STATE OF MICHIGAN
42ND JUDICIAL CIRCUIT COURT, MIDLAND COUNTY

YVETTE M. CORMIER,
Plaintiff,
vs.

PF FITNESS – MIDLAND, LLC and PLA-FIT FRANCHISE, LLC,
Defendants.

Civil Action No. 15-2463-NZ-B

Honorable Michael J. Beale

David A. Kallman (P34200)
Stephen P. Kallman (P75622)
Kallman Legal Group, PLLC
5600 W. Mount Hope Hwy
Lansing, MI 48917
T: (517) 322-3207
F: (517) 322-3208
dave@kallmanlegal.com
Attorneys for Plaintiff Yvette Cormier

Brian Witus (P53062)
Patrice Arend (P56962)
Jaffe, Raitt, Heuer & Weiss, PC
27777 Franklin Road, Suite 2500
Southfield, MI 48034
T: (248) 351-3000
F: (248) 351-3082
bwitus@jaffelaw.com
parend@jaffelaw.com

Attorneys for Defendant PF Fitness—Midland, LLC

Ronald S. Nixon (P57117)
Kemp Klein Law Firm
201 West Big Beaver Road
Troy, MI 48084
T: (248) 817-4967
ron.nixon@kkue.com

Arthur L. Pressman (*admitted pro hac vice*)
Troy K. Lieberman (*admitted pro hac vice*)
Nixon Peabody LLP
100 Summer Street
Boston, MA 02110
T: (617) 345-1000
F: (617) 345-1300
apressman@nixonpeabody.com
tlieberman@nixonpeabody.com

Attorneys for Defendant Pla-Fit Franchise, LLC

DEFENDANT PLA-FIT FRANCHISE, LLC'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(8) AND BRIEF IN SUPPORT

Defendant Pla-Fit Franchise, LLC ("Pla-Fit" or "Planet Fitness"), through counsel, moves pursuant to MCR 2.116(C)(8) to dismiss all counts of the Second Amended Complaint (the "Complaint") of plaintiff Yvette Cormier ("Plaintiff" or "Mrs. Cormier") for failure to state a claim on which relief can be granted. In support of its motion, Pla-Fit submits the accompanying Brief in Support and further states as follows:

1. Mrs. Cormier's claims arise, she alleges, from a single encounter with a transgender individual, Carlotta Sklodowska ("Ms. Sklodowska") in the women's locker room of a franchised Planet Fitness brand gym in Midland, Michigan on February 28, 2015. The Complaint alleges that Mrs. Cormier was surprised by the "sight of a man inside the women's locker room" and left the locker room. Under the law, this encounter is not an invasion of privacy. It pleads no invasion of a "secret and private subject matter" or that Pla-Fit obtained any information about "a secret and private subject matter." As pleaded, after learning of Planet Fitness' gender-self-identification policy, Mrs. Cormier returned to the locker room on three succeeding days, looking for additional encounters. Her search, regardless of what she found (nothing), is likewise not actionable.

2. The balance of the Complaint likewise fails to plead cognizable claims. The Elliott-Larsen Civil Rights Act requires allegations of a sexual nature or of harassing conduct directed towards Mrs. Cormier because of her gender for sexual harassment or involvement in protected activity for retaliation. The Complaint contains none of these allegations.

3. The Complaint also does not plead a valid claim for breach of contract because it fails to attach the Membership Agreement that forms the basis of the alleged claim. Moreover, on its face, the Membership Agreement requires Mrs. Cormier to follow all Planet Fitness policies and rules, and givesthe club to which she belongs the right to terminate her membership for any violation.

4. The Complaint does not plead a valid claim for intentional infliction of emotional distress because it fails to allege extreme and outrageous behavior, or that Pla-Fit (or any defendant) specifically intended to cause Mrs. Cormier damage.

5. The Complaint's claim of exemplary damages is not a claim at all; it is a form of damages, not an independent cause of action, and is expressly precluded by Mrs. Cormier's

Membership Agreement. Nonetheless, this claim fails to allege that Pla-Fit's (or any defendant's) conduct was so willful and wanton as to demonstrate a disregard of Mrs. Cormier's rights.

6. Finally, the Complaint fails to plead a valid claim for violation of the Michigan Consumer Protection Act because it alleges no misrepresentation or omission by Pla-Fit or that Mrs. Cormier acted in reliance on any statement by Pla-Fit.

REQUEST FOR RELIEF

For these reasons, and those stated more fully in the brief in support that follows, Pla-Fit Franchise, LLC respectfully requests that this Court:

A. Dismiss each and every claim of the Second Amended Complaint and Jury Demand with prejudice; and

B. Grant such other relief as it deems appropriate.

BRIEF IN SUPPORT

As an initial matter, it is an unusual case in which a plaintiff seeks to promote, rather than combat, discrimination against transgender individuals.[1] Here, Planet Fitness enacted an inclusive policy that recognizes the extraordinary difficulties that transgender individuals face with regard to public restroom and locker room usage. From her Complaint, it appears that Mrs. Cormier disagrees with that policy. While Mrs. Cormier is entitled to her opinions, and her opinions may influence her personal conduct, her preferences are not before the Court, any more than Ms. Sklodowska's preferences are. The only issue before the Court is whether the

[1] Transgender individuals have long attempted to obtain relief from discrimination under state and federal civil rights. "It is simply unreasonable to expect a transgendered person to enter a bathroom designated for use by the sex with which they do not identify. Doing so is likely to provoke confrontation, or even violence. If transgendered people are prohibited from using bathrooms designated for the sex with which they identify, they are left with no practical recourse in most public settings. This result is simply untenable." *Doe v Regl Sch Unit 26*, 86 A 3d 600, 608 (Me 2014) (Mead, J. agreeing with the majority that transgender rights should be protected but dissenting from the majority, believing a statutory conflict required legislative intervention).

Complaint states a claim for relief in any of its counts. As Planet Fitness and its local franchisee demonstrate in their respective motions and briefs, the Complaint is woefully deficient and should be stricken. As this is the Complaint's third iteration, Mrs. Cormier should no longer have the opportunity to amend.

BACKGROUND[2]

On March 23, 2015, Mrs. Cormier commenced this action. Her most recent Complaint, the Second Amended Complaint, alleges nine causes of action against Pla-Fit, the franchisor of the Planet Fitness brand, and its local franchisee, PF Fitness – Midland, LLC ("PF Midland") (together, with Pla-Fit, "Defendants"), all relating to a single incident that Mrs. Cormier experienced at the Midland Planet Fitness gym on February 28, 2015. *See* Complaint ("Compl."). According to the Complaint, Mrs. Cormier was a member of the gym operated by PF Midland (the "Planet Fitness Gym") from January 28, 2015 to March 4, 2015. Compl. ¶¶ 3, 12. PF Midland is a franchisee of Pla-Fit. Compl. ¶ 6. On February 28, 2015, she used the locker room at the gym, where she encountered Ms. Sklodowska. Compl. ¶¶ 13, 15-16.

Mrs. Cormier describes Ms. Sklodowska as a "large tall man." Compl. ¶15. She alleges that because she was not "comfortable changing her clothes or showering" in Ms. Sklodowska's presence, she left the locker room. Compl. ¶ 18, 21. Mrs. Cormier then notified the front desk that "a man was in the locker room." Compl. ¶ 21. The front desk employee told Mrs. Cormier "that it was Defendants' policy that whatever sex an individual self-identifies with allows that person to have full access to the corresponding facilities." Compl. ¶ 22. The front desk employee suggested to Mrs. Cormier that if she was uncomfortable, she could wait until Ms. Sklodowska finished using the locker room. Compl. ¶ 23. Rather than wait, Mrs. Cormier left

---

[2] The facts recited come directly from the Complaint and are assumed true only for purposes of this motion and Pla-Fit reserves the right to refute any allegation and raise any appropriate defense should any claim survive this motion.

the gym, telephoned Planet Fitness corporate office and learned that its "no judgement policy" permits a member or guest to use the locker room of the gender with which he or she self-identifies. Compl. ¶¶ 24-26.

Following notice of Defendants' policy, Mrs. Cormier returned to the Planet Fitness Gym at least three times and used the locker room each time without incident, other than her own denunciation of Planet Fitness' policy. Compl. ¶¶ 27, 29. While at the Planet Fitness Gym, Mrs. Cormier took it upon herself to repeatedly "warn" other members about the "no judgement policy." Compl. ¶ 28. According to Mrs. Cormier, PF Midland then terminated her membership on March 4, 2015 for refusing to submit to Planet Fitness' policy. Compl. ¶ 32.

ARGUMENT

Under MCR 2.116(C)(8), the Court may dismiss a complaint if a plaintiff "has failed to state a claim on which relief can be granted." MCR 2.116(C)(8). "The motion [to dismiss] should be granted if no factual development could possibly justify recovery." *Corley v Detroit Bd of Educ,* 470 Mich 274 (2004). Indeed, no factual development could support Mrs. Cormier's claims and therefore her claims fail as a matter of law and should be dismissed with prejudice.

I. COUNT I (INVASION OF PRIVACY) SHOULD BE DISMISSED BECAUSE MRS. CORMIER CANNOT ALLEGE THE ELEMENTS NECESSARY FOR AN INTRUSION UPON HER SECLUSION

The tort of invasion of privacy is based on a common-law right to privacy that protects against four types of invasion of privacy: (1) intrusion upon the plaintiff's seclusion or solitude; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity that places the plaintiff in a false light in the public eye; and (4) appropriation of the plaintiff's name or likeness. *Tobin v Civil Service Comm*, 416 Mich 661, 672 (1982); *Doe v Mills*, 212 Mich App 73, 79-80 (1995). Here, Mrs. Cormier alleges that she had a right to privacy in the use of the

locker room and that her right was violated by a policy that would allow a "man to disrobe and be naked with [] women" and that "intruded on [her] right to privacy." Compl. ¶¶ 35-36, 39, 41.[3]

Mrs. Cormier alleges no public disclosure of any fact about herself, any publicity that places her in a false light, or any appropriation of her name or likeness. At best, Mrs. Cormier alleges an intrusion upon her seclusion; that is, her "right" in a locker room to be free from "encountering" a man who self-identified as a woman.

A valid claim for intrusion upon seclusion or solitude requires a plaintiff to allege: (1) the existence of a secret and private subject matter, (2) a right to keep that subject matter private, and (3) that someone obtained information about that private subject matter through a method objectionable to the reasonable person. *Tobin*, 416 Mich at 673-674; *Doe*, 212 Mich at 88.

As initial matter, Mrs. Cormier does not plead the existence of a secret and private subject matter; for example, she does not plead that either she or Ms. Sklodowska was in any stage of undress. Careful reading of the Complaint leads only to the conclusion that one clothed person saw another clothed person. For this reason, her claim should be dismissed. Additionally, once aware of Planet Fitness' policy, Mrs. Cormier had no expectation of being free from any further encounter with a member who self-identifies as other than her biological gender. *See Lewis v Dayton Hudson Corp*, 128 Mich App 165, 171-172 (finding no expectation of privacy once there is awareness of a policy).

Not only does the Complaint not identify any private subject matter invaded, but it also fails to allege that either Defendant obtained information about any such private subject matter, much less through some method objectionable to the reasonable person. Mrs. Cormier admits that she did not change in the locker room on February 28, 2015. *See* Compl. ¶ 18 ("Because of

---

[3] Mrs. Cormier does not allege that any person, including Ms. Sklodowska, did "disrobe and be naked" with her in the locker room.

the presence of the man in the women's locker room, Mrs. Cormier...did not feel comfortable changing her clothes or showering with a man present and watching."). Additionally, in her subsequent visits to the Planet Fitness Gym, Mrs. Cormier apparently did not encounter Ms. Sklodowska or any other transgender person and admits that she did not feel uncomfortable when using the locker room facilities. Compl. ¶ 29. (Mrs. Cormier "thoroughly" checked the locker room to ensure she felt comfortable changing her clothes).

Failing to identify any private subject matter, Mrs. Cormier appears to allege that the very existence of a transgender policy that would permit Ms. Sklodowska to use the locker room was an invasion of Mrs. Cormier's privacy; she should be free from potential encounter in a Planet Fitness Gym with a transgender individual. That is simply not the law, nor is it Planet Fitness policy. *Cf Crosby v Reynolds*, 763 F Supp 666 (D Me 1991) (granting summary judgment dismissing plaintiff's complaint of invasion of privacy for being housed in jail cell with pre-operative transgender woman). Accordingly, Count I should be dismissed with prejudice for failing to allege any of the elements of a claim for invasion of privacy.

II. COUNTS II THROUGH V (VIOLATION OF THE ELLIOTT-LARSEN CIVIL RIGHTS ACT) SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED

The Complaint asserts four counts under the Elliott-Larsen Civil Rights Act, MCL § 37.2101 *et seq.* (the "ELCRA"): two counts of sexual harassment, one count of retaliation, and one count seeking injunctive relief. None of these counts states any cognizable basis for relief under ELCRA. First, the Complaint contains no allegations of any conduct of a sexual nature, let alone conduct severe and pervasive enough to create a hostile environment. Second, Mrs. Cormier was not engaged in any protected activity and was not engaged in any conduct that would put Pla-Fit (or any defendant) on notice that she was asserting a statutory right. Third, because Pla-Fit did not violate the ELCRA, the request for injunctive relief is inappropriate.

A. No Sexual Harassment Occurred and Counts II and III Should Be Dismissed

Mrs. Cormier asserts two counts of sexual harassment (Counts II and III) based on her brief encounter with Ms. Sklodowska and based on the existence of Planet Fitness' policy. However, neither constitutes sexual harassment.

The ELCRA defines sexual harassment as:

> [U]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> > (*i*) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain ... public accommodations ....
> >
> > (*ii*) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's ... public accommodations ....
> >
> > (*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's ... public accommodations ..., or creating an intimidating, hostile, or offensive ... public accommodations ... environment.

MCL § 37.2103(i). The first two subsections describe *quid pro quo* harassment (alleged in Count III) and the third subsection describes hostile environment harassment (alleged in Count II). *See Chambers v Trettco, Inc*, 463 Mich 297, 310 (2000).

To state a valid claim for *quid pro quo* sexual harassment, a plaintiff must allege: (1) that she was subjected to any of the types of unwelcome sexual conduct or communication described in the statute [MCL § 37.2103(i)] and (2) that a public accommodation provider or its agent made submission to the proscribed conduct a term or condition of obtaining public services or used the submission to or rejection of the proscribed conduct as a factor in a decision affecting receipt of public services. *Hamed v Wayne Co*, 490 Mich 1, 10 (2011).

To state a valid claim of hostile environment sexual harassment, a plaintiff must allege that: (1) she belonged to a protected group; (2) was subjected to a communication or conduct on the basis of sex; (3) was subjected to unwelcome sexual conduct or communication (4) that was

intended to or in fact did substantially interfere with her access to a public accommodation or created an intimidating, hostile, or offensive environment; and (5) there was respondeat superior. *Radtke v Everett*, 442 Mich 368, 382 (1993).

The Complaint fails to plead any of these necessary elements.

1. Mrs. Cormier Experienced No Sexual Communication or Conduct

A threshold element of both hostile environment and *quid pro quo* sexual harassment is *sexual* communication or conduct. The ELCRA requires Mrs. Cormier to allege "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature." MCL § 37.2103(i). Here, the Complaint contains no allegation whatsoever of a *sexual* nature. Instead, the Complaint only alleges that (1) encountering a transgender person in the women's locker room and (2) Planet Fitness' gender self-identification policy is each "conduct or communication of a sexual nature" *ipso facto*. Compl. ¶ 47. This assertion is plainly wrong.

Michigan law is clear that "actionable sexual harassment requires conduct or communication that *inherently* pertains to sex." *Corley*, 470 Mich at 279. "Sex" refers to the act of sex, not gender, as made clear by the Michigan Supreme Court:

> It is clear from this definition of sexual harassment that only conduct or communication that is sexual in nature can constitute sexual harassment, and thus conduct or communication that is gender-based, but that is not sexual in nature, cannot constitute sexual harassment.

Haynie v State, 468 Mich 302, 312 (2003).

The Complaint fails to state a claim for sexual harassment because what Planet Fitness policy allows – the presence of a transgender person in the locker room of his or her choice – is facially not "sexual in nature." It is instead clearly gender-based, allowing individuals to self-

identify and express their gender identity.[4] As such, the Complaint's sexual harassment claims should be dismissed for failure to state a claim under the statute and under *Haynie.*

2. Mrs. Cormier Cannot Show She Was Subjected to Harassing Conduct Because of Gender

Mrs. Cormier's sexual harassment claim also fails because she has not (and cannot) allege that she was subjected to harassing behavior because of her gender. Planet Fitness' transgender policy has nothing to do with Mrs. Cormier's gender. *See Radtke*, 442 Mich at 383-384 ("plaintiff need only show that but for the fact of her sex, she would not have been the object of harassment," an element which was met because "but for her womanhood, [defendant] would not have held plaintiff down and attempted to solicit romance").

Indeed, Mrs. Cormier admits that Planet Fitness' policy is gender-neutral. "[W]hatever sex an individual self-identifies as allows that person to have full access to the corresponding facilities." Compl. ¶¶ 22, 26. The policy also permits a transgender individual identifying as male (biological female) to use the men's locker room. The Planet Fitness "no judgement" policy is non-discriminatory by nature and design. A gender-neutral policy that affects men and women equally cannot be sexual harassment as a matter of law.

3. Mrs. Cormier's Encounter with Ms. Sklodowska Did Not Objectively Create a Hostile Environment

Under *Radtke* the analysis of whether conduct creates the essence of a hostile environment is "whether a reasonable person, in the totality of circumstances, would have perceived the conduct as substantially interfering...or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Radtke*, 442 Mich at 394. Under

---

[4] Additionally, Planet Fitness' policy is not *ipso facto* "conduct or communication." If the mere presence of a man in a restroom or locker room designated for women is conduct or communication of a sexual nature, any male janitor who entered the locker room to clean or any man that accidentally wandered into a women's restroom could be liable for sexual harassment. Such a result is clearly not in concert with the law's intention.

this standard, "a single incident, unless extreme, will not create an offensive, hostile, or intimidating … environment." *Id.* at 395. The *Radtke* court offered "rape and violent sexual assault" as "two possible scenarios" where a single incident might suffice. *Id.* The allegations of the Complaint simply do not meet this high standard.

While her brief view of Ms. Sklodowska's presence[5] or her subsequent learning of Planet Fitness' policy may have "surprised, stunned and shocked" Mrs. Cormier, neither constitutes an extreme incident of the type the Michigan Supreme Court had in mind as supporting a hostile environment sexual harassment claim. According to the Complaint, Mrs. Cormier "returned to PF Midland's gym each day to exercise from March 2, 2015 through March 4, 2015" and used the locker room facilities to change her clothes. Compl. ¶¶ 27-28, 29. Because she continued to use the gym each day, she cannot allege that a reasonable person would perceive the conduct as substantially interfering with use of the Planet Fitness Gym.[6] For this separate reason, Mrs. Cormier's claim of hostile environment sexual harassment should be dismissed with prejudice.

B. Mrs. Cormier Cannot State a Retaliation Claim (Count IV) Because She Was Not Engaged in Protected Activity and Planet Fitness Had No Reason to Believe That She Was

As discussed above, the Complaint's claims of sexual harassment are completely without merit; as such, they cannot support retaliation under the ELCRA. *Cf Mattson v Caterpillar, Inc*, 359 F 3d 885, 890-91 (CA 7, 2004) (Title VII civil rights statute does not protect against "utterly baseless claims"). To state a valid claim for retaliation under MCL § 37.2701,[7] a plaintiff must

---

[5] The Complaint does not allege any interaction between Mrs. Cormier and Ms. Sklodowska.

[6] The Complaint also acknowledges that this Planet Fitness policy did not objectively create a hostile environment because Mrs. Cormier believed that she had to tell other female members about it or they would not have known. Compl. ¶¶ 28, 30, 56.

[7] MCL § 37.2701 provides that "[t]wo or more persons shall not conspire to, or a person shall not: (a) Retaliate or discriminate against a person because the person has opposed a violation of

allege: (1) engagement in a protected activity (2) that was known by defendant, and that (3) defendant took an action adverse to plaintiff that was (4) causally connected to the protected activity. *See Garg v Macomb Co Cmty Mental Health Servs*, 472 Mich 263, 273 (2005).

First, Mrs. Cormier fails to allege that she was engaged in a protected activity when she saw Ms. Sklodowska. Second, Mrs. Cormier fails to plead any protected activity that was known to Pla-Fit. She merely alleges that after she left the locker room, she "contacted management at PF Midland and PF Corporate to communicate her opposition to their policy which violated the Act by creating an offensive and hostile environment," Compl. ¶ 55, and that she also "notified other members at the public accommodation of the offensive and hostile policy." Compl. ¶ 56. These facts, even if assumed to be true, do not suggest that either Defendant was aware that Mrs. Cormier was "raising the spectre of a discrimination complaint." *See McLemore v Detroit Receiving Hosp*, 196 Mich App 391, 396 (1992). Indeed, because the Planet Fitness policy is gender-neutral and not sexual in nature, neither Defendant had (nor could not have had) any awareness that Mrs. Cormier's objection to the policy voiced sexual harassment or discrimination complaints. *See Garg*, 472 Mich at 273-75 (court found that plaintiff slapping bewildered supervisor for touching her shoulder was insufficient to establish retaliation claim because supervisor "obviously would have been aware that plaintiff had struck him, [but] there was nothing inherent in this conduct that would have apprised him that plaintiff was thereby opposing sexual harassment.").

C. The Separate Count for Injunctive Relief (Count V) Should Be Dismissed Because Defendants Did Not Violate the ELCRA.

The ELCRA provides that a "person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both." MCL § 37.2801(1). As discussed

---

this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act."

above, because the Complaint does not properly allege an ELCRA violation, no injunctive relief is warranted and this claim should also be dismissed.

III. COUNT VI (BREACH OF CONTRACT) SHOULD BE DISMISSED

To state a valid claim for breach of contract, a plaintiff must allege: (1) the existence of a contract and (2) a breach of that contract (3) resulting in damages to the party claiming breach. *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 178 (2014).

The basis of her breach of contract claim is Mrs. Cormier's January 28, 2015 Membership Agreement with PF Midland. Compl. ¶ 67. Yet the Complaint fails to attach a copy of the Membership Agreement in violation of MCR 2.113(F).[8] For that reason alone the claim for breach of contract should be dismissed. *See English Gardens Condo, LLC v Howell Tp*, 273 Mich App 69, 81 (2006), *aff'd in relevant part, rev'd in part*, 480 Mich 962 (2007).

Nonetheless, for the convenience of the Court, Pla-Fit attaches Mrs. Cormier's Membership Agreement as Exhibit A. *See* MCR 2.113(F)(2) ("An exhibit attached or referred to under sub-rule (F)(1)(a) or (b) is a part of the pleading for all purposes."); *see also Woody v Tamer*, 158 Mich App 764, 770 ("In an action based upon a contract, the court may examine the contract in conjunction with a motion for summary judgment for failure to state a claim.").

In the Membership Agreement, Mrs. Cormier explicitly agreed to the following terms:

> You agree to follow Planet Fitness' membership policies and club rules. Planet Fitness may, in its sole discretion, modify the policies and any club rule without notice at any time. Club rules vary by location and all signs posted in a club or on the premises or verbal communication shall be considered a part of the rules of Planet Fitness. Planet Fitness reserves the right to refund the pro-rated cost of unused services and terminate your membership immediately for violation of any membership policy or club rule.

---

[8] The Complaint offers no excuse for not attaching the operative contract. It does not allege that the Membership Agreement is otherwise a matter of public record, in the possession of the adverse party, inaccessible, unnecessary or impractical. *See* MCR 2.113(F)(1)(a)-(d).

Ex. A, Membership Agreement ¶ 4. Mrs. Cormier's membership was terminated for her failure to follow "membership policies and club rules," including Planet Fitness' well-advertised "no judgement policy." That policy includes acceptance of an individual's use of the locker room of the gender with which he or she self-identifies. Mrs. Cormier admits that after January 28, 2015, she expressly knew of the Planet Fitness policy, but refused to "submit to it," preferring instead to "warn" other members of the policy. *See* Compl. ¶¶ 25, 28, 31-32, 56, 70.

PF Midland operated its Planet Fitness Gym according to the Membership Agreement and the law. "Where a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith." *Ferrell v Vic Tanny Intern, Inc*, 137 Mich App 238, 243 (1984) (court upholding dismissal of suit challenging club's termination of members based on policy specifying color of apparel permitted to be worn based in part on club's right to make rules and regulations); *see also Downing v Life Time Fitness*, 483 Fed Appx 12, 19 (CA 6, 2012) (noting gym agreement allowed for discretion in revoking membership based on conduct).

IV. COUNT VII (INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS) SHOULD BE DISMISSED BECAUSE ANY CONDUCT ALLEGED DOES NOT MEET THE HIGH THRESHOLD REQUIRED

To state a valid claim for intentional infliction of emotional distress ("IIED"), a plaintiff must allege: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation, and (4) resulting severe emotional distress. *See Graham v Ford*, 237 Mich App 670, 674 (1999); *Linebaugh v Sheraton Mich Corp*, 198 Mich App 335, 342 (1993). Here, Mrs. Cormier must allege that Pla-Fit's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* She has not done so.

Mere indignities do not rise to the level of intentional infliction of emotional distress. *See Doe*, 212 Mich App at 91. The test to determine whether conduct was so extreme and outrageous is whether recitation of the facts of the case to an average member of the community "would arouse his resentment...and lead him to exclaim, 'Outrageous!'" *Graham*, 237 Mich App at 674-675 (internal citations omitted). That is simply not the case here. Mrs. Cormier's only allegation is the personal conclusion that the "decision to institute the policy was extreme and outrageous." Nothing could objectively be farther from the truth. Pla-Fit and its franchisees have implemented a transgender policy that is similar to transgender policies of universities and Fortune 500 companies throughout Michigan.[9] Hundreds of thousands of Planet Fitness members across the country and thousands of PF Midland members in this community go to Planet Fitness gyms every month with full knowledge of its "no judgement" policy. The average member of the community does not exclaim that such policy is outrageous; rather, they enjoy Planet Fitness gyms and renew their memberships. It is not the existence of a transgender policy that is extreme and outrageous. [10]

A plaintiff may also show that a defendant specifically intended to cause a plaintiff to suffer emotional distress or that a defendant's conduct was so reckless that any reasonable person would know emotional distress would result. *Haverbush v Powelson*, 217 Mich App 228, 236-237 (1996). Here, the Complaint makes no such allegation.

---

[9] This Court may take judicial notice that the websites of several Michigan-based entities show that they have non-discrimination policies that protect and respect gender identity similar to the Planet Fitness policy, including Michigan State University (http://www.hr.msu.edu/documents/facacadhandbooks/facultyhandbook/AntiDiscrimPolicy.htm), the University of Michigan (http://spg.umich.edu/policy/201.89-1), and General Motors (http://www.gm.com/company/aboutGM/diversity/gm_plus.html).

[10] Despite Mrs. Cormier's undertaking to "verbally warn[] other women about Defendants' policy," Compl. ¶ 28, she makes no allegation that anyone else shared her shock and surprise.

Further, Mrs. Cormier cannot maintain her IIED claim based on an allegation that she was forced to share the locker room with Ms. Sklodowska because, as she admits, she was not. She left before changing. Compl. ¶¶ 18, 29. She was accommodated by the front desk clerk. Compl. ¶ 23. After learning of the policy, she went back to the locker room *at least three times* (and did not encounter Ms. Sklodowska or any other transgender individuals) to use the locker room. Compl. ¶ ¶ 27-29. Mrs. Cormier's own actions and admissions belie her IIED claim.

Finally, termination of her membership is not a basis for an IIED claim. *See* Compl. ¶ 78 ("Defendants [sic] conduct caused Mrs. Cormier severe emotional distress as she was subjected to…having her membership terminated"). With respect to both Mrs. Cormier and Planet Fitness, losing a gym membership that costs no more than $20 per month, five days into its second month is, at most, nothing more than the "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" that cannot form the basis of this claim. *See Downing*, 483 Fed Appx at 18. Moreover, as discussed above, PF Midland was well within its right to terminate the Membership Agreement and an IIED cannot lie where a defendant has "done no more than to insist upon their legal rights in a permissible way, even [if] they are well aware that such insistence is certain to cause emotional distress." *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 80-81 (1991). Therefore, Mrs. Cormier cannot maintain a claim for intentional infliction of emotional distress and that claim as to Pla-Fit should be dismissed with prejudice.

V. COUNT VIII (EXEMPLARY DAMAGES) SHOULD BE DISMISSED BECAUSE IT IS NOT A STANDALONE CLAIM AND BECAUSE SUCH DAMAGES ARE NOT WARRANTED

As an initial matter, exemplary damages are a remedy, not an independent cause of action. *See Sneyd v Int'l Paper Co, Inc*, 142 F Supp 2d 819, 822 (ED Mich 2001); *see also McPeak v McPeak*, 233 Mich App 483, 487 (1999) ("[e]xemplary damages are a class of

compensatory damages that allow for compensation for injury to feelings"). For that reason alone, this claim should be dismissed.

Moreover based on the Complaint, Mrs. Cormier is not entitled to exemplary damages. "To justify an exemplary damages award, a defendant's conduct must be so willful and wanton as to demonstrate a reckless disregard of plaintiff's rights." *Mais v Allianz Life Ins Co of N Am*, 34 F Supp 3d 754, 760 (WD Mich 2014) (citing *McPeak*, 233 Mich App at 487). No defendant's conduct was so willful and wanton as to demonstrate a reckless disregard for Mrs. Cormier's rights. Pla-Fit instituted a valid policy to which its members, save Mrs. Cormier, adhere. When she refused to abide by policy, she lost her membership pursuant to the Membership Agreement.

Lastly, the Membership Agreement expressly precludes exemplary damages. "Any award by the arbitrator or a court is limited to actual compensatory damages. Specifically, neither an arbitrator nor a court can award either party any indirect, special, incidental or consequential damages." Membership Agreement at ¶ 7. Compensation for injury to Mrs. Cormier's feelings would certainly fall under indirect, special, incidental, or consequential damages. As such, Mrs. Cormier is not entitled to exemplary damages and this "claim" should be dismissed with prejudice.

VI. COUNT IX (MICHIGAN CONSUMER PROTECTION ACT) SHOULD BE DISMISSED BECAUSE THE COMPLAINT FAILS TO PLEAD ANY MISREPRESENTATION OR OMISSION MATERIAL TO A TRANSACTION

The Complaint asserts that Defendants violated seven separate subsections of the Michigan Consumer Protection Act, MCL § 445.903 (MCPA).[11] Compl. ¶¶ 90-96. Upon

---

[11] Mrs. Cormier alleges violations of the MCPA under subsections (g), (n), (s), (t), (y), (bb), and (cc), which provide, respectively, that unfair, unconscionable, or deceptive methods or acts include: "Advertising or representing goods or services with intent not to dispose of those goods or services as advertised or represented." MCL § 445.903(1)(g); "Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction." MCL § 445.903(1)(n). Mrs. Cormier cites to MCL 445.911(1)(n) but the language

inspection, no action alleged against either defendant rises to the level of unfair, unconscionable or deceptive acts required by the MCPA. Count IX should be dismissed.

As an initial matter, the provisions of the MCPA are construed with reference to the common-law tort of fraud. *Zine v Chrysler Corp*, 236 Mich App 261, 261 (1999); *see also Mayhall v AH Pond Co, Inc*, 129 Mich App 178, 182 (1983). To state a valid claim for fraud or misrepresentation, a plaintiff must allege: (1) that defendant made a knowing material misrepresentation that was false (2) with the intent that plaintiff would act upon it, and (3) that plaintiff did act in reliance upon it, (4) with resulting damages. *See Baker v Arbor Drugs, Inc*, 215 Mich App 198, 208-209 (1996). A material fact is "one that is important to the transaction or affects the consumer's decision to enter into the transaction." *Zine*, 236 Mich App at 283. For purposes of the MPCA, a "'transaction' is the business conducted between the parties." *Id.* at 280.

At bottom, the Complaint's MCPA claim is rooted in the allegation from that Pla-Fit represented to Mrs. Cormier that there were separate locker rooms for men and women without disclosing that its policy of "no-judgement" included gender self-identification. This claim must fail because it does not allege any statement or omission was a misrepresentation. Mrs. Cormier alleges that she was told there were separate locker rooms for men and women – there were.

---

referenced indicates she is referring to 445.903(1)(n); "Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer." MCL § 445.903(1)(s); "Entering into a consumer transaction in which the consumer waives or purports to waive a right, benefit, or immunity provided by law, unless the waiver is clearly stated and the consumer has specifically consented to it." MCL § 445.903(1)(t); "Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits." MCL § 445.903(1)(y); "Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is." MCL § 445.903(1)(bb); and "Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner." MCL § 445.903(1)(cc).

The literal truth of that fact is not overridden by a policy that allows individuals to self-identify their gender (indeed, as a matter of law a self-identified woman is not a "man"). *See MacDonald v Thomas M Cooley Law School*, 724 F 3d 654, 662-65 (CA 6, 2013) (not fraudulent misrepresentation for law school to claim percentage of its graduates were employed, since representation was not false even though graduates might have thought "employed" meant employed in permanent position for which law degree was required or preferred, statistic did not so indicate). That Mrs. Cormier may believe that male and female identification is solely a matter of birth, with all due respect, does not make it so.

The Complaint also fails to plead that any alleged misrepresentation or omission was material to Mrs. Cormier's entering the Membership Agreement. First, as a member, she could choose to use a locker room or not; indeed, many members use a gym and go home to change and shower. Second, the Complaint does not allege that Planet Fitness' policy regarding gender self-identification would have affected her decision to join the Planet Fitness Gym. Indeed, her continued use of the gym and locker room after knowledge of the policy indicates that the Planet Fitness gender policy was not material to her use and enjoyment of her gym membership.

The Complaint also fails to plead that either Defendant knowingly made a misrepresentation (or omission of fact) intending her to act. Indeed, Mrs. Cormier admits that Pla-Fit and PF Midland were forthcoming about the policy. Compl. ¶¶ 22-26. There is no allegation in the Complaint (nor could there be) that either withheld information about the policy in hopes of luring Mrs. Cormier into joining the Planet Fitness Gym; on the contrary, to Planet Fitness and its franchisees, "no judgement" means just that.

Finally, Mrs. Cormier, by her admission, has suffered no harm, from Planet Fitness' policy other than a few moments of non-actionable shock and surprise. As she herself admitted, she was still able to fully utilize the gym and locker room after learning of Planet Fitness' policy.

Notwithstanding the policy, she had the rights and duties of her Membership Agreement, including the right to enjoy the facilities and the duty to abide by its rules and policies.

Mrs. Cormier has not pled a claim under the MCPA and therefore, her claim should be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, the Court should grant Pla-Fit Franchise, LLC's motion for summary disposition under MCR 2.116(C)(8) and dismiss the Complaint, with prejudice, for failure to state a claim on which relief can be granted.

Dated: July 31, 2015

Respectfully submitted,

PLA-FIT FRANCHISE, LLC

Ronald S. Nixon (P57117)
Kemp Klein Law Firm
201 West Big Beaver Road
Troy, MI 48084
T: (248) 817-4967
ron.nixon@kkue.com

Arthur L. Pressman (*admitted pro hac vice*)
Troy K. Lieberman (*admitted pro hac vice)*
Nixon Peabody LLP
100 Summer Street
Boston, MA 02110
T: (617) 345-1000
F: (617) 345-1300
apressman@nixonpeabody.com
tlieberman@nixonpeabody.com

Attorneys for Defendant
Pla-Fit Franchise, LLC