IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK LONG, JOSEPH SHIPLEY, and MICHAEL WHITE, individually and on Behalf of all others similarly situated,	:	
Plaintiffs,	:	CIVIL ACTION NO. 2:16-cv-01991-PBT
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,	:	
Defendant.	:	

DEFENDANT SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED CLASS ACTION COMPLAINT

BUCHANAN INGERSOLL & ROONEY, PC
Elizabeth A. Malloy (Pa. I.D. No. 48297)
Samantha L. Southall (Pa. I.D. No. 80709)
Andrew G. Hope (Pa. I.D. No. 317932)
Two Liberty Place
50 S. 16th Street, Suite 3200
Philadelphia, PA 19102-2555
(215) 665-8700

SWARTZ CAMPBELL LLC
Candidus K. Dougherty (Pa. I.D. No. 206106)
Jeffrey B. McCarron (Pa. I.D. No. 49467)
Michael A. Cognetti (Pa. I.D. No. 55819)
Two Liberty Place
50 S. 16th Street, 28th Floor
Philadelphia, PA 19102
(215) 564-5190

Attorneys for Defendant Southeastern Pennsylvania Transportation Authority

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendant Southeastern Pennsylvania Transportation Authority ("SEPTA"), by its undersigned counsel, respectfully submits this Memorandum of Law in support of its Motion to Dismiss the First Amended Class Action Complaint (the "Amended Complaint").

PRELIMINARY STATEMENT

This putative class action was brought by three individuals, Frank Long, Joseph Shipley and Michael White, who allegedly applied for positions as a Bus Operator or Railroad Supervision Manager with SEPTA between 2014 and 2016. Plaintiffs aver that, in each instance, SEPTA extended them a conditional offer of employment, which was contingent upon a background check. Plaintiffs also aver that, in each instance, they disclosed the existence of a drug conviction to SEPTA. Plaintiffs contend that SEPTA obtained a consumer report about each of them, which, consistent with Plaintiffs' disclosures to SEPTA, demonstrated that Plaintiffs did, in fact, have one or more felony drug convictions. Plaintiffs further allege that, because of a SEPTA policy, their conditional offers of employment were revoked as a result of their criminal history.

Arising from this background, the Amended Complaint asserts four separate claims under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (the "FCRA") and Pennsylvania's Criminal History Record Information Act, 18 Pa. Cons. Stat. Ann. § 9125 *et seq.* (the "CHRIA"). More specifically:

- In Count I, Plaintiffs allege that SEPTA willfully violated the FCRA because it failed to make a disclosure to Plaintiffs purportedly required by the FCRA before it obtained consumer reports about Plaintiffs (Am. Compl. at ¶ 112);
- In Count II, Plaintiffs allege SETPA willfully violated the FCRA because it failed to provide Plaintiffs with a pre-adverse action letter and a copy of the consumer report before revoking their conditional offers of employment (Am. Compl. at ¶¶ 120-21);

- In Count III, Plaintiffs allege that SEPTA willfully violated the FCRA because it failed to provide Plaintiffs with a written description of their rights under the FCRA before revoking their conditional offers of employment (Am. Compl. at ¶ 130); and

- In Count IV, Plaintiffs allege that SEPTA willfully violated the CHRIA because it declined to employ Plaintiffs as Bus Operators and a Railroad Supervision Manager because of their criminal drug convictions. (Am. Compl. at ¶¶ 138-39).

Plaintiffs lack standing to assert their FCRA claims in Counts I, II and III of the Amended Complaint because Plaintiffs have not alleged facts sufficient to show that they suffered a concrete and particularized injury as a consequence of the purported FCRA violations. In addition, Plaintiffs have not alleged facts that demonstrate any linkage between the revocation of Plaintiffs' conditional offers and the alleged FCRA violations. In each instance, Plaintiffs disclosed the existence of the conviction at issue to SEPTA before SEPTA obtained a consumer report about Plaintiffs. Moreover, Plaintiffs do not allege that the consumer reports were inaccurate in any manner. Thus, Plaintiffs have not suffered any injury in fact as a consequence of SEPTA's purported failures to provide them with a pre-adverse action letter, consumer report, and summary of rights.

Plaintiffs also have failed to state a claim for relief in the Amended Complaint. Indeed, contrary to Plaintiffs' allegations, they were provided with the required "stand alone" disclosure when they authorized SEPTA to obtain a consumer report about their criminal history. Plaintiffs' allegations that SETPA willfully violated the FCRA are insufficient because they lack the necessary factual support. In addition, Plaintiffs cannot contend that SEPTA willfully violated the CHRIA when at least one court has found that a similar policy was justified by business necessity and Plaintiffs have identified no facts that SEPTA's policy is objectively unreasonable.

For all of these reasons and as further set forth below, this Court should dismiss Plaintiffs' Amended Complaint with prejudice.

FACTUAL BACKGROUND

For purposes of this Motion, the allegations in the Amended Complaint must be accepted as true. Plaintiffs are three individuals who reside in Philadelphia and applied for positions with SEPTA between 2014 and 2016: Frank Long and Michael White applied for Bus Operator positions, while Joseph Shipley applied to be a Railroad Supervision Manager. (Am. Compl. at ¶¶ 21, 23, 25, 26, 28, 30). Plaintiffs allege that, during the application and interview process, they each executed a document entitled "Authorization to Review Criminal History." (the "SEPTA Authorization") (Am. Compl. at ¶¶ 42, 52, 65; copies of executed SEPTA Authorizations are attached collectively as Exhibit A). In each SEPTA Authorization, the Plaintiffs disclosed their criminal convictions. (Ex. A; *see also* Am. Compl. at ¶¶ 45, 59, 70). More specifically, each Plaintiff disclosed that he had a drug conviction. (*Id.*)

Plaintiffs aver that SEPTA did not "provide [them] with any other authorization form that complied with FCRA." (Am. Compl. at ¶¶ 43, 53, 66). On the contrary, SEPTA provided each Plaintiff with a second document entitled "U.S. Security Care, Inc./SEPTA Notice and Authorization Under the Fair Credit Reporting Act" (the "U.S. Security Care Notice and Authorization") (Copies of executed U.S. Security Care Authorizations are attached collectively as Exhibit B). The U.S. Security Care Notices and Authorizations state in relevant part:

> Notice: As part of the job application process, the Company named above (the "Company") may request a Consumer Report which may include an Investigative Consumer Report and may rely upon such Report in making its employment decision. By signing this form, you authorize U.S. Security Care, Inc. to compile such Report on you and provide to the Company. A "Consumer Report" is any written, oral, or other communication of any information bearing on your credit worthiness, credit standing,

> credit capacity, character, general reputation, personal characteristics, or mode of living which is used for employment purposes. An "Investigative Consumer Report" is obtained through personal interviews with your neighbors, friends, or associates, or with others with whom you are acquainted who may have knowledge concerning any such items of information. Your authorization to obtain these Reports is required by federal law (Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.). Upon your written request within a reasonable time after today, you will receive a complete and accurate disclosure of the nature and scope of this Investigation.
>
> * * *
>
> Authorization: I hereby authorize U.S. Security Care, Inc. to obtain a Consumer Report on me and to provide such Report to the Company. I authorize and direct all schools, landlords, employers, criminal justice agencies, departments of motor vehicles, government agencies, credit bureaus, consumer reporting agencies, collection agencies, retail business establishments, or other sources of information to release such information upon request of U.S. Security Care, Inc. regardless of any previous statement to the contrary. I understand that I will be notified by the Company if information contained in such Report results in a negative employment decision, including, without limitation, a decision to terminate my employment, and in that case I will be given a copy of such report. I hereby certify that I have received a Summary of My Rights Under the Fair Credit Reporting Act. This authorization is valid for five (5) years from the date signed or upon termination of my affiliation with Company, whichever is sooner.

(Ex. B). The U.S. Security Care Notices and Authorizations do not contain any additional substantive information. (*Id.*). Indeed, the U.S. Security Care Notice and Authorization complies with and satisfies the "stand alone disclosure requirement" of 15 U.S.C. § 1681b(b)(2)(A)(i) - (ii).

Plaintiffs allege that, after they were given conditional offers of employment, they received telephone calls from SEPTA recruiters revoking the offers because of their previous criminal history. (Am. Compl. at ¶¶ 44 ("In or about late October, 2014, the recruiter called Mr.

Long revoking the offer of employment for the Bus Operator position based on Mr. Long's previous criminal history."); 57 ("On approximately March 25, 2016, the SEPTA recruiter called Mr. Shipley back and told him that SEPTA was denying him the Railroad Supervision Manager position because of his criminal history."); 69 ("Approximately six months after his interview, and following Mr. White's numerous follow ups, Mr. White received a letter from SEPTA denying him the Bus Operator position because of his criminal history."). Plaintiffs allege that they did not receive pre-adverse action letters with copies of their consumer reports and other required disclosures before SEPTA revoked the conditional offers of employment. (*See* Am. Compl. at ¶ 85).

Plaintiffs further allege that SEPTA has a "blanket policy and practice of disqualifying job applicants with unrelated felony convictions from employment in positions involving the operation of SEPTA vehicles." (Am. Compl. at ¶ 12). More specifically, Plaintiffs aver that "SEPTA has a categorical and lifetime ban on hiring anyone with a felony drug conviction for '[a]ll positions which require the operation of a SEPTA vehicles as part thereof, whether or not they are in revenue service' and '[a]ll positions requiring the maintenance, repair or operation of power facilities, substations, towers, signals, vehicles or rolling stock.'" (Am. Compl. at ¶ 92).

Plaintiffs allege not only that SEPTA willfully violated the FCRA by failing to provide them with the proper disclosure before obtaining their consumer report but that it also willfully violated the FCRA by taking an adverse employment action against Plaintiffs without providing them with a pre-adverse action notice, a copy of the report at issue, and a summary of rights. Notably, Plaintiffs do *not* allege that the consumer reports were inaccurate. Nor could they. Indeed, Plaintiffs themselves disclosed their felony drug convictions.

In addition to raising claims based upon SEPTA's interview process, Plaintiffs challenge the underlying policy. Simply put, Plaintiffs contend that SEPTA improperly considered their felony drug convictions in their applications for Bus Operator and Railroad Supervision Manager positions based on both the age of the convictions and the fact that the convictions purportedly do not relate to Plaintiffs' suitability for employment in these positions. (Am. Compl. at ¶¶ 90-91).

As set forth below, these averments are insufficient to support Plaintiffs' claims that SEPTA willfully violated the FCRA and CHRIA.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO ASSERT THEIR FCRA CLAIMS.

It is axiomatic that a particular plaintiff must have standing to bring a claim. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy . . . . The doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Id.* (citing cases). Put another way, if a plaintiff lacks standing, the federal court lacks jurisdiction. *Smith v. Ohio State Univ.*, No. 2:15-CV-3030, 2016 WL 3182675, at *3 (S.D. Ohio June 8, 2016).

As the party invoking federal jurisdiction, Plaintiffs bear the burden of establishing these elements. *Spokeo*, 136 S. Ct. at 1547 (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)). And, where, as here, the case is at the pleading stage, Plaintiffs must clearly allege facts demonstrating each element. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)).

Standing consists of three elements -- Plaintiffs must have (i) suffered an injury in fact, (ii) that is fairly traceable to the challenged conduct of the defendant; and (iii) that is likely to be redressed by a favorable judicial decision. *Id.* (citing cases). To establish injury in fact, Plaintiffs must show that they suffered an invasion of a legally protectable interest that is

concrete and particularized, and actual or imminent, rather than conjectural or hypothetical. *Id.* at 1548 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "For an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way." *Id.* at 1548 (citing cases). And, for an injury to be concrete, it must actually exist, it cannot be an abstract injury. *Id.* at 1548.

As the Supreme Court noted, "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate the right, Article III standing requires a concrete injury in the context of a statutory violation." *Id.* at 1549. Indeed, "[a] violation of one of the FCRA's procedural requirements may result in no harm. For example, a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate." *Id.*

Where a plaintiff is unable to allege facts sufficient to show that there is a concrete injury resulting from the alleged violation of the FCRA, courts have dismissed those complaints for lack of standing. *See Gubala v. Time Warner Cable, Inc.*, No. 15-CV-1078-PP, 2016 WL 3390415, at *4-5 (E.D. Wis. June 17, 2016) (appeal filed) (applying *Spokeo* to dismiss a complaint under the FCRA and holding that privacy of personally identifiable information is not a concrete harm); *Smith*, 2016 WL 3182675, at *4 (applying *Spokeo* to hold that plaintiffs have not suffered a concrete injury where the plaintiffs alleged that their privacy was invaded and they were misled as to their rights under the FCRA).

Here, the procedural violations of which Plaintiffs complain have not caused them any particularized or concrete harms. Plaintiffs allege that they failed to receive the "stand alone"

disclosure required before a consumer report is obtained about a person and that they failed to receive the pre-adverse action letter with a copy of the report and summary of rights before their conditional offers of employment were revoked. (Am. Compl. at ¶ 9, 82). Plaintiffs contend in a conclusory manner that this failure caused concrete injury including confusion, lack of notice of their rights, and denial of an opportunity to explain the circumstances of the criminal convictions. (Am. Compl. at ¶¶ 6, 113, 122). These averments are insufficient to support a finding of injury in fact.

First, Plaintiffs did receive and execute the required "stand alone" disclosure. *Supra* at pp. 4-5. Second, Plaintiffs do not allege that the consumer reports were inaccurate in any way. Plaintiffs themselves disclosed the disqualifying convictions to SEPTA. As the *Smith* court held, being misled as to your rights under the FCRA, without suffering any concrete consequential damage is insufficient to establish Article III standing. *Smith*, 2016 WL 3182675, at *4. In fact, federal "courts have concluded that the mere absence of information and resulting confusion is not a sufficiently concrete harm to constitute an injury." *Lopez v. Wendy's Int'l, Inc.*, No. CV 11-00275 MMM JCX, 2011 WL 6967932, at *9 (C.D. Cal. Sept. 19, 2011). Therefore, because Plaintiffs did not suffer any particularized or concrete injury as a consequence of any purported violation of FCRA, they lack standing to bring this action.

Further, to satisfy the causation requirement of Article III standing, Plaintiffs must establish that their alleged injuries "fairly can be traced to the challenged action" of the defendants. *Moore v. Johnson & Johnson*, 83 F. Supp. 3d 629, 630 (E.D. Pa. 2014). In *Moore*, this Court held that the plaintiffs lacked standing where their injuries had nothing to do with the defendant's failure to properly remove defective pain medication from retail stores. *Id.* The court reasoned that the complaint failed to establish how the defendants' actions could have

possibly caused their injuries, and as such, they failed to establish Article III causation. *Id.* at 632; *see also Springfield Tp. v. Lewis*, 702 F.2d 426, 450–451 (3d Cir. 1983) (holding that plaintiffs lacked standing even assuming that they had suffered injury, where injury was not caused by alleged failure to comply with federal regulations, especially where there was no showing that had there been compliance, they would not have suffered injury).

Therefore, even if this Court were to find that Plaintiffs met the first prong of the standing requirement, they nevertheless lack standing to assert their FCRA claims because they have not, and cannot, allege that the revocation of their conditional offers was fairly traceable to SEPTA's failure to provide the pre-adverse action letter with a copy of the report and summary of rights. *See Duquesne Light Co. v. U.S. E.P.A.*, 166 F.3d 609, 613 (3d Cir. 1999) (finding that plaintiffs lack standing where alleged injury was not fairly traceable to challenged action of defendant because of independent action of a third party).

For the same reason that the Complaint's allegations fail to allege traceability, the Amended Complaint fails the redressability requirement. "To be 'redressable' for standing purposes, it must 'be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Id.* The purpose of the FCRA notice requirements is to "provide individuals an opportunity to contest inaccurate information and to avoid an adverse decision by a potential employer based on erroneous information." *Ramos v. Genesis Healthcare, LLC*, 141 F. Supp. 3d 341, 347 (E.D. Pa. 2015) (appeal filed). As such, injury to a plaintiff would generally consist of an inability to contest inaccurate information, leading to an adverse action by a potential employer. *Id.* Here, Plaintiffs do not allege that the information was inaccurate; to the contrary, they voluntarily provided this information to SEPTA. Even if SEPTA had provided the pre-adverse action letter with a copy of the report and summary of rights, SEPTA would still

have revoked Plaintiffs' offers of conditional employment because Plaintiffs themselves disclosed their convictions, separate and apart from any FCRA forms. Consequently, it is clear that Plaintiffs' injuries were not caused by the alleged failure of SEPTA to provide notices, and as such, Plaintiffs cannot meet the traceability or redressability prongs of Article III standing with respect to their FCRA claims.

II. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

To survive a motion to dismiss for failure to state a claim, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679–80 (2009). That is, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citation omitted). In deciding a motion to dismiss, the general standard is that the Court must take all allegations in the complaint as true and draw all reasonable inferences in favor of the nonmovant. *Davis v. Wells Fargo*, No. 15-2658, 2016 WL 3033938, at *3 (3d Cir. May 27, 2016).

While the Court must accept all well-pleaded allegations as true, it should not credit mere "labels and conclusions" or "naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678; *see also David v. Neumann Univ.*, No. CV 15-4098, 2016 WL 1404153, at *1 (E.D. Pa. Apr. 11, 2016) (holding that a complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . . the Court is 'not bound to accept as true a legal conclusion couched as a factual allegation'"). Moreover, the court is not confined to reviewing the allegations in the Amended Complaint because Plaintiffs reviewed, quoted, and relied upon several documents in the Amended Complaint. When ruling on a motion to dismiss, a court may properly consider any "undisputedly authentic document that

a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993); *see Hughes v. United Parcel Serv., Inc.*, No. 15-1690, 2016 WL 386220, at *3 (3d Cir. Feb. 1, 2016); *Miller v. Clinton County*, 544 F.3d 542, 550 (3d. Cir. 2008); *In re NAHC, Inc. Sec. Litig.*, No. CIV. A. 00-4020, 2001 WL 1241007, at *11 (E.D. Pa. Oct. 17, 2001), *aff'd*, 306 F.3d 1314 (3d Cir. 2002).

In *Hughes*, the Third Circuit stated,

> When a plaintiff relies on a document without attaching it to the complaint, the plaintiff nevertheless has notice that the document will be at issue. Because notice to the plaintiff is the principal reason for which courts decline to look beyond the complaint, the consideration of documents upon which the plaintiff relies does not implicate this rationale. Indeed, failure to consider such documents would raise the countervailing concern that '*a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied*.'

2016 WL 386220, at *3 (internal citations omitted) (emphasis added). Here, although Plaintiffs did not attach either the SEPTA Authorizations or the U.S. Security Care Notices and Authorizations to the Amended Complaint, this Court can and should consider them.

Because the allegations in Plaintiffs' Amended Complaint do not, and cannot, raise a claim upon which relief can be granted against SEPTA, this Court should dismiss those counts with prejudice.

A. SEPTA Provided Plaintiffs With the Required "Stand Alone" Disclosure and Authorization Before Obtaining Consumer Reports About Them.

In Count I of the Amended Complaint, Plaintiffs allege that SEPTA willfully violated the FCRA because it obtained consumer reports about Plaintiffs without making the "stand alone" disclosure required by the FCRA. (Am. Compl. at ¶ 112). 15 U.S.C. § 1681b(b)(2)(A) prohibits potential employers from obtaining consumer reports about an individual unless "(i) a clear and

conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes" and "(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procure of the report by that person."

Plaintiffs base their claim on their execution of the SEPTA Authorization, claiming that it was not the required stand alone disclosure. However, as set forth above, *supra* at pp. 4-5, Plaintiffs also received and signed the U.S. Security Care Notices and Authorizations. The U.S. Security Care Notices and Authorizations refer only to the consumer reports obtained pursuant to the FCRA. Thus, contrary to Plaintiffs' assertions, there is no basis to assert that they contain extraneous information likely to cause confusion or impeding individuals of understanding their rights under the FCRA. (*See* Am. Compl. at ¶ 113). Moreover, courts routinely find that language such as that in the U.S. Security Care Notices and Authorizations complies with the FCRA. *See, e.g, Smith v. Waverly Partners, LLC*, No. 3:10-CV-00028-RLV, 2012 WL 3645324, at *6 (W.D.N.C. Aug. 23, 2012); *Burghy v. Dayton Racquet Club, Inc.*, 695 F. Supp. 2d 689, 698-99 (S.D. Ohio 2010); *see also Just v. Target Corp.*, No. 15-4117 (DWF/TNL), 2016 WL 2757370, at *3-4 (D. Minn. May 12, 2016) (discussing the types of authorizations that courts routinely find that comply with the disclosure requirements). This Court should therefore dismiss Count I of the Amended Complaint with prejudice.

B. Plaintiffs Have Failed to State a Claim for Willfulness Under the FCRA.

It is axiomatic that the FCRA is not a strict liability statute. *See Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir. 1997). "[T]o state a cause of action for willful noncompliance, and thereby collect punitive damages pursuant to 15 U.S.C. § 1681n, the complaint must allege facts that support the inference that the defendant acted in knowing or reckless disregard of the

FCRA's requirements." *Hutchinson v. Carco Grp., Inc.*, No. CV 15-1570, 2015 WL 5698283, at *3 (E.D. Pa. Sept. 29, 2015) (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57-58 (2007)). Simply violating the statute is not enough to impose liability. *See, e.g., Hutchinson*, 2015 WL 5698283, at *3; *Perl v. Plains Commerce Bank*, No. 11 CIV. 7972 KBF, 2012 WL 760401, at *2 (S.D.N.Y. Mar. 8, 2012) (stating claim that only alleges violation of FCRA is legally insufficient, since claim could plausibly be based on innocent mistake). It is not enough for the plaintiff to simply state that the defendant's conduct was willful. *See, e.g., Hutchinson*, 2015 WL 5698283, at *6-7 (granting motion to dismiss claim of willfulness under FCRA).

When pleading a claim for willfulness, the Supreme Court elaborated that recklessness is "conduct violating an objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Safeco*, 551 U.S. at 49 (internal quotation omitted). Plaintiff must at least plead facts that could not just as easily support a claim for negligence. *See Hutchinson*, 2015 WL 5698283, at *6 (dismissing allegation of willfulness where claims "may ultimately fall under the negligence prong"). If a plaintiff succeeds on a claim alleging a willful violation of the FCRA, he may be entitled to punitive damages. 15 U.S.C. § 1681n(a).

Here, Plaintiffs attempt to assert a claim that SEPTA has willfully violated the FCRA because it failed to provide the "stand alone" disclosure before obtaining a consumer report and because it failed to provide a pre-adverse action letter with a copy of the consumer report and summary of rights to an applicant. Plaintiff seeks punitive damages for these purported willful violations pursuant to 15 U.S.C. § 1681n. (Am. Compl. at ¶¶ 23-24).

Plaintiffs, however, fail to plead *any* facts that show SEPTA knowingly or intentionally disregarded their rights. Plaintiffs also fail to plead facts that show that SEPTA acted in reckless

disregard of the FCRA's requirements. Plaintiffs instead allege in a conclusory manner that SEPTA knew or should have known of its obligations under the FCRA. (Am. Compl. at ¶ 87). More is required under *Twombly*, and the Amended Complaint should be dismissed to the extent it asserts a claim for willful violation of the FCRA.

C. Plaintiffs Have Failed to State a Claim for Willful Violation of the CHRIA.

In Count IV of the Amended Complaint, Plaintiffs aver that SEPTA willfully violated the CHRIA because they improperly considered Plaintiffs' felony drug convictions when deciding not to offer them employment because they are more than seven years old and are not related to their suitability for employment for "[a]ll positions which require the operation of a SEPTA vehicles as part thereof, whether or not they are in revenue service" and "[a]ll positions requiring the maintenance, repair or operation of power facilities, substations, towers, signals, vehicles or rolling stock." (Am. Compl. at ¶¶ 92, 138-39). Plaintiffs, however, have failed to plead facts sufficient to show that SEPTA willfully violated the statute and this Court should dismiss this count.[1]

The CHRIA provides, in relevant part, "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." 18 Pa. Cons. Stat. Ann. § 9125(a). The statute permits employers, such as SEPTA, to consider an applicant's felony and misdemeanor convictions to the extent that they relate to the applicant's suitability for employment in the applied position. 18 Pa. Cons. Stat. Ann. § 9125(b).

Put another way, "[w]hen an employer denies employment to an individual because of his criminal record, the employer's denial of employment must be reasonably related to the

[1] The CHRIA creates a private right of action for damages and authorizes the imposition of exemplary and punitive damages for willful violations of the CHRIA. 18 Pa. Cons. Stat. Ann. § 9183(b).

furtherance of a legitimate public objective." *Dean v. Specialized Sec. Response*, No. CIV.A. 09-515, 2011 WL 3734238, at *15 (W.D. Pa. Aug. 24, 2011); *see El v. Southeastern Pa. Transp. Auth.*, 297 F. Supp. 2d 758, 761 (E.D. Pa. 2003) (citing cases). Examples of recognized legitimate public objectives include "a bar against the employment of convicted felons as police officers" reasoning that "a person who has committed a felony may be thought to lack the qualities of self-control or honesty that this sensitive job requires." *Dean*, 2011 WL 3734238, at *15 (quoting *Upshaw v. McNamara*, 435 F.2d 1188, 1190 (1st Cir. 1970)). Similarly, a bar against the employment of convicted felons as security guards may be in the interest of public safety. *Id.* at *16. Another example is a bar against the employment of convicted felons as couriers on the basis that a legitimate reason exists to prevent such individuals from entering onto the premises of others and delivering parcels. *Id.* (citing *Cisco v. United Parcel Serv., Inc.*, 476 A.2d 1340, 1344 (Pa. Super. Ct. 1984)).

These examples are analogous to SEPTA's legitimate public objective of protecting passengers of its transit system. Indeed, the Third Circuit upheld a policy similar to the one challenged by Plaintiffs in this litigation in *El v. Southeastern Pennsylvania Transp. Auth.*, 479 F.3d 232, 237 (3d Cir. 2007). In *El*, an African-American paratransit driver-trainee was terminated because of a 40-year old homicide conviction. The policy at issue in *El* prohibited anyone with a past criminal conviction for homicide from providing paratransit services for SEPTA. *El v. Southeastern Pa. Transp. Auth.*, 418 F. Supp. 2d 659, 668 (E.D. Pa. 2005), *aff'd*, 479 F.3d 232 (3d Cir. 2007). SEPTA asserted that (i) the drivers were in close proximity to the public; (ii) drivers can be alone with passengers; (iii) disabled persons are disproportionately targeted by sexual and violent criminals; (iv) violent criminals recidivate at a higher rate; (v) it is impossible to predict with a higher degree of accuracy which criminals will recidivate; (vi)

someone with a violent crime record is more likely than someone without a record to commit a future crime irrespective of how remote in time the conviction is; and (vii) the policy is the most accurate way to screen out applicants who present an unacceptable risk. The district court upheld the policy, finding that it was justified by business necessity, and entered summary judgment against the plaintiff on his Title VII claim. The Third Circuit affirmed the district court's decision, also concluding that the policy was job-related and consistent with business necessity. *El*, 479 F.3d at 247-48.

Where willfulness is a statutory condition of civil liability, the plaintiff must plead facts necessary to demonstrate that violation of the statute was either knowing or reckless. *Safeco*, 551 U.S. at 57. In holding that the defendant's failure to transmit adverse action notices reflecting negative credit reports did not constitute a willful violation of the FCRA, the Court in *Safeco* observed that a company subject does not act in reckless disregard of a statute "unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." 551 U.S. at 69. The "objectively reasonable" standard set forth in *Safeco* has been consistently applied by courts in this circuit with respect to FCRA claims, as well as in a variety of other contexts. *See, e.g.*, *Hutchinson*, 2015 WL 5698283, at *6-7 (granting motion to dismiss claim for willful violation of FCRA by consumer reporting agency); *Long v. Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371, 376-78 (3d Cir. 2012) (granting motion to dismiss putative nationwide class action claim for willful violation of FACTA by clothing retailer); *U.S. ex rel. Streck v. Allergan, Inc.*, 894 F. Supp. 2d 584, 593 (E.D. Pa. 2012) (granting motion to dismiss *qui tam* action for willful violation of False Claims Act and various

state laws by multiple pharmaceutical manufacturers that participated in Medicaid Drug Rebate Program).

Plaintiffs have not pled any facts which could show that any violation of the CHRIA was willful. For example, Plaintiffs have not articulated any facts demonstrating why SEPTA should be precluded from considering a conviction more than seven years old or why a felony drug conviction does not relate to Plaintiffs' suitability for employment as a Bus Operator or Railroad Supervision Manager. In addition, Plaintiffs only aver in a conclusory fashion that SEPTA willfully violated the CHRIA because "SEPTA knew or should have known its obligations under the CHRIA. These obligations are well-established by the plain language of the CHRIA and in the longstanding case law." (Am. Compl. at ¶ 93). This is insufficient to assert a claim for willful violation of the statute. This Court should therefore dismiss Count IV of the Amended Complaint.

CONCLUSION

For all of the foregoing reasons, Defendant Southeastern Pennsylvania Transportation Association respectfully requests that this Court grant its motion and dismiss the First Amended Class Action Complaint.

Dated: June 24, 2016

Respectfully submitted,

/s/ Samantha L. Southall
Elizabeth A. Malloy (Pa. I.D. No. 48297)
Samantha L. Southall (Pa. I.D. No. 80709)
Andrew G. Hope (Pa. I.D. No. 317932)
Buchanan Ingersoll & Rooney, PC
Two Liberty Place
50 S. 16th Street, Suite 3200
Philadelphia, PA 19102-2555
(215) 665-8700

Candidus K. Dougherty (Pa. I.D. No. 206106)
Jeffrey B. McCarron (Pa. I.D. No. 49467)
Michael A. Cognetti (Pa. I.D. No. 55819)
Swartz Campbell LLC
Two Liberty Place
50 S. 16th Street, 28th Floor
Philadelphia, PA 19102

Attorneys for Defendant Southeastern Pennsylvania Transportation Authority