**STATE OF MICHIGAN**

**IN THE OAKLAND COUNTY CIRCUIT COURT**

**GLENDA CROMER,**

**Plaintiff,**

**VS**

**OAKLAND HILLS COUNTRY CLUB,**

**Defendant.**

**THE HON CHERYL MATHEWS**

**CASE NO 2017-162223-CZ**

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**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7), (8), AND (10) AND FOR COSTS AND SANCTIONS PURSUANT TO MCR 2.114(F) AND MCR 2.625(A)(2)**

PLAINTIFF GLENDA CROMER **Plaintiff Cromer or Ms. Cromer]**, by her undersigned counsel, LEDERMANLAW, PC, responds to Defendants' above motion as follows:

This Court should deny the motion under MCR 2.116(C)(7), MCR 2.116(C)(8), MCR 2.116(C)(10), MCR 2.114(F) **[now MCR 1.109(E)(7)]**, and MCR 2.625(A)(2) for the reasons outlined in her Brief in Support below.

THEREFORE, PLAINTIFF GLENDA CROMER respectfully requests this Court to deny the motion with prejudice.

Dated: December 26, 2018

/s/ Howard Yale Lederman
LEDERMANLAW, PC
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**BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7), (8), AND (10) AND FOR COSTS AND SANCTIONS PURSUANT TO MCR 2.114(F) AND MCR 2.625(A)(2)**

## INTRODUCTION

Plaintiff Glenda Cromer **[Plaintiff Cromer or Ms. Cromer]**, an African-American woman, is suing Defendants Oakland Hills Country Club **[Defendant Oakland Hills]** and a former supervisor, David Walker **[Defendant Walker]**, for federal and state employment racial discrimination claims. **For 27 years, Plaintiff Cromer worked for Defendant Oakland Hills, mostly as a housekeeper and housekeeping supervisor.** For most of that period, she had no problems with Oakland Hills, and Oakland Hills had no problems with her. **Even Defendants have admitted that "[f]or the most part, Ms. Cromer did not have…major issues as an employee at [Oakland Hills]."** (Brief in Support of Defendants' Motion for Summary Disposition, etc., p 6) After about 15 years, in 2003 or 2004, Oakland Hills promoted Ms. Cromer to housekeeping supervisor. In about 2015, **Defendants began to make her work life hell. They abused, harassed, demoted, and discharged her. They promoted a white employee with far less experience and seniority to replace her as housekeeping supervisor. Despite their contrary contentions, they did all these based on her race. Their ostensible reasons for their actions were pretexts for racial discrimination.** They did not treat any comparable white supervisor that way. Therefore, Defendants are liable for racial discrimination and resulting damages.

## COUNTER-STATEMENT OF FACTS-PART I

On or about November 29, 1989, Plaintiff Cromer, an African-American woman, began working at Defendant Oakland Hills first in its indoor pantry area and outdoor refreshments area and from 1991 in its Housekeeping Department as a housekeeper. (Exhibit 1, 11/29/89 Hiring

Document; Exhibit 2, 10/9/18 Deposition of Glenda Cromer Excerpts **[Cromer Dep I]**, pp 32-34; Exhibit 3, 12/26/18 Affidavit of Glenda Cromer **[Cromer Affidavit]**, para 3) Defendant Oakland Hills did not have any known written employee evaluation system. (Exhibit 4, 6/11/18 Defendants' Discovery Responses Excerpts, Response 22; Exhibit 5, 10/8/18 Deposition of David Walker Excerpts **[Walker Dep],** pp 21, 23) **But Plaintiff Cromer did receive a positive semi-formal evaluation. There, Defendant OHCC evaluated her as exceeding its standards.** (Exhibit 6, 6/6/07 Performance Evaluation: Exceeds Standards) For at least 20 years, she worked there without any problems.

In 2003 or 2004, Defendant Oakland Hills promoted Plaintiff Cromer to Housekeeping Department Supervisor. From then until November 2016, she was Defendant Oakland Hills' only African-American supervisor. As supervisor, she trained housekeeping employees, ordered linen and cleaning supplies, and scheduled housekeeping employees work periods. (Exhibit 3, Cromer Affidavit, paras 3-7) **But Defendant Oakland Hills did not treat her like a supervisor. From the beginning of her supervisory term until the end, Defendant Oakland Hills located her office in several demeaning, insulting, and undesirable areas.** No other known similarly situated white supervisor had to work under similar conditions. (Exhibit 3 Cromer Affidavit, paras 8-11) **Mr. Berlin forced her to go outside and clean outside furniture and wash chairs in the cold.** They gave other housekeepers inside jobs. Nobody spoke up. **In early 2016, they made her clean the whole building by herself. They refused to let anyone help her. They refused to bring someone else back from holiday leave.** She did the best she could by herself. **No known white supervisor received such treatment.** (Exhibit 3, Cromer Affidavit, para 12)

Defendants did not support her in dealing with employee situations. In mid-August 2015, according to Defendant Oakland Hills' General Manager, Chris Berlin, Ms. Cromer asked him to

set up a meeting to discuss and resolve issues that she was having regarding a supervised employee: Erica Pine. (Exhibit 7, 8/19/15 Chris Berlin Memo) "He [Mr. Berlin] called me [to his] office and said that he saw Erica Pine walking down Maple Street. And he asked me why. And I said, she needed to leave early because she had a flat tire[,] and I let her go home early." (Exhibit 2, Cromer Dep I, p 67) Mr. Berlin told Ms. Cromer that she should have written Ms. Pine up. **Ms. Cromer replied that "this was her first time being late[,] and I didn't have a problem with it[,] because [there] wasn't that much to do that morning…."** (Exhibit 2, Cromer Dep I, p 67; Exhibit 7, 8/19/15 Chris Berlin Memo, p 1; Exhibit 8, 9/4/15 Glenda Cromer Memo) Ms. Cromer had authority to direct employees working under her to leave early or stay late. Letting Ms. Pine leave early did not violate company policy. (Exhibit 2, 10/9/18 Cromer Dep I, p 68) At an August 14, 2015 meeting on the issue, **Mr. Berlin was "yelling and screaming at me…he kept calling me up to the office…he wrote me up saying I was a bully[,] and I didn't know how to do my job.** And so he asked me to sign some papers[,] and I refused to sign them. And when I refused to sign them[,] he banged on the table." (Exhibit 2, Cromer Dep I, pp 65-66) Mr. Berlin ordered her to evaluate her employees within 90 days on pain of discharge and "ordered me to go to a seminar." (Exhibit 2, Cromer Dep I, p 66; Exhibit 7, 8/19/15 Chris Berlin Memo; Exhibit 9, 9/8/15 Improvement Action Plan) **Defendant Walker did not recall any requirement for him to evaluate the employees working under him.** (Exhibit 5, Walker Dep, p 37) Ms. Cromer attended the seminar and evaluated the female employees working under her. She tried to meet with Defendant Walker to show him her completed evaluations once a week, but he was too busy. After the 90 day period, she showed him her evaluations. She told him that she wanted to meet with Mr. Berlin on this. Neither

Defendant Walker nor Mr. Berlin got back to her. (Exhibit 2, Cromer Dep I, p 70; Exhibit 10, Seminar Certificate)

**COUNTER-STATEMENT OF FACTS-PART II**

On March 16, 2016, Mr. Berlin, Ms. Cromer, Defendant Walker, and Ms. Vecillio met to discuss a situation, where Ms. Cromer could not complete evaluations on her supervised employees, because her department was short one employee, and she did not have time to complete the forms. She was supervising three employees. Ms. Pine was relatively new, and Ms. Cromer was still training her. **Also, Ms. Pine had an attitude problem, and she was giving Ms. Cromer a hard time. Defendant Oakland Hills later discharged Ms. Pine. Further, Ms. Cromer had to follow Ms. Pine, review her work, and often do it right or complete it.** The meeting participants discussed some ideas for remedying the problem. Ms. Cromer had no problem with these ideas. (Exhibit 3, Cromer Affidavit, para 14; Exhibit 11, 3/16/16 Chris Berlin Memo; Exhibit 5, 10/8/18 Walker Dep, p 77) On March 25, 2016, Mr. Berlin, Ms. Vecillio, and Defendant Walker accused her of talking down to and belittling an employee. Ms. Cromer did not do so and stood by her position. After supposedly investigating the matter, they gave her a written warning and threatened to terminate her. **But she refused to sign it, because she had not talked down to or belittled the employee.** (Exhibit 3, Cromer Affidavit, para 16; Exhibit 12, 3/31/16 Written Warning)

**In November 2016, Defendant Walker, Mr. Berlin, and Ms. Vecillio kept abusing Ms. Cromer. They kept calling her to come into Defendant Walker's or Mr. Berlin's office and yelling and screaming at her about her housekeeping duties. They had two other employees, Valbona Filipi and Julie Mero, yell and scream at her, too. Later, some temporary employees started yelling and screaming at her. When she complained about**

**this abuse repeatedly, Defendants, did nothing about it.** Another employee, Paul Boshaw, did not want to help Ms. Cromer clean some glue off the floor. So, he accused her of belittling him. Without any real investigation, they wrote her up for that. They removed the thermostat so she could not control her office's heat. **Also, in November 2016, Mr. Bowman told her that Defendant Walker had pushed a trash cart into her office.** Defendant Walker said something about not wanting to keep trash carts in the employees bathroom any more. **No known similarly situated white supervisor received such treatment.** (Exhibit 3, Cromer Affidavit, paras 17-18)

On May 13, 2016, Mr. Berlin "investigated" Ms. Cromer's racial discrimination and harassment complaints and interviewed her. During her interview, Ms. Cromer responded that Oakland Hills management, including Defendant Walker, Mr. Berlin, and Human Resources, "would not listen to her[.]" When Mr. Berlin interviewed other employees about Ms. Cromer's racial discrimination and harassment complaints, these employees responded that they had not heard any "one-on-one" interactions between Defendant Walker and another employee, Paul Boshaw, and Ms. Cromer and thus **"were not necessarily in a position to know."** (Exhibit 13, 5/13/16 Chris Berlin Memo) Of course, Mr. Berlin found no racial discrimination or harassment. **Next, he found Ms. Cromer's racial discrimination and harassment allegations to be "false accusations" and cited Defendant Oakland Hills' "employment policy on false accusations[.]" Though not finding her accusations malicious, he threatened "termination." Lastly, he threatened that if she charged that any Oakland Hills employee had committed racial discrimination and harassment, and if an unknown person or persons did not find her charge meritorious, he would consider terminating her.** (Exhibit 13, 5/13/16 Chris Berlin Memo, p 2)

On July 28, 2017, Defendant Walker accused Plaintiff Cromer of substandard work performance. For example, he contended that in 2016 and 2017, he had instructed Plaintiff Cromer and another employee to stop using vacuum cleaners with beater bars on high end wool carpets, because beater bar vacuum cleaners would damage the carpets. He contended that contrary to his directions, on July 4, 6, and 8, 2017, she had been using a beater bar vacuum on these carpets. (Exhibit 14, 7/28/17 Termination Memo) Ms. Cromer does not recall using beater bar vacuum cleaners on these carpets. **Rather, she recalls using the vacuum cleaners that Defendant Walker had instructed her to use. These heavy vacuum cleaners removed fibers from the carpets.** (Exhibit 3, Cromer Affidavit, para 21) Almost all of Defendant Walker's termination memorandum is untrue. Using micro fiber rags to clean the mirrors was Ms. Cromer's idea. When she and others clean rooms, like bathrooms, country club members and employees can and do come in and use them right after their cleanings. Further, she cleaned all her assigned areas, including bathrooms, and did not leave any areas dirty or uncleaned. Almost all the time, Ms. Cromer and her housekeeping employees worked well together as a team. (Exhibit 14, 7/28/17 Termination Memo; Exhibit 3, Cromer Affidavit, para 22; Exhibit 15, Cromer Supervisory Documents)

**COUNTER-STATEMENT OF FACTS-PART III**

On June 27, 2016, Plaintiff Cromer claimed that Defendants Oakland Hills and Walker had racially harassed her and made her work environment hostile: **"[Before] and since April 13, 2016," she had complained to Ms. Vecillio three or four times and to Mr. Berlin three or four times that Defendant Walker had done both. For example, Defendant Walker told her "that he will move me to the bathroom and put a cage around me[,]" and that she was "`ADD and [he] would put [her] on You-Tube[.]'"** (Exhibit 16, 6/27/16 EEOC Claim; Exhibit

3, Cromer Affidavit, para 30) On November 9, 2016, Defendants Oakland Hills and Walker demoted Plaintiff Cromer from housekeeping department supervisor to housekeeper. **Defendants promoted a white employee, William Bowman, "with less seniority to a management position similar in duties to [her] supervisory position and informed [her] that he would `shadow' [her] to assist him in learning his new position."** (Exhibit 17, 3/22/18 Plaintiff's Responses to Defendant Oakland Hills' Discovery Requests Excerpts **[Plaintiff's Discovery Responses]**, Response 22; Exhibit 3, Cromer Affidavit, paras 23, 24, 30, 32; Exhibit 5, Walker Dep, p 58) From November 2016, Defendant Oakland Hills "heavily scrutinized" her work. (Exhibit 18, 8/10/17 EEOC Claim. Accord, Exhibit 3, Cromer Affidavit, para 32)

Defendant Walker's demotion of Plaintiff Cromer resulted from racial discrimination. To Defendants, it ostensibly resulted from their adoption of the new Tier System covering engineering and housekeeping employees. Defendant Walker mentioned that the new tier system would displace supervisors and cause demotions of supervisors. (Exhibit 3, Cromer Affidavit, para 24) Defendant Oakland Hills stated that it "changed to the tier system and moved supervision of the housekeeping staff to Paul Boshaw [a white male.]" (Exhibit 4, 6/11/18 Defendants' Discovery Responses, Response 34) **The Tier System included four tiers. "Tier 1 would be your basic entry level…house services, light maintenance….Tier 2 was a little more advanced training in maintenance needs, more knowledge in different areas. Tier 3 [required] a skill set in a specific field….Tier 4 is…a master's level or someone who has completed several years of online training." Housekeeping employees were almost always in Tier 1. Tier 2 employees were beginning engineers. Tier 3 employees were senior engineers, supervisory or nonsupervisory.** According to Defendant Walker, Tier 2 required internal or external training. The external training could require attending a community college or a specialized school. (Exhibit

5, Walker Dep, pp 97-98) **Only Tier 1 included housekeeping responsibilities in its capabilities description: "Perform house services on all facilities on OHCC property."** (Exhibit 19, T1 Document) Tier 2's description included: "Perform services and repair for all facilities, equipment, and furnishings on OHCC grounds." (Exhibit 19, T2 Document) Tier 3's description included: "Ability to manage GL accounts. Be responsible for managing a budget and completion of jobs in your specialized field." (Exhibit 19, T3 Document) Tier 4's description included the same capabilities description with expanded responsibilities. (Exhibit 19, T4 Document)

After the meeting, the attending employees had to read and sign at least one tier document stating that they were qualified to be Tier 1, Tier 2, Tier 3, or Tier 4 employees. **Defendant Walker told Plaintiff Cromer that she had to work her way back up from Tier 1 to Tier 4 to be a supervisor. Plaintiff Cromer signed only the Tier 1 document, because she was not licensed or experienced enough to do certain Tier 2 functions, she could not do certain Tier 2 functions, and these reasons extended even more to Tiers 3 and 4. So, her demotion went through.** (Exhibit 3, Cromer Affidavit; paras 24, 25; Exhibit 17, 3/22/18 Plaintiff's Discovery Responses, Response 25; Exhibit 20, Tier System Documents, 12/9/16 Document) Plaintiff Cromer never requested additional training in the Tiers 2, 3, and 4 fields, because such training would require extensive and expensive formal education that she could not afford. **Defendants never offered her any in-house training in the Tiers 2, 3, and 4 fields. Defendants never informed her that any training in these areas was available. Defendant Oakland Hills never offered to reimburse her for any such training.** (Exhibit 3, Cromer Affidavit, paras 27-28) **Though Defendant Walker ostensibly left open the possibility that Plaintiff Cromer could become a supervisor again, that possibility was an illusion.**

**According to Defendant Oakland Hills, "[t]he tier system made it a requirement to be a higher tier before you had supervisory responsibilities, and Plaintiff only had tier one [experience and training]"** (Exhibit 4, 6/11/18 Defendants' Discovery Responses, Response 34) **Indeed, Plaintiff Cromer had about 24 years of housekeeping experience and about 12 years of supervisory experience.** (*Infra*, pp 2-4) **But under the Tier System, she could not even supervise housekeepers.**

Ms. Cromer saw Defendant Oakland Hills honor several employees on their 10th work anniversaries. When her 10th work anniversary came, Defendant Oakland Hills did not honor her. Instead, Ms. Vecillio told her that she had to wait for her 15th work anniversary to receive any honors. When Ms. Cromer's 15th work anniversary came, Defendant Oakland Hills did not honor her. Instead, Ms. Vecillio told her that she had to wait for her 20th work anniversary to receive any honors. When Ms. Cromer's 20th work anniversary came, Defendant Oakland Hills did not honor her. Instead, Ms. Vecillio told her that she had to wait for her 25th work anniversary. When Ms. Cromer's 25th work anniversary came, Ms. Vecillio told her that she had to wait for her 30th work anniversary to receive any honors. (Exhibit 3, Cromer Affidavit, paras 37-44)

On August 9, 2017, Defendant Oakland Hills discharged Plaintiff Cromer from her employment. (Exhibit 21, 8/9/17 Employee Information Change Form) On June 27, 2016, Plaintiff Cromer had claimed racial discrimination and retaliation to the EEOC and the MDCR based on Defendants' demotion and harassment of her. (Exhibit 16, 6/27/16 EEOC Claim) On August 11 & 15, 2016, the EEOC and the MDCR dismissed her claims for lack of jurisdiction arising from Defendant Oakland Hills' private club status. (Exhibit 16, 8/11/16 EEOC Dismissal and Notice of Rights & 8/15/16 MDCR Notice of Disposition and Order of Dismissal) On

November 10, 2016, Plaintiff Cromer had again claimed racial discrimination and retaliation to the EEOC. (Exhibit 22, 11/10/16 EEOC Claim) On June 27, 2017, after investigating, the MDCR found insufficient evidence to proceed and dismissed her claims. (Exhibit 22, 6/27/17 MDCR Notice of Disposition and Order of Dismissal) On August 8, 2017, the EEOC again dismissed her claims for lack of jurisdiction arising from Defendant Oakland Hills' private club status. (Exhibit 22, 8/8/17 EEOC Dismissal and Notice of Rights) On August 10, 2017, Plaintiff Cromer claimed that Defendant Oakland Hills had retaliated for engaging in a protected activity and mentioned her dischage. (Exhibit 18, 8/10/17 EEOC Claim) On August 22, 2017, the EEOC again dismissed her claims for lack of jurisdiction arising from Defendant Oakland Hills' private club status. (Exhibit 18, 8/22/17 EEOC Dismissal and Notice of Rights) On November 22, 2017, Plaintiff Cromer sued Defendants for Michigan Elliott-Larsen Civil Rights Act violations (Count I) and federal Title VII Civil Rights Act of 1964 violations (Count II) (Exhibit 23, 11/22/17 Complaint)

## ARGUMENT

### THIS COURT SHOULD DENY THE MOTION UNDER MCR 2.116(C)(7), BECAUSE RES JUDICATA DOES NOT BAR PLAINTIFF CROMER'S FEDERAL TITLE VII CLAIMS ARISING FROM HER THIRD EEOC CLAIM, AND BECAUSE RES JUDICATA DOES NOT BAR HER STATE ELLIOTT-LARSEN CIVIL RIGHTS ACT CLAIMS.

When considering an MCR 2.116(C)(7) motion, the Court evaluates the pleadings, affidavits, depositions, admissions, and documents that the parties present with their motion and response. *Horace v City of Pontiac,* 456 Mich 744, 749; 575 NW2d 762 (1998), *Linton v Arenac County Road Commission,* 273 Mich App 107, 111; 729 NW2d 883 (2006), *lv den* 477 Mich 1114; 729 NW2d 855 (2007). The Court accepts all well-pleaded complaint allegations as true and construes them in the plaintiff's favor, unless the parties present documentary evidence

contradicting them. *Id*, *RDM Holdings, Ltd v Continental Plastics Co,* 281 Mich App 678, 687; 762 NW2d 529 (2008). **"`The Court must consider the documentary evidence in a light most favorable to the nonmoving party.'"** *Zwiers v Growney,* 286 Mich App 38, 42; 778 NW2d 81 (2009), *lv den* 486 Mich 1058; 783 NW2d 514 (2010), quoting *RDM Holdings, Ltd*, 281 Mich App 678, 687.

This case involves res judicata. For res judicata to apply, the proponent must show the following elements: (1) The first action ends with a final decision on the merits; (2) Both actions involve the same parties or their privies; and (3) The claim or defense in the second action was or could have been resolved in the first action. *Adair v Michigan,* 470 Mich 105, 121; 680 NW2d 386 (2004), *Marketplace of Rochester Hills Parcel B, LLC v Comerica Bank,* 309 Mich App 579, 588; 873 NW2d 332 (2015), *vacated in part on other grounds* 498 NW2d 934; 871 NW2d 710, 711 (2015). **The res judicata proponent has the burden of proving these elements.** *Barraga v State Tax Commission,* 466 Mich 264, 269; 645 NW2d 13 (2002), *Garrett v Washington,* 314 Mich App 436, 441; 886 NW2d 762 (2016). Michigan recognizes broad res judicata "Res judicata bars `every claim *arising from the same transaction* that the parties, exercising reasonable diligence, could have raised, but did not.'" *Marketplace of Rochester Hills Parcel B,* 309 Mich App 579, 588, quoting *Adair*, 470 Mich 105, 123 (*Marketplace* Court's emphasis).

In Title VII cases, EEOC decisions do not operate as claim preclusion. *See University of Tennessee v Elliott*, 478 US 788, 796; 106 S Ct 3220; 92 L Ed 2d 635 (1986) (Congress expressed its intent to forbid claim and issue preclusion in Title VII suits), *Van Wulfen v County of Montmorency*, 428 Fed Appx 531, 532 (CA 6, 2011), *Hillman v Shelby County Government*, 297 Fed Appx 450, 453 (CA 6, 2008), *Hicks v Floyd County Board of Education*, 99 Fed Appx

603, 605 (CA 6, 2004), 42 USC Sec 2000e-5(b). *See also, Astoria Federal Savings & Loan Association v Solimino,* 501 US 104, 107; 111 S Ct 2166; 115 L Ed 2d 96 (1991) (The EEOC "`cannot adjudicate claims….'" ) As a rule, an agency decision can have claim preclusion effect when the agency was acting in a judicial capacity, the agency resolved disputed facts before it, and the parties had "an adequate opportunity to litigate…." *US v Utah Construction & Mining Co,* 384 US 394, 422; 86 S Ct 1545; 16 L Ed 2d 642 (1966). In the Title VII context, unreviewed state agency decisions are not res judicata. *Elliott*, 478 US 788, 796, *Hillman*, 297 Fed Appx 450, 453. In the Elliott-Larsen Civil Rights Act context, even after an MDCR insufficient evidence decision, a plaintiff has a right to sue in a judicial forum. *Straghan v Mutual Aid & Neighborhood Club, Inc,* ___ Mich ___; 285 NW2d 297 (1979), *Holmes v Haughton Elevator Co,* 404 Mich 36, 41-43; 272 NW2d 550 (1978), *Hillman v Consumers Power Co,* 90 Mich App 627, 630; 282 NW2d 422 (1979).

Applying these principles here leads to the conclusion that the EEOC and MDCR determinations and dismissals do not bar her claims. The MDCR determinations are unreviewed state agency decisions. The MDCR did not hold any hearings. Thus, the MDCR determinations are not res judicata. Likewise, the EEOC dismissals are not res judicata. The EEOC did not resolve any claims on the merits. Plaintiff Cromer had no opportunity to introduce evidence or otherwise litigate her claims in the EEOC. It did not hold any hearings. Therefore, she could not have resolved her claims before either agency. The MDCR determinations do not foreclose her right to litigate in court. She did not choose to litigate in the MDCR. Accordingly, the EEOC and MDCR determinations and dismissals are not res judicata on her claims.

**THIS COURT SHOULD DENY THE MOTION UNDER MCR 2.116(C)(8), BECAUSE HER COMPLAINT STATES VALID TITLE VII CLAIMS ARISING FROM HER THIRD EEOC CLAIM, AND BECAUSE HER COMPLAINT STATES VALID STATE ELLIOTT-LARSEN CIVIL RIGHTS ACT CLAIMS.**

A motion to dismiss under MCR 2.116(C)(8) tests the complaint's legal sufficiency by the pleadings alone. *Kuzmar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008), *Corley v Detroit Board of Education,* 470 Mich 274, 277; 681 NW2d 342 (2004). But if the court and the parties rely on evidence outside the pleadings, MCR 2.116(C)(8) does not apply, while MCR 2.116(C)(10) does apply. *Silberstin v Pro-Golf of America, Inc,* 278 Mich App 446, 458; 750 NW2d 615 (2008), *lv den* 483 Mich 886; 759 NW2d 882 (2009), *Driver v Hanley (On Remand),* 226 Mich App 558, 562; 575 NW2d 31 (1997), *lv den* 459 Mich 887; 587 NW2d 283 (1998). The court must accept all well-pleaded complaint allegations and reasonable inferences from them as true. *Kuzmar,* 481 Mich 169, 176, *Adair,* 470 Mich 105, 119. The court construes all factual allegations in the light most favorable to the nonmoving party. *Kuzmar,* 481 Mich 169, 176, *Maiden v Rozwood,* 461 Mich 109, 119; 597 NW2d 817 (1999). For a court to grant the motion, a claim must be "`so clearly unenforceable that no factual development could possibly justify recovery.'" *Kuzmar,* 481 Mich 169, 176, quoting *Maiden,* 461 Mich 109, 119.

If the moving party moves for summary disposition under MCRs 2.116(C)(8), (9), or (10), the trial court must permit the non-moving party to amend his/her/its pleading, unless the proposed amendment is futile. MCR 2.116(I)(5), *Ormsby v Capital Welding, Inc,* 471 Mich 45, 53; 684 NW2d 320 (2004).

The employment racial discrimination plaintiff can prove his/her case with direct or circumstantial evidence. If using circumstantial evidence, the *McDonnell Douglas* burden shifting analysis applies. *Hazle v Ford Motor Co,* 464 Mich 456, 462-467; 628 NW2d 515 (2001). Under *McDonnell Douglas,* the plaintiff must first show a prima facie racial discrimination case. The required prima facie case elements are:

1. He or she belongs to a protected class of persons.

2. He or she suffered an adverse employment action.

3. She was qualified for the position at issue.

4. The defendant's adverse action arose from circumstances giving rise to an unlawful discrimination inference.

*Hazle,* 464 Mich 456, 463, *Lytle v Malady,* 458 Mich 153, 172-173; 579 NW2d 906 (1998). "When the plaintiff `has sufficiently established a prima facie case, a presumption of discrimination arises.'" *Hazle,* 464 Mich 456, 463, quoting *Lytle,* 458 Mich 153, 173. If the plaintiff shows a prima facie case, the burden shifts to the defendant to produce sufficient evidence to show that its actions arose from "`a legitimate, nondiscriminatory reason.'" *Hazle,* 464 Mich 456, 464, *Lytle,* 458 Mich 153, 173. Then, the plaintiff has the burden of showing that the defendant's articulated reason was a pretext for discrimination, and that unlawful discrimination was a motivating factor for the defendant's decision at issue. *Hazle,* 464 Mich 456, 465-466. To show pretext and motivating factor, the plaintiff must "show that she was treated differently from similarly situated employees." *Lytle,* 458 Mich 153, 178.

Plaintiff Cromer has pleaded all required recovery elements. She has pleaded that she is an African-American woman and thus belongs to a protected class of persons. (Exhibit 23, 11/22/17 Complaint, para 10). She has pleaded several adverse employment actions. (Exhibit 23, 11/22/17 Complaint, paras 20-55) She has pleaded her qualifications for continued supervisory position and employment. (Exhibit 23, 11/22/17 Complaint, paras 11-14) She has pleaded that Defendants' discrimination arose from circumstances giving rise to an unlawful discrimination inference. (Exhibit 23, 11/22/17 Complaint, paras 20-55) Based on discovery evidence, she can move to amend her Complaint to add more materials and thus conform to the evidence. Accordingly, summary disposition based on MCR 2.116(C)(8) is unjustified.

**THIS COURT SHOULD DENY THE MOTION UNDER MCR 2.116(C)(10), BECAUSE GENUINE ISSUES OF MATERIAL FACT ON HER CLAIMS ARE PRESENT. RELEVANT MCR 2.116(C)(10) PROCEDURAL LAW.**

A motion for summary disposition under MCR 2.116(C)(10) tests whether a claim or defense has genuine factual support. *Corley*, 470 Mich 274, 278, *Maiden,* 461 Mich 109, 119. The court evaluates the admissions, affidavits, depositions, and other documents "then filed in the action or submitted by the parties (the record) to determine whether a genuine issue of material fact is present." MCR 2.116(G)(5). *Accord, Id* at 119-120. **The court evaluates the record in the light most favorable to the nonmoving party.** *Allison v AEW Capital Management, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008), *Corley*, 470 Mich 274, 278, *Maiden,* 461 Mich 109, 120. **The court "makes all reasonable inferences in the nonmoving party's favor."** *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618; 537 NW 2d 185 (1995) (our emphasis). *Accord*, *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 91; 597 NW2d 517 (1999). **The court gives "the benefit of [any] reasonable doubt to the opposing party."** *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003) (our emphasis). *Accord, Bertrand*, 449 Mich 606, 618.

**Michigan appellate courts are liberal in finding genuine issues of material fact.** *Lytle,* 458 Mich 153, 176-177, *Livonia v Dept of Social Services*, 423 Mich 466, 529-530; 378 NW2d 402 (1985), *Jimkoski v Shupe,* 282 Mich App 1, 5; 763 NW2d 1 (2008), *Benton v Dart Properties, Inc,* 270 Mich App 437, 444; 715 NW2d 335 (2006). The court does not find facts or weigh witness' credibility. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994), *Nesbitt v American Community Mutual Insurance Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999). "A genuine issue of material fact exists when the record…leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich 177, 183.

Plaintiff has presented sufficient evidence on all recovery elements. Defendants have

admitted that Plaintiff Cromer was an African-American woman and thus under the 1964 Civil Rights Act, Title VII, and the Elliott-Larsen Civil Rights Act, belongs to a protected class of persons. (Exhibit 23, 11/22/17 Complaint, para 10; Exhibit 24, 1/18/18 Defendants' Answer to Complaint, para 10) Plaintiff Cromer has also presented evidence that she suffered adverse employment actions. Examples include discharge, reprimand, demotion from housekeeping supervisor to housekeeper, promotion of a white employee with much less housekeeping seniority and experience to housekeeping supervisor over her, the tier system preventing her from becoming a supervisor again de facto, abusing her, harassing her, and making her work under demeaning conditions. (Exhibit 3, Cromer Affidavit, paras 6-10, 12-14, 19-28; Exhibit 2, Cromer Dep I, pp 65-66, 78-79, 82) Further, Plaintiff Cromer has presented evidence that she was qualified to be housekeeping supervisor. Examples include her over 20 years of housekeeping experience, her 12-14 years of supervisory experience, her 12-13 years of training housekeeping employees, her one year of refreshment stand supervisory experience, and her correction of Erica Pine's work. (Exhibit 3, Cromer Affidavit, paras 3, 4, 11; Exhibit 2, Cromer Dep I, pp 33, 34)

Lastly, Plaintiff Cromer has presented evidence that the above adverse actions arose from circumstances giving rise to an unlawful discrimination inference. She was the only African-American supervisor. She never knew or even heard of Defendant Oakland Hills abusing, discharging, harassing, reprimanding, or otherwise mistreating any similarly situated white supervisors like Defendant Oakland Hills did to her. (Exhibit 3, Cromer Affidavit, paras 13, 17, 18, 21, 31, 33, 34, 35, 45) As she said: "I'm the only person they [Defendants] kept picking on….Out of 20 some years, all of a sudden, I can't do my job. You don't need a degree to do housekeeping. I was good enough….Y'all said I was doing an excellent job. And all of a sudden,

now I'm doing a terrible job." (Exhibit 2, Cromer Dep I, p 79) Defendants' Tier System displaced only her. Defendants refused to honor her alone for her years of service. Thus, Defendant Oakland Hills' wrongful treatment arose from circumstances giving rise to an unlawful treatment inference. Therefore, Plaintiff Cromer has presented sufficient evidence for a reasonable jury to find unlawful racial discrimination.

Defendants' contrary arguments are meritless. Defendants' assertion to have designed and implemented the Tier System with no intent to discriminate and to increase efficiency ignores that it deprived their only African-American supervisor of her supervisory position and blocked any real opportunity for her to become a supervisor again. Defendants' contention that the Tier System abolished the housekeeping supervisory position overlooks that after the Tier System's inauguration, Defendants appointed a while male with far less seniority and experience, Paul Bowman, as housekeeping supervisor. Defendants' assertion that Bowman was assistant engineering supervisor and was already housekeeping supervisor (Exhibit 5, Walker Dep, p 58) ignores Defendant Walker's statement that he would shadow Plaintiff Cromer to help Bowman learn his new duties (Exhibit 3, Cromer Affidavit, para 23), and that Plaintiff Cromer had been and functioned as housekeeping supervisor since 2003-204.

Defendants' position that substandard performance caused and rationalized their discharge and reprimand ignores their failure to offer her any supervisory training, except one class to punish her, in her 12 + years as a supervisor. Defendants' position that Plaintiff Cromer has provided no credible or specific evidence of racial discrimination or retaliation overlooks her citation of specific instances of racial abuse, harassment, reprimand, and discharge. These include Defendants' heavy scrutiny of her work after her November 2016 EEOC claim. Defendants' claim that Defendants' argument that she has not provided any other witness

statements besides her own overlooks that the most crucial events had few participants and witnesses, and that "[u]nder Michigan law, the number of witnesses which a party produces at trial is quite irrelevant in determining where the truth lies." *People v Bender,* 124 Mich App 571, 573-574; 335 NW2d 85 (1983). *Accord, People v Phillips,* 112 Mich App 98, 109-110; 315 NW2d 868 (1982). Accordingly, summary disposition is unjustified.

**THIS COURT SHOULD DENY THE MOTION FOR SANCTIONS UNDER MCR 2.114(F) [Now MCR 1.109(E)((7)] AND MCR 2.625(A)(2), BECAUSE PLAINTIFF CROMER'S HAS PROVIDED EVIDENCE TO SUPPORT HER CLAIMS.**

MCR 1.109(E)(7), MCR 2.625(A)(2), and MCL 600.2591 provide for award of sanctions, attorney fees, and costs to parties, where the opposing party has filed frivolous claims. Frivolous means that "[t]he party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party[, t]he party had no reasonable basis to believe that the facts underlying that party's legal position were …true[, or] that [t]he party's legal position was devoid of arguable legal merit." MCL 600.2591. Michigan courts evaluate whether a claim or defense was frivolous under the above statute "based on the circumstances" existing, when the party asserted the claim or defense. *Jerico Construction, Inc v Quadrants, Inc,* 257 Mich App 22, 36; 666 NW2d 310 (2003), *lv den* 463 Mich 1003; 675 NW2d 37 (2004), *In Re Attorney Fees and Costs,* 233 Mich App 694, 702; 593 NW2d 589 (1999), *lv den sub nom Septer v Tjarksen,* 461 Mich 951; 607 NW2d 726 (2000). **"We will not construe MCL 600.2591; MSA 27A.2591 in a manner that has a chilling effect on advocacy or prevents the filing of all but the most clear-cut cases. Nor will we construe the statute in a manner that prevents a party from bringing a difficult case or asserting a novel defense, or penalizes a party whose claim initially appears viable but later becomes unpersuasive."** *Louya v William Beaumont Hospital,* 190 Mich App 151, 163; 475 NW2d 434 (1991) (our

emphasis). *See also,* Exhibits 26-29 (approving Louya) **That a claim is not successful does not mean that it was frivolous.** *Jerico Construction,* 257 Mich App 22, 36, *Hansen Family Trust v FGH Industries, LLC,* 279 Mich App 468; 760 NW2d 526 (2008).

As a rule, Title VII exempts private clubs or establishments. *Daniel v Paul*, 395 US 298, 301; 89 S Ct 1697; 23 L Ed 2d 318 (1969), *Wolgat v Tam-O-Shanter Country Club*, 1998 US App Lexis 2098 (CA 6, 1998). But Title VII applies to those "not in fact open to the public." 42 USC Sec 2000a(e). The exemption does not apply to those with certain ownership and governance attributes. *See Daniel,* 395 US 298, 301 (As Lake Nixon Club does not have the necessary attributes, Title VII applies).

Plaintiff Cromer's claims are far from frivolous. She has provided substantial supporting evidence. She has provided her detailed affidavit, her deposition testimony, certain Defendant Walker deposition testimony, and other discovery documents and materials to support her claims. Further, she retained counsel just before her third EEOC claim's right to sue notice deadline. (See Exhibit 25, 10/20/18 Glenda Cromer Document) Additionally, some documents, facts, and information became known to her counsel only through discovery. Leading examples are Tier System documents, facts, and information. Also, she has presented supporting private club qualification evidence. (Exhibit 31, Fund Raiser) On the res judicata and valid claim issues, she has presented substantial positions. Thus, frivolous action sanctions are unwarranted.

## CONCLUSION

THEREFORE, PLAINTIFF GLENDA CROMER respectfully requests this Court to deny the motion with prejudice.

Dated: December 26, 2018

/s/ Howard Yale Lederman
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## CERTIFICATE OF SERVICE

I certify that I served copies of Plaintiff's Response to Defendants' Motion for Summary Disposition & Sanctions, Brief in Support, Exhibits, and this Certificate of Service on December 26, 2018 via this Court's electronic filing system on:

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## LIST OF EXHIBITS

Exhibit 1, 11/29/89 Hiring Document.

Exhibit 2, 10/9/18 Deposition of Glenda Cromer Excerpts **[Cromer Dep I]**.

Exhibit 3, 12/26/18 Affidavit of Glenda Cromer **[Cromer Affidavit]**)

Exhibit 4, 6/11/18 Defendants' Discovery Responses Excerpts.

Exhibit 5, 10/8/18 Deposition of David Walker Excerpts **[Walker Dep]**.

Exhibit 6, 6/6/07 Performance Evaluation: Exceeds Standards.

Exhibit 7, 8/19/15 Chris Berlin Memo.

Exhibit 8, 9/4/15 Glenda Cromer Memo. & 9/4/15 Chris Berlin Memo.

Exhibit 9, 9/8/15 Improvement Action Plan.

Exhibit 10, Seminar Certificate.

Exhibit 11, 3/16/16 David Walker Memo.

Exhibit 12, 3/31/16 Written Warning.

Exhibit 13, 5/13/16 Chris Berlin Memo.

Exhibit 14, 7/28/17 Termination Memo.

Exhibit 15, Cromer Supervisory Documents.

Exhibit 16, 6/27/16 EEOC Claim, 8/11/16 EEOC Dismissal and Notice of Rights & 8/15/16 MDCR Notice of Disposition and Order of Dismissal.

Exhibit 17, 3/22/18 Plaintiff's Responses to Defendant Oakland Hills' Discovery Requests Excerpts **[Plaintiff's Discovery Responses]**.

Exhibit 18, 8/10/17 EEOC Claim, & 8/22/17 EEOC Dismissal and Notice of Rights.

Exhibit 19, Tier System Category Descriptions.

Exhibit 20, Tier System Documents.

Exhibit 21, 8/9/17 Employee Information Change Form.

Exhibit 22, 11/10/16 EEOC Claim, 8/8/17 EEOC Dismissal and Notice of Rights, & 6/27/17 MDCR Notice of Disposition and Order of Dismissal.

Exhibit 23, 11/22/17 Complaint.

Exhibit 24, 1/18/18 Defendants' Answer to Complaint.

Exhibit 25, 10/20/17 Glenda Cromer Document.

Exhibit 26, *Ma v Weber,* Unpub Opin of the Michigan Court of Appeals, Docket No 330380, et al, 2017 Mich App Lexis 968; 2017 WL 2607957 (June 15, 2017) *36-37, *lv den* 501 Mich App 982; 907 NW2d 558 (2018).

Exhibit 27, *Quelas v Daimler Trucks of North America, LLC,* Unpub Opin of the Michigan Court of Appeals, Docket No 326290, et al, 2017 Mich App Lexis 442 (March 21, 2017) *29-30.

Exhibit 28, *Ashley Livnonia A & P v Livonia A & P,* Unpub Opin of the Michigan Court of Appeals, Docket No 319288, 2015 Mich App Lexis 1217 (June 16, 2015) *18-19.

Exhibit 29, *In Re Estate of Krane,* Unpub Opin of the Michigan Court of Appeals, Docket N 312236, et al, 2014 Mich App Lexis 218 (February 4, 2014) *4.

Exhibit 30, 8/23/16 David Walker Memo.

Exhibit 31, Defendant Oakland Hills Fund Raiser Document.