UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RONNIE E. WILLIAMS, SR. et al., **Plaintiffs,** **v.** **NATIONAL RAILROAD PASSENGER CORPORATION,** **Defendant.**	**Case No. 1:21-CV-01122-EGS-MAU**

DEFENDANT NATIONAL RAILROAD PASSENGER CORPORATION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiffs' Opposition to Defendant National Railroad Passenger Corporation's ("Amtrak's" or "Defendant's") Motion to Dismiss Plaintiffs' Third Amended Complaint, or Alternatively, Motion for Summary Judgment ("Motion to Dismiss") is notable for what it does not do. Plaintiffs seemingly go out of their way to avoid substantively addressing Amtrak's arguments attacking the continued insufficient and threadbare allegations in the Third Amended Complaint ("TAC"). Plaintiffs go so far to avoid explaining how they have met their pleading burden that the majority of their opposition focuses on: (1) challenging the format of Amtrak's motion; (2) endorsing an inaccurate interpretation of the Supreme Court's seminal holdings in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); (3) incorrectly accusing Amtrak of seeking to impose an incorrect pleading standard; and (4) seeking shelter by making repeated requests to jump past the pleadings stage and directly into discovery so they might find facts to fill the holes that still exist in the third iteration of their complaint.

It is, frankly, shocking how little of their 40-page opposition Plaintiffs spend addressing the substance of Amtrak's Motion to Dismiss and how much space Plaintiffs occupy with arguments that do nothing to establish that each Plaintiff has met his or her burden to plead facts sufficient to state a plausible claim of race discrimination, race harassment, or retaliation. The fact that this lawsuit has been pending for nearly three years makes this failure even more acute. Indeed, it is curious why Plaintiffs have so obviously avoided addressing the substance of Amtrak's arguments, but the answer may lie in Amtrak's long-held concern that this lawsuit was brought on behalf of the vast majority of the Plaintiffs without sufficient authorization or investigation, despite Plaintiffs' counsel's representations to this Court to the contrary.

Regrettably, Amtrak's concerns appear to have been well-founded, as after Amtrak filed its Motion to Dismiss, it discovered that five (5) Plaintiffs had died *prior to* the initial filing of the

original Complaint on April 26, 2021. Amtrak further discovered that another plaintiff died between the filing of initial complaint in this action and the subsequent First Amended Complaint, which was filed on November 24, 2021. (*See* ECF No. 8). As a result, it is apparent that Plaintiffs' counsel proceeded on behalf of these Plaintiffs when he lacked authorization to do so, since it is well-settled that any authorization to pursue claims on behalf of an individual expires at the moment he or she becomes deceased.

Amtrak previously expressed concern to this Court about the "cookie cutter" nature of the allegations asserted on behalf of most Plaintiffs in the earlier complaints in this matter. Indeed, it now comes as no surprise that all six (6) of these now-deceased Plaintiffs asserted nothing more than the same "cookie cutter" allegations in the initial complaint in this matter. However, it is truly astonishing that the subsequent amended pleadings for these deceased Plaintiffs were then supplemented with new allegations in subsequent complaints after these Plaintiffs were no longer available to confer with Plaintiffs' counsel. This supplementation of the deceased Plaintiffs' claims even comes after Plaintiffs' counsel's affirmation to the Court that any Plaintiff and their claims that were to be included in the TAC would be vetted by Plaintiffs' counsel and would be live and properly pleaded claims. (ECF No. 51 at 43-44). To be clear, Plaintiffs' counsel has neither filed any suggestions of death in this case nor attempted to substitute the six deceased Plaintiffs. Remarkably, though, Plaintiffs' counsel still seeks to defend the viability of the claims of these six deceased Plaintiffs in the Opposition to Amtrak's Motion to Dismiss. Defendants raised this issue with Plaintiffs' counsel prior to the filing of this Reply brief but, to date, has not received any response or any sign that counsel appreciates the gravity of this situation.

With this perspective, the lens through which Plaintiffs' Opposition can be viewed becomes clearer. While Plaintiffs' counsel contends, without any legal support, that Amtrak's

Motion should not be countenanced by the Court because Amtrak chose to utilize charts to address the fact that more than 100 plaintiffs have failed to sufficiently plead plausible claims, Amtrak was careful in its Motion to Dismiss to identify the specific reason for each deficiency and cited to certain Plaintiffs as examples to demonstrate to the Court where those same deficiencies exist for other Plaintiffs. Amtrak then provided the Court with the specific corresponding paragraphs for each particular Plaintiff that fit into the same category. Plaintiffs' counsel ultimately proves Amtrak's point that nearly all of the Plaintiffs' claims lack merit. Notably, for all its sound and fury, Plaintiffs' Opposition and corresponding exhibits include numerous examples of Plaintiffs' counsel *voluntarily* dismissing the discrimination claims for many Plaintiffs, as well as the harassment or hostile work environment claims for an astounding 61 Plaintiffs. (Opp'n, Ex. A).

In the end, however, Plaintiffs seek to avoid the consequences of their inadequate pleading by arguing that the Court should evaluate Plaintiffs' claims based on a non-existent legal standard that is nothing more than a "*de minimis*" standard – low enough that Plaintiffs contend that, simply by asserting a mere smattering of legal conclusions masked as facts, they should be entitled to skip past the pleading stage and move to the discovery phase of the litigation to obtain the information needed to assert plausible claims. Amtrak is not requesting that the Court evaluate Plaintiffs' claims using any standard other than the one made clear by the Supreme Court – namely, that the burden rests with the plaintiffs to plead sufficient, detailed, non-conclusory facts to support a proper claim for relief and that a complaint "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79; *Twombly*, 550 U.S. at 570 (Plaintiffs must state "enough facts to state a claim to relief that is plausible on its face."). Because it is clear that Plaintiffs' claims addressed in Amtrak's Motion to Dismiss fail to meet these standards, Amtrak respectfully requests that its Motion to Dismiss should be granted in its entirety.

II. LEGAL ARGUMENT

A. Plaintiffs Seek to Preserve the Claims of at Least Six Deceased Plaintiffs, Most of Whom Were Deceased Before the Action Was Filed[1]

When the parties appeared before the Court on June 7, 2023 to address Plaintiffs' repeated amendments to Plaintiffs' threadbare complaints, the following interaction occurred between the Court and Plaintiffs' counsel:

> MR. FLEMING: … **Every person who is in this complaint authorized it. Every one.** As I said, there are two people there may have been a mistake about their name. Everybody authorized it over the years….I practice -- I practice law. I'm responsible. I have, I think, a very high standard for what I put into claims. And the reason there are generalized allegations is if I could not confirm something with the client or with -- or with the documents, then I didn't put it in yet, because **I'm not going to put in things that I don't have -- you know, don't have confirmation on**.
>
> …
>
> THE COURT: Well, let me just start from the beginning. These are -- this is not a class action; these are your clients. It's incumbent on counsel to know the names and addresses of his or her clients. That's a rule that we have in the court. I believe it's also in the federal rules you have to put the address in a complaint. **And I assume the allegations that tie to these individuals have been vetted**.
>
> MR. FLEMING: **They have**. But, Your Honor –
>
> …
>
> THE COURT: So what I need is some operative complaint with all of this information **with the -- you know, the deficient information, the obsolete information, the information that, you know, for clients that are either duplicates, that you don't know where they are, that you have no facts that you can allege as to them specifically given that this is not a class action . . ..** And then I need a complaint where I can actually then take that and rule on the substantive arguments to that.
>
> …
>
> But what I will say is if I allow an amendment to get these -- both the parties and the allegations up to date – in other words, **to delete obsolete information and/or individuals, duplicate individuals, individuals that -- and I'm not casting any aspersions -- that haven't gotten back to you, that are not in touch, that you**

[1] Amtrak has not conducted a full audit of all Plaintiffs. As a result, there may be additional Plaintiffs who were deceased and were nevertheless included as part of this action.

> **can't, you know, under Rule 11, you know, certify that these are -- you know, when you filed the complaint and signed the complaint that these are individuals who are part of the case and that these claims and facts are accurate and that the claims are live** -- if I allow this, you know, I need some sort of pleading that's, like, the most up to date given that we're dealing with operative complaint by all accounts seem to include people that may not be part of the case anymore. Then that's going to be the last opportunity absent some exigent circumstance.
>
> MR. FLEMING: **I understand, Your Honor**.

(Jun. 7, 2023 Status Hrg. Tr. 26, 43-44) (emphasis added). Given the threadbare nature of the original complaint in this action, as well as the failure of Plaintiffs' counsel to meaningfully enhance the insufficiency of the claims of most plaintiffs in later filed amended complaints, Amtrak appreciated the Court's admonition above, as it had long been concerned that Plaintiffs' counsel had brought these claims without sufficient investigation or, perhaps, authorization.[2] These concerns, however, were recently confirmed when Amtrak became aware that at least six (6) of the current *Williams* plaintiffs are deceased, **including at least five (5) of whom were deceased *before Plaintiffs' counsel ever filed this action***.

After Amtrak had already filed its pending Motion to Dismiss here, it learned from Plaintiffs' counsel that the plaintiff in *Lawrence Loggins v. National Passenger Railroad Corp.*, Case No. 1:23-cv-06275 (N.D. Ill.) ("*Loggins*"), a case with which this Court has keen familiarity, was deceased. After this Court transferred Mr. Loggins' case to the United States District Court for the Northern District of Illinois, Amtrak renewed its Motion to Dismiss Mr. Loggins' operative complaint. (*Loggins*, ECF No. 48). On the day his opposition was due, Mr. Loggins' counsel filed

[2] *See*, *e.g.*, ECF No. 30 at 2 ("The bottom line is that if Plaintiffs' counsel lacked the capacity to bring this action, no one forced him to do it – he chose to bring this action and subject himself to the basic requirements of this Court, not the other way around. Indeed, it is not even clear that many of the Plaintiffs identified in the Amended Complaint were contacted or communicated with before its filing, despite the passage of nearly four years since class certification was denied in Campbell, and the passage of approximately seven months after the initial Complaint was filed.").

a Motion to Suspend All Deadlines (*Loggins*, ECF No. 57) and a Suggestion of Death. (*Loggins*, ECF No. 58). Counsel indicated that he located an obituary online after failed attempts to communicate with Mr. Loggins. (*Loggins*, ECF No. 58 at 1 n.2). Though that obituary was not attached to the filing, Amtrak located it and it showed Mr. Loggins had passed away on *September 21, 2020*, more than *seven months before* Plaintiff's counsel filed the initial Complaint in *Harris v. National Railroad Passenger Corp.*, Case No. 1:21-cv-01129 (D.D.C.) that included Mr. Loggins as one of ten (10) named plaintiffs. *See* A.A. Rayner & Sons, *Celebrating the Homegoing of Lawrence B. Loggins, III*, https://aaraynerandsonsfuneralhome.com/2020/10/lawrence-b-loggins-iii-obituary/ (last visited Dec. 4, 2023).

Upon learning that Plaintiffs' counsel had initiated a claim on behalf of Mr. Loggins in this court after he had already passed away, Amtrak investigated the status of the remaining Plaintiffs identified in the TAC in this action. Particularly given Plaintiffs' counsel's vigorous representations to this Court at the June 7, 2023 status hearing that "[e]very person who is in this complaint authorized it" and his recognition of the Court's admonition that he must "delete obsolete information and/or individuals" and "certify that these are -- you know, when you filed the complaint and signed the complaint that these are individuals who are part of the case and that these claims and facts are accurate and that the claims are live," Amtrak was shocked to discover that at least six (6) individuals currently listed in the TAC are deceased – including five who died *before* Plaintiffs' counsel filed the original complaint on April 26, 2021. (ECF No. 1). The six deceased Plaintiffs, including the dates of their deaths are as follows:

1. Thomas Ayers. Date of Death: Feb. 1, 2021. The Washington Post's Legacy.com, *Thomas Ayers Obituary*, https://www.legacy.com/us/obituaries/washingtonpost/name/thomas-ayers-obituary?id=6126326 (last visited Dec. 22, 2023).

2. Gail George. Date of Death: Apr. 15, 2021. The Times-Picayune, *Gail Romelle Hillman George Obituary*, https://obits.nola.com/us/obituaries/nola/name/gail-george-obituary?id=6580072 (last visited Dec. 22, 2023).

3. Hilry McNealey. Date of Death: Jan. 27, 2020. Larkin and Scott Mortuary, LLC, Mr. Hilry Joe McNealey Obituary, https://www.larkinandscott.com/obituary/mr-hilry-joe-mcnealey (last visited Dec. 22, 2023).

4. James Peoples. Date of Death: Jun. 9, 2022. Neptune Society, *James Peoples Obituary*, https://obituaries.neptunesociety.com/obituaries/jacksonville-fl/james-peoples-10785311 (last visited Dec. 22, 2023).

5. Eileen Vyfhuis. Date of Death: Feb. 26, 2020. Tribute Archive, *Eileen K. George-Vyfhuis Obituary*, https://www.tributearchive.com/obituaries/24580638/eileen-k-george-vyfhuis (last visited Dec. 22, 2023).

6. Evelyn Whitlow. Date of Death: Apr. 2, 2019. Laveniasummers.com, *Evelyn Louis Whitlow Obituary*, https://www.laveniasummers.com/obituaries/evelyn-louise-whitlow (last visited Dec. 22, 2023).

Federal courts across the country have made clear that an attorney loses the authority to take action with respect to an individual once that person dies. *See Engle Cases 4432 Individual Tobacco v. Various Tobacco Cos.*, 767 F.3d 1082, 1086-87 (11th Cir. 2014) ("As any lawyer worth his salt knows, a dead person cannot maintain a . . . claim."); *In re Johnson*, 402 B.R. 313, 314 (B.A.P. 8th Cir. 2009) ("The attorney-client relationship between [counsel] and [his client] terminated upon the [client's] death." [Therefore,] [a]n attorney cannot file a suggestion of death on behalf of a former client, let alone initiate an adversary proceeding or pursue an appeal."); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 962 (4th Cir. 1985) ("The attorney's agency to act ceases with the death of his client…and he has no power to continue or terminate an action on his own initiative. Because the attorney is neither a party, nor a legal successor or representative of the estate, he has no authority to move for substitution under [Federal Rule] of [Civil Procedure] 25(a)(1), as the courts have repeatedly recognized."). Remarkably, in this action, Plaintiffs' counsel not only asserted claims on behalf of individuals already deceased at the time he filed the original complaint in April 2021, but has continued to advocate on behalf of those individuals – including adding *new* factual allegations regarding them in later-filed amended complaints – for more than two years post-filing when he clearly had no access to the individuals and no authority

to do so. (*See* Opp'n Ex. A).

At a bare minimum, these six (6) Plaintiffs (and any others who are deceased but about whom Amtrak has not yet learned) should be dismissed from the case immediately and with prejudice.[3] But, more than anything, these facts make clear that Plaintiffs' counsel's representations to this Court at the June 7, 2023 status hearing were not accurate, and that, given the filing of the TAC after that status hearing, Plaintiffs' counsel did not abide by the Court's admonitions to him. Moreover, the continued purported representation of plaintiffs who died well before the initial complaint only fuels Amtrak's long-held concerns that Plaintiffs' counsel brought these claims without sufficient investigation or, perhaps, authorization, which might explain the minimal allegations included in the original and later complaints.

B. Plaintiffs' Attack on Amtrak's Use of Charts is Meritless

A considerable portion of Plaintiffs' Opposition is devoted to opposing Amtrak's Motion to Dismiss on the grounds that Amtrak's "improper chart format does not allow either the Plaintiffs or the Court to understand Amtrak's asserted ground." (Opp'n 10). Exhibits B and C to Amtrak's Motion to Dismiss consist of two charts offered to aid the Court in aligning: (1) the specific reason why a particular Plaintiff's discrimination and/or hostile work environment claim(s) should be dismissed; and (2) for each such Plaintiff, the paragraphs of the TAC related to the insufficiently pleaded claim at issue. Specifically, Exhibit B contains a list of the 130 Deficient Discrimination Plaintiffs and Partially Deficient Discrimination Plaintiffs who have either: (1) alleged a discriminatory act but failed to allege a requisite adverse employment action or (2) otherwise failed to allege facts sufficient to support a plausible inference of race discrimination. (Mot. to Dismiss

[3] Amtrak also believes it is reasonable for the Court to award Amtrak the attorneys' fees associated with multiple motions to dismiss it has brought responding to claims that were wholly unauthorized in the first place. As a result, Amtrak is evaluating separate motions that it may file on this subject seeking to recover those fees.

at 28 n.13 and Ex. B). Exhibit C contains a list of the 115 Deficient Harassment Plaintiffs whose hostile work environment claims should be dismissed because they have either: (1) improperly alleged only "work-related" actions or (2) improperly alleged conclusory allegations or otherwise failed to sufficiently state a hostile work environment *prima facie* case. (*Id*. at 36 n.14 and Ex. C).

As an initial matter, Plaintiffs cite no case law or other authority precluding Amtrak's use of tables and charts to efficiently address the continued insufficiency of the clams of more than 100 plaintiffs in this action. Indeed, one federal court did address the use of a chart prepared by the defendant in connection with a motion to dismiss – identifying statements from a complaint that the plaintiff alleged to be false or misleading and detailing the corresponding basis why the statement failed to sufficiently allege fraud – and permitted its use. *See Plymouth Cnty. Ret. Sys. v. Evolent Health, Inc.*, No. 119CV1031RDATCB, 2021 WL 1439680, at *17 (E.D. Va. Mar. 24, 2021). Here, where Plaintiffs' continued pleading failures left Amtrak to address hundreds of insufficiently pleaded claims in a single motion with a page limit, there is no basis to reject Amtrak's motion because it utilized charts to efficiently address those pleading issues.

The currently pending Motion to Dismiss is not the first time Amtrak has utilized charts to manage the Plaintiffs' unwieldy and problematic pleadings. Amtrak's initial Motion to Dismiss similarly used tables and charts to group together Plaintiffs' claims suffering from the same deficiencies. (*See* ECF Nos. 13, 14-1). Notably, Plaintiffs did not object to Amtrak's use of tables or charts in that instance or seek denial of the motion on that basis. It is unclear why Plaintiffs have only selectively made this "charts" argument now, though it may be because, having simply filed amended complaints in response to Amtrak's earlier motion to dismiss, Amtrak's current motion finally requires them to address their allegations and explain why those allegations are sufficiently pleaded – which is Plaintiffs' burden. This is precisely what Amtrak intended and what Plaintiffs

must do for their claims to survive. *See Loggins v. Nat'l R.R. Passenger Corp*., No. 21-CV-1129-EGS-MAU, 2022 WL 21758545, at *2 (D.D.C. Dec. 1, 2022) (citing Fed. R. Civ. P. 12(b)(6) and stating, "A motion to dismiss under [Rule] 12(b)(6) tests whether a complaint has stated a claim upon which relief can be granted."). Plaintiffs, however, do not provide that level of specificity in their Opposition or make any meaningful attempt to do so.

Indeed, even though Plaintiffs object to Amtrak's use of charts to efficiently address their pleading deficiencies, they have proffered their own chart in support of their opposition. (Ex. A to Opp'n). Plaintiffs begin their chart by attempting to explain why some of their discrimination and/or hostile work environment claims are sufficiently pled, but also include a substantial number of entries where, in the most circular of fashion, Plaintiffs' counsel resorts to inserting conclusory statements to support what were already legal conclusions masked as facts. For example, Plaintiff Leroy Jackson alleges the following in the TAC:

> 1169. Plaintiff Leroy Jackson experienced intentional racial discrimination by Amtrak in regard to some or all of the following: discipline and discharge.
>
> 1170. In 2010, Plaintiff Leroy Jackson was wrongfully terminated and lost two years' worth of wages.
>
> 1171. Plaintiff Leroy Jackson filed a complaint with his local union, but he was still terminated.
>
> 1172. White employees are generally not wrongfully terminated, and, when they are terminated, they usually are granted hearings sooner than two years to contest their disciplinary terminations.
>
> 1173. Plaintiff Leroy Jackson was subjected to racial harassment and a racially hostile work environment during Plaintiff's employment at Amtrak.

(TAC ¶¶ 1169-1173). Amtrak moved to dismiss Mr. Jackson's discrimination and hostile work environment claims on the grounds that they were insufficiently pleaded. Plaintiffs' chart entry for Mr. Jackson, however, merely states in conclusory fashion and without any detail that "Plaintiff provided sufficient detail re: his discipline and termination claims. The motion is without merit."

(Opp'n Ex. A at 20).[4] As demonstrated *infra* at Sections II.E and II.F and applying the applicable pleading standards to Mr. Jackson's allegations, Mr. Jackson's allegations are nothing more than mere conclusions and are insufficient by any reasonable standard. Mr. Jackson pleads no facts describing any discipline he received other than simply saying in conclusory fashion that he was "wrongfully" terminated. (TAC ¶¶ 1169-1170). Further, Mr. Jackson's assertions that "[w]hite employees are generally not wrongfully terminated" and "are granted hearings sooner than two years to contest their disciplinary terminations" are conclusory insofar as he offers no examples of any favorable treatment to any specific white employees, let alone the "who, what, where, and when" of his allegations. (*Id*. at ¶ 1172). Thus, the proffer in Plaintiffs' Exhibit A for Mr. Jackson does nothing to satisfy his burden to demonstrate his claims are plausible. The other conclusory entries in Plaintiffs' Exhibit A are equally insufficient to overcome Amtrak's motion to dismiss.[5]

In sum, given that the claims of more than a hundred named Plaintiffs in this action remain insufficiently pleaded in the TAC, the chart approach utilized by Amtrak was the most efficient means of bringing those pleading deficiencies before the Court and nothing in Plaintiffs' Opposition supports the conclusion that its use was improper or objectionable.

C. Plaintiffs Attack Amtrak's Cited Pleading Standards By Misstating the Holdings in *Bell Atl. Corp. v. Twombly* and *Ashcroft v. Iqbal*

In an effort to argue that Amtrak has relied on incorrect pleading standards, Plaintiffs mischaracterize the Federal Rules of Civil Procedure and the holdings in the Supreme Court's two seminal pleading standard cases – *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). (Opp'n 5-6, 8). Specifically, Plaintiffs piece together various

[4] Plaintiffs also voluntarily withdrew Mr. Jackson's hostile work environment claim. (Opp'n Ex. A at 20).

[5] Nonetheless, for the Court's convenience, Amtrak separately provides responses to each entry in Plaintiffs' Exhibit A in Exhibit 1 to this reply.

fragments from *Twombly* and *Iqbal* in an attempt to sidestep the Supreme Court's main points of emphasis. For example, while Plaintiffs cherry-pick the Court's statement in *Twombly* that a district court may grant a motion to dismiss where the complaint does not contain "enough facts to state a claim to relief that is plausible on its face" (Opp'n 5 (citing *Twombly*, 550 U.S. at 570)), Plaintiffs omit the Supreme Court's further admonition that:

> [A] plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true.

Id. at 555-56 (internal citations and quotations omitted). Indeed, the *Twombly* Court reviewed, in detail, the factual allegations in the plaintiffs' complaint in order to determine whether the plaintiffs set forth sufficient factual allegations to state a claim and the grounds showing entitlement to relief. *Id*. at 556-69. Ultimately, the Supreme Court held that the plaintiffs failed to state sufficient facts, and as a result, were unable to "nudge[] their claims across the line from conceivable to plausible." *Id*. at 570.

With respect to *Iqbal*, Plaintiffs' Opposition merely scratches the surface, and in doing so, critically misses the Supreme Court's analysis in which it further detailed the reasons why and how a complaint must be "facially plausible" in order to survive a motion to dismiss. (*Compare* Opp'n 5-6 *with Iqbal*, 556 U.S. at 678-79). Importantly, the *Iqbal* Court stated:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. ***Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.*** Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, ***but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.*** Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. ***But where the well-pleaded facts do not permit the court to infer more than the mere possibility of***

> ***misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief.***

Iqbal, 556 U.S. at 678-79 (internal citations and quotations omitted) (emphasis added). Thus, the Court's pronouncements in *Twombly* and *Iqbal* were not simply, as Plaintiffs argue in their Opposition, that "Rule 8(a)(2) . . . does not require detailed factual allegations." (Opp'n 6). Rather, a district court reviewing a motion to dismiss must adhere to the aforementioned two working principles – (1) that accepting facts as true does not apply to legal conclusions masked as facts, which alone are not sufficient to sustain a complaint facing a motion to dismiss; and (2) looking only at the "well-pleaded facts," the court must determine whether there is a plausible claim for entitlement to relief and not just a mere possibility of misconduct. *Iqbal*, 556 U.S. at 678-79; *see also Loggins*, 2022 WL 21758545, at *2 (Upadhyaya, Mag. J.). These clear pleading standards govern the sufficiency of the TAC here, not Plaintiffs' incorrect recasting of the Supreme Court's holdings.

D. Plaintiffs' Calls for Discovery Instead of Substantively Addressing Amtrak's Arguments Constitutes Waiver and Amtrak's Arguments Are Conceded

Throughout the Opposition, Plaintiffs implore the Court to allow them to move past the pleading stage and into discovery so that they may attempt to discover facts sufficient to fill in the current gaps in their deficient allegations. In doing so, Plaintiffs sidestep their obligation to: (1) have already pleaded sufficient facts before the Court and (2) address the deficiencies in the TAC that Amtrak has highlighted. Indeed, as the *Iqbal* Court observed, "Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678. Despite this, Plaintiffs simply seek discovery rather than directly addressing their pleading deficiencies in a number of places.

First, Plaintiffs' opposition fails to substantively address the conclusory allegations asserted by Plaintiffs Lena Faye Johnson (discriminatory promotion claim, Opp'n 16), Brenda

Matthews (discriminatory terms and conditions claims, *id*. at 17-18), Akanke Isoke (discriminatory discipline claims, *id*. at 18), Ronnie Williams (discriminatory treatment claims, *id*. at 21), Christopher Adams (discriminatory failure to recall for hire claims, *id*. at 23), Ulysses Barton (discriminatory promotion claims, *id*. at 23-24), and Priscilla Cathey (retaliation claim, *id*. at 28-29), and instead seek discovery as to each in hopes of discovering facts to support their claims.

Second, Plaintiffs have failed to substantively respond at all to Amtrak's timeliness arguments pertaining to the 57 Fully Time-Barred Plaintiffs and the specific claims referenced in Exhibit D to Amtrak's Motion to Dismiss for the 31 Partially Time-Barred Plaintiffs -- that some or all those Plaintiffs' claims should be dismissed because they either (1) affirmatively alleged that certain challenged conduct occurred on a date outside the limitations period; or (2) failed to allege any specific date when the alleged conduct occurred. (Mot. to Dismiss 41-43, Ex. D). Instead, Plaintiffs merely argue that these arguments are "premature" and that they should be permitted to engage in discovery. (Opp'n 39-40). The failure to respond substantively to Amtrak's timeliness arguments is fatal to the claims of those Plaintiffs subject to them. Indeed, if Plaintiffs had a different understanding of the timeliness of the claims of the Fully Time-Barred Plaintiffs and the Partially Time-Barred Plaintiffs, their Opposition was the time to present them. They failed to do so, merely requested discovery, cite to no authority whatsoever permitting such an approach, and, as noted below, have therefore waived any opposition to those arguments by Amtrak. *See Henneghan v. District of Columbia*, 916 F. Supp. 2d 5, 9 (D.D.C. 2013) ("The Court has reviewed plaintiffs' opposition to the District's motion to dismiss, and finds that it utterly fails to address the substantive arguments the District makes. Under these circumstances, the Court may treat as conceded any argument raised in the motion which the opposing parties fail to address."); *Mitchell v. Thomas*, No. CV 17-90-JWD-EWD, 2019 WL 2270597, at *4 (M.D. La. May 28, 2019)

("Plaintiff's failure to provide a substantive argument in his opposition is essentially a waiver and justifies dismissal by itself.") (internal citations omitted).[6]

E. Nothing in Plaintiffs' Opposition Changes the Failure of the Deficient Discrimination Plaintiffs to Sufficiently Plead Plausible Claims

In addressing the sufficiency of the claims of the Deficient Discrimination Plaintiffs, Plaintiffs argue Amtrak "would have this Court create new pleading standards based on what evidence must be adduced at trial in order to prevail on a Section 1981 claim." (Opp'n 13). In support, Plaintiffs erroneously try to seize on the fact that Amtrak cited to cases for its Section 1981 discrimination arguments that were procedurally at the summary judgment phase. (*Id*. at 14). Plaintiffs' suggestion that Amtrak is advocating for a new standard is without merit.

As an initial matter, many courts, including this Court, often cite to cases decided at the summary judgment stage in ruling on motions to dismiss since those cases set out the basic standards for evaluating Title VII and Section 1981 discrimination claims. *See*, *e.g*., *Loggins*, 2022 WL 21758545, at *2 (citing *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 576 (D.C. Cir. 2013)); *Harris v. Mayorkas*, No. 21-CV-1083 (GMH), 2022 WL 3452316, at *5 (D.D.C. Aug. 18, 2022) (citing *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995)). Plaintiffs' Opposition also ignores Amtrak's citations that were procedurally at the motion to dismiss stage. *See*, *e.g*., Mot. to Dismiss 26 (citing *Black v. Guzman*, No. CV 22-1873 (BAH), 2023 WL 3055427, at *8 (D.D.C. Apr. 24, 2023) and *Garza v. Blinken*, No. 21-CV-02770 (APM), 2023 WL 2239352, at *5 (D.D.C. Feb. 27, 2023)), 27-28 (citing *Gonzalez v. Garland*, No. CV-21-

[6] Because Plaintiffs also failed to address Section II.B of Amtrak's Motion to Dismiss concerning the nine "No Allegation Plaintiffs" (other than to suggest that Amtrak had an obligation to contact Plaintiffs' counsel to informally request their dismissal), Plaintiffs likewise have conceded that argument and the nine "No Allegation Plaintiffs" should be dismissed. Moreover, Plaintiffs fail to address Amtrak's argument concerning the sufficiency of Plaintiff Steven Harris' hostile work environment claim and all similar claims that are based entirely on work-related decisions. (Mot. to Dismiss 34-35). Accordingly, these claims, too, should be dismissed.

1653 (TSC), 2023 WL 6160013, at *8 (D.D.C. Sept. 21, 2023)), and 31 (citing *Mesumbe v. Howard Univ.*, 706 F. Supp. 2d 86, 92 (D.D.C. 2010), *aff'd*, No. 10-7067, 2010 WL 4340401 (D.C. Cir. Oct. 19, 2010)).

Finally, and most importantly, it appears that Plaintiffs' suggestion that Amtrak was attempting to impose a new legal standard on Plaintiffs is actually some sort of "projection" on their part. The authority cited by Amtrak is rooted in precedent and the principle of *stare decisis*. It is *Plaintiffs*, however, who advocate for the application of legal principles unmoored from actual authority and attempt to pass it off as doctrine. Specifically, Plaintiffs state, "In the TAC, Plaintiffs in this case meet their burden to identify the claims, include information that tends to meet a prima facie case (which is not actually required), and allege facts that permit a reasonable inference that race discrimination was the cause of the adverse employment action." (Opp'n 11). But this is not the law. In order to sufficiently plead a Section 1981 claim, the Supreme Court held that "a plaintiff must initially plead and ultimately prove that, *but for race*, it would not have suffered the loss of a legally protected right." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020) (emphasis added); *see also Adetoro v. King Abdullah Acad.*, 585 F. Supp. 3d 78, 83 (D.D.C. 2020) (citing *Comcast* and holding that race must be alleged to be the reason for the adverse action and not some potential combination of reasons); *Mohamed v. George Washington Univ.*, No. 1:22-CV-00812 (TNM), 2022 WL 3211806, at *4 (D.D.C. Aug. 9, 2022) ("At bottom, Mohamed relies on an outdated pleading standard. He says a court may dismiss a § 1981 claim 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' [] But as every first-year law student learns, the Supreme Court repudiated that more-liberal rule in *Twombly* . . . . The modern standard requires Mohamed to affirmatively plead facts suggesting his race was the but-for cause of his termination. He did not—

so the § 1981 claim against GWU must be dismissed."). Thus, the standard Plaintiffs rely upon in addressing the sufficiency of their Section 1981 claims is incorrect.[7]

Without citation to any legal authority, Plaintiffs seek to defend the claims of Ronnie Williams, Ransford Acquaye, and Christopher Adams from Amtrak's attack, but are unable to overcome their inadequate allegations to avoid dismissal. As Amtrak noted in its Motion to Dismiss, the full extent of race-related allegations for these three plaintiffs could be distilled to the following: (1) Mr. Williams: "[w]hite employees in [his] position were not subject to this level of discipline for missing a shift of work" and that white employees were not escorted off the premises and threatened with arrest; (2) Mr. Acquaye: "White employees in Ransford Acquaye's position were not subjected to such humiliation"; and (3) Mr. Adams: "[u]pon information and belief, there were other black men who were laid off in around 2001 or 2002 that were not called back for rehire either". (TAC ¶¶ 12-15, 21, 28-30). As a result, Mr. Williams, Mr. Acquaye, and Mr. Adams have not alleged enough to "nudge[] their [Section 1981 discrimination] claims across the line from conceivable to plausible." *Twombly* 550 U.S. at 570. Indeed, D.C. federal courts have not permitted claims with the same type of conclusory allegations to avoid dismissal and proceed into discovery. For example, in *Auf v. Medford*, No. CV 20-0815 (ABJ), 2021 WL 3025222 (D.D.C. Mar. 26,

[7] Plaintiffs argue that Amtrak contests the sufficiency of all of Plaintiff Vernon Carter's discrimination claims. (Opp'n 15). To be clear, and as Amtrak stated in its Motion to Dismiss, Defendant does not contest the sufficiency of Mr. Carter's allegations as set forth in ¶¶ 345-367 of the TAC. (*See* Mot. to Dismiss 25 n.12). However, where Mr. Carter's allegations do not pass muster is with respect to his allegations in ¶¶ 371-380. Here, there are no facts in the TAC explaining why or how Amtrak discriminated against Mr. Carter's wife, Kim McKay. There are also no facts that satisfy *Comcast's* "but-for" standard as to his allegations that Mr. Carter was discriminated against when he was allegedly "stripped of his seniority," removed from his union, and denied a transfer to Wilmington, Delaware. *Comcast*, 140 S. Ct. at 1019; *see also Doe #1 v. Am. Fed'n of Gov't Emps.*, 554 F. Supp. 3d 75, 105 (D.D.C. 2021) (granting motion to dismiss the plaintiff's § 1981 claim because there were no facts that comparators were similarly situated in all materials aspects and there were no allegations of racial animus or that a supervisor's failure to respond constituted an adverse action).

2021), the plaintiff alleged:

> Defendants hired African American professors at the same time it offered employment to Dr. Auf and complied with its published onboarding procedures and followed those procedures in processing grievances . . . . In taking the above mentioned actions against Plaintiff Dr. Auf, Defendant Howard University discriminated against her based on her race and treated her differently than its non-Caucasian professors.

In denying leave to amend the plaintiff's complaint, the court highlighted the same deficiencies that are present with respect to the claims of all of the Deficient Discrimination Plaintiffs and Partially-Deficient Discrimination Plaintiffs:

> Putting aside the question of whether plaintiff has alleged the first essential element of a section 1981 claim, ***she does not allege racial animus on the part of any individual actor, nor does she identify any specific statements or actions from which discriminatory intent can be inferred. Plaintiff grounds the claim on a vague statement that includes none of the facts and circumstances surrounding other appointments, so the Court can draw no plausible conclusions about whether the situations are comparable.*** It is true that plaintiffs can raise an inference of discrimination by pointing to "similarly situated" employees that were treated differently. *Holbrook v. Reno*, 196 F.3d 255, 261 (D.C. Cir. 1999). ***But plaintiff has provided the Court with no details about the other employees that would enable one to draw an inference as to whether they were similar, let alone whether their situations were "nearly identical."*** *Id*. As a result, plaintiff has not "identified a similarly-situated employee who is not in her protected class and explained why she has equivalent qualifications." *Brown v. Sessoms*, 774 F.3d 1016, 1023 (D.C. Cir. 2014).

Auf, 2021 WL 3025222, at *11 (emphasis added); *see also SS & T, LLC v. Am. Univ.*, No. CV 19-721 (JDB), 2020 WL 1170288, at *4 (D.D.C. Mar. 11, 2020) (dismissing the plaintiff's § 1981 claim and stating, "SS & T cannot merely allege that similarly situated leaseholders not owned by persons of Indian-descent were treated differently and then offer 'nothing more in the way of specific facts or allegations associated with this claim.'"); *Loggins*, 2022 WL 21758545, at *3 (recommending dismissal of Loggins' Section 1981 claim and finding after a detailed analysis that Loggins' identified comparator, Lonnie Lavoie, was not similarly situated); *Mesumbe*, 706 F. Supp. 2d at 92 (quoting *Iqbal*, 556 U.S. at 678 ("a conclusory allegation that similarly situated [employees] of different national origin, ethnicity, and race have been treated differently and more

favorably," is insufficient "[w]ithout some allegation indicating the intent behind these disparate outcomes" because "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.")), *aff'd*, No. 10-7067, 2010 WL 4340401 (D.C. Cir. Oct. 19, 2010). Based on the court's holding in *Auf* and the requirement that Plaintiffs must plead facts sufficient to establish a plausible claim that race was the but-for cause of an adverse employment action, the discrimination claims of Ronnie Williams, Ransford Acquaye, and Christopher Adams, Brenda Matthews, Akanke Isoke, Ulysses Barton, as well as the other Deficient Discrimination Plaintiffs and the Partially-Deficient Discrimination Plaintiffs, must be dismissed. (*See* Mot. to Dismiss 27-32).[8]

F. Plaintiffs' Arguments Opposing the Dismissal of Their Hostile Work Environment Claims Are Unavailing

For the same reasons as above, Plaintiffs' argument that Amtrak has put forth an incorrect pleading standard to evaluate Plaintiffs' Section 1981 hostile work environment claims because it cited cases decided at the summary judgment stage lacks merit. Plaintiffs seek to use the summary judgment "red herring" to avoid confronting their failure to meet their affirmative pleading obligations. *See*, *supra*, at Section II.E. Indeed, even this Court has cited to the same cases as Amtrak in evaluating a Section 1981 hostile work environment claim on a motion to dismiss. *See Loggins*, 2022 WL 21758545, at *4 (Upadhyaya, Mag. J.) (citing *Baloch v. Kempthorne*, 550 F.3d 1191, 1201 (D.C. Cir. 2008), *Toomer v. Mattis*, 266 F. Supp. 3d 184, 193 (D.D.C. 2017), and

[8] Plaintiffs erroneously argue that, with respect to Plaintiff Brenda Matthews and the other *Williams* plaintiffs who have asserted additional claims pursuant to Title VII, Amtrak failed to address their Title VII claims and therefore has waived its right to seek dismissal of those claims. (Opp'n 17.) This is incorrect. Contrary to Plaintiffs' assertion, Amtrak's Motion to Dismiss clearly states that it is seeking dismissal of the Title VII claims of those plaintiffs as well, noting explicitly that "[b]ecause those claims are analyzed under a similar standard . . . , their Title VII race discrimination claims also warrant full dismissal." (Mot. to Dismiss 11 n.6). There is thus no waiver by Amtrak with respect to its request for dismissal of the Title VII and Section 1981 discrimination claims for Plaintiffs Cynthia Edwards, Brenda Matthews, and Gary Williams.

Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)); *see also Spence v. United States Dep't of Veterans Affs.*, No. CV 19-1947 (JEB), 2022 WL 3354726, at *9 (D.D.C. Aug. 12, 2022).

Regardless, Amtrak has demonstrated that Joseph Peden's and William Waytes' hostile work environment claims are utterly inadequate. Notably, Plaintiffs' Opposition even concedes that ". . . these claims could be better grounded as to Plaintiffs Peden and Waytes[.]" (Opp'n 26). But the point is that their claims are not grounded *at all*. It is the unmistakable void of context in the form of specific allegations that makes their claims conclusory. In the most vague and general terms, Mr. Peden and Mr. Waytes claim that certain racially charged conduct occurred during their employment, but they fail to supply *any* underlying details, making these claims subject to dismissal. *See Johnson v. District of Columbia*, 49 F. Supp. 3d 115, 121 (D.D.C. 2014) (the implication alone that the plaintiff was subjected to severe and pervasive conduct was found to be conclusory and the plaintiff's hostile work environment claim was dismissed).

As for Eric Woodruff and Jimmy Lee Whitley, Amtrak offered them as examples because the deficiencies in their harassment claims are illustrative of the same deficiencies that also plague the similar claims of the remaining Deficient Harassment Plaintiffs,[9] each of whom has failed to meet the bar necessary to plead that the workplace subjected Plaintiffs to "discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the [plaintiff]'s employment and create an abusive working environment." *Massaquoi v. District of Columbia*, 81 F. Supp. 3d 44, 52 (D.D.C. 2015) (citing *Baloch*, 550 F.3d at 1201). (Mot. to Dismiss at 36-38). Plaintiffs though offer no substantive response to establish plausibility and rely instead on the incorrect argument that Amtrak applied the wrong standard. (Opp'n 26-27).

[9] As with the Deficient Discrimination Plaintiffs in Exhibit 1 to this Reply, Amtrak has also, for the Court's convenience, separately provided responses to each entry in Plaintiffs' Exhibit A for the remaining Deficient Harassment Plaintiffs in Exhibit 2 to this Reply.

Moreover, it bears noting that, while Plaintiffs contend that Amtrak has not sufficiently supported its basis for dismissal, Plaintiffs have voluntarily dismissed the harassment claims of 61 plaintiffs, demonstrating the saliency of Amtrak's arguments. For these reasons, the Court should dismiss Deficient Harassment Plaintiffs' claims in their entirety.

G. Plaintiffs Do Not Demonstrate Their Deficient Retaliation Claims Should Survive Dismissal

Amtrak argued in its Motion to Dismiss that five Plaintiffs insufficiently pled their Section 1981 retaliation claims. (Mot. to Dismiss 14-15, 39-40). Of the five Deficient Retaliation Plaintiffs, Plaintiffs concede that Gary Christian never alleged a proper retaliation claim. (Opp'n 27-28). With respect to Plaintiff Vernon Carter, Plaintiffs confusingly state that his retaliation claim is based on alleged treatment during his training classes and they have withdrawn any retaliation claim based on alleged conduct related to Mr. Carter's spouse. (*Id*. at 27). Even so, Mr. Carter still does not allege that he engaged in any protected activity. *Lemmons v. Georgetown Univ. Hosp*., 431 F. Supp. 2d 76, 92 (D.D.C. 2006) (if a plaintiff alleges retaliation under 42 U.S.C. § 1981, the plaintiff must demonstrate that she had alleged harassment or discrimination based on her race, or some other category the law protects, before the retaliatory conduct occurs). Indeed, Mr. Carter never asserts that he complained to anyone at Amtrak that Mr. Kopecki was discriminating against him because of his race. (TAC ¶¶ 344-381). This is fatal to his retaliation claim. *See Ramey v. Potomac Elec. Power Co.*, 468 F. Supp. 2d 51, 59 (D.D.C. 2006) (finding that a union grievance did not constitute protected activity because it did not allege discrimination).

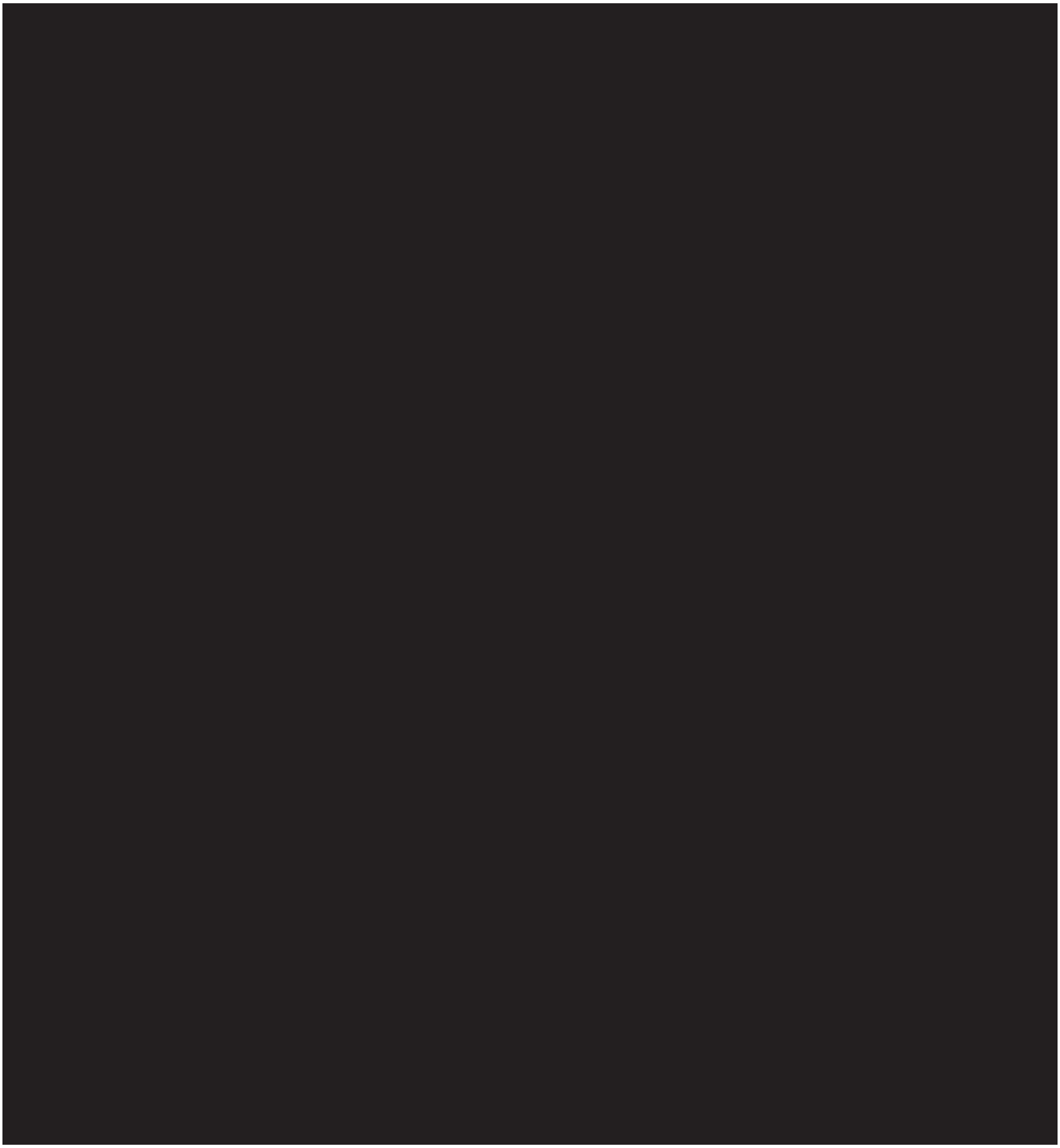
Plaintiffs next argue that Priscilla Cathey, Kirk Collins, and Cynthia Edwards sufficiently alleged retaliation. (Opp'n 28-29). Plaintiffs' arguments in support of them, however, underscore a fundamental misunderstanding of the law. Plaintiffs mischaracterize the holdings in *Jones v. D.C. Water & Sewer Auth.*, 922 F. Supp. 2d 37 (D.D.C. 2013), a case cited extensively in both

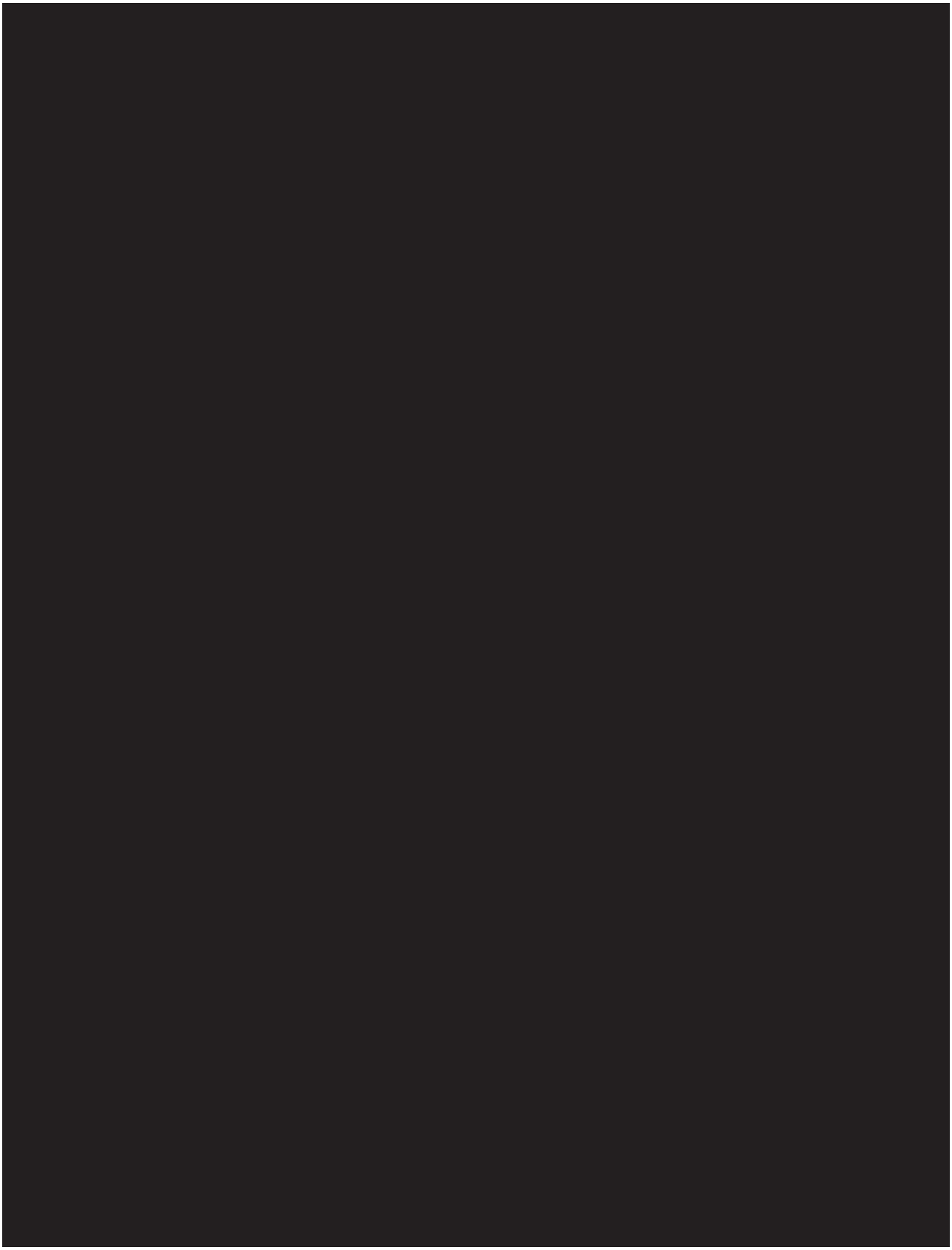
Amtrak's Motion to Dismiss and Plaintiffs' Opposition. The *Jones* court indicated that "[t]o establish a causal connection between the protected activity and the termination—in the absence of direct evidence—a plaintiff may show that the employer had knowledge of the employee's protected activity, and that the adverse personnel action took place shortly after that activity." *Id.* at 42 (internal citations and quotations omitted). But Plaintiffs fail to provide the full context of the court's decision with respect to showing causation through temporal proximity. Plaintiffs only quote that part of *Jones* stating that "neither the Supreme Court nor [the D.C. Circuit] has established a bright-line three-month rule" (Opp'n 29), but conveniently skip over the next phrase in the *same* sentence stating "this Circuit has generally found that a two- or three-month gap between the protected activity and the adverse employment action does not establish the temporal proximity needed to prove causation." *Id.* (alteration in original).[10] Thus, due to the length of time between the alleged protected activity and adverse actions, which in each case is at least ten (10) months, Ms. Cathey, Mr. Collins, and Ms. Edwards' allegations do not appropriately allege causation. (*See* Mot. to Dismiss 39-40 (citing TAC ¶¶ 388-405, 530-532, 720-727); Opp'n 28-30). None of these three Plaintiffs sufficiently allege that there was direct evidence of retaliation. And none of these Plaintiffs assert that Amtrak's agent responsible for implementing the adverse action had knowledge of Plaintiff's alleged protected activity. For the foregoing reasons, the Deficient Retaliation Plaintiffs' claims must be dismissed.

H. [redacted]

[redacted]

[10] *See also Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) ("The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a *prima facie* case uniformly hold that the temporal proximity must be 'very close.'") (internal citations omitted)





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III. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court grant its Motion to Dismiss in its entirety.

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Dated: December 22, 2023

Respectfully submitted,

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