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FRANK LONG, JOSEPH SHIPLEY, MICHAEL WHITE, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Defendant.

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

May Term, 2017

No. 00784

Class Action

MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY OBJECTIONS TO PLAINTIFFS' COMPLAINT

I. MATTER BEFORE THE COURT

The matter before the Court are the preliminary objections of defendant, Southeastern Pennsylvania Transportation Authority, to plaintiffs' complaint, pursuant to *Pennsylvania Rules of Civil Procedure* 1028(a)(2), (3), (4) and (6) for failure to conform to rule of court, inclusion of scandalous and impertinent matter, insufficient specificity in pleading, legal insufficiency and pendency of a prior action.

II. QUESTIONS PRESENTED

A. Should the Court sustain defendant's preliminary objections to the complaint and dismiss this action without prejudice where there is a prior pending action involving the same parties, claims and relief?

Suggested response: Yes.

B. Should the Court sustain defendant's preliminary objections to the complaint and dismiss this action with prejudice where plaintiffs' claims are absolutely barred by sovereign immunity?

Suggested response: Yes.

C. Should the Court sustain defendant's preliminary objections to the complaint and dismiss the individual claims with prejudice where the plaintiffs failed to allege facts sufficient to establish their convictions did not relate to suitability for employment for the applied for position or willfulness?

Suggested response: Yes.

D. Should the Court sustain defendant's preliminary objections to the complaint and dismiss the putative class claims with prejudice where the putative class claims require an individualized assessment and therefore lack commonality?

Suggested response: Yes.

E. Should the Court sustain defendant's preliminary objections to the complaint and strike the demand for exemplary and punitive damages where punitive damages are not recoverable from SEPTA as a matter of law?

Suggested response: Yes.

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F. Should the Court sustain defendant's preliminary objections to the complaint and dismiss the complaint where the complaint is insufficiently specific?

Suggested response: Yes.

G. Should the Court sustain defendant's preliminary objections to the complaint and dismiss the complaint where the complaint failed to conform to rule of court?

Suggested response: Yes.

H. Should the Court sustain defendant's preliminary objections to the complaint and strike paragraphs 5 through 11 of the complaint where the paragraphs are scandalous and impertinent matter?

Suggested response: Yes.

III. FACTUAL BACKGROUND[1]

This is a putative class action by plaintiffs, Frank Long, Joseph Shipley, and Michael White, individually and on behalf of all others similarly situated, against defendant, Southeastern Pennsylvania Transportation Authority ("SEPTA"), alleging SEPTA's Policy #E20, which disqualifies applicants with certain drug convictions from some job positions, violates the Criminal History Records Information Act, 18 Pa. C.S. § 9125 ("CHRIA"). Complaint, attached hereto as Exhibit "A," ¶¶ 2-3. Plaintiffs' claims are based on the contention their disqualifying felony convictions were "minor drug convictions" that did not relate to their suitability to operate a SEPTA vehicle. Exhibit "A" at ¶ 4. Plaintiffs alleged a willful violation of the CHRIA and demanded injunctive and declaratory relief; actual, real and/or statutory damages; exemplary and punitive damages; pre- and post-judgment interest; and attorneys' fees and costs. Exhibit "A" at ¶ 4.

[1] The facts are drawn from plaintiffs' complaint because the standard for preliminary objections. SEPTA denies plaintiffs' factual allegations and liability.

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A. The Plaintiffs

Plaintiff, Frank Long ("Mr. Long"), applied for a bus operator position with SEPTA in October 2014. Exhibit "A" at ¶ 33. Mr. Long was convicted for possession and manufacture of a controlled substance in 1997. Exhibit "A" at ¶ 41. Plaintiffs did not allege the factual circumstances of Mr. Long's conviction, whether the conviction was for a misdemeanor or felony, length of incarceration (if any) and/or other aggravating factors (if any). In March 2015, SEPTA informed Mr. Long of its decision not to hire him for the bus operator position based on his criminal conviction history. Exhibit "A" at ¶ 42.

Plaintiff, Joseph Shipley ("Mr. Shipley"), applied for a Railroad Supervisor Manager position with SEPTA in October 2015. Exhibit "A" at ¶ 43. Mr. Shipley was convicted of a "drug-related" crime in 2001. Exhibit "A" at ¶ 53. Plaintiffs did not allege the factual circumstances of Mr. Shipley's conviction, whether the conviction was for a misdemeanor or felony, length of incarceration (if any) and/or other aggravating factors (if any). In March 2016, SEPTA informed Mr. Shipley of its decision not to hire him for the Railroad Supervision Manager position based on his criminal conviction history. Exhibit "A" at ¶ 51.

Plaintiff, Michael White ("Mr. White"), applied to be a Bus Operator with SEPTA in April 2015. Exhibit "A" at ¶ 55. Mr. White was convicted of "drug-related offenses" in 2006 and 2007. Exhibit "A" at ¶ 62. Plaintiffs did not allege the factual circumstances of Mr. White's convictions, whether the conviction was for a misdemeanor or felony, length of incarceration (if any) and/or other aggravating factors (if any). In approximately October 2016, SEPTA informed Mr. White of its decision not to hire him for the bus operator position based on his criminal conviction history. Exhibit "A" at ¶ 52.

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The putative class is defined as:

> All applicants for employment with SEPTA in the United States during the applicable statute of limitations period through the date of final judgment who were denied SEPTA employment involving the operation and/or maintenance of SEPTA non-paratransit vehicles based in whole or in part on a drug-related conviction unrelated to their suitability for [the] job to which they applied.

Exhibit "A" at ¶ 69.

B. Procedural History and Claims

Plaintiffs first asserted their CHRIA claims on or about April 27, 2016 in the United States District Court for the Eastern District of Pennsylvania at civil class action at docket no. 2:16-cv-01991 ("Federal Court Action"). Federal Court Action complaint, attached hereto as Exhibit "B"; Federal Court Action docket, attached hereto as Exhibit "C." Plaintiffs asserted federal question claims under the Fair Credit Reporting Act as well as state law claims under the CHRIA. Exhibit "B." The federal question claims and the state law claims arose from the same operative facts and involved the same damages to the extent the demand included actual damages.

On April 5, 2017, SEPTA's motion to dismiss the first amended complaint was granted, and the Federal Court Action was dismissed. Exhibit "C." The federal court found plaintiffs lacked standing to assert their federal question claims and declined to exercise supplemental jurisdiction over the state law, CHRIA claims. Federal Court Action opinion, attached hereto as Exhibit "D." On April 18, 2017, plaintiffs filed a notice of appeal from the federal court's April 5, 2017 opinion. The appeal is pending before the Court of Appeals for the Third Circuit.

On May 3, 2017, plaintiffs commenced this action by complaint. Plaintiffs contended their individual criminal conviction histories were not related to their suitability for employment involving the operation or maintenance of SEPTA non-paratransit vehicles because "the nature

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of the crime, the age of the conviction, [each of their] employment history, and the years [they were each] in the general population without any further convictions." Exhibit "A" at ¶¶ 41, 54, 63. Plaintiffs alleged "[d]enying employment to applicants with unrelated drug convictions undermines and violates [the] CHRIA." Exhibit "A' at ¶ 9. Plaintiffs also suggested SEPTA denies job opportunities to anyone with a criminal record. Exhibit "A" at ¶ 89.

Plaintiffs' claims are based entirely on the content of SEPTA Policy #E20. Exhibit "A" at ¶¶ 2-3, 66. However, plaintiffs did not attach the SEPTA Policy #E20 to the complaint.

Plaintiffs did not indicate this action was filed as a savings action or request the matter be held in suspense pending disposition of the Federal Court Action. SEPTA accepted service as of May 12, 2017. Plaintiffs agreed to a fourteen (14) day extension of time to respond to the pleadings. These preliminary objections to the complaint followed.

IV. ARGUMENTS OF LAW

A. This Action Should Be Dismissed Pending Disposition of the Appeal

1. Standard

Pennsylvania Rule of Civil Procedure 1028(a)(6) permits preliminary objections to a pleading due to the pendency of a prior action. *Crutchfield v. Eaton Corp.*, 2002 Pa. Super. 286, 806 A.2d 1259, 1262 (Pa. Super 2002). The defense of *lis pendens, i.e.,* the pendency of a prior action, applies when the prior case, the parties, and the relief requested are the same. *Penox Technologies, Inc. v. Foster Medical Corp.*, 376 Pa. Super. 450, 546 A.2d 114, 115 (1988). The purpose of the *lis pendens* defense is to protect a defendant from harassment by needing to defend several suits on the same cause of action at the same time. *Id.* The doctrine of *lis pendens* requires that the prior action be pending. *Norristown Auto. Co. v. Hand,* 386 Pa. Super. 269, 562 A.2d 902, 904 (1989). The question of a pending prior action "is purely a question of

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law determinable from an inspection of the pleadings." *Davis Cookie Co. v. Wasley*, 389 Pa. Super. 112, 566 A.2d 870, 874 (1989). Once the defense of *lis pendens* is raised, a court may dismiss or stay the subsequent proceedings. *Crutchfield*, 806 A.2d at 1262.

2. Plaintiffs' CHRIA Claims Are Still Pending in the Federal Court Action

The CHRIA claims asserted by plaintiffs in this action are identical to the CHRIA claims asserted by plaintiffs against SEPTA in the Federal Court Action that is now on appeal. The state law claims were dismissed for lack of supplemental jurisdiction once the federal question claims were dismissed for lack of standing. Plaintiffs only raised the dismissal of the federal question claims as issues on appeal. However, no legitimate basis to challenge the dismissal of the state law claims concomitant with the dismissal of the federal question claims existed. If plaintiffs are successful in their appeal, then all claims should be reinstated, since the basis for dismissal of the state law claims would no longer exist.

The factual basis for the federal question claims as well as the damages alleged for the federal question claims overlap with the state law claims. SEPTA is now in jeopardy of defending substantially the same claims simultaneously in two different jurisdictions. Plaintiffs will achieve two attempts at proving their claims to the prejudice of SEPTA. To the extent plaintiffs alleged actual damages relating to a denial of employment, there is a substantial risk of a double recovery if plaintiffs were somehow successful in parallel litigation tracks.

Both the federal and state law claims permit recovery of attorneys' fees and costs by plaintiffs. Plaintiffs are exponentially and artificially increasing the damages alleged against SEPTA by forcing litigation of the same issues in two jurisdictions and have no incentive to self-police the duplicative litigation. Court intervention to either dismiss or hold this action in

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suspense pending disposition of the Federal Court Action is therefore necessary. Accordingly, defendant's preliminary objections should be sustained and this action dismissed without prejudice pending a final order in the Federal Court Action.

B. Plaintiffs' Claims Fail As a Matter of Law

1. Standard

Preliminary objections must be granted if a party does not plead factual allegations to support its legal contentions in a complaint. A preliminary objection in the nature of a demurrer is properly sustained where the complaint has failed to set forth a cause of action. *Lerner v. Lerner*, 954 A.2d 1229, 1235 (2008); *Cunningham v. Prudential Prop. & Cas. Ins. Co.*, 340 Pa. Super. 130, 489 A.2d 875 (1985). The question presented on demurrer is whether, based on the facts alleged, the law provides that no recovery is possible. *Werner v. Plater-Zyberk*, 799 A.2d 776, 783 (2002).

A court is "precluded from considering any conclusions of law or inferences which are not supported by the factual allegations contained in the complaint." *Hart v. O'Malley*, 436 Pa. Super. 151, 647 A.2d 542, 553 (1994), *aff'd*, 544 Pa. 315, 676 A.2d 222 (1996). A plaintiff, therefore, cannot maintain a cause of action by merely stating "conclusions of law, . . . argumentative allegations, and expressions of opinion." *Neill v. Eberly*, 153 Pa. Commw. 181; 620 A.2d 673, 675 (Pa. Commw. 1983); *see also Surgical Laser Technologies, Inc. v. Commonwealth, Dept. of Revenue*, 156 Pa. Cmwlth. 48, 56, 626 A.2d 664, 667 (1993) ("The court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion."). Furthermore, the court "must not supply

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a fact missing in the complaint" in order to cure a defect in the pleading. *Hart*, 647 A.2d at 553. A demurrer should be sustained where the plaintiff has clearly failed to state a claim on which relief may be granted. *Eckell v. Wilson*, 597 A.2d 696, 698 (Pa. Super. 1991).

2. Plaintiffs' Claims Are Barred by Sovereign Immunity

Whether plaintiffs can assert a claim against SEPTA depends on whether SEPTA is subject to a claim under the CHRIA. If SEPTA is immune from claims under the CHRIA, then plaintiffs' claims fail on the face of the pleadings. *Poliskiewicz v. East Stroudsburg University*, 536 A.2d 472, 475 (Pa. Cmmw. Ct. 1998) (affirming the dismissal of CHRIA claims on preliminary objections based on sovereign immunity); *Chester Upland School Dist. v. Yesavage*, 653 A.2d 1319, 1327 (Pa. Cmmw. Ct. 1994) (holding preliminary objections are a proper vehicle for raising the defense of immunity where the defense is apparent on the face of the pleadings). Sovereign immunity is an absolute bar to plaintiffs' claims.

Sovereign immunity applies to the Commonwealth of Pennsylvania. Pursuant to 1 Pa. C.S. § 2310, "the Commonwealth … shall continue to enjoy sovereign immunity … and remain immune from suit except as the General Assembly shall specifically waive the immunity." 74 Pa. C.S. § 1711(c)(3). Pursuant to SEPTA's enabling statute, SEPTA "shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof." 74 Pa. C.S. § 1711(a). SEPTA:

> ***[s]hall continue to enjoy sovereign and official immunity, as provided in 1 Pa. C.S. § 2310*** (relating to sovereign immunity reaffirmed; specific waiver), and ***shall remain immune from suit***

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> ***except as provided by and subject to the provision of 42 Pa. C.S. §§ 8501 (relating to definitions) through 8528*** (relating to limitations on damages).

74 Pa. C.S. § 1711(c)(3) (emphasis added). Pennsylvania's Supreme Court has recognized: "SEPTA is part of the sovereignty of the Commonwealth." *SEPTA v. Board of Revision of Taxes*, 833 A.2d 710, 716 (Pa. 2003).

The Commonwealth is subject to a lawsuit only where sovereign immunity has been waived. It is well-established lawsuits against the Commonwealth "are permissible only where the legislature has *expressly waived* immunity." *SEPTA v. City of Philadelphia*, 122 A.3d 1163, 1170 (Pa. Commw. Ct. 2015), *appeal granted*, 133 A.3d 292 (Pa. 2016), and *aff'd sub nom*, *SEPTA v. City of Philadelphia*, --- A.3d ----, 2017 WL 1489043 (Pa. Apr. 26, 2017) (quoting *Ebersole v. SEPTA*, 111 A.3d 286, 289 (Pa. Cmwlth.2015)) (emphasis in original). Pursuant to 42 Pa. C.S. §§ 8501 through 8528 ("Pennsylvania Sovereign Immunity Act"), sovereign immunity is waived only as to claims for damages caused by: vehicle liability; medical-professional liability; care, custody or control of personal property; Commonwealth real estate, highways and sidewalks; potholes and other dangerous conditions; care custody or control of animals; liquor store sales; national guard activities; and toxoids and vaccines. 42 Pa. C.S. § 8522. There is no statutory waiver of sovereign immunity for claims under the CHRIA.

Commonwealth agencies are immune from claims under the CHRIA. *Poliskiewicz*, 536 A.2d at 475. In *Poliskiewicz v. East Stroudsburg University*, 536 A.2d 472 (Pa. Cmmw. Ct. 1998), the Commonwealth Court held CHRIA was not an exception to sovereign immunity enumerated in 42 Pa. C.S. § 8522 and did not contain a waiver of sovereign immunity. *Id.* at 474-75. Specifically, the Commonwealth Court concluded:

> Section 2310 is clear on its face: Unless sovereign immunity has been *specifically* waived, the legislature intends that it remain in

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> effect. We can find nothing in either [42 Pa. C.S. § 8522] or anywhere in [CHRIA] that demonstrates that the legislature has *specifically* waived the defense for purposes of the type of action brought here.

Id. (emphasis in original); *see also Finkelstein v. Shippensburg State College*, 370 A.2d 1259, 1260 (Pa. Cmmw. Ct. 1977) (sustaining a state college's preliminary objections on immunity because it was "a state agency, owned and operated by the Commonwealth."); *see generally Dynamic Student Services v. State System of Higher Educ.*, 697 A.2d 239, 242 (Pa. 1997) (citing 24 Pa. S. § 20-2002-A (1992)) (state colleges are state agencies); *Williams v. West Chester State College*, 370 A.2d 774 (Pa. Cmmw. Ct. 1977) (same). Sovereign immunity therefore applies to claims under the CHRIA.

Plaintiffs' claims under the CHRIA are barred by sovereign immunity. SEPTA enjoys the same sovereign immunity granted to the Commonwealth and its agencies. There is no statutory waiver to sovereign immunity applicable to the CHRIA claims asserted by plaintiffs. Moreover, the Commonwealth Court addressed the very issue of whether state agencies were immune from CHRIA claims and found the sovereignty immune. Plaintiffs' CHRIA claims are absolutely barred. Accordingly, SEPTA's preliminary objections to the complaint should be sustained and plaintiffs' complaint dismissed with prejudice.

3. Plaintiffs' Claims Fail on the Merits

a. Individual CHRIA Claims Fail

Plaintiffs' individual CHRIA claims depend on whether SEPTA willfully violated the CHRIA. Plaintiffs alleged SEPTA willfully violated the CHRIA because plaintiffs' individual disqualifying felony convictions were "minor drug convictions" that did not relate to their

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suitability to operate a SEPTA vehicle. Exhibit "A" at ¶ 4. Plaintiffs' individual claims fail absent adequate factual averments to establish the convictions did not relate to suitability for employment or willfulness.

The CHRIA permits employers to consider an applicant's criminal convictions when making employment decisions. The CHRIA provides, in relevant part,

> [W]henever 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 CHRIA provides employment can be denied based on an applicant's felony and misdemeanor convictions provided the convictions relate the applicant's suitability for employment in the applied for position. 18 Pa. Cons. Stat. Ann. § 9125(b).

The CHRIA is an affirmative grant of authority to consider criminal convictions with restrictions on when the conviction can disqualify an applicant for employment. "When an employer denies employment to an individual because of his criminal record, the employer's denial of employment must be reasonably related to the furtherance of a legitimate public objective." *Dean v. Specialized Sec. Response*, 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). 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

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convicted felons as couriers reasoning that a legitimate reason exists to prevent such individuals from entering onto the premises of others to deliver parcels. *Id.* (citing *Cisco v. United Parcel Serv., Inc.*, 476 A.2d 1340, 1344 (Pa. Super. Ct. 1984)).

The Court of Appeals for the Third Circuit already found SEPTA's objective of protecting passengers of its transit system was a legitimate public objective when reviewing a similar policy in *El v. Southeastern Pennsylvania Transp. Auth.*, 479 F.3d 232, 237 (3d Cir. 2007). In *El*, an African-American paratransit driver-trainee terminated because of a 40-year-old homicide conviction challenged his termination under Title VII. *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 explained the drivers were in close proximity to the public, drivers can be alone with passengers, disabled persons are disproportionately targeted by sexual and violent criminals, violent criminals recidivate at a higher rate, it is impossible to predict with a higher degree of accuracy which criminals will recidivate, 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 the policy is the most accurate way to screen out applicants who present an unacceptable risk. The district court found the policy was justified by business necessity and entered summary judgment against the plaintiff on his Title VII claim. The Third Circuit affirmed, also concluding the policy was job-related and consistent with business necessity. *El*, 479 F.3d at 247.

Plaintiffs must do more than plead the bare statutory elements to establish a CHRIA claim. Plaintiffs merely averred SEPTA willfully violated the CHRIA but provided no factual support for the contention of a knowing violation. Plaintiffs did not allege facts sufficient to perform an individual suitability assessment, such as grading (misdemeanor vs. felony), length of

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incarceration (if any), aggravating factors (if any) or the circumstances of the convictions themselves. The *El* case, upholding a similar policy, provided a roadmap of factors to consider when reviewing the legitimacy of the objective(s) of a policy relating to disqualifying convictions. Of material importance to the *El* analysis were the facts of the crimes themselves. Plaintiffs' bald assertions felony convictions were "minor" is not sufficient to permit an appropriate analysis according to the roadmap provided by *El*.

Plaintiffs cannot establish a violation of the CHRIA absent allegations that reveal the disqualifying convictions were not related to the suitability for employment in the applied-for positions. Plaintiffs have not pled sufficient facts to establish the SEPTA Policy #E20 violates the CHRIA. Accordingly, SEPTA's preliminary objections to the complaint should be sustained and plaintiffs' individual claims dismissed.

b. Plaintiffs' CHRIA Claims Are Not Proper for Class Treatment

Plaintiffs' putative class claims depend on whether the CHRIA claims require an individualized determination of suitability for each class member. Plaintiffs' claims are based on the contention employers may only consider criminal convictions "to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied." *See* Exhibit "A" at ¶ 3. Plaintiffs alleged their individual criminal histories were not related to their suitability for employment involving the operation or maintenance of SEPTA non-paratransit vehicles because "the nature of the crime, the age of the conviction, [each of their] employment history, and the years [they were each] in the general population without any further convictions." Exhibit "A" at ¶¶ 41, 54, 63. Plaintiffs' claims do not qualify for class treatment if every class members' individual criminal history must be considered to determine suitability for employment.

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A plaintiff class must establish it meets the commonality requirement for class treatment. Under the *Pennsylvania Rules of Civil Procedure* governing class actions (Pa. R.C.P. No. 1702 et seq), one or more members of a class may sue as representative only if there are questions of law or fact common to the class, frequently referred to as "commonality." Pa. R.C.P. No. 1707. Claims requiring individual assessments are not properly brought as class actions.

For example in *Eisen v. Independence Blue Cross*, 839 A.2d 369 (Pa. Super. Ct. 2003), the Superior Court found a plaintiff class did not establish commonality where an individualized assessment of whether medical care was "medically necessary care" was necessary to determine whether insurance coverage had been properly denied. In-network healthcare providers asserted class claims against health insurance companies alleging that the companies improperly interpreted a form contract requiring coverage for "medically necessary care" to deny coverage. *Eisen v. Independence Blue Cross*, 839 A.2d 369, 371-72 (Pa. Super. Ct. 2003). The healthcare providers argued commonality existed because their claims all arose from the companies' interpretation of the form contract. *Id.*

The Superior Court disagreed and explained the contract between the parties required a determination of "medical necessity" and was "perforce, based on individual rather than common factors." *Id.* Even though the healthcare providers "challenge[d] the process by which such decisions [we]re made, precertification must be granted or denied on individual, not common, facts." *Id.* A "common question of fact means precisely that the facts must be substantially the same so that proof as to one claimant would be proof as to all." *Id.* (quoting *Allegheny County Hous. Auth. V. Berry*, 487 A.2d 995, 997 (Pa. Super. Ct. 1985). "If each

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question of disputed fact has a different origin, a different manner of proof and to which there are difference defenses," they are not common questions of fact. *Id.* The Superior Court dismissed the class claims for failure to establish commonality.

Plaintiffs' own pleadings reveal a failure of commonality. Plaintiffs acknowledged their claims require an examination of individual factors, such as "the nature of the crime, the age of the conviction, [each applicant's] employment history, and the years [each applicant] has been in the general population without any further convictions," to determine whether the disqualifying conviction relates to suitability for employment in the applied for position. See Exhibit "A" at ¶¶ 41, 54, 63. The three named plaintiffs – much less the entire putative class – do not have the same convictions or criminal records, the same ages of convictions, the same employment history, the same number of years without further convictions or the same applied for positions. There is no way to evaluate whether a class member's disqualifying conviction relates to suitability for employment without performing an individualized assessment. A necessary precondition to challenging SEPTA's Policy #E20 is a determination of each class member-applicant's suitability for the applied for position based on individual, not common, facts.

The necessity of individualized assessments of suitability for employment shows a lack of commonality among Plaintiffs' claims. The putative plaintiff class cannot establish claims that qualify for class treatment on the face of the pleadings. Accordingly, SEPTA's preliminary objections to the complaint should be sustained and plaintiffs' class claims dismissed with prejudice.

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4. Exemplary and Punitive Damages Should be Struck

Plaintiffs demanded "exemplary and punitive damages" pursuant to 18 Pa. C.S. § 9183(b). Exhibit "A" at ¶¶ 4, 91. Punitive damages are not recoverable against SEPTA. *Feingold v. SEPTA*, 517 A.2d 1276-77 (Pa. 1986). In *Feingold v. SEPTA*, 517 A.2d 1276 (Pa. 1986), the Pennsylvania Supreme Court rejected an assessment of punitive damages against SEPTA and explained "the public policy implications of assessing [punitive] damages, effectively against the taxpayers and public at large, must be weighed against the necessity of punishing the entity which has been entrusted with performing a public function." *Id.* at 1277. The Pennsylvania Supreme Court agreed with the United States Supreme Court, which reasoned:

> [P]unitive damages imposed on a [government] are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of the blameless or unknowing taxpayers.

Id. (quoting *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981)).

Plaintiff's demand for exemplary and punitive damages is invalid, as a matter of law. Accordingly, SEPTA's preliminary objections to the complaint should be sustained and the demand for exemplary and punitive damages should be stricken.

C. Plaintiffs' Complaint Is Insufficiently Specific

1. Standard

Pursuant to *Pennsylvania Rule of Civil Procedure* 1028(a)(3), preliminary objections must be sustained if the pleading is insufficiently specific. Pa. R.C.P. No. 1028(a)(3). To determine if a complaint is sufficiently specific, a court must determine "whether the complaint is sufficiently clear to enable the defendant to prepare his defense or [if it] informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may

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know without question upon which grounds to make his defense." *McNeil v. Jordan*, 814 A.2d 234, 237-38 (2002). The trial court has broad discretion in determining what amount of detail must be averred, but the pleader must set forth the facts upon which the cause of action is based. *Pike Cnty Hotels Corp. v. Kiefer*, 262 Pa. Super. 126, 396 A.2d. 677, 681 (1978).

2. Plaintiffs Failed to Plead Facts to Support Their Claims

Plaintiffs did not allege facts to sufficient to establish a claim under the CHRIA. Pennsylvania is a fact-pleading jurisdiction. *Miketic v. Baron*, 450 Pa. Super. 91, 104, 675 A.2d 324, 330 (1996). "Under the Pennsylvania system of fact pleading, the pleader must define the issues; every act or performance essential to that end must be set forth in the complaint." *Id.* (quoting *Santiago v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 418 Pa. Super. 178, 185, 613 A.2d 1235, 1238 (1992)). It is well-established that a complaint must not only apprise a defendant of the asserted claim but must also provide a synopsis of the essential facts to support the claim. *Lerner*, 954 A.2d at 1235; *Alpha Tau Omega Fraternity v. Univ. of Pa.*, 318 Pa. Super. 293, 298, 464 A.2d 1349, 1352 (1983); *Miketic*, 450 Pa. Super. at 104-05; *Cardenas v. Schober*, 783 A.2d 317, 324-25 (Pa. Super. 2001); *Weiss v. Equibank*, 313 Pa. Super. 446, 453,460 A.2d 271, 274-75 (1983).

Pennsylvania Rule of Civil Procedure 1019(a) provides that "the material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Pa. R.C.P. No. 1019(a). "Allegations will withstand a challenge under section 1019 (a) if (1) they contain averments of all of the facts the plaintiff will eventually have to prove in order to recover . . . and (2) they are 'sufficiently specific so as to enable [a] defendant to prepare his defense[.]'" *Smith v. Wagner*, 403 Pa. Super. 316, 319, 588 A.2d 1308, 1310 (1991) (quoting *Commonwealth Envt'l Pollution Strike Force v. Jeanette*, 9 Pa. Commonwealth Ct. 306, 308, 305 A.2d 774, 776

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(1973)); *In re Barnes Foundation*, 443 Pa. Super. 369, 381, 661 A.2d 889, 895 (1995) (quoting *Gen. State Auth. v. The Sutter Corp.*, 24 Pa. Commw. 391, 395, 356 A.2d 377, 381 (1976) & *Line Lexington Lumber-Millwork Co., Inc. v. Pa. Publ'g Co.*, 451 Pa. 154, 162, 301 A.2d 684, 688 (1973)) ("'[A pleading] should formulate the issues by fully summarizing the material facts', and 'as a minimum, a pleader must set forth concisely the facts upon which his cause of action is based'"); *Laursen v. Gen. Hosp. of Monroe County*, 259 Pa. Super. 150, 160, 393 A.2d 761, 766 (1978), *rev'd on other grounds*, 494 Pa. 238, 431 A.2d 237 (1981) (same).

The purpose behind the rules of pleading is to enable parties to use their own professional discretion to ascertain the claims and defenses asserted in a case. *Krajsa v. Keypunch, Inc.*, 424 Pa. Super. 230, 236, 622 A.2d 355, 357 (1993). The requirement for specific pleadings is designed to protect the defendant from defending against theories of liability for which there was no notice. The pleading must achieve the purpose of informing the court and the adverse party or parties of the matter in issue. *Krajsa*, 424 Pa. Super. at 236 ("The purpose [behind rules of pleading] would be thwarted if the courts, rather than the parties, were burdened with the responsibility of deciphering a cause of action from a pleading of facts which obscurely support the claim in question.").

Plaintiffs' complaint does not contain sufficient factual averments to establish a claim under the CHRIA. Plaintiffs contended the SEPTA Policy #E20 violates the CHRIA but did not attach the policy to the pleadings or quote the policy in its entirety. Plaintiffs averred SEPTA willfully violated the CHRIA but alleged no facts to support the conclusory contention. Plaintiffs contended an individualized assessment would reveal their disqualifying convictions were not related to suitability for employment in the applied for position. However, plaintiffs

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alleged none of the factual circumstances of their actual convictions to provide a basis to perform an individualized assessment. Merely contending a conviction was "minor" is not sufficient to establish the disqualifying conviction was not related to suitability for employment.

Plaintiffs must do more than aver bald assertions, repeat the statutory language and assert legal conclusions to adequately plead their claims. Plaintiffs have failed to adequately plead a violation of the CHRIA. Accordingly, SEPTA's preliminary objections to the complaint should be sustained and plaintiffs' complaint dismissed.

D. Plaintiffs' Complaint Failed to Conform to Rule of Court

1. Standard

Preliminary objections must be granted if a pleading does not conform to the rule of court. Pa. R.C.P. No. 1028(a)(2); *Siravo v. Crown, Cork & Seal Co.*, 2005 Phila. Ct. Com. Pl. LEXIS 195 (Phila. Com. P. LEXIS 2005), *appeal dismissed*, 890 A.2d 1115 (Pa. Super. 2005); *see also Ellenbogen v. PNC Bank*, N.A., 731 A.2d 175, 184 (Pa. Super. 1999).

2. Plaintiffs Did Not Attach the SEPTA Policy #E20 to the Complaint

Plaintiffs' claims are based entirely on the content of the SEPTA Policy #E20. *Pennsylvania Rule of Civil Procedure* 1019(i) requires:

> When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if there writing or copy is not accessible to the pleader, it is sufficient so to state together with the reason, and to set forth the substance of the writing.

Pa. R.C.P. No. 1019(i).

The SEPTA Policy #E20 is a written policy. The content of the policy cannot be properly evaluated under the CHRIA absent a review of the entire policy, rather than out-of-

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context quotes. Plaintiffs identified no reason why the policy was not attached to the complaint. Plaintiffs obviously have a copy of the policy, since it was purportedly selectively quoted in the complaint.

Plaintiffs' complaint failed to comply with rule of court because it did not include the written policy upon which the claims are based. Plaintiffs' complaint is defective, as a matter of law. Accordingly, SEPTA's preliminary objections to the complaint should be sustained and plaintiffs' complaint dismissed.

E. Scandalous and Impertinent Matter Should Be Struck

1. Standard

Pursuant to *Pennsylvania Rule of Civil Procedure* 1028(a)(2), this Court may strike matter that is "scandalous or impertinent." Pa. R.C.P. No. 1028(a)(2). Scandalous and impertinent has been defined as "immaterial and inappropriate to the proof of the cause of action." *Rollinson v. Clarke-DeMarco*, 83 Pa. D. & C.4th 467, 475 (Mercer Cnty. CCP 2007) (quoting *White v. George*, 66 Pa. D. & C.4th 129, 142 (Mercer Cnty. CCP 2004)). Pennsylvania Courts have held that an "averment will be considered impertinent when it is irrelevant to any material issue made or tendered. *Schwingen v. Piekarski*, 13 Pa. D.&C. 2d 617, 618, 48 Luz. Legal Reg. Rep. 23 (Luz. Cty. CCP 1957). An averment is considered scandalous when it is an:

> Unnecessary allegation which bears cruelly on the moral character of an individual or states anything which is contrary to good manners, or anything which it is unbecoming to the dignity of the court to hear, or which charges some person with a crime, not necessary to be shown in the cause. Schwingen at 618.

Gula v. Golden Hill Nursing Home, Inc., 24 Pa. D. & C.5th 300, 310-11 (Law. Cty. CCP 2011). Scandalous and impertinent matter should be struck if there is prejudice.

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For example in *Common Cause/Pa v. Commonwealth*, *Common Cause/Pa. v. Commonwealth*, 710 A.2d 108 (Pa. Commw. Ct. 1998), the Commonwealth Court sustained preliminary objections and struck certain portions of plaintiff's complaint for being scandalous and impertinent. In criticizing plaintiff's complaint the Court wrote:

> In their introductory statement, Petitioners have provided us with an editorialized history of lawmaking in Pennsylvania. Rather than setting forth factual allegations relevant to the procedure by which HB 67 was considered and passed, Petitioners have chosen to include allegations regarding the procedures used by the Governor and the legislative leadership in enacting certain other pieces of legislation, not here before us. These allegations are immaterial to Petitioners' cause of action. Petitioners' introductory statement also contains statements which improperly cast a derogatory light on the legislative and executive branch leadership. Such scandalous statements have no place in a pleading.

Common Cause/Pa. v. Commonwealth, 710 A.2d 108, 114-15 (Pa. Commw. Ct. 1998).

2. Paragraphs 5 through 11 Should Be Struck

The "STATUTORY BACKGROUND" section of the complaint contained in paragraphs 5 to 11 of the complaint is scandalous and impertinent matter that should be struck from the complaint. Contrary to the heading, the majority of the allegations in paragraphs 5 to 11 do not even relate to the CHRIA. The case quoted in paragraphs 5 and 6 relates to a cigarette tax and in no way relates to the CHRIA. The CHRIA was not even enacted until July 16, 1979 (effective January 1, 1980), six (6) years after the cited case opinion. The paragraphs that immediately follow (7, 8 and 9) suggest in an unreasonably misleading way the case opinion quotes in paragraphs 5 and 6 actually pertain to the CHRIA and express the Commonwealth's public policy and purpose of the CHRIA, when they do not.

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Paragraphs 10 and 11 include outrageous contentions that suggest, without any basis, SEPTA Policy #E20 is discriminatory on the basis of race or ethnicity. Plaintiffs' editorial about their perception of the fairness of the criminal justice system has no relevance to the claims for a violation of the CHRIA against SEPTA. Plaintiffs expressly alleged their general social commentary was not material to any claim by acknowledging "this disparate impact is not the direct target of this lawsuit[.]" Exhibit "A" at ¶ 11. The only reasonable conclusion is plaintiffs included the veiled accusations to improperly enflame the sensibilities of the community SEPTA serves and suggest a basis for liability where none exists – in law or fact.

Plaintiffs improperly included scandalous and impertinent matter in their pleadings that should be struck. Paragraphs 5 to 11 of the complaint are not material to the claims asserted by plaintiffs. Accordingly, SEPTA's preliminary objections to the complaint should be sustained and paragraphs 5, 6, 7, 8, 9, 10 and 11 of the complaint struck.

V. CONCLUSION

The preliminary objections to the complaint by defendant should be sustained and the claims by plaintiffs dismissed with prejudice.

Respectfully submitted,

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