APPENDIX A – E

NOT RECOMMENDED FOR PUBLICATION

No. 24-1643

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 28, 2025
KELLY L. STEPHENS, Clerk

NINTU XI GILMORE-BEY, Plaintiff-Appellant, v. HENRY MELTSER, Supervisor/President/Owner; FIDELITY TRANSPORTATION OF MI, INC., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

Before: SUHRHEINRICH, WHITE, and RITZ, Circuit Judges.

Pro se Michigan plaintiff Nintu Xi Gilmore-Bey appeals the district court's judgment dismissing her employment-discrimination and defamation complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Defendants Henry Meltser and Fidelity Transportation of Michigan, Inc. (FTM) move for frivolous appeal sanctions against Gilmore-Bey under Federal Rule of Appellate Procedure 38. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. Civ. P. 34(a). For the following reasons, we affirm the district court's judgment and deny the defendant's motion for sanctions.

On September 19, 2022, FTM president and owner Meltser hired Gilmore-Bey, a self-described "descendent of the Autochthonous Natives of the Americas," as an office staff worker. Meltser fired Gilmore-Bey five weeks later because she was 20 minutes late for work. Gilmore-Bey alleged that staff member "Katia" was often late, but Meltser never disciplined her. Gilmore-Bey suggested that Meltser and Katia were both Russian or of Russian descent because

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they sometimes spoke Russian to each other. Gilmore-Bey also alleged that another staff member, "Brian," slept at his desk and was prone to angry outbursts in the office, but Meltser did not discipline him, either.

After her termination, Gilmore-Bey filed a national-origin discrimination charge with the Equal Employment Opportunity Commission (EEOC) and received a right-to-sue letter. Gilmore-Bey then filed a complaint against Meltser and FTM in the district court, claiming that they violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and the Michigan Elliott-Larsen Civil Rights Act (ELCRA), Mich. Comp. Laws § 37.2101, et seq., by committing national-origin discrimination during her employment and in terminating her. The defendants moved to dismiss Gilmore-Bey's complaint under Rule 12(b)(6). They argued that Meltser was not subject to individual liability under Title VII and that "Autochthonous Natives of the Americas" is not a cognizable protected national origin.

Gilmore-Bey responded by filing an amended complaint. Gilmore-Bey clarified that her national origin is "Autochthonous and Indigenous Native American, descendent of the original copper-tone people of the Americas." This group, she explained, consists of "the original and allodial inhabitants of the Americas and the adjoining islands prior to the existence of the United States." Gilmore-Bey repeated the allegations concerning her employment and termination and added that the defendants' actions also violated 42 U.S.C. § 1981 and Articles VII, VIII, and XXVII of the Organization of American States' (OAS) American Declaration on the Rights of Indigenous Peoples. Gilmore-Bey also claimed that Meltser wrote false and defamatory notes about her and included them in her personnel file. Additionally, Gilmore-Bey claimed that the defendants defamed her in their motion to dismiss by calling her a "bully," a "paper terrorist," and "delusional."

The defendants then moved to dismiss the amended complaint. They again argued that Gilmore-Bey had not identified a cognizable national origin. The defendants also argued that Gilmore-Bey failed to state a defamation claim because their allegedly defamatory statements were entitled to absolute immunity under Michigan law.

Over Gilmore-Bey's objections, the district court adopted a magistrate judge's report and recommendation to grant the motion to dismiss. The court agreed with the defendants that "Autochthonous and Indigenous Native American" is not a federally protected national origin. Further, the court concluded that absolute immunity shielded the defendants from Gilmore-Bey's defamation claims. Accordingly, the court dismissed the amended complaint with prejudice for failure to state a claim.

On appeal, Gilmore-Bey argues that the district court erred in ruling that she failed to identify a protected national origin under Title VII. But Gilmore-Bey did not develop an argument demonstrating that the district court erred in dismissing her defamation claims. Accordingly, she has forfeited those claims. *See Geboy v. Brigano*, 489 F.3d 752, 767 (6th Cir. 2007).

We review de novo a district court's judgment granting a Rule 12(b)(6) motion to dismiss. *Bickerstaff v. Lucarelli*, 830 F.3d 388, 395-96 (6th Cir. 2016). A complaint will be dismissed under Rule 12(b)(6) if it does not plead facts, accepted as true and viewed in the light most favorable to the plaintiff, that state a plausible claim to relief. *See id.* at 396.

National original discrimination is an unlawful employment practice under Title VII and the ELCRA. 42 U.S.C. § 2000e-2(a)(1); Mich. Comp. Laws § 37.2202(1). "'[N]ational origin' . . . refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973); *see also* Mich. Comp. Laws § 37.2103(f) ("'National origin' includes the national origin of an ancestor."). The EEOC "defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1. Here, Gilmore-Bey claimed that her national origin is "Autochthonous and Indigenous Native American." "Autochthonous" and "indigenous" are synonyms and refer to the earliest known inhabitants of a place. WEBSTER'S NEW WORLD DICTIONARY, 92, 687 (3d ed. 1988).

We confronted a similar issue in *Wilson v. Art Van Furniture*, No. 99-2292, 2000 WL 1434690 (6th Cir. Sept. 19, 2000). There, a Title VII plaintiff claimed that his national origin was "the Washitaw de Dugdahmoundyah Empire." We concluded that the plaintiff was not a member of a protected class because he was born in the United States, and he "presented no credible proof that there is or ever was a country or ethnic group known as the Washitaw de Dugdahmoundyah Empire." *Id.*

Similarly, in this case, neither of Gilmore-Bey's complaints plausibly demonstrates that there ever was a country known as "Autochthonous and Indigenous Native America." Gilmore-Bey alleged that she is "indigenous to the Americas," suggesting that she is a citizen of the United States. *See Espinoza*, 414 U.S. at 88 . And although she could have also demonstrated her national origin by alleging that she has the "physical, cultural or linguistic characteristics of a national origin group," 29 C.F.R. § 1606.1, she did not allege facts demonstrating that "Autochthonous and Indigenous Native Americans" have any particular "physical, cultural or linguistic characteristics" that make them a protected class. Finally, although a plaintiff can bring a national-origin claim based on membership in a recognized Indian tribe, *cf. Dawavendewa v. Salt River Project Agric. Imp. & Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998), Gilmore-Bey did not allege that she belongs to any particular tribe.[1] Accordingly, the district court correctly concluded that she failed to state a claim for national origin discrimination under Title VII and the ELCRA.[2]

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[1] We do not hold that Gilmore-Bey was required to demonstrate membership in a recognized Indian tribe in order to plausibly allege Native American national origin, merely that this is one way in which she could have done so.

[2] Gilmore-Bey also alleged that she is a descendant of the "copper tone people of the Americas." Consequently, her amended complaint could possibly be construed as raising a race-discrimination claim. *See In re Rodriguez*, 487 F.3d 1001, 1006 n.1 (6th Cir. 2007) (noting that race and national-origin claims can overlap). But both of Gilmore-Bey's complaints repeatedly and specifically limited her claim to national-origin discrimination. Accordingly, we conclude that she did not intend to bring a race-discrimination claim against the defendants. *Cf. Ang v. Proctor & Gamble Co.*, 932 F.2d 540, 545-46 (6th Cir. 1991), *abrogated on other grounds by Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006).

Lastly, Gilmore-Bey failed to state a claim under § 1981 because that provision does not cover national-origin discrimination. *See Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987); *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001). And the OAS declaration does not provide a private right of action to remedy alleged violations. *See Williams v. Trump*, 495 F. Supp. 3d 673, 685 (N.D. Ill. 2020), *aff'd sub nom. Williams v. Pritzker*, No. 20-3231, 2021 WL 4955683 (7th Cir. Oct. 26, 2021); *Van Hope-el v. U.S. Dep't of State*, No. 1:18-cv-0441, 2019 WL 295774, at *3 n.2 (E.D. Cal. Jan. 23, 2019), *aff'd*, No. 19-15311, 2019 WL 3941181 (9th Cir. June 26, 2019).

Arguing that Gilmore-Bey's appeal is frivolous, the defendants move for sanctions under Federal Rule of Appellate Procedure 38. The defendants request an award of $2,900 in attorney's fees that they have incurred defending Gilmore-Bey's appeal.

Rule 38 provides that "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." Fed. R. App. P. 38. Monetary sanctions may be appropriate when an appeal is wholly meritless and the appellant "essentially had no reasonable expectation of altering the district court's judgment." *B & H Med., LLC v. ABP Admin., Inc.*, 526 F.3d 257, 270 (6th Cir. 2008) (quoting *Wilton Corp. v. Ashland Castings Corp.*, 188 F.3d 670, 677 (6th Cir. 1999)); *see also Larry E. Parrish, P.C. v. Bennett*, 989 F.3d 452, 457-58 (6th Cir. 2021) ("[A]n appeal may also be frivolous if it is filed out of 'sheer obstinacy—when the only issues in the case clearly have been resolved against the appellant.'" (quoting *Anderson v. Dickson*, 715 F. App'x 481, 489 (6th Cir. 2017))). Bad faith is not required to award sanctions under Rule 38, but we will usually impose sanctions "only where there was some improper purpose, such as harassment or delay, behind the appeal." *B & H Med., LLC*, 526 F.3d at 270 (quoting *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1212 (6th Cir. 1997)). We have discretion under Rule 38 to deny sanctions even if the appeal was frivolous. *See Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987); *Shirvell v. Gordon*, 602 F. App'x 601, 607-08 (6th Cir. 2015).

In exercising this discretion here, we take into account the fact that Gilmore-Bey is pro se and cannot "be held to the high standards to which members of the bar aspire or should aspire." *WSM, Inc. v. Tenn. Sales Co.*, 709 F.2d 1084, 1088 (6th Cir. 1983). Moreover, Gilmore-Bey is indigent, and the financial affidavit we have on file states that she has been unemployed for over two years. And we have "decline[d] to assess costs against a pro se appellant with limited financial resources, even if, 'on the basis of legal issues involved it would be appropriate to do so.'" *Donkers v. Simon*, 173 F. App'x 451, 454 (6th Cir. 2006) (quoting *Martin v. Comm'r*, 753 F.2d 1358, 1361 (6th Cir. 1985) (cleaned up)). In view of Gilmore-Bey's indigency, we decline to sanction her. However, we caution Gilmore-Bey not to pursue frivolous appeals in the future.

For these reasons, we **AFFIRM** the district court's judgment and **DENY** the defendants' motion for sanctions.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-1643

NINTU XI GILMORE-BEY,

Plaintiff-Appellant,

v.

HENRY MELTSER, Supervisor/President/Owner;
FIDELITY TRANSPORTATION OF MI, INC.,

Defendants-Appellees.

Before: SUHRHEINRICH, WHITE, and RITZ, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NINTU XI GILMORE-BEY,

Plaintiff,

v.

HENRY MELTSER and FIDELITY TRANSPORTATION OF MICHIGAN, INC.,

Defendants.
_____/

Case No. 23-12651

Hon. George Caram Steeh
Hon. David R. Grand

ORDER ADOPTING REPORTS AND RECOMMENDATIONS (ECF NO. 29, 34), GRANTING DEFENDANTS' MOTION TO DISMISS (ECF NO. 18) AND DENYING MOTION FOR SANCTIONS (ECF NO. 27)

On April 22, 2024, Magistrate Judge Grand issued a report and recommendation proposing that the court grant Defendants' motion to dismiss. Plaintiff submitted objections for the court's review. The magistrate judge issued a second report and recommendation on June 14, 2024, proposing that the court deny Defendants' motion for sanctions. Although Plaintiff filed a "declaration of facts" on June 28, 2024, Defendants did not file an objection to the second report and recommendation. Plaintiff's declaration does not present objections to the report and recommendation, which proposes resolving the motion for sanctions in her favor.

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With respect to reports and recommendations from magistrate judges, this court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). The court "may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate." *Id.*

Plaintiff's complaint raises two claims: national origin discrimination under Title VII and the Elliott-Larsen Civil Rights Act, and defamation. The magistrate judge recommends that Plaintiff's discrimination claim be dismissed because she has not sufficiently alleged membership in a protected class. Plaintiff claims to be "an Autochthonous and Indigenous Native American, descendant of the original copper-tone peoples of the Americas." ECF No. 17 at ¶ 25. As the magistrate judge noted, however, "there is no federally recognized 'Autochthonous' or 'Indigenous Native American' tribe," and courts "have routinely dismissed national origin discrimination claims like Plaintiff's that are brought by 'native-born individuals . . . who claim to be affiliated with a tribal government purportedly existing independently of any federally recognized Indian tribe." ECF No. 29 at PageID 267 (citing *Alzid v. Blue Cross Blue Shield of Mich.*, 671 F. Supp.3d 786, 797 (E.D. Mich. 2023)).

Plaintiff generally objects to this finding, but she does not specifically challenge the case law cited by the magistrate judge, which is fatal to her claim. Although Plaintiff need not plead a *prima facie* case of discrimination to avoid dismissal, she must plead sufficient facts to state a plausible claim that she was discriminated against based upon her "race, color, religion, sex, or national origin." *Primm v. Dep't of Hum. Servs.*, 2017 WL 10646487, at *2 (6th Cir. Aug. 17, 2017) (citing 42 U.S.C. § 2000e-2(a)(1)); *see also Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 510 (2002) ("The prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement."). To state a plausible claim of discrimination, Plaintiff must allege that she is a member of a protected class. *See Kinney v. McDonough*, 2022 WL 223633, at *5 (6th Cir. Jan. 26, 2022) (affirming dismissal of Title VII claims when the plaintiff failed to plead her race or age). Plaintiff has not done so here. Although she claims to be "an Autochthonous and Indigenous Native American," this self-designation is not recognized as a protected class under federal law. Accordingly, Plaintiff has failed to state a plausible discrimination claim.

Plaintiff also objects that the magistrate judge did not address her claims under 42 U.S.C. § 1981 and "international law." These claims were mentioned only in passing in her complaint. She does not specify the

international law that she claims to apply here; and such vague allegations are insufficient to comply with basic pleading standards.

Plaintiff's § 1981 claim fails for the same reason as her other claims of discrimination. Section 1981 prohibits racial discrimination in the making and enforcing of private contracts. To plead a § 1981 claim, a plaintiff must allege "sufficient facts to show that (1) the plaintiff belonged to a protected class; (2) the defendant intended to discriminate against him on the basis of race; and (3) the defendant's discriminatory conduct abridged a right enumerated in § 1981." *Inner City Contracting, LLC v. Charter Twp. of Northville, Mich.*, 87 F.4th 743, 755 (6th Cir. 2023). Because Plaintiff has failed to plead that she belongs to a protected class, she cannot state a claim under § 1981.

Plaintiff also makes a generalized objection to the dismissal of her defamation claim. She claims two sources of defamatory statements: statements made in Defendants' briefing and statements made in her personnel file. The magistrate judge concluded that statements made in this litigation are absolutely privileged and do not give rise to a defamation claim as a matter of law. He further determined that Plaintiff did not allege that there was an unprivileged communication of the contents of her personnel file to a third party, as required to state a defamation claim.

Plaintiff has not identified an error the magistrate judge's analysis; accordingly, her objection is not well taken.

With respect to the magistrate judge's recommendation that the court deny Defendants' motion for sanctions, no objections have been made. Upon review, the court agrees with Magistrate Judge Grand's analysis and conclusions and will deny the motion for sanctions.

For these reasons, IT IS HEREBY ORDERED that Plaintiff's objections are OVERRULED, Magistrate Judge Grand's reports and recommendations (ECF No. 29, 34) are ADOPTED, Defendants' motion to dismiss (ECF No. 18) is GRANTED, and Defendants' motion for sanctions (ECF No. 27) is DENIED.

Dated: July 11, 2024

s/George Caram Steeh
HON. GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on July 11, 2024, by electronic and/or ordinary mail and also on Nintu Xi. Gilmore-Bey, 60 East Milwaukee Street, Unit 6633, Detroit, MI 48202.

s/LaShawn Saulsberry
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NINTU XI GILMORE-BEY,

Plaintiff,

v.

HENRY MELTSER and FIDELITY TRANSPORTATION OF MICHIGAN, INC.,

Defendants.
_____/

Case No. 23-12651

Hon. George Caram Steeh
Hon. David R. Grand

JUDGMENT

In accordance with the court's order granting Defendants' motion to dismiss, entered this date,

IT IS ORDERED AND ADJUDGED that judgment is hereby GRANTED in favor of Defendants.

KINIKIA ESSIX
CLERK OF THE COURT

By: LaShawn Saulsberry
Deputy Clerk

APPROVED:

s/George Caram Steeh
HON. GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

Dated: July 11, 2024

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on July 11, 2024, by electronic and/or ordinary mail and also on Nintu Xi. Gilmore-Bey, 60 East Milwaukee Street, Unit 6633, Detroit, MI 48202.

s/LaShawn Saulsberry
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NINTU XI GILMORE-BEY,

Plaintiff,

v.

HENRY MELTSER, *et al.*,

Defendants.
/

Civil Action No. 23-12651

George Caram Steeh
United States District Judge

David R. Grand
United States Magistrate Judge

REPORT AND RECOMMENDATION TO GRANT DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT (ECF No. 18)

Pro se plaintiff Nintu Xi Gilmore-Bey ("Plaintiff") commenced this action against Fidelity Transportation of Michigan, Inc. ("Fidelity") and its president, Henry Meltser ("Meltser"), on October 20, 2023. (ECF No. 1). In her complaint, Plaintiff alleged that Fidelity and Meltser (collectively, "Defendants") engaged in national origin discrimination in violation of Title VII of the Civil Rights Act of 1964, as well as the Elliott-Larsen Civil Rights Act ("ELCRA") when they terminated her employment. (*Id.*).

On December 21, 2023, Defendants filed a motion to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6), arguing that it failed to state a claim upon which relief could be granted. (ECF No. 12). In response, Plaintiff filed an amended complaint, in which she modified her discrimination claim in certain respects and added a defamation claim based on statements contained in her personnel file, as well as statements made by Defendants in their motion to dismiss. (ECF No. 17).

Now pending before the Court is Defendants' Motion to Dismiss Plaintiff's

APPENDIX C

Amended Complaint, which was filed on February 19, 2024. (ECF No. 18). Plaintiff filed a response to Defendants' motion on March 4, 2024 (ECF No. 21), and Defendants filed a reply on March 18, 2024 (ECF No. 23).[1]

An Order of Reference was entered on January 3, 2024, referring all pretrial matters to the undersigned pursuant to 28 U.S.C. § 636(b). (ECF No. 13). Having reviewed the pleadings and other papers on file, the Court finds that the facts and legal issues are adequately presented in the parties' briefs and on the record, and it declines to order a hearing at this time.

I. REPORT

A. Factual Background

Plaintiff alleges that she was employed by Fidelity[2] in an "Office Staff position" for about a month, from September 19, 2022, through October 26, 2022. (ECF No. 17, PageID.100). According to Defendants, Plaintiff's employment was terminated because of her tardiness. (ECF No. 18, PageID.152). Indeed, in her original complaint, Plaintiff admitted that she arrived "20 minutes late" for work on the date she was terminated. (ECF No. 1, PageID.6). And while she omits this precise language from her amended complaint,

[1] Subsequently, Plaintiff filed two additional documents – one captioned "Plaintiff's Facts of Service of Amended Complaint to Defendants with Exhibits and Plaintiff's Declaration of Facts" and the other titled "Plaintiff's Opposition to Defendants' Motion for Imposition of Rule 11 Sanctions Against Plaintiff." (ECF Nos. 25, 26). Although these filings are neither particularly relevant nor procedurally proper, the Court will consider the facts and arguments contained therein in ruling on the instant motion.

[2] Fidelity is a "specialty transportation company that operates a fleet of wheelchair lift vans and minivans." (ECF No. 18, PageID.153). Fidelity is owned by Meltser, who also served as its president at all relevant times. (*Id.*).

she does acknowledge that, on October 26, 2022, she arrived "between 9:20-9:21 am" (approximately 20 minutes after her scheduled start time of 9:00 a.m.). (ECF No. 17, PageID.105).

In her amended complaint, Plaintiff alleges that she was terminated not because of her tardiness, but "because of her national origin as an Autochthonous and Indigenous Native American, descendant of the original copper-tone people of the Americas." (*Id.*, PageID.102). Although she does not plead any direct evidence of national origin discrimination, she alleges that, by virtue of her termination, she was treated less favorably than "Katia" and "Brian," two other "Office Staff" workers who allegedly engaged in conduct Plaintiff deemed inappropriate but were not terminated. (*Id.*, PageID.101, 110). Plaintiff further alleges that "Defendants and their counsel conspired to defame [her] character by writing adversarial, malice [sic] and false statements in [her] employee file and in" Defendants' initial motion to dismiss. (*Id.*, PageID.110). Defendants now move to dismiss Plaintiff's amended complaint pursuant to Fed. R. Civ. P. 12(b)(6).

B. Standard of Review

A motion to dismiss pursuant to Rule 12(b)(6) tests a complaint's legal sufficiency. Under Fed. R. Civ. P. 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference

that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The plausibility standard "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Twombly*, 550 U.S. at 556. Put another way, the complaint's allegations "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (emphasis in original) (citing *Twombly*, 550 U.S. at 555-56).

In deciding whether a plaintiff has set forth a "plausible" claim, a reviewing court must accept the factual allegations in the complaint as true. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). This tenet, however, "is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to prevent a complaint from being dismissed on grounds that it fails to sufficiently comport with basic pleading requirements. *Iqbal*, 556 U.S. at 678; *see also Twombly*, 550 U.S. at 555; *Howard v. City of Girard, Ohio*, 346 F. App'x 49, 51 (6th Cir. 2009). Ultimately, "[d]etermining 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." *Iqbal*, 556 U.S. at 679.

Pleadings filed by *pro se* litigants are entitled to a more liberal reading than would be afforded to formal pleadings drafted by lawyers. *See Thomas v. Eby*, 481 F.3d 434, 437 (6th Cir. 2007). Nonetheless, "[t]he leniency granted to pro se [litigants] ... is not boundless." *Martin v. Overton*, 391 F.3d 710, 714 (6th Cir. 2004). Rather, such

"complaints still must plead facts sufficient to show a redressable legal wrong has been committed." *Baker v. Salvation Army*, No. 09-11424, 2011 WL 1233200, at *3 (E.D. Mich. Mar. 30, 2011).

C. Analysis

1. Plaintiff's National Origin Discrimination Claims Fail

As set forth above, in her amended complaint, Plaintiff alleges that she "was terminated because of her national origin as an Autochthonous and Indigenous Native American, descendant of the original copper-tone people of the Americas." (ECF No. 17, PageID.102). In order to make out a *prima facie* case of national origin discrimination under Title VII,[3] Plaintiff must show that (1) she is a member of a protected class; (2) she experienced an adverse employment action; (3) she was qualified for the position; and (4) she was replaced by a person outside the protected class or was treated differently than a similarly-situated, non-protected employee. *See Johnson v. Farmington Pub. Sch.*, No. 21-12562, 2024 WL 1395140, at *12 (E.D. Mich. Mar. 31, 2024). If the plaintiff is able to present a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *See Alzid v. Blue Cross Blue Shield of Mich.*, 671 F. Supp. 3d 786, 794 (E.D. Mich. 2023). Assuming the defendant can do so, the burden shifts back to the plaintiff, who must show that the defendant's proffered reason is a pretext for discrimination. *Id.*

In this case, Plaintiff cannot make out a *prima facie* case of national origin

[3] Claims under the ELCRA involve the same legal analysis as Title VII claims. *See, e.g., Idemudia v. J.P. Morgan Chase*, 434 F. App'x 495, 499 (6th Cir. 2011).

discrimination because she has not plausibly alleged that she is a member of a protected class. In her original complaint, Plaintiff alleges that Defendants discriminated against her based on her "national origin Descendent of Autochthonous Native Americans." (ECF No. 1, PageID.5). In her amended complaint, Plaintiff expands upon this allegation by claiming that her national origin is "Autochthonous and Indigenous Native American, descendant of the original copper-tone people of the Americas." (ECF No. 17, PageID.102).

It is clear, however, that there is no federally recognized "Autochthonous"[4] or "Indigenous Native American" tribe.[5] Courts in the Eastern District of Michigan and the Sixth Circuit have routinely dismissed national origin discrimination claims like Plaintiff's that are brought by "native-born individuals ... who claim to be affiliated with a tribal government purportedly existing independently of any federally recognized Indian tribe." *Alzid*, 671 F. Supp. 3d at 797 (internal quotation marks omitted); *see also Wilson v. Art Van Furniture*, No. 99-2292, 2000 WL 1434690, at *1 (6th Cir. Sept. 19, 2000) (rejecting national origin discrimination claim where the plaintiff was born in the United States and "presented no credible proof that there is or ever was a country or ethnic group known as the Washitaw de Dugdahmoundyah Empire"); *Bey v. FCA US LLC*, No. 19-10521, 2019 WL 5849367, at *3 (E.D. Mich. Oct. 15, 2019) (plaintiff's national origin discrimination

[4] "Autochthonous" is defined as "indigenous" or "native." *See* https://www.merriam-webster.com/dictionary/autochthonous?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last accessed April 22, 2024).

[5] *See* https://www.federalregister.gov/documents/2024/01/08/2024-00109/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of (last accessed April 22, 2024). The Court is permitted to take judicial notice of the fact that, as confirmed by the Federal Register, there is no federally recognized "Autochthonous" or "Indigenous Native American" tribe. *See Coupe v. Federal Express Corp.*, 121 F.3d 1022, 1026 n. 3 (6th Cir. 1997).

claim failed because "[n]umerous Courts have held that 'Moorish Americans' or variations thereof are not a federally recognized group to which the national origin protections of Title VII applies"). Courts in other jurisdictions have reached the same conclusion. *See, e.g., Tum-Re v. Keel*, No. 3:15-cv-2708, 2016 WL 2990944, at *1 (N.D. Ohio May 24, 2016) (rejecting national origin discrimination claim where it was premised on the plaintiff's claim that he was "affiliated with a tribal government purportedly existing independently of any federally recognized Indian Tribe"); *Nixon El v. General Motors Co.*, No. 4:20-CV-471-A, 2020 WL 3848099, at *2 (N.D. Tex. July 8, 2020) (plaintiff's self-identification as a "Moor Americas Aboriginal Native Californian National" does not entitle him to protection under Title VII); *Bey v. Oakton Comm. College*, No. 14 C 06655, 2015 WL 5732031, at *5 (N.D. Ill. Sept. 30, 2015) ("Without a nonnative country of origin or any characteristic physical, cultural, or linguistic distinctions, the self-professed U.S. nationals of the 'Aboriginal-Indigenous Native American/Moor' persuasion do not credibly allege a protected 'national origin.'").

For all of these reasons, Plaintiff's allegation that she is "Autochthonous and Indigenous Native American, descendant of the original copper-tone people of the Americas" is insufficient to establish that she is a member of a protected class. Thus, she has not stated a *prima facie* case for national origin discrimination, and this claim should be dismissed.

2. Plaintiff's Defamation Claim Fails

In her amended complaint, Plaintiff pleads a defamation claim based on statements contained in her personnel file, as well as statements made by Defendants in their motion

to dismiss. (ECF No. 17, PageID.110-12). A plaintiff alleging defamation must plead the following elements: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm (defamation *per se*) or the existence of special harm caused by publication. *See Edwards v. Detroit News, Inc.*, 322 Mich. App. 1, 12 (2017). Moreover, the essentials of a cause of action for defamation must be stated *in the complaint*. *See Bhan v. Battle Creek Health Sys.*, 579 F. App'x 438, 446 (6th Cir. 2014) (citing *Ledl v. Quik Pik Food Stores, Inc.*, 133 Mich. App. 583, 589 (1984)). This includes allegations as to the exact language the plaintiff contends is defamatory, the connection of the defamatory words to the plaintiff where such words are not clear, and the publication of the alleged defamatory words. *Id.* "Inherent in those requirements is that the allegations must set forth where, when, and to whom the alleged statements were published." *Id.*

a. Statements Made in Defendants' Motion to Dismiss

Here, Plaintiff alleges in her amended complaint that Defendants "made false statements to defame [her] character in the motion [to dismiss] filed with this Court on 12.21.2023 (Page 9 of the motion)." (ECF No. 17, PageID.111). It appears that Plaintiff is taking issue with the following paragraph from Defendants' motion:

> Plaintiff's Complaint should be seen for what it is: A vexatious attempt to bully a small business into submission. If the Plaintiff is not sanctioned, it is reasonable to assume that she will continue her "paper terrorism" campaign by filing even more frivolous lawsuits premised on her delusional belief about her ostensible "national origin."

(ECF No. 12, PageID.55) (footnote omitted). However, "Michigan recognizes that statements which are pertinent to judicial proceedings made by attorneys *in the courtroom or in pleadings* are absolutely privileged, and as such, no cause of action for defamation can be predicated on such statements." *Various Mkts., Inc. v. Chase Manhattan Bank, N.A.*, 908 F. Supp. 459, 465 (E.D. Mich. 1995) (emphasis in original); *see also Lawrence v. Burdi*, 314 Mich. App. 203, 217 (2016) ("Statements made by judges, attorneys, and witnesses during the course of judicial proceedings are absolutely privileged if they are *relevant, material, or pertinent* to the issue being tried.") (internal quotation marks omitted) (emphasis in original). Here, the statements set forth in Defendants' motion to dismiss are unquestionably pertinent to the case and, thus, are absolutely privileged. Therefore, this aspect of Plaintiff's defamation claim fails.

b. Statements Recorded in Plaintiff's Personnel File

Finally, Plaintiff alleges in her amended complaint that "Defendants and their counsel conspired to defame [her] character by writing adversarial, malice [sic] and false statements in [her] employee file ..." (ECF No. 17, PageID.110). However, even assuming that Defendants did in fact make false statements about her in her personnel file, as she alleges,[6] she has not plausibly alleged that any unprivileged communication was

[6] For example, Plaintiff alleges that Defendants made false statements on a "hand-written paper placed inside [her] employee file with notes, a list of dates and arrival times." (ECF No. 17, PageID.104) (referring to *Id.*, PageID.119). Similarly, she asserts that a "false statement was hand-written on [her] resume by [Meltser] stating, 'During an interview, [Plaintiff] confirmed that she lives in Southfield & has adequate transportation. I reiterated the importance of living close to the office. [Plaintiff] reassured me of Southfield & being punctual.'" (*Id.*, PageID.105) (referring to *Id.*, PageID.121).

made to a third party. Rather, Plaintiff alleges only that: "Defendants shared the false statements with Wright Beamer Attorneys and Plaintiff *has reason to believe* Defendants are concealing any other third parties that may be involved." (*Id.*, PageID.111) (emphasis added). Obviously, statements made by clients to their attorneys for purposes of obtaining legal advice are privileged. *See, e.g., Laetham Equip. Co. v. Deere & Co.*, 261 F.R.D. 127, 142 (E.D. Mich. 2009). Thus, Defendants' transmission of Plaintiff's personnel file to their attorneys in order to defend against Plaintiff's allegations in this lawsuit does not constitute an unprivileged communication to a third party and, therefore, is not actionable. *See Oesterle v. Wallace*, 272 Mich. App. 260, 264 (2006) ("If a statement is absolutely privileged, it is not actionable even if it was false and maliciously published.").

Moreover, Plaintiff's vague and speculative assertion that she "has reason to believe" Defendants "may" have shared the contents of her personnel file with "other third parties" (ECF No. 17, PageID.111) is insufficient to state a claim for defamation, as courts have held that the failure to identify the recipient of the alleged defamatory statement is "fatal to the claim." *Coles v. Dearborn Midwest Co.*, No. 13-14450, 2014 WL 7530433, at *6 (E.D. Mich. Sept. 27, 2014). Thus, this aspect of Plaintiff's defamation claim also fails.

For all of these reasons, Plaintiff has failed to state a claim against Defendants, despite being given two opportunities to do so. As such, Plaintiff's claims should be dismissed in their entirety and with prejudice.[7]

[7] In their motion to dismiss, Defendants also argue that Plaintiff should be sanctioned for filing frivolous claims pursuant to Fed. R. Civ. P. 11. (ECF No. 18, PageID.161-64). Subsequently,

II. RECOMMENDATION

For the reasons set forth above, **IT IS RECOMMENDED** that Defendants' Motion to Dismiss Plaintiff's Amended Complaint **(ECF No. 18)** be **GRANTED** and Plaintiff's claims be **DISMISSED WITH PREJUDICE**.

Dated: April 22, 2024
Ann Arbor, Michigan

s/David R. Grand
DAVID R. GRAND
United States Magistrate Judge

NOTICE TO THE PARTIES REGARDING OBJECTIONS

Within 14 days after being served with a copy of this Report and Recommendation, any party may serve and file specific written objections to the proposed findings and recommendations and the order set forth above. *See* 28 U.S.C. §636(b)(1); Fed. R. Civ. P. 72(b)(2); E.D. Mich. LR 72.1(d)(1). Failure to timely file objections constitutes a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140, (1985); *United States v. Sullivan,* 431 F.3d 976, 984 (6th Cir. 2005). Only specific objections to this Report and Recommendation will be preserved for the Court's appellate review; raising some objections but not others will not preserve all objections a party may have. *See Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987); *see also Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 596-97 (6th Cir. 2006). Copies of any objections must be served upon the Magistrate Judge. *See* E.D. Mich. LR 72.1(d)(2).

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however, after properly serving a "safe harbor" letter pursuant to Rule 11(c), as is required, Defendants filed a separate motion for Rule 11 sanctions. (ECF No. 27). Thus, the Court will rule on Defendants' request for sanctions in the context of that motion, not herein.

A party may respond to another party's objections within 14 days after being served with a copy. *See* Fed. R. Civ. P. 72(b)(2); 28 U.S.C. §636(b)(1). Any such response should be concise, and should address specifically, and in the same order raised, each issue presented in the objections.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on April 22, 2024.

s/Eddrey O. Butts
EDDREY O. BUTTS
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NINTU XI GILMORE-BEY,

Plaintiff,

v.

HENRY MELTSER, *et al.*,

Defendants.
_____/

Civil Action No. 23-12651

George Caram Steeh
United States District Judge

David R. Grand
United States Magistrate Judge

REPORT AND RECOMMENDATION TO DENY DEFENDANTS' MOTION FOR SANCTIONS (ECF No. 27)

I. REPORT

A. Background

Pro se plaintiff Nintu Xi Gilmore-Bey ("Plaintiff") commenced this action against Fidelity Transportation of Michigan, Inc. ("Fidelity") and its president, Henry Meltser ("Meltser"), on October 20, 2023. (ECF No. 1). In her complaint, and, subsequently, her amended complaint, Plaintiff alleged that Fidelity and Meltser (collectively, "Defendants") engaged in national origin discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as well as the Elliott-Larsen Civil Rights Act ("ELCRA"), when they terminated her employment. (ECF Nos. 1, 17). This case has been referred to the undersigned for all pretrial purposes. (ECF No. 13).

On April 22, 2024, this Court entered a Report and Recommendation ("R&R"), recommending that Defendants' motion to dismiss Plaintiff's amended complaint be granted. (ECF No. 29). Now before the Court is a Motion for Imposition of Rule 11

APPENDIX D

Sanctions Against Plaintiff, filed by Defendants on April 9, 2024. (ECF No. 27).[1] Plaintiff filed a response to this motion on April 29, 2024 (ECF No. 30), and no reply was filed.

Having reviewed the pleadings and other papers on file, the Court finds that the facts and legal issues are adequately presented in the parties' briefs and on the record, and it declines to order a hearing at this time.

B. Analysis

In their motion, Defendants argue that sanctions should be imposed against Plaintiff because her claims are frivolous and "wholly devoid of any legal merit[.]" (ECF No. 27, PageID.253). Specifically, Defendants assert that Plaintiff's national origin discrimination claims, brought pursuant to Title VII and the ELCRA, are without merit because she failed to plausibly allege that she is a member of a recognized protected class when she alleged discrimination on the basis of her national origin as a descendant of "Autochthonous Native Americans[.]" (*Id.*, PageID.256). Defendants further assert that Plaintiff's defamation claim – which was pled first in her amended complaint – is equally frivolous, as it is based on statements contained in her personnel file (which were not shared with anyone outside of Fidelity) and statements made in court pleadings (which are absolutely privileged). (*Id.*). According to Defendants, then, Rule 11 sanctions are warranted because Plaintiff's "legal theories are indisputably meritless **and** certain factual contentions are fantastic or delusional." (*Id.*) (emphasis in original). Defendants seek sanctions in the amount of "at

[1] "[T]he prudential practice that has developed throughout this circuit is to treat motions for Rule 11 sanctions as dispositive in both the pretrial and post-judgment context." *Annabel v. Erichsen*, No. 15-10345, 2018 WL 4854098, at *1 (E.D. Mich. June 1, 2018) (citing cases). Accordingly, the Court proceeds by way of a Report and Recommendation. *See* 28 U.S.C. § 636(b)(1)(B).

least $5,000.00 ... to deter Plaintiff from filing other similar frivolous complaints in the future." (*Id.*, PageID.258).

Rule 11(b) provides that, when an attorney or unrepresented party presents a pleading to the Court, she is certifying that, "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; [and]
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery ....

Fed. R. Civ. P. 11(b). Rule 11(c) states that if "the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ. P. 11(c).

Here, as set forth above, Defendants argue that Rule 11 sanctions are warranted because the allegations contained in Plaintiff's complaint and amended complaint are frivolous, in the sense that her legal theories are "indisputably meritless" and certain factual contentions are "fantastic or delusional." (ECF No. 27, PageID.256). For the reasons set forth in its prior R&R (ECF No. 29), this Court agrees that Plaintiff's national origin discrimination and defamation claims are without legal merit. However, "Plaintiff's pro se status and the absence of legal advice are appropriate factors to be considered as special

circumstances when determining if Rule 11 has been violated." *Booker v. Buckely*, Nos. 85-3867, 85-3893, 1986 WL 18396, at *1 (6th Cir. 1986). And, as the movants, Defendants have the burden of demonstrating that Plaintiff engaged in "objectively unreasonable conduct." *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 510 (6th Cir. 2002).

Here, while Defendants are correct that "there exists no recognized tribe of Autochthonous Native Americans" (ECF No. 27, PageID.256) (internal quotations omitted), and, thus, that Plaintiff's national origin discrimination claims fail, her apparently sincere belief that she is a member of such a tribe, along with her lack of formal legal training and/or knowledge of the intricacies of discrimination law, weighs in favor of a conclusion that her allegations – while ultimately meritless – were neither fantastic nor delusional. Similarly, while Plaintiff's defamation claims fail for the reasons set forth in the R&R, there is no indication that she brought such claims in bad faith or that they were utterly frivolous.[2]

In sum, the Sixth Circuit has recognized that district courts have "broad discretion

[2] Defendants also argue that Plaintiff's "continued pursuit" of a Title VII claim against Meltser – even after being advised that the statute does not provide for individual liability – evidences Plaintiff's "improper purposes" in bringing the instant lawsuit. (ECF No. 27, PageID.257). For purposes of Rule 11(b)(1), the Court has the discretion to determine whether a party or its counsel pursued the litigation for an "improper purpose." *See Kircher v. Charter Twp. of Ypsilanti*, No. 07-13091, 2007 WL 4557714, at *3 (E.D. Mich. Dec. 21, 2007). In making this determination, the court applies an objective standard of reasonableness. *Id.* Here, although the Court has recommended dismissing Plaintiff's claims against Meltser (ECF No. 29), it does not view Plaintiff's refusal to voluntarily dismiss her Title VII claim against Meltser as indicative that she instituted this case for any improper purpose so as to warrant sanctions under Rule 11(b)(1). *See, e.g., Grossman v. DTE Energy Co.*, No. 10-13712, 2010 WL 5279836, at *4 (E.D. Mich. Dec. 17, 2010) (declining to award Rule 11 sanctions despite the fact that "the plaintiff's legal theories [were] rejected as thinly supported by the facts ...") (internal quotations omitted).

in determining when a sanction is warranted and what sanction is appropriate." *Nieves v. City of Cleveland*, 153 F. App'x 349, 353 (6th Cir. 2005). Here, while the Court appreciates Defendants' frustration, for all of the reasons stated above, the Court finds that the requested award of monetary sanctions is inappropriate under the circumstances. However, Plaintiff is expressly cautioned that should she choose to file and/or pursue other federal court litigation, whether arising out of her employment or otherwise, she must take care to ensure that her factual allegations are well-supported and her legal theories are sound. Plaintiff's failure to heed this warning could result in sanctions being imposed against her.

II. RECOMMENDATION

For the reasons set forth above, **IT IS RECOMMENDED** that Defendants' Motion for Sanctions **(ECF No. 27)** be **DENIED**.

Dated: June 14, 2024
Ann Arbor, Michigan

s/David R. Grand
DAVID R. GRAND
United States Magistrate Judge

NOTICE TO THE PARTIES REGARDING OBJECTIONS

Within 14 days after being served with a copy of this Report and Recommendation, any party may serve and file specific written objections to the proposed findings and recommendations and the order set forth above. *See* 28 U.S.C. §636(b)(1); Fed. R. Civ. P. 72(b)(2); E.D. Mich. LR 72.1(d)(1). Failure to timely file objections constitutes a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140, (1985); *United States v. Sullivan,* 431 F.3d 976, 984 (6th Cir. 2005). Only specific objections to this Report and Recommendation will be preserved for the Court's appellate review; raising some

objections but not others will not preserve all objections a party may have. *See Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987); *see also Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 596-97 (6th Cir. 2006). Copies of any objections must be served upon the Magistrate Judge. *See* E.D. Mich. LR 72.1(d)(2).

A party may respond to another party's objections within 14 days after being served with a copy. *See* Fed. R. Civ. P. 72(b)(2); 28 U.S.C. §636(b)(1). Any such response should be concise, and should address specifically, and in the same order raised, each issue presented in the objections.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on June 14, 2024.

s/Eddrey O. Butts
EDDREY O. BUTTS
Case Manager

No. 24-1643

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NINTU XI GILMORE-BEY,

Plaintiff-Appellant,

v.

HENRY MELTSER, Supervisor/President/Owner; FIDELITY TRANSPORTATION OF MI, INC.,

Defendants-Appellees.

ORDER

BEFORE: SUHRHEINRICH, WHITE, and RITZ, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

*Judge Davis is recused in this case.

APPENDIX E