matter styled, Cause No. 1:23-CV-193-H, *Dale Scoggins, et. al, Plaintiffs, v. Native Community Capital, Defendant*, United States District Court, Northern District of Texas, Abilene Division, which states in pertinent part:

> For the reasons stated at the Court's show cause hearing on February 7, 2024, the Court finds that W. Tim Ladyman, Texas Bar No. 11787900, has not shown good cause for failing to comply with Court Orders. *See* Dkt. No. 20. Therefore, the Court hereby issues a formal reprimand

against Ladyman and fines him $300.00. It will also forward this Order to the Texas State Bar's Chief Disciplinary Counsel. Below, the Court describes the conduct at issue, the result of the hearing, and the Court's ultimate sanction.

This case was removed to federal court in late September 2023. *See* Dkt. No. 1. On November 6, 2023, the Court entered its scheduling conference order, which, among other things, required the parties' counsel to confer with each other and submit a joint report. *See* Dkt. No. 5. That same day, the plaintiffs filed a Notice of Nonsuit (Dkt. No. 6), which the Court denied because it failed to comply with Federal Rule of Civil Procedure 41 (Dkt. No. 7). Because the case was still ongoing, and in an effort to comply with the Court's scheduling conference order, the defendant attempted to make contact with the plaintiffs' counsel, Ladyman. *See* Dkt. No. 11 at 1. The defendant emailed Ladyman four times between November 15, 2023, and December 1, 2023, each of which went unanswered. *Id.* Further, Ladyman did not return phone calls to his office, nor did he respond to voicemails that were left at that number. *Id.* Without other options, the defendant chose to submit a solo report so that it might comply with the Court's Order. *See id.*

After receiving the defendant's solo report, the Court ordered the plaintiffs to show cause "as to why they should not be sanctioned because of their refusal to participate in the scheduling conference." Dkt. No. 12 at 1. The Court further ordered the plaintiffs' counsel to comply with the Court's scheduling conference order (Dkt. No. 5). Dkt. No. 12 at 1. Both the show cause response and the scheduling conference report were due by December 15, 2023. *Id.* Yet on December 16, 2023, nothing had been filed with the Court. Because nothing had been filed, the Court dismissed this case for want of prosecution and failure to follow Court Orders, and it set a hearing on the show cause order. Dkt. No. 19. A court clerk emailed the Order dismissing the case and setting the show cause hearing to Ladyman, as well as counsel for the defendant, to which Ladyman responded with the following:

> I received the attached order. I'm sorry, I was not aware of the obligations of a scheduling conference. We do not normally practice civil litigation in Federal Court. We filed this

> matter in State Court and the defendant removed it to Federal Court. We did have conversations with the defendant's attorney regarding a dismissal but were unable to agree to the Summary Judgment requested by the defendant.

The Court responded, and it noted that Ladyman's presence was still required at the February 7 hearing.

On February 7, 2024, the Court held a hearing on the show cause order. *See* Dkt. No. 20. At that hearing, the Court gave Ladyman an opportunity to demonstrate good cause as to why he had failed to comply with the Court's Orders. *Id.* Ladyman, however, wholly failed to demonstrate good cause. To the contrary, the Court became more concerned with Ladyman's conduct given his nonchalant attitude. In short, Ladyman admitted that he had received ECF notifications via email from the Court, but that those notifications had "a lot of words," so he did not read them. He ignored the Court's deadlines and his obligation to work with opposing counsel. At best, he alleged he was simply ineffective, but ineffectiveness does not establish good cause. Thus, the Court concluded that Ladyman had not shown good cause as to why he should not be sanctioned. As a result, the Court issues the following sanctions against Ladyman:

1. The Court issues a formal letter of reprimand (this Order) against Ladyman for failure to comply with Court Orders.

2. Ladyman is ordered to pay a monetary sanction in the amount of $300.00. The fine must be paid no later than 30 days from today – March 8, 2024. The fine shall be paid to the U.S. District Clerk, 341 Pine Street, Room 2008, Abilene, TX 79601.

3. A copy of this Order will be submitted to the Texas State Bar's Chief Disciplinary Counsel, P.O. Box 13287, Austin, Texas 78711.

So ordered on February 8, 2024.

(3) Respondent, William Timothy Ladyman, is the same person as the W. Tim Ladyman, who is the subject of the Order entered in a matter styled, Cause

No. 1:23-CV-193-H, *Dale Scoggins, et. al, Plaintiffs, v. Native Community Capital, Defendant*, United States District Court, Northern District of Texas, Abilene Division; and

(4) The public reprimand entered by the United States District Court, Northern District of Texas, Abilene Division, is final.

Conclusions of Law. Based upon the foregoing findings of facts the Board of Disciplinary Appeals makes the following conclusions of law:

(1) This Board has jurisdiction to hear and determine this matter. TEX. RULES DISCIPLINARY P. R. 7.08(H).

(2) Reciprocal discipline identical, to the extent practicable, to that imposed by the United States District Court, Northern District of Texas, Abilene Division, is warranted in this case.

It is, accordingly, **ORDERED, ADJUDGED, AND DECREED** that Respondent, William Timothy Ladyman, State Bar Card No. 11787900, is hereby PUBLICLY REPRIMANDED as an attorney at law in the State of Texas.

Signed this 18th day of June 2024.

CHAIR PRESIDING

I certify that this is a true and correct copy of the original.

Jackie Truitt, Executive Assistant, BODA

APPROVED AS TO FORM AND CONTENT:

William Timothy Ladyman
State Bar No. 11787900
Respondent

Amanda M. Kates
Assistant Disciplinary Counsel
State Bar No. 24075987
Attorney for Petitioner

EXHIBIT 7

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

DALE SCOGGINS, et al.,

Plaintiffs,

v.

NATIVE COMMUNITY CAPITAL,

Defendant.

No. 1:23-CV-193-H

ORDER

For the reasons stated at the Court's show cause hearing on February 7, 2024, the Court finds that W. Tim Ladyman, Texas Bar No. 11787900, has not shown good cause for failing to comply with Court Orders. *See* Dkt. No. 20. Therefore, the Court hereby issues a formal reprimand against Ladyman and fines him $300.00. It will also forward this Order to the Texas State Bar's Chief Disciplinary Counsel. Below, the Court describes the conduct at issue, the result of the hearing, and the Court's ultimate sanction.

This case was removed to federal court in late September 2023. *See* Dkt. No. 1. On November 6, 2023, the Court entered its scheduling conference order, which, among other things, required the parties' counsel to confer with each other and submit a joint report. *See* Dkt. No. 5. That same day, the plaintiffs filed a Notice of Nonsuit (Dkt. No. 6), which the Court denied because it failed to comply with Federal Rule of Civil Procedure 41 (Dkt. No. 7). Because the case was still ongoing, and in an effort to comply with the Court's scheduling conference order, the defendant attempted to make contact with the plaintiffs' counsel, Ladyman. *See* Dkt. No. 11 at 1. The defendant emailed Ladyman four times between November 15, 2023, and December 1, 2023, each of which went unanswered. *Id.* Further, Ladyman did not return phone calls to his office, nor did he respond to voicemails

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On February 7, 2024, the Court held a hearing on the show cause order. *See* Dkt. No. 20. At that hearing, the Court gave Ladyman an opportunity to demonstrate good cause as to why he had failed to comply with the Court's Orders.[1] *Id.* Ladyman, however, wholly failed to demonstrate good cause. To the contrary, the Court became more

[1] Also present was Emmanuel Almaraz, who had represented the defendant in this matter. Alamaraz was given the opportunity to speak, but he chose not to do so.

concerned with Ladyman's conduct given his nonchalant attitude. In short, Ladyman admitted that he had received ECF notifications via email from the Court, but that those notifications had "a lot of words," so he did not read them. He ignored the Court's deadlines and his obligation to work with opposing counsel. At best, he alleged he was simply ineffective, but ineffectiveness does not establish good cause. Thus, the Court concluded that Ladyman had not shown good cause as to why he should not be sanctioned. As a result, the Court issues the following sanctions against Ladyman:

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3. A copy of this Order will be submitted to the Texas State Bar's Chief Disciplinary Counsel, P.O. Box 13287, Austin, Texas 78711.

So ordered on February 8, 2024.

JAMES WESLEY HENDRIX
UNITED STATES DISTRICT JUDGE