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January 7, 2016

Via U.S. Certified Mail

Prothonotary
Chester County Court of Common Pleas
201 W. Market Street, Suite 1425
West Chester, PA 19380

Re: Taheera S. Heard v. Genesis Healthcare, LLC, et al.
CCP No. 15-10406

Dear Prothonotary:

Enclosed for filing please find the original and 2 copies of the Plaintiff's Brief in Opposition to the Preliminary Objections of Defendant Genesis Administrative Services LLC, a Proposed Order, and a Certification of Service. Kindly return a time-stamped copy to my attention at the address above using the pre-paid enclosed envelope.

Very truly yours,

Ryan Allen Hancock

RAH/djw

cc: Christiana L. Signs, Esquire (w/enclosures via electronic mail)
James N. Boudreau, Esquire (w/enclosures via electronic mail)

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

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Counsel for Plaintiff; Additional Counsel Appear on Signature Page

TAHEERA S. HEARD, **Plaintiff,** **v.** **GENESIS HEALTHCARE, LLC,** **and** **GENESIS ADMINISTRATIVE SERVICES LLC,** **Defendants.**

Case No.: 15-10406

BRIEF IN OPPOSITION TO PRELIMINARY OBJECTIONS OF DEFENDANT GENESIS ADMINISTRATIVE SERVICES LLC

Plaintiff, through her counsel and pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure and Rules 210 and 1028(c) of the Chester County Rules of Civil Procedure, hereby submits this Brief in Opposition to the Preliminary Objections of Defendant Genesis Administrative Services LLC.

I. HISTORY OF THE CASE

Plaintiff, Taheera Heard, is an experienced professional who has worked for nearly a decade as a financial systems analyst and information systems/information technology auditor. (Compl. ¶ 8.) Beginning in or about February 2013, she worked as a Senior Auditor at TD Bank, N.A. (Compl. ¶ 17.) In spring 2015, Defendant Genesis Administrative Services LLC ("Genesis") approached Ms. Heard through a recruiter to invite her to apply for a job. (Compl. ¶ 18.) During the application process, Ms. Heard disclosed to Genesis a misdemeanor conviction that arose out of the overpayment of welfare benefits to her. (Compl. ¶ 14.) The underlying charge dated to 1998, when Ms. Heard was twenty years old. (*See* Compl. ¶¶ 8, 14.) A Genesis corporate recruiter advised her that this conviction would not interfere with her hiring, and so she resigned her position at TD Bank, N.A. in anticipation of starting work at Genesis. (Compl. ¶ 23.) Subsequently, Genesis chose not to hire Ms. Heard, because of this conviction and because of other blemishes on her criminal record, including a 1999 charge that never resulted in a conviction. (Compl. ¶¶ 15-16, 38.) Genesis did not provide notice to Ms. Heard of any reason for its decision not to hire her until after her attorneys contacted Genesis, and even since then it has not itself provided notice to her specifying that its decision was based in whole or in part on criminal history record information. (Compl. ¶ 39.) Ms. Heard then filed this action under Pennsylvania's Criminal History Record Information Act ("CHRIA"), 18 Pa. C.S. §§ 9125, 9183.

II. QUESTIONS PRESENTED

1. Does CHRIA § 9125(a) create a cause of action for refusal to hire on the basis of a criminal charge that did not result in a conviction?

   Suggested Answer: Yes.

2. Does CHRIA § 9125(b) offer any protection to a woman nearing forty who is succeeding in a professional career, if half her lifetime ago she committed a misdemeanor by accepting overpayment of public benefits?

   Suggested Answer: Yes.

3. Is CHRIA § 9125(c)'s notice requirement satisfied by a letter that was not from the employer, did not specify whether the decision against hiring was based in whole or in part on criminal history record information, and was sent one month after the applicant notified the employer of an impending CHRIA lawsuit?

   Suggested Answer: No.

III. LEGAL ARGUMENT

A. Standard of Review

Pennsylvania Rule of Civil Procedure 1028 establishes the grounds for a party to file preliminary objections to a complaint. *See* Pa. R. Civ. P. 1028. The grounds include legal insufficiency of the pleading (demurrer). Pa. R. Civ. P. 1028(4). "A demurrer by a defendant admits all relevant facts sufficiently pleaded in the complaint and all inferences fairly deducible therefrom, but not conclusions of law or unjustified inferences. In ruling on a demurrer, the court may consider only such matters as arise out of the complaint itself; it cannot supply a fact missing in the complaint." *Juszczyszyn v. Taiwo*, 113 A.3d 853, 856 (Pa. Super. Ct. 2015) (citation omitted). "The question presented in a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. If doubt exists concerning whether the demurrer should be sustained, then this doubt should be resolved in favor of overruling it." *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 56 (Pa. 2014) (internal quotation marks and citations omitted).[1]

[1] Plaintiff notes that the Genesis has filed a Praecipe to Attach Exhibit A (identified as a copy of a "Background Report"). Ms. Heard objects to and opposes any effort by Genesis to include or rely on such a document as a part of its Preliminary Objections. *E.g.*, *Kirschner v. K&L Gates LLP*, 46 A.3d 737, 747 (Pa. Super. Ct. 2012) ("Preliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings; no testimony or other

B. Count I States a Claim Under CHRIA § 9125(a)

Section 9125(a) of the CHRIA states, in its entirety: "Whenever an employer is in receipt of information which is part of an employment applicant's criminal history record information file, it may use that information for the purpose of deciding whether or not to hire the applicant, only in accordance with this section." Count I of Ms. Heard's Complaint alleges that Genesis violated § 9125(a), *inter alia*, by using **non-conviction** information that was part of her criminal history record information file for the purpose of deciding not to hire her.

The use of criminal history record information is authorized "only in accordance with this section," i.e., § 9125.[2] Another subsection of this section provides: "Felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied." *Id.* § 9125(b). Thus, § 9125 authorizes employers to consider certain convictions, but not to consider non-convictions. State and federal courts have repeatedly and consistently adopted this interpretation of the CHRIA. *E.g.*, *Commonwealth v. D.M.*, 695 A.2d 770, 773 n.2 (Pa. 1997) ("Title 18 Pa. C.S. § 9125 forbids any employer from denying employment on the basis of an arrest not resulting in conviction."); *Foxworth v. Pa. State Police*, 228 F. App'x 151, 155 (3d Cir. 2007) ("[Section 9125] allows employers to consider, when relevant in hiring decisions, convictions but not arrests."); *King v. Gen. Info. Servs.*, 903 F. Supp. 2d 303, 312-13 (E.D. Pa. 2012) ("In Pennsylvania, employers are allowed to consider an applicant's felony and misdemeanor convictions, but not mere arrests, in connection with hiring decisions."); *see also Tilson v. Sch.*

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evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer." (internal quotation marks and citation omitted)).

[2] Records of convictions and records of non-convictions are both types of "criminal history record information," as that term is defined in the CHRIA. 18 Pa. C.S. § 9102.

Dist., No. 89-cv-1923, 1990 U.S. Dist. LEXIS 8964, at *11-12 (E.D. Pa. July 12, 1990) ("Employers were formerly allowed to consider arrest records of prospective employees, but the word 'arrest' was removed by statutory amendment in 1979, effective December 11, 1982."), *aff'd*, 932 F.2d 961 (3d Cir. 1991).[3]

Wherefore, Ms. Heard's Complaint sufficiently pleads a claim under 18 Pa. C.S. § 9125(a). Therefore, this Honorable Court should overrule Genesis's preliminary objection to Count I.

C. Count II States a Claim Under CHRIA § 9125(b)

Genesis's principal argument is that the specific facts of Ms. Heard's conviction disqualify her from employment in the specific factual setting of the job for which she applied. This is the sort of defense an employer might be expected to mount at the summary-judgment stage (in this case, after development of a factual record, such a defense would surely fail). But this argument cannot be sustained at the demurrer stage, as it relies on abundant "facts" not found in the complaint. Accordingly, the preliminary objection should be overruled.

Specifically, Genesis bases its legal argument on numerous factual allegations absent from the Plaintiff's Complaint, including, but not limited to, the following factual assertions:

- Genesis believes, and told Ms. Heard so, that her public benefits conviction relates to her suitability for employment in the position of Senior Auditor (Genesis's Br. at 6);
- "A senior IT auditor typically secures company information technology systems and infrastructures and works with high-level management to ensure compliance of such systems and infrastructures with federal and state law." (*Id.*)

[3] Genesis appears to suggest that a claim for failure to hire on the basis of non-convictions is cognizable under CHRIA § 9125(b) instead of § 9125(a). *See* Genesis's Br. at 5 n.2. If, *arguendo*, that interpretation is correct, dismissal of Count I should leave intact Ms. Heard's similar claim in Count II under § 9125(b), *see* Compl. ¶ 53.

- "[A]n individual in a senior IT audit [sic] position is exposed, and has access, to volumes of private and confidential personal protected health and financial information." (*Id.*)
- "Genesis concluded that Ms. Heard's Public Assistance Act conviction directly bears on her character for honesty and trustworthiness." (*Id.* at 7.)
- "Ms. Heard misrepresented her criminal history to Genesis." (*Id.* at 3 n.1.)

The court should disregard these allegations. When these allegations are deleted from Genesis's argument, little remains.

What does remain are citations to three inapposite cases. The first is an unreported decision concerning a man who had been convicted "of twenty-five felony counts of possession of child pornography" and "was required to register on the Megan's Law Website, on which he is listed as a Lifetime Offender." *Frankowski v. State Civ. Serv. Comm'n Dep't of Conservation & Natural Res.*, No. 1706 C.D. 2012, 2013 Pa. Commw. Unpub. LEXIS 482, at *1-2 (Pa. Commw. Ct. 2013). He sought employment in a job with responsibilities that would include cleaning cabins and changing facilities in state parks. *Id.* at *4. The Commonwealth Court rejected his CHRIA § 9125(b) claim, on the grounds that

> felony convictions for possession of child pornography . . . related to his suitability for employment in the State Park system, where large numbers of children congregate, employees are left unsupervised for extended periods of time, and children may be unattended by adults or may be disrobing in remote locations.

Id. at *15. It is outrageous to analogize Ms. Heard to a child pornography convict seeking such a job.

Genesis's second analogy is to a South Dakota unemployment benefits case concerning an employee of a county auditor's office. *Dean v. S.D. Dep't of Labor*, 367 N.W.2d 779 (S.D. 1985). The employee was fired because, while off-duty, she was twice arrested for shoplifting.

Id. at 781. The court upheld the denial of unemployment benefits to the employee, on the grounds that her off-duty misconduct was connected to her employment. *Id.* at 782. *Dean* arose in a very different legal context in another state. Even more significantly, the employer in *Dean* fired the employee for misconduct she committed **while she was an employee**; but Genesis refused to hire Ms. Heard because of an incident that had occurred **seventeen years earlier**.[4]

Genesis's third and final citation is to a case in which an employer asked an applicant to disclose convictions from the previous ten years; the applicant disclosed certain convictions, but "intentionally omitted" that he had also "been convicted of or pleaded guilty to numerous other misdemeanors and summary offenses, which he failed to disclose, including: public drunkenness, disorderly conduct, possession of drug paraphernalia, possession of a controlled substances, driving under the influence of marijuana, underage drinking, and violating vehicle lighting regulations." *McCorkle v. Schenker Logistics, Inc.*, No. 13-cv-3077, 2014 U.S. Dist. LEXIS 143187, at *3-5 (M.D. Pa. Oct. 8, 2014).[5] Here, by contrast, Ms. Heard disclosed her public benefits conviction and did not "intentionally omit" any convictions on her record.

The factual record, once fully developed, will bear out that nothing in Ms. Heard's criminal history record information has **any** relation to her suitability for employment in the position to which she applied. Indeed, she is precisely the sort of employment applicant whom the Pennsylvania General Assembly meant to protect by enacting the CHRIA. *See generally King v. General Info. Servs.*, 903 F. Supp. 2d 303, 312-13 (E.D. Pa. 2012) (noting that the

[4] Plaintiff notes also that the decision in *Dean* occurred not at the preliminary objection stage of the proceeding, but after a formal administrative hearing with findings of fact and conclusions of law. In other words, the court had a fully developed record to review before reaching its decision on appeal.

[5] Plaintiff notes that the decision in *McCorkle* came not at the motion-to-dismiss stage, but at the summary-judgment stage, after the parties had engaged in a discovery process that included a deposition during which the plaintiff admitted that he had intentionally omitted the various convictions in question. *McCorkle*, 2014 U.S. Dist. LEXIS 143187, at *5-6.

CHRIA is among legislation that "exemplifies [a] national effort towards restricting both the dissemination and consideration of adverse information that is potentially harmful to an individual's economic opportunities"). This is especially true given Ms. Heard's long, successful career in the years since her public assistance misdemeanor. *See generally Sec'y of Revenue v. John's Vending Corp.*, 309 A.2d 358, 362 (Pa. 1973) ("Where, as here, nearly twenty years has expired since the convictions and the record reveals that the individual has held this position of responsibility for twelve years without any allegation of impropriety, it is ludicrous to contend that these prior acts provide any basis to evaluate his present character."). To the extent that Genesis maintains that a misdemeanor Public Assistance Act conviction **forever** disqualifies one from employment as an IT auditor, such an employment policy is unsustainable in light of repeated Pennsylvania cases recognizing that lifetime employment bans are unreasonably broad. *E.g.*, *Peake v. Commonwealth*, No. 216 M.D. 2015, ___ A.3d ___, 2015 Pa. Commw. LEXIS 585, at *35 (Pa. Commw. Ct. Dec. 30, 2015) ("[I]t defies logic to suggest that **every** person who has at any time been convicted of any of the crimes listed in Section 503 of the [Older Adult Protective Services] Act, including misdemeanor theft, presents a danger to those in an Act-covered facility."); *Warren Cnty. Human Servs. v. State Civ. Serv. Comm'n (Roberts)*, 844 A.2d 70, 74 (Pa. Commw. Ct. 2004) (rejecting conviction-based "limitations that have no temporal proximity to the time of hiring").

Wherefore, Ms. Heard's Complaint sufficiently pleads a claim under 18 Pa. C.S. § 9125(b). Therefore, this Honorable Court should overrule Genesis's preliminary objection to Count II.

D. Count III States a Claim Under the CHRIA § 9125(c)

Section 9125(c) of the CHRIA protects the right of employment applicants to know if they have been turned away because of a criminal record: "The employer shall notify in writing the applicant if the decision not to hire the applicant is based in whole or in part on criminal history record information." 18 Pa. C.S. § 9125(c). Here, Genesis has never provided such notice to Ms. Heard.

Genesis decided not to hire Ms. Heard in summer 2015. However, Ms. Heard has never received any notice from Genesis explaining why it chose not to hire her. On November 2, 2015, she received a letter from a third-party credit agency, General Information Services, Inc. ("GIS"), stating: "Based on information contained in a recently obtained consumer report on you, Genesis Healthcare has elected not to extend you an offer of employment or continue your employment." (Compl. ¶ 36.)

The GIS Letter does not satisfy § 9125(c). First, it is from a third party, not Genesis. Second, and more significantly, it does not specify that the decision not to hire Ms. Heard was based in whole or in part on criminal history record information. Rather, the GIS Letter refers to a "recently obtained consumer report." That consumer report presented a range of information about Ms. Heard, including criminal history record information, but also including information wholly unrelated to her criminal history but potentially quite relevant to an employer's decision whether to hire her, such as information about her TD Bank position and salary. (Compl. ¶ 34.)

Lastly, even if the GIS Letter were from Genesis and specified that criminal history record information had motivated Genesis's decision, it would not satisfy § 9125(c). This is because the GIS Letter was sent to Ms. Heard unreasonably late: three months after Genesis's decision not to hire her, and one month after she had put Genesis on notice that she was about to

file a lawsuit against it for violations of the CHRIA, including § 9125(c). (*See* Compl. ¶ 35.) Such an unreasonably late and prejudicial notice must, as a matter of law, fail to satisfy the statutory "notice" requirement. The Pennsylvania General Assembly included the § 9125(c) notice requirement within the CHRIA to empower job applicants to exercise their rights under the statute. Section 9125(c) would be entirely hollowed out if an employer could disregard the notice requirement until and unless it was sued, and then could escape all consequences for its § 9125(c) violation simply by sending a notice **after** the initiation of a lawsuit. Such a construction of § 9125(c) would frustrate the purpose of the provision and result in an absurdity. *See* 1 Pa. C.S. § 1922(1) (Statutory Construction Act presumption "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable").

In a highly analogous situation, the Commonwealth Court has identified an implied "reasonable time" requirement in 75 Pa. C.S. § 1542. That statute directs the Department of Transportation to "revoke the operating privilege of any person found to be a habitual offender" but does not set forth a time limit. The Commonwealth Court has interpreted that statute as implicitly requiring that the notice be sent within a reasonable time:

> We observe that nothing in Section 1542(a) expressly requires the Department to issue its revocation notice within any time limit. And, of course, a court may not disregard the plain words of a statute where the language is free and clear of all ambiguity. We must agree with the appellant, however, that the legislature could not have intended to allow the Department, without a good reason, to wait years to impose penalties such as that prescribed in Section 1542. Such a result, in our opinion, would be absurd and unreasonable and the legislature is presumed not to intend such results. We conclude, therefore, that the provisions of Section 1542(a) are ambiguous with respect to the time frame within which the Department must act. We also believe that in order to avoid an absurd or unreasonable result, the provisions of Section 1542(a) must be construed to impliedly require the Department to give notice of revocation as a habitual offender within a "reasonable" time after it receives the triggering third conviction notice.

Lemley v. Commonwealth, Dep't of Transp., 509 A.2d 1380, 1382 (Pa. Commw. Ct. 1986) (internal quotation marks, citations, and footnote omitted); *accord Rothstein v. DOT, Bureau of Driver Licensing*, 922 A.2d 17, 23 (Pa. Commw. Ct. 2006) (reiterating that "in the absence of a specific statutorily imposed time limit, we have held that DOT must notify the motorist of a suspension, revocation or cancellation within a reasonable period of time after DOT receives notice of the conviction or other action that triggers DOT's action"). For identical reasons, CHRIA § 9125(c) requires the employer to give notice to the applicant within a reasonable time. Here, providing notice to Ms. Heard one month after she put Genesis on notice of an impending CHRIA lawsuit was not "reasonable."

The only case that Genesis cites is not on point. *See McCorkle v. Schenker Logistics, Inc.*, No. 13-cv-3077, 2014 U.S. Dist. LEXIS 143187, at *18 (M.D. Pa. Oct. 8, 2014) ("Defendant revoked Plaintiff's conditional offer because he intentionally misrepresented his criminal history on his employment application in violation of Defendant's employment policies. As such, the disqualification was not based on Plaintiff's criminal history record information and, therefore, Defendant was under no obligation to comply with the CHRIA's notification requirement.").[6]

Wherefore, Ms. Heard's Complaint sufficiently pleads a claim under 18 Pa. C.S. § 9125(c). Therefore, this Honorable Court should overrule Genesis's preliminary objection to Count III.

[6] Dictum in *McCorkle* suggests that the notice provided to the applicant in that case would have satisfied § 9125(c), *see* 2014 U.S. Dist. LEXIS 143187, at *18 n.5, but there is no suggestion in *McCorkle* that the notice contained other information relevant to hiring, as is the case here. In addition, the plaintiff in *McCorkle* received his notice some two months before filing suit, *see id.* at *10, *19 n.5, and the notice was from the employer, not just from a third-party credit agency, *id.* at *10 n.3.

IV. CONCLUSION

For all of the reasons stated above, the Court should overrule Genesis's preliminary objections to Counts I, II, and III of Ms. Heard's Complaint.

Dated this 7th Day of January, 2016.

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IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

TAHEERA S. HEARD, **Plaintiff,** **v.** **GENESIS HEALTHCARE, LLC,** **and** **GENESIS ADMINISTRATIVE SERVICES LLC,** **Defendants.**	Case No.: 15-10406

[PROPOSED] ORDER

AND NOW, this _____ day of _____, 2016, upon consideration of the Preliminary Objections of Genesis Administrative Services LLC to the Plaintiff's Complaint, it is hereby ORDERED and DECREED that the Preliminary Objections are OVERRULED. Genesis Administrative Services LLC shall file an Answer to the Plaintiff's Complaint within twenty (20) days from the date of this Order.

BY THE COURT

_____

Hon. Jacqueline C. Cody

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

TAHEERA S. HEARD, **Plaintiff,** **v.** **GENESIS HEALTHCARE, LLC,** **and** **GENESIS ADMINISTRATIVE SERVICES LLC,** **Defendants.**

Case No.: 15-10406

CERTIFICATION OF SERVICE

I hereby certify that on this date, I caused a complete copy of all papers contained in the foregoing Plaintiff's Brief in Opposition to Preliminary Objections of Defendant Genesis Administrative Services LLC to be served on the following counsel of record via email, per agreement of the parties under Pennsylvania Rule of Civil Procedure 205.4(g):

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Dated: January 7, 2016