GREENBERG TRAURIG, LLP
James N. Boudreau (Pa. I.D. No. 77891)
Christiana L. Signs (Pa. I.D. No. 317851)
2700 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
TEL: 215.988.7800
FAX: 215.717.5232
boudreauj@gtlaw.com
signsc@gtlaw.com

Attorneys for Defendant Genesis Administrative Services LLC

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA

TAHEERA S. HEARD, Plaintiff, v. GENESIS HEALTHCARE, LLC and GENESIS ADMINISTRATIVE SERVICES LLC, Defendants.	NO. 15-10406-IR

REPLY IN SUPPORT OF PRELMINARY OBJECTIONS OF DEFENDANT GENESIS ADMINISTRATIVE SERVICES LLC

Defendant Genesis Administrative Services LLC ("Genesis") submits this Reply in support of its preliminary objections filed December 7, 2015.

In Plaintiff Taheera Heard's Brief in Opposition to Preliminary Objections of Defendant Genesis Administrative Services LLC (the "Opposition" or "Opp'n"), Ms. Heard raises arguments that have nothing to do with her Complaint and leaves glaring voids that only serve to highlight why this Court should grant Genesis' preliminary objections. For example, regarding

her claim under 18 Pa. C.S. § 9125(a), she cites no legal authority which justifies three separate causes of action under § 9125. Instead, she cites cases addressing § 9125 as a whole, only furthering Genesis' point that the first subpart of that Section does not give rise to a separate count. Next, Ms. Heard tries to defeat Genesis' demurrer as to Count II by making conclusory allegations and pointing to inapposite case law. Her attempt to second guess Genesis' consideration of her criminal background information conflicts with the law and common sense. Genesis, not Ms. Heard, decides whether her criminal convictions are relevant to the position for which she applied. Furthermore, given that her Public Assistance Act conviction indisputably involves fraud, Genesis' consideration of that conviction in assessing her suitability for employment as a Senior IT Auditor is objectively proper under the Act. Finally, Ms. Heard makes three technical and ultimately unavailing arguments in trying to save her notice claim. The plain language of the statute flatly refutes all of them.

Accordingly, Ms. Heard's Opposition fails to give the Court any reason to deny Genesis' preliminary objections. Each of her claims fails as a matter of law, and the Court should therefore dismiss her Complaint in its entirety and with prejudice.

I. MS. HEARD FAILS TO STATE A LEGALLY COGNIZABLE CLAIM IN COUNT I BECAUSE THAT SUBSECTION CONTAINS NO RULES TO VIOLATE AND DOES NOT PROVIDE A CAUSE OF ACTION.

Ms. Heard has failed to provide any legal authority to support the existence of a separate CHRIA claim under § 9125(a) because no such claim exists. In fact, the only relevant legal authority Ms. Heard cites is the statute itself. The statute's plain, unambiguous language does not support the existence of a separate count. Subsection (a) of § 9125 simply states that an employer "may use [criminal history record information] for the purpose of deciding whether or not to hire the applicant, only in accordance with this section." *See* § 9125(a). It does not contain any rules that an employer can violate, much less provide an express cause of action.

Nonetheless, Ms. Heard attempts to manufacture a claim under § 9125(a) out of whole cloth. In doing so, she conflates § 9125(a) and § 9125(b), which governs when employers are permitted to consider criminal history record information in making hiring decisions. Not surprisingly, the cases Plaintiff cites in support of a separate claim under § 9125(a) do not support her contention. Simply put, not one mentions subsection (a) of § 9125. The cases simply stand for the proposition that under § 9125(b), an employer may only consider an applicant's felony and misdemeanor convictions, but not mere arrests, in connection with hiring decisions. (*See* Opp'n at 4-5); *cf. Foxworth v. Pa. State Police*, 228 F. App'x. 151, 155 (3rd Cir. 2007) (stating 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); *Tilson* v. *Sch. Dist. of Phila.*, No. 89-cv-1923, 1990 WL 98932, at *4 (E.D. Pa. July 13, 1990), *aff'd*, 932F.2d 961 (3rd Cir. 1991).

Further, the cases Ms. Heard cites are wholly inapposite, as none even involve claims under the CHRIA. *See Commonwealth v. D.M.*, 548 Pa. 131, 695 A.2d 770 (Pa. 1997) (involving entitlement to expungement of arrest record after acquittal of criminal charges); *King*, 903 F. Supp. 2d 303 (opinion involving defendant's motion to dismiss where defendant challenged constitutionality of disclosure provisions of the Fair Credit Reporting Act on First Amendment grounds); *Foxworth*, 228 F. App'x. 151 (involving Title VII race discrimination, 42 U.S.C. § 1983, and due process and equal protection claims arising from Pennsylvania State Police refusal to hire an African-American applicant after the applicant revealed an expunged criminal record for theft).

In sum, instead of supporting her position, the cases in Ms. Heard's Opposition further demonstrate there is no separate cause of action under § 9125(a). Count I fails to state a legally cognizable claim, and the Court should sustain Genesis' preliminary objection as to Count I.

II. COUNT II FAILS BECAUSE GENESIS DECIDES WHETHER PLAINTIFF'S PUBLIC ASSISTANCE ACT CONVICTION RELATES TO HER SUITABILITY FOR EMPLOYMENT AND GENESIS COMPLIED WITH THE CHRIA BY CONSIDERING THE CONVICTION.

To save her claim under § 9125(b) of the CHRIA (Count II), Ms. Heard urges the Court to ignore "factual allegations" allegedly made by Genesis, including Genesis' averment that "it believes, and told Ms. Heard so, that her public benefits conviction relates to her suitability for employment in the position of Senior Auditor." (Opp'n 5). The problem for Ms. Heard is that her own Complaint alleges this. (*See* Compl. ¶¶ 14, 30-32, 35-36). Further, after urging the Court to set aside Genesis' "factual allegations," Ms. Heard then ironically proceeds to rely on her own *conclusions* and *opinions* to save her Complaint. Though she points to no facts in her Complaint supporting the allegation, she claims, "[t]he 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." (Opp'n 7). Her argument does not save her Complaint from dismissal for three distinct reasons.

First, under the plain language of § 9125(b), an employer may consider felony and misdemeanor convictions "to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied." As a matter of law and common sense, this means the employer decides whether a criminal conviction relates to an applicant's suitability for the position sought. *See McCorkle v. Schenker Logistics, Inc.*, No. 1:13-CV-3077, 2014 WL 5020598, at *6 (M.D. Pa. Oct. 8, 2014) (finding that plaintiff's claims that she did not have to disclose convictions to be without merit, because "[e]ven assuming *arguendo*, that the

convictions were unrelated to the position [for which she applied], such a determination is to be made by the employer, not the applicant."). Put another way, a job applicant does not make this decision and cannot state a viable claim merely by second guessing whether the criminal convictions an employer considers are relevant to suitability for a particular position.

This leads to the second reason Ms. Heard's arguments fail. Because the employer makes the determination of relevance, mere conclusory allegations that a criminal conviction does not relate to suitability for employment from a plaintiff are irrelevant and insufficient under Pennsylvania law to sustain a claim. *See Bayada Nurses, Inc. v. Com., Dept. of Labor and Industry*, 8 A.3d 866, 884, 607 Pa. 527, 558 (Pa. 2010) (stating that in deciding a *demurrer*, although "the court must accept as true all well pleaded material allegations and any reasonable inferences therefrom . . . a court need not accept as true conclusions of law, unwarranted inferences, allegations, or expressions of opinion.") (citations omitted); *see also Krentz v. Consolidated Rail Corp.*, 910 A.2d 20, 26, 589 Pa. 576, 586 (Pa. 2006). Even if Ms. Heard's personal opinion was relevant – which it is not, given that it is Genesis' prerogative to decide whether her criminal convictions are related to suitability – Ms. Heard has provided no factual allegations that support her opinion. It thus remains that her own naked opinion that her "convictions did not relate to her suitability for employment in the position at Genesis for which she applied" is not by itself enough. *Compare* (Compl. ¶ 52), *with Bayada Nurses*, 8 A.3d at 884; 607 Pa. at 558 ("a court need not accept as true . . . unwarranted inferences . . . or expressions of opinion").

Third, on its face, Ms. Heard's misdemeanor fraud conviction under the Public Assistance Act relates to her "suitability for employment" as a Senior IT Auditor, a position that

objectively requires honesty and trustworthiness.[1] Genesis' consideration of her fraud conviction thus complies with § 9125(b). Ms. Heard does not and cannot dispute that fact. Nor does Ms. Heard cite any applicable legal authority to support her contention that consideration of a fraud conviction would be improper under the CHRIA in these circumstances. In any event, Ms. Heard misrepresented her Public Assistance Act conviction to Genesis. In the Attestation of Good Moral Character Ms. Heard completed as part of the onboarding process, she stated that she had a civil judgment from 1998 that was not a "charge of Misdemeanor Felony." (*See* Br. in Support of Preliminary Objections at 3 n.1); *cf. McCorkle*, 2014 WL 5020598, at *5-6 (granting summary judgment on CHRIA claim where defendant "revoked [plaintiff's job offer] because he intentionally misrepresented his criminal history on his employment application"). Further factual development is thus futile.

The four cases Ms. Heard cites to support Count II and her contention that "she is the sort of employment applicant whom the Pennsylvania General Assembly meant to protect by enacting the CHRIA" are also wholly inapposite. (*See* Opp. at p. 7). First, the *King* opinion, as discussed *supra*, is not on point. It involves claims about the constitutionality of an FCRA provision, not the CHRIA. 903 F. Supp. 2d 303. Nor does Ms. Heard's quote from *King* provide any support for her claim that Genesis violated § 9125(b) by considering her conviction in making its employment decision. The quote does nothing more than state the general purpose of the CHRIA legislation. Second, *Sec'y of Revenue v. John's Vending Corp*, 309 A.2d 358, 362, 453 Pa. 488, 493-94 (Pa. 1973) has no bearing here. It has nothing to do with the CHRIA and does not involve employment or hiring decisions. In *John's Vending Corp.*, a case over forty

[1] As Genesis previously established, Ms. Heard's misdemeanor Public Assistance Act conviction involved the crime of fraudulently procuring federal food stamps under Pennsylvania's Public Welfare Code. *See* 62 Pa. Stat. Ann § 481; *see also* Def. Br. at 7.

years old, the plaintiff successfully challenged the State of Pennsylvania's decision to revoke its wholesale cigarette dealer's license under the Cigarette Tax Act based on one of its officer's prior convictions for moral turpitude that long predated the license revocation. 309. A.2d at 362. In stark contrast to this case, *John's* involved an existing interest in a business license, not a hiring decision, and the case nowhere addresses whether or to what extent an employer can consider criminal convictions in making hiring decisions. *Id.*

Likewise, *Peake v. Commonwealth,* 2015 WL 9488235, at *1 (Pa. Commw. Ct. Dec. 30, 2015) and *Warren County Human Services v. State Civil Service Comm'n*, 844 A.2d 70 (Pa. Commw. Ct. 2004), which Plaintiff also cites in her Opposition, are similarly irrelevant. Neither involves claims under the CHRIA. Rather, they concern lifetime employment bans under the Older Adults Protective Services Act and the Child Protective Services Law, respectively. Unlike the statutes at issue in *Peake* and *Warren County*, which mandate that employers consider certain convictions in certain circumstances, the CHRIA regulates what criminal convictions an employer may consider in general in evaluating the suitability of a job applicant. That is, no legally imposed lifetime employment ban is at issue here. Accordingly, these cases offer no support for the crux of Ms. Heard's claim -- that Genesis improperly considered her past misdemeanor Public Assistance Act conviction in evaluating her suitability for employment as a Senior IT Auditor.

In sum, Ms. Heard's arguments fail to save Count II. It was Genesis' decision to make when it found that her criminal conviction related to her suitability for a particular position within the company, and in any event, Ms. Heard has presented no factual allegations supporting her own opinion to the contrary. In fact, given the conviction and the position at issue here,

Genesis objectively complied with the CHRIA. For all of these reasons, the Court should sustain Genesis' preliminary objection as to Count II.

III. COUNT III FAILS BECAUSE GENESIS COMPLIED WITH § 9125(c) BY USING GIS TO PROVIDE MS. HEARD WITH WRITTEN NOTICE.

Regarding Ms. Heard's claim related to notice (Count III), it fails because, as Ms. Heard admits, she in fact received notice that Genesis ultimately decided not to hire her based in part on information contained in her consumer report – a consumer report she herself admittedly received. To save her notice claim from dismissal, Ms. Heard argues: (1) that Genesis cannot use a third party to provide the notice required when a decision not to hire is based in whole or in part on criminal history information; (2) that the notice must state verbatim that the decision was based in whole or in part on "criminal history record information;" and (3) that the notice must be made within a certain time of the hiring decision. Ultimately, however, her fault-finding is to no avail; none of the issues she highlights state a viable claim.

A. § 9125(c) DOES NOT PROHIBIT USE OF A THIRD PARTY TO FACILITATE NOTICE OF A HIRING DECISION.

Ms. Heard's first complaint about the notice she received is that "it is from a third party, not Genesis." (Opp'n 9). Contrary to Ms. Heard's implication, § 9125(c) does not prohibit employers like Genesis from using third party consumer reporting agencies like General Information Services, Inc. ("GIS") to send notice on the employers' behalf. The language "[t]he employer shall notify in writing" simply does not restrict an employer from satisfying that obligation using a third party agent. *See* § 9125(c).

In fact, employers routinely and permissibly use third parties to facilitate the sending of adverse action notices to job applicants, as is apparent through even a brief survey of Fair Credit Reporting Act ("FCRA") law. *See, e.g.*, *Moore v. Rite Aid Hdqtrs. Corp.*, 33 F. Supp. 3d 569 (E.D. Pa. 2014) (noting and not objecting to Rite Aid's use of Lexis-Nexis to deliver form letters

designed to satisfy the FCRA's notice requirements). The Federal Trade Commission, charged with interpreting the FCRA, has even issued an opinion letter explicitly approving of employers using third parties to send adverse action notices to job applicants to comply with the law. *See* Staff Opinion Letter, Fair Credit Reporting Act, 1998 WL 34323763, at *2 (Federal Trade Commission June 9, 1998) (stating that "[a]n employer or any other user of consumer report information obtained from a CRA may have the CRA fulfill the user's ministerial obligations under the FCRA").

Given the above, Ms. Heard's argument finding fault with the notice she received because it came from a "third party" essentially asks the Court to fashion a new law – nowhere written in statute – that conflicts with established federal law and has no support in *any* law. The Court should decline to do so.

B. THE CONTENT OF THE GIS LETTER TO MS. HEARD SATISFIES THE CHRIA'S REQUIREMENTS.

Ms. Heard's second argument is that the GIS letter "does not specify that the decision not to hire Ms. Heard was based in whole or in part on criminal history record information. Rather, [it] refers to a 'recently obtained consumer report.'" (Opp'n 9). Her attempt to split hairs by distinguishing a "consumer report" from "criminal history record information" yet again reads requirements into the statute that do not exist. There is no requirement that notice under § 9125(c) contain "magic language" or recite verbatim the words from the statute. Ms. Heard cites no authority showing otherwise. To the contrary, courts have already implicitly approved the very same "consumer report" language Genesis used here as satisfying the CHRIA notice requirement. *See McCorkle*, 2014 WL 5020598, at *6 (finding defendant complied with CHRIA notice requirement where "Defendant notified Plaintiff by letter that it was revoking his

conditional offer and that its decision was 'influenced in whole or in part by a consumer report'").

Moreover, Ms. Heard knew full well when she received the GIS letter that the "consumer report" it referred to included her criminal history record information. The term "consumer report" includes criminal history record information, as defined under the FCRA.[2] Ms. Heard specifically authorized GIS to conduct a criminal background check on behalf of Genesis. (Compl. ¶ 22). After GIS did so, it sent her a copy of the resulting background report – which Ms. Heard identifies in her Complaint as a "consumer report." (Compl. ¶ 30). To argue now that when she received a later communication notifying her that Genesis had elected not to continue her employment based in part on information contained in "a recently obtained consumer report" she had no idea this referred to her "criminal history record information" as defined in the CHRIA is disingenuous.

C. THE OCTOBER 28, 2015 LETTER FROM GIS TO MS. HEARD WAS SATISFIED GENESIS' OBLIGATIONS UNDER § 1925(c).

True to form, Ms. Heard's last argument that she has stated a claim under § 9125(c) reads another requirement into the statute that does not in fact exist. She claims that the notice she received was "unreasonably late," as it came "three months after Genesis' 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." (Opp'n 9-10).

Section 9125(c) does not contain any requirement that the notice called for in that section be sent within a specific timeframe. The plain words of § 9125(c) are free and clear of all

---

[2] The FCRA notoriously defines "consumer report" broadly. The Act including in its definition of "consumer report" "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's . . . character, general reputation, [or] personal characteristics . . . which is used or expected to be used . . . in establishing the consumer's eligibility for . . . employment purposes." 15 U.S.C. § 1681a(d).

ambiguity. The statute requires that an employer notify an applicant in writing if a decision not to hire is based in whole or in part on criminal history record information. *See* § 9125(c). Genesis, by virtue of GIS having sent the October 28, 2015 letter to Ms. Heard on its behalf, complied with § 9125(c).

Ms. Heard's attempt to graft an implied "reasonable time" requirement based on case law involving a wholly unrelated statute is unavailing. Neither of the cases she cites in her Opposition involves the CHRIA, the statue at issue here, or even analogous state or federal laws related to employers' use of background reports in making hiring decisions. In stark contrast, the two cases Ms. Heard cites address whether the Pennsylvania Department of Transportation's ("DOT") is obligated under the Vehicle Code at 75 Pa. C.S. § 1542 to send a notice revoking the operating privilege of any person found to be a habitual offender within a reasonable time. *See Lemley v. Com., Dept of Transp.*, 509 A.2d 1380, 1382 (Pa. Commw. Ct. 1986); *Rothstein v. DOT, Bureau of Driver Licensing*, 922 A.2d 17, 23 (Pa. Commw. Ct. 2006).

Rothstein addresses a "reasonable" time period only in the context of what a licensee must prove "to avoid an otherwise valid cancellation of his or her driver's license on the basis of delay." The Court explained: "Generally, in cases involving a purported delay by DOT in issuing a notice of suspension, revocation or cancellation, 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 and that DOT is not accountable for delays caused by other entities." *Rothstein*, 922 A.2d at 23. Ms. Heard offers no reason why this general reasonableness requirement imposed on the DOT, a government entity, in the context of issuing

notices of license cancellations should be imposed on private employers in the context of issuing notices related to hiring decisions.

In any event, even Ms. Heard's fabricated "reasonable time" requirement does not help her. She relies on *Lemley*, a case in which the DOT did not issue its notice revoking the plaintiff's driver's license until twenty seven months after the precipitating third conviction under the Vehicle Code. 509 A.2d at 1381. The court found that "the legislature could not have intended to allow the DOT, without good reason, to wait years to impose penalties such as that prescribed in Section 1542" and concluded that § 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." *Id.* at 1382. Here, Ms. Heard alleges she received the required notice just a few months after the decision that she argues should have triggered it. In short, even her own suggested reading of the statute does not support her claim that Genesis' "unreasonably" waited, *i.e.*, 27 months, to send her the statutorily required notice where, as here, Genesis sent her notice within a few months.[3]

In sum, this Court should ignore Ms. Heard's requests that it re-write the CHRIA. Instead, the Court should apply the plain and unambiguous language of § 9215(c), and thereby sustain Genesis' preliminary objection as to Count III.

---

[3] Ms. Heard's allegation that she did not receive the notice until "one month after she had put Genesis on notice that she was about to file a lawsuit," (Opp'n 9-10), also fails to support any legally cognizable claim. In fact, this allegation works against her. Essentially, Ms. Heard alleges that she communicated her concerns about not receiving a notice to Genesis, and Genesis thereafter sent her the notice for which she asked. That Ms. Heard then nevertheless filed a lawsuit based on the CHRIA's notice requirement – a notice requirement that does not dictate anything about *when* notice must be sent – raises eyebrows to say the least.

II. CONCLUSION.

For all of the foregoing reasons, the Court should sustain Genesis' preliminary objections to Counts I, II, and III of Ms. Heard's Complaint and dismiss the Complaint in its entirety and with prejudice.

Respectfully Submitted,

Dated: January 26, 2016

James N. Boudreau (Pa. I.D. No. 77891)
Christiana L. Signs (Pa. I.D. No. 317851)
GREENBERG TRAURIG, LLP
2700 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
TEL: 215.988.7800
FAX: 215.717.5232
boudreauj@gtlaw.com
signsc@gtlaw.com

Attorneys for Defendant Genesis Administrative Services LLC

GREENBERG TRAURIG, LLP
James N. Boudreau (Pa. I.D. No. 77891)
Christiana L. Signs (Pa. I.D. No. 317851)
2700 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
TEL: 215.988.7800
FAX: 215.717.5232
boudreauj@gtlaw.com
signsc@gtlaw.com

Attorneys for Defendant Genesis Administrative Services LLC

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA

TAHEERA S. HEARD, Plaintiff, v. GENESIS HEALTHCARE, LLC and GENESIS ADMINISTRATIVE SERVICES LLC, Defendants.	NO. 15-10406-IR

CERTIFICATION OF SERVICE

This is to certify that in this case, complete copies of all papers contained in the foregoing Reply in Support of Preliminary Objections of Defendant Genesis Administrative Services LLC have been served upon the following persons, by the following means and on the date(s) stated:

Name:	**Means of Services:**	**Date of Service:**
Ryan Allen Hancock Attorney ID No. 92590 rhancock@wwdlaw.com **WILIG, WILLIAMS & DAVIDSON** 1845 Walnut Street, 24th Floor Philadelphia, PA 19103	Electronic mail	January 26, 2016

Christiana L. Signs
2700 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
Pa. I.D. No. 317851
TEL: 215.988.7800