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Plaintiffs,	:	May TERM, 2017
v.	:	No. 00784
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,	:	CLASS ACTION
Defendant.	:	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY'S PRELIMINARY OBJECTIONS TO PLAINTIFFS' COMPLAINT

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MATTER BEFORE THE COURT

Plaintiffs Frank Long, Joseph Shipley, and Michael White bring this lawsuit against the Southeastern Pennsylvania Transportation Authority ("SEPTA") on behalf of themselves and thousands of similarly situated qualified job applicants denied jobs based on SEPTA's overbroad criminal history screening policy, in systematic violation of Pennsylvania's Criminal History Record Information Act ("CHRIA"), 18 Pa. C.S. § 9125. Plaintiffs challenge, *inter alia,* SEPTA's lifetime ban on hiring anyone with certain drug-related convictions for a large number of SEPTA jobs. SEPTA has been on notice of the probable illegality of its criminal history screening policies and practices since at least when the Court of Appeals for the Third Circuit ("Third Circuit") issued its opinion in *El v. SEPTA*, 479 F.3d 232 (3d Cir. 2007). There, the Third Circuit opined that "the reasonable inference [is] that SEPTA has no real basis for asserting that its policy accurately distinguishes between applicants that do and do not present an unacceptable level of risk." *Id*. at 248.

Through its Preliminary Objections to Plaintiffs' Complaint ("Preliminary Objections" or "SEPTA POs"),[1] SEPTA raises a series of defenses that blatantly lack legal support, even within the cases cited by SEPTA, or applicability to the case at hand. First, it claims that this case should be dismissed because of ongoing federal litigation. However, SEPTA's arguments fly in the face of logic as the district court in *Long v. SEPTA,* No. 16 Civ. 1991, 2017 WL 1332716 (E.D. Pa. 2017), dismissed Plaintiffs' federal claims based upon a federal statute, and dismissed without prejudice Plaintiffs' CHRIA claims declining to exercise supplemental jurisdiction. Plaintiffs did not appeal the state law dismissals, but only certain federal claims. Plaintiffs' CHRIA claims are no longer pending and Plaintiffs properly refiled the state claims in state

[1] Plaintiffs' Complaint is attached as Exhibit A to SEPTA's Preliminary Objections ("Complaint" or "Compl.").

court. Plaintiffs appealed to the Third Circuit the alleged violations of the federal Fair Credit Reporting Act ("FCRA"), a completely distinct statute providing for different relief.

Second, SEPTA asserts that it is entitled to sovereign immunity but admits that it is an "agency" of the Commonwealth, SEPTA Br. at 9-10, and the CHRIA applies to "any agency of the Commonwealth[,]" 18 Pa. C.S. § 9103. Similarly, it contends that it is not subject to exemplary and punitive damages, when the CHRIA's remedies expressly apply to "agenc[ies]." *Id*. at §§ 9181, 9183.

Third, SEPTA contends that Plaintiffs' claims fail on the merits, but also admitted in the previous federal action that Plaintiffs' CHRIA claims stated a cause of action under the CHRIA.[2] To the extent SEPTA challenges willfulness, it ignores that willfulness is not required to establish a violation under the CHRIA. Nonetheless, Plaintiffs pled sufficient examples of willfulness including multiple repeated violations of the CHRIA and the long line of Pennsylvania cases establishing that lifetime bans on employment because of criminal records are illegal under Pennsylvania law.

Further, SEPTA challenges the factual underpinnings of Plaintiffs' class claims, ignoring that Rule 1705 of the Pennsylvania Rules of Civil Procedure ("Rule") expressly prohibits factual challenges to class certification at the preliminary objection stage. *See* Pa. R. Civ. P. 1705.[3] The

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[2] SEPTA's counsel stated that "under the state law claim [*i.e.* the CHRIA] I would tell you that I believe that [the plaintiffs] have been injured if they are able to prove their case." Ex. A (Oct. 12, 2016 motion to dismiss oral argument transcript ("Tr.")) at 11:23:25. The transcript is part of the federal litigation record. *See Long*, No. 16 Civ. 1991, ECF No. 47; *cf.* Pa. R. Civ. P. 1019(g) (in pleadings, permitting reference to "any matter of record in any . . . Federal court of record whose records are within the county in which the action is pending, or any matter which is recorded or transcribed verbatim in the . . . clerk of any court of record . . . of such county"). As a result, Plaintiffs attach relevant transcript excerpts for the Court's consideration.

[3] Nonetheless, even if the Court were to consider SEPTA's improperly raised objections, the question of whether SEPTA's criminal history adjudication criteria violates the CHRIA can

remainder of SEPTA's arguments concerning lack of specificity as to Plaintiffs' allegations, failure to attach SEPTA Policy #E20, and the alleged scandalous and impertinent "Statutory Background" of Plaintiffs' Complaint are meritless.

SEPTA's Preliminary Objections provide no basis to dismiss this case and as such the Court should overrule them.

STATEMENT OF QUESTIONS INVOLVED

A. Should Plaintiffs' state law claims remain in state court after the federal court declined to exercise supplemental jurisdiction? Suggested response: Yes.

B. As an agency of the Commonwealth, can SEPTA be sued under the CHRIA? Suggested response: Yes.

C. Did Plaintiffs sufficiently plead their claims under the CHRIA, including for willfulness? Suggested response: Yes.

D. Does SEPTA's attempt to dismiss Plaintiffs' class claims at the preliminary objection stage violate Rule 1705? Suggested response: Yes.

E. If Plaintiffs prove willfulness, are they entitled to exemplary and punitive damages against SEPTA? Suggested response: Yes.

F. Did SEPTA understand Plaintiffs' claims and were those claims pled with sufficient specificity? Suggested response: Yes.

G. Does Plaintiffs' Complaint conform to the rules of the Court? Suggested response: Yes.

H. Are Paragraphs 5 through 11 properly pled? Suggested response: Yes.

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be commonly adjudicated on a classwide basis without individual determinations given that Plaintiffs challenge a "wholesale ban" to employment. Compl. ¶ 3.

FACTS

I. Background

Plaintiffs bring suit against SEPTA for its rejection of job applicants with criminal records, including themselves, where the criminal history of the applicant does not have a relationship to suitability for the job. Compl. ¶ 1. Plaintiffs allege that SEPTA's policies and practices in screening job applicants with criminal records are overbroad and illegal, including an explicit policy (SEPTA Policy #E20) barring individuals with any felony or misdemeanor drug related convictions from employment in "[a]ll positions which require the operation of a SEPTA vehicles [sic]" or "positions requiring the maintenance, repair or operation of power facilities, substations, towers, signals, vehicles or rolling stock." *Id.* ¶ 2. Plaintiffs further allege that SEPTA's wholesale ban on gainful employment for Plaintiffs and the putative class is unlawful under the CHRIA, which permits employers to consider convictions "only to the extent to which they relate to the applicant's suitability for employment in the position for which he [or she] has applied." *Id.* ¶ 3.

SEPTA denied each Plaintiff employment because of unrelated criminal history.

Plaintiff Frank Long

Plaintiff Frank Long applied to be a Bus Operator with SEPTA on or about October 2014. *Id.* ¶ 33. At his interview, Mr. Long discussed the experiences that qualified him for the position, including his Commercial Driver's License and his job as a school bus driver at the time of the interview. *Id.* ¶ 35. In turn the SEPTA recruiter told Mr. Long that he thought Mr. Long would be a good driver, that he interviewed well, and that he was qualified for the position, and extended an offer of employment contingent on a background check. *Id.* ¶¶ 36-37. Nonetheless, 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 criminal history. *Id.* ¶ 39. Mr.

Long has a 1997 drug conviction for possession and manufacture of a controlled substance originating from a single 1994 arrest. *Id.* ¶ 41.

Plaintiff Joseph Shipley

Plaintiff Joseph Shipley applied to be a Railroad Supervision Manager with SEPTA in or about October 2015. *Id.* ¶ 43. At his interview, Mr. Shipley discussed the experiences that qualified him for the position, including his significant experience working for transportation companies. *Id.* ¶ 46. Mr. Shipley's interview went well and SEPTA offered him the position on approximately February 29, 2016. *Id.* ¶ 48. On approximately March 22, 2016, Mr. Shipley received a letter from SEPTA informing him about SEPTA's new hire orientation scheduled for March 28, 2016. *Id.* ¶ 49. Approximately two days later, Mr. Shipley received a telephone call from a SEPTA recruiter telling him not to report to work and that his background check had not been cleared. *Id.* ¶ 50. 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, followed by a letter stating the same. *Id.* ¶ 51. In response to Mr. Shipley's request for more information, SEPTA sent Mr. Shipley a second letter from its counsel, dated April 26, 2016, notifying him that SEPTA disqualified him pursuant to its categorical lifetime ban on hiring anyone who was convicted of a crime "involving the possession, sale, distribution, manufacture and use of controlled substances," 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," and enclosed a copy of SEPTA Policy #E20 with the relevant section highlighted. *Id.* ¶ 52. Mr. Shipley has a 2001 drug-related conviction arising out of a single arrest. *Id.* ¶ 53.

Plaintiff Michael White

Plaintiff Michael White applied to be a Bus Operator with SEPTA in or about April 2015. *Id* ¶ 55. At his interview, Mr. White discussed the experiences that qualified him for the position, including his job as a delivery driver at the time of the interview and that he had recently obtained his Commercial Driver's License. *Id.* ¶ 57. Mr. White's interview went well, and the SEPTA employee who interviewed him told him that he would receive more information about commencing training. *Id.* ¶ 59. Nonetheless, approximately six months after Mr. White's interview and after repeated follow up, Mr. White received a letter from SEPTA denying him the Bus Operator position because of his criminal history. *Id.* ¶ 61. Mr. White was convicted of drug-related offenses in 2006 and 2007. *Id.* ¶ 62.

II. The Statutes at Issue

Plaintiffs bring claims on behalf of themselves and a putative class for SEPTA's overbroad and illegal policies and practices in screening job applicants with criminal records. Plaintiffs allege that SEPTA has violated Section 9125 of the CHRIA, which permits employers to consider convictions "only to the extent to which they relate to the applicant's suitability for employment in the position for which he [or she] has applied." 18 Pa. C.S. § 9125(b).

SEPTA's enabling legislation states that it "shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof." 74 Pa. C.S. § 1711(a). Section 9103 of the CHRIA provides that it "shall apply to persons within this Commonwealth and to any agency of the Commonwealth or its political subdivisions which collects, maintains, disseminates or receives criminal history record information." 18 Pa. C.S. § 9103.

III. Procedural History

On April 27, 2016, Mr. Long first filed a class action lawsuit against SEPTA in the United States District Court for the Eastern District of Pennsylvania (subsequently, on May 26, 2016, Mr. Long was joined by Messrs. Shipley and White in an amended complaint). *See* SEPTA POs at Ex. B. In that federal lawsuit, Messrs. Long, Shipley, and White alleged that: (Count 1) SEPTA had failed to provide job applicants with a clear and conspicuous disclosure in writing, in a document that consists solely of the disclosure, that it may obtain a consumer report for employment purposes, in violation of 15 U.S.C. § 1681b(b)(2) of the FCRA; (Counts 2-3) SEPTA systemically violates section 1681b(b)(3) of the FCRA by using consumer reports to make adverse employment decisions without first providing the applicant and/or employee who is the subject of the report with sufficient and timely notification of its intent to take an adverse action, a copy of the report, and a summary of rights under the FCRA; and (Count 4) SEPTA routinely violates the CHRIA through its blanket policy and practice of disqualifying job applicants with unrelated felony convictions from employment in positions involving the operation of SEPTA vehicles, *see* 18 Pa. Cons. Stat. § 9125(b).

On April 5, 2016, SEPTA moved to dismiss the Complaint of Messrs. Long, Shipley, and White. *See* SEPTA POs at Ex. C (ECF No. 25). After the motion was fully briefed, on October 12, 2016, the federal court heard oral argument. At that oral argument, SEPTA's counsel made two statements contradicting those made to this Court (as discussed *infra*, Argument §§ IV, VII). First, SEPTA's counsel stated that "under the state law claim [*i.e.* the CHRIA] I would tell you that I believe that [the plaintiffs] have been injured if they are able to prove their case." Tr. at 11:23:25. Second, SEPTA's counsel stated that "our sole issue [with Plaintiffs' CHRIA claims] was the pleading of willfulness." Tr. 25:11-12. Although SEPTA was required to bring all

plausible challenges to the sufficiency of the claims under the CHRIA (*see* Fed. R. Civ. P. 12(g)(2), (h)), SEPTA sought only to dismiss the allegations that it willfully violated the statute.

On April 5, 2017, the federal district court dismissed the FCRA claims as lacking standing under Article III of the United States Constitution and accordingly declined supplemental jurisdiction over the CHRIA claims. *See* SEPTA POs at Ex. D at 1 & n.1. On April 18, 2017, the federal district court formally closed the case "for statistical purposes." SEPTA POs at Ex. C (ECF No. 54). Messrs. Long, Shipley, and White subsequently appealed the federal district court's decision as to the dismissal of their FCRA claims under Section 1681b(b)(3) of the FCRA, but *not* Section 1681b(b)(2) of the FCRA or the CHRIA. On May 3, 2017, Plaintiffs filed this matter challenging SEPTA's policies and practices as to the hiring of individuals with criminal records as violating the CHRIA. *See* SEPTA POs at Ex. A.

ARGUMENT

I. Legal Standard

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

II. Plaintiffs' CHRIA Claims Were Dismissed in Federal Court and as a Result Were Properly Brought in State Court.

A. Plaintiffs' CHRIA Claims in Federal Court Were Dismissed.

As SEPTA acknowledges, Plaintiffs' CHRIA claims were dismissed in federal court. SEPTA Br. at 7. Once that occurred, Plaintiffs properly filed their Pennsylvania state law claims in state court. *See, e.g.*, *Caldwell v. Dep't of Corr. Agency*, No. 631 C.D. 2014, 2014 WL 10298888, at *6 (Pa. Commw. Ct. Nov. 17, 2014) (holding that "trial court erred in determining it lacked jurisdiction" because when "federal court did not exercise supplemental jurisdiction over [plaintiff's] state law claims, [the plaintiff] did not lose his right to pursue these claims in state court"); *see* also *Oleski v. Dep't of Public Welfare*, 822 A.2d 120, 126-27 (Pa. Commw. Ct. 2003). In support of its argument, SEPTA fails to identify *any* authority that the Court somehow lacks jurisdiction over Plaintiffs' state law claims. *Cf. Gurecki v. Ne. Med. Assocs., P.C.*, 41 Pa. D. & C.4th 309, 310, 315 (Pa. Com. Pl. 1999) (refusing to consider plaintiff's federal age discrimination litigation when raised by defendant's preliminary objections to plaintiff's state age discrimination litigation).

The federal court's dismissal, including the rejection of supplemental jurisdiction, was a final judgment. *See O'Donnell v. Passport Health Commc'ns, Inc.*, 561 F. App'x 212, 215 n.7 (3d Cir. 2014); *Stanley v. Int'l Bhd. of Elec. Workers, AFL-CIO CLC*, 207 F. App'x 185, 190 (3d Cir. 2006). This divests the district court of "all control over the action." *Pa. Nurses Ass'n v. Pa. State Educ. Ass'n*, 90 F.3d 797, 801 (3d Cir. 1996). After dismissal, a plaintiff's state law claims could "*only*" be brought "in state court, as there would be no basis for the [federal] district court to exercise jurisdiction over such a reinstated action" after declining to exercise supplemental jurisdiction. *Erie Cnty. Retirees Ass'n v. Cnty. of Erie*, 220 F.3d 193, 202 (3d Cir. 2000) (emphasis supplied).

To protect the putative class, Plaintiffs had an ethical obligation to expeditiously re-file their case in state court once the federal district court declined supplemental jurisdiction. If Plaintiffs had not re-filed, after thirty days their statutes of limitations would have started to run again and their claims would have started to erode. *See* 28 U.S.C. § 1367(d).[4] Nonetheless, SEPTA speculates that "[i]f plaintiffs are successful in their appeal" of separate federal claims "then all claims should be reinstated[]" since the basis for dismissal of the state law claims would no longer exist." SEPTA Br. at 7. However, there is "no basis for the [federal] district court to exercise jurisdiction over . . . [Plaintiffs'] reinstated action." *Erie Cnty. Retirees*, 220 F.3d at 202 (emphasis supplied).[5]

B. The Doctrine of *Lis Pendens* Cannot Apply Where Plaintiffs' Dismissed Federal Claims Addressed Different Violations of the Law and Provide Different Remedies from Plaintiffs' State Claims.

SEPTA invokes the defense of *lis pendens*, which applies only where "the relief requested [is] the same." SEPTA Br. at 6. Here, the federal FCRA claims and the state CHRIA claims address separate violations of the law and, most importantly, provide distinct remedies. The dismissed FCRA claims on appeal to the Third Circuit challenge SEPTA's failure to provide a putative class with timely copies of their consumer reports and statements of FCRA rights before taking adverse employment actions against them based at least in part on the information

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[4] Plaintiffs did not seek to appeal the district court's refusal to exercise supplemental jurisdiction as to Plaintiffs' CHRIA claims, but even if they had done so, and lost, the statutes of limitations also would not have been tolled during the pendency of that appeal. *See Nelson v. Cnty. of Allegheny*, 60 F.3d 1010, 1013 (3d Cir. 1995) ("conclud[ing] that to permit tolling the statute of limitations until final resolution on appeal of all claims would disable the essential purpose of the statute and encourage plaintiffs to sleep on their rights").

[5] SEPTA has no basis for removal to federal court given that all parties are located in Philadelphia, Pennsylvania (no diversity or class action jurisdiction, *see* 28 U.S.C. § 1332(a), (d)(2), (d)(4)), and this case includes no federal claims. SEPTA cannot have its cake and eat it too: SEPTA first sought to deprive the federal court of jurisdiction over Plaintiffs' claims and now argues that Plaintiffs' CHRIA claims should return to federal court if Plaintiffs prevail on their federal appeal. *See* SEPTA Br. at 7.

contained in those consumer reports. *See* 16 U.S.C. § 1681b(b)(3); *see also* SEPTA POs at Ex. B. In sharp contrast, Plaintiffs' CHRIA claims challenge SEPTA's policies and practices categorically banning the hiring of certain individuals with criminal records as violating Section 9125 of the CHRIA, which provides that: "[f]elony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied."

If Messrs. Long, Shipley, and White prove their separate cases, the damages recoverable will be under distinct statutory schemes for separate illegal acts by SEPTA (including any actual damages that may flow from separate injuries). For example, the FCRA provides for statutory damages and the CHRIA has no similar provision. *Compare* 15 U.S.C. § 1681n *with* 18 Pa. C.S. § 9183(b). Crucially, the FCRA does not include a provision for equitable relief,[6] but the CHRIA provides for injunctive and declaratory relief (*see* § 9183(a))—which is a central remedy sought by Plaintiffs in this class action. *See* Compl. at 16-17; *see also id.* ¶¶ 4, 75, 82, 91.

Because the statutory remedies are different, the doctrine of *lis pendens* cannot apply. *See, e.g., I. W. Levin & Co. v. Oldsmobile Div. of Gen. Motors Corp.*, 8 Pa. D. & C.3d 361, 364 (Pa. Com. Pl. 1978) ("Even assuming the parties are the same, the doctrine of lis pendens will not be applied where the relief requested is not the same").[7]

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[6] 15 U.S.C. § 1681n (civil liability for willful noncompliance with FCRA); 15 U.S.C. § 1681o (same with negligent noncompliance); *see also Gelman v. State Farm Mut. Auto. Ins. Co.*, No. 06 Civ. 5118, 2007 WL 2306578, at *9 (E.D. Pa. Aug. 9, 2007) (Section 1681n and 1681o "expressly refer to damages and attorney fees, but not to injunctive or declaratory relief" and finding that "injunctive and declaratory relief are not available to [the plaintiff] under the FCRA."), *aff'd on other grounds*, 583 F.3d 187 (3d Cir. 2009).

[7] The cases cited by SEPTA articulating the legal standard for a *lis pendens* defense, SEPTA Br. at 6-7, do not fit the facts of this case: either they granted dismissal when the claims were filed in separate Pennsylvania counties (and not in federal court) and where the relief was the same, or they otherwise rejected the defense. *See Crutchfield v. Eaton Corp.*, 806 A.2d 1259, 1263 (Pa. Super. Ct. 2002) (doctrine applied to same claims litigated in separate counties); *Davis*

To the extent SEPTA claims it would be burdened by additional attorneys' fees in this action, if Plaintiffs succeed in their efforts to vindicate their rights, Plaintiffs are entitled to pursue attorneys' fees under these two distinct statutes brought in two separate actions. Moreover, Plaintiffs would be the parties burdened and facing significant prejudice by the further delay and uncertainty (and potential erosion of claims) if their state law claims were dismissed.

C. SEPTA's Request for Dismissal Is Baseless and Would Greatly Prejudice Plaintiffs and the Putative Class.

SEPTA's request that this action be "dismissed without prejudice pending a final order in the Federal Court Action[,]" SEPTA Br. at 7-8, should be rejected as the two cases are utterly different. There is no basis to wait on the federal court action when Plaintiffs did not appeal the dismissal of their CHRIA claims and the federal district court declined to exercise supplemental jurisdiction. Plaintiffs' state claims are properly brought in state court.

Dismissal would cause irreparable injury to Plaintiffs and the putative class. First, dismissal would trigger the continued erosion of the statutes of limitations for Plaintiffs and the entire putative class (time that could be reinstated only if Plaintiffs prevailed on their appeal of unrelated FCRA claims). Although Plaintiffs are confident about the merits of the Third Circuit appeal as to their Section 1681b(b)(3) FCRA claims, SEPTA's proposal would place Plaintiffs in an untenably risky situation.

Second, Plaintiffs have pled that SEPTA continues to reject job applicants through its illegally broad criminal history ban. Compl. ¶ 89 (SEPTA continues to "reject[] all applicants with applicable criminal records, whether or not they were job related, denying job opportunities

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Cookie Co. v. Wasley, 566 A.2d 870, 874 (Pa. Super. Ct. 1989) (rejecting doctrine in case where cause of action and relief was different); *Norristown Auto. Co. v. Hand*, 562 A.2d 902, 905 (Pa. Super. Ct. 1989) (same when rights asserted and relief were different); *Penox Techs., Inc. v. Foster Med. Corp.*, 546 A.2d 114, 116 (Pa. Super. Ct. 1988) (same; rejecting motion to stay or dismiss action in one county because of action in separate county).

to all those with criminal records to the detriment of Plaintiffs and the Class."); *see also id.* ¶¶ 1-3, 66 ("SEPTA routinely violates the law through its blanket policy and practice (including SEPTA Policy #E20) of disqualifying job applicants with unrelated drug convictions from employment in positions involving the operation of SEPTA vehicles"), 70, 74, 75, 82. Potential class members are injured each day. Waiting for the unrelated federal case to resolve would only exacerbate this harm.[8]

III. Plaintiffs' CHRIA Claims are Not Barred by Sovereign Immunity.

SEPTA asserts that it has sovereign immunity from suit under the CHRIA. SEPTA Br. at 9-11. However, SEPTA's enabling statute and case law establish that SEPTA is, at best, considered an agency of the Commonwealth and that the CHRIA provides that agencies of the Commonwealth can be sued for violation of its provisions.

A. SEPTA Is Not Entitled to the Same Immunity as the Commonwealth.

SEPTA's enabling legislation establishes that it is a municipal authority created to operate a metropolitan transportation authority, and as such "shall exercise the public powers of the Commonwealth *as an agency and instrumentality thereof*." 74 Pa. C.S. § 1711(a) (emphasis supplied). SEPTA admits as much. SEPTA Br. at 9-10 ("Pursuant to SEPTA's enabling statute, SEPTA 'shall exercise the public powers of the Commonwealth *as an agency and instrumentality thereof*.'" (quoting 74 Pa. C.S. § 1711(a)) (emphasis supplied)).

Pennsylvania courts have recognized that SEPTA is an *agency* of the Commonwealth. *See, e.g., SEPTA v. City of Phila.* ("*City of Phila.*"), 159 A.3d 443 (Pa. 2017) ("SEPTA exercises its public powers as an agency of the Commonwealth."); *Goldman v. SEPTA*, 57 A.3d 1154,

[8] SEPTA did not ask, in the alternative, for a stay of the action, and so Plaintiffs do not address a stay here. Nonetheless, Plaintiffs (and countless Philadelphia residents) would be similarly injured by a stay because it would leave SEPTA free to continue to violate the law.

1180 (Pa. 2012) ("We agree with SEPTA that [§ 1711] establishes that SEPTA has been statutorily classified by the legislature as an agency of the Commonwealth" and collecting cases); *SEPTA v. Bd. of Revision of Taxes*, 833 A.2d 707, 717-18 (Pa. 2003) ("SEPTA is a municipal authority created pursuant to 74 Pa. C.S. § 1711(a). . . . [and] 'shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof.'" (quoting 74 Pa. C.S. § 1711(a))); *Krenzel v. SEPTA*, 840 A.2d 450, 456 n.10 (Pa. Commw. Ct. 2003) ("For purposes of immunity from actions in tort, SEPTA is an agency of the Commonwealth.").

SEPTA misleadingly uses the terms "the Commonwealth" and "agency of the Commonwealth" interchangeably, SEPTA Br. at 9-11, but SEPTA is not coterminous or legally identified with the Commonwealth. Instead, SEPTA is a distinct legal entity; it is not *the* Commonwealth and does not enjoy the same immunity as *the* Commonwealth. *See, e.g.*, *Tork-Hiis v. Commonwealth*, 735 A.2d 1256, 1259 (Pa. 1999) ("The commonwealth and its agencies are distinct legal entities."); *Pa. State Sys. of Higher Educ. v. Ind. Area Sch. Dist.*, No. 184 M.D. 2011, 2012 WL 8667893, at *6, n. 11 (Pa. Commw. Ct. Apr. 5, 2012) ("*PASSHE*") (explaining that the Supreme Court in *SEPTA v. Bd. of Revision of Taxes*, 833 A.2d 710 (Pa. Sup. Ct. 2003), "did not determine that SEPTA is the Commonwealth"), *aff'd without opinion*, 69 A.3d 236 (Pa. 2013); *Cooper v. SEPTA*, 548 F.3d 296, 308, 311 (3d Cir. 2008) (concluding that SEPTA does not enjoy sovereign immunity).

In an illustrative case, *PASSHE*, the court distinguished *the* Commonwealth and an *agency or instrumentality* thereof. 2012 WL 8667893. The *PASSHE* court found that an agency or instrumentality of the Commonwealth—Pennsylvania's public university system—served and carried out a particular function for the Commonwealth, "as opposed to being *the* Commonwealth." 2012 WL 8667893 at *4-5. The court explained that agencies of the

Commonwealth do not enjoy the same sovereign immunity as does the Commonwealth. *Id*. at *3-5 (State agency or instrumentality does not enjoy unqualified immunity; unlike "the sovereign Commonwealth[,]" the university system was "not entitled to absolute, unqualified real estate tax immunity"). Likewise, SEPTA is an agency of the Commonwealth, authorized to carry out limited public transportation functions for the Commonwealth. In this capacity, SEPTA cannot be equated to the sovereign Commonwealth, and does not enjoy the same sovereign immunity as *the* Commonwealth.[9]

B. The CHRIA Applies to SEPTA As An Agency of the Commonwealth.

The CHRIA, by its express language, establishes that SEPTA lacks sovereign immunity as an agency of the Commonwealth. The plain language of Section 9103 of the CHRIA provides that the CHRIA "shall apply to persons within this Commonwealth and to any *agency of the Commonwealth* or its political subdivisions *which collects, maintains, disseminates or receives criminal history record information*." 18 Pa. C.S. § 9103 (emphasis supplied); *see also Poliskiewicz v. E. Stroudsburg Univ*., 536 A.2d 472, 475 (Pa. Commw. Ct. 1998) ("Section 9103

[9] Pennsylvania courts have also rejected SEPTA's status as an agency of the Commonwealth—further undermining its sovereign immunity argument. Although Pennsylvania courts have often accepted SEPTA's enabling legislation as providing that SEPTA is an agency of the Commonwealth, courts also have cautioned that the determination alone is "not the end of the matter." *SEPTA v. City of Phila.*, 101 A.3d 79, 87 (Pa. 2014). In fact, the Supreme Court of Pennsylvania has refrained from determining SEPTA's status as a Commonwealth agency for all purposes. *Id*. at 87, n.12 ("To be clear, we need not, and do not determine whether SEPTA is treated as Commonwealth agency for all purposes."); *see also Blount v. Phila. Parking Auth*., 965 A.2d 226, 232 n.13 (Pa. 2009) (recognizing SEPTA's enabling statute, but observing that SEPTA's organizational and financial structure contain indicators that it is a local agency); *Fraternal Order of Transit Police v. SEPTA*, 114 A.3d 893, 898 (Pa. Commw. Ct. 2015) (acknowledging that "SEPTA may not be considered a Commonwealth agency for all purposes"); *SEPTA v. Union Switch & Signal*, 637 A.2d 662, 666, 669 (Pa. Commw. Ct. 1994) (concluding that SEPTA should not be considered the Commonwealth for purposes of the Board of Claims Act); *Fisher v. SEPTA*, 431 A.2d 394, 397 (Pa. Commw. Ct. 1981) (concluding that the Legislature did not intend "SEPTA to be a Commonwealth agency in the traditional sense").

of the Record Act, 18 Pa. C.S. § 9103, makes it clear that the Record Act does apply to . . . 'any agency of the Commonwealth'" (quoting 18 Pa. C.S. § 9103)). Moreover, Plaintiffs have pled that SEPTA is an "employer," "person" and/or "organization" for purposes of the CHRIA. Compl. ¶ 31. Plaintiffs also have pled that SEPTA collected, maintained, disseminated and/or received their criminal history record information. *See, e.g.*, Compl. ¶¶ 38-39, 42, 47, 50-52, 58, 60-61. Further, Section 9183 provides that "individuals" may bring actions against "any person, agency or organization" in order to seek injunctive relief as well as damages. 18 Pa. C.S. § 9183(a), (b). In other words, a plain reading of the CHRIA leads to a conclusion that the statute expressly applies to SEPTA.[10]

SEPTA misrepresents the Commonwealth Court's holding in *Poliskiewicz*, which distinguishes between Commonwealth agencies and the Commonwealth. SEPTA Br. at 10. In *Poliskiewicz*, sovereign immunity was limited to state colleges, which were traditionally "held to be '*the* Commonwealth'" and thus were immune from suit under certain provisions of the CHRIA. 536 A.2d at 474-75 (emphasis supplied)). SEPTA, in sharp contrast, is an agency of the Commonwealth and *Poliskiewicz* expressly reaffirmed that the CHRIA applies to agencies of the Commonwealth. *Id*. at 475 (noting that "Section 9103 . . . makes it clear that the Record Act does apply to . . . '*any agency of the Commonwealth*[,]'" but that it "does not contain . . . a specific provision waiving immunity as to *the* Commonwealth" (emphasis supplied)). The

[10] The Statutory Construction Act, 1 Pa. C.S. § 1501, *et seq.*, provides that the object of interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. *See* 1 Pa. C.S. §§ 1903(a), 1921(b). To determine the meaning of a statute, a court must first determine whether the issue before it may be resolved by reference to the express language of the statute, which is to be read according to the plain meaning of the words. 1 Pa. C.S. § 1903. A statute's plain language generally offers the best indication of legislative intent. *Commonwealth v. Gilmour Mfg. Co.*, 822 A.2d 676, 679 (Pa. 2003); *Pa. Fin. Responsibility Assigned Claims Plan v. English*, 664 A.2d 84, 87 (Pa. 1995). Contrary to SEPTA's assertion that "Commonwealth agencies are immune from claims under CHRIA[,]" SEPTA Br. at 10, the legislature's intent is clear: the CHRIA applies to agencies of the Commonwealth.

Poliskiewicz court's holding was narrow and supports the argument that CHRIA liability applies to SEPTA as an agency of the Commonwealth.

SEPTA's reliance on *City of Philadelphia* is similarly misleading because the statute at issue there did not expressly apply to agencies of the Commonwealth. There, the Supreme Court found that a local ordinance could not "piggyback" on the express waiver of sovereign immunity for Commonwealth agencies found in the Pennsylvania Human Relations Act. 159 A.3d at 543-54. Here, Section 9103 of the CHRIA states that "any agency of the Commonwealth . . . which . . . receives criminal history record information" is subject to the CHRIA—like SEPTA.[11]

C. Exemplary and Punitive Damages are Recoverable Against SEPTA.

As an agency of the Commonwealth, SEPTA is susceptible to exemplary and punitive damages if Plaintiffs establish SEPTA willfully violated the CHRIA. Section 9181 of the CHRIA states that "[a]ny person, *including any agency or organization*, who violates the provisions of this chapter . . . may . . . [b]e subject to civil penalties or other remedies as provided for in this chapter," 18 Pa. C.S. § 9181(2) (emphasis supplied), and Section 9183 defines one of the available civil penalties as "[e]xemplary and punitive damages[.]" *Id.* § 9183(b)(2). If willfulness is established, exemplary and punitive damages *must* be imposed, showing that the Pennsylvania legislature intended this remedy to apply broadly. *See id.* (exemplary and punitive damages "shall be imposed").

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[11] The other cases to which SEPTA cites are equally unavailing because they do not address the CHRIA and are otherwise inapposite. *See, e.g.*, *Dynamic Student Servs. v. State Sys. of Higher Educ.*, 697 A.2d 239, 243 (Pa. 1997) (case bearing no relevance to the issues here; holding that a university is a state agency and analyzing its compliance with state Right to Know Act); *Chester Upland Sch. Dist. v. Yesavage*, 653 A.2d 1319, 1327 (Pa. Commw. Ct. 1994) (discussing simply whether defense of sovereign immunity, which in this case is unavailable to SEPTA, can be raised in preliminary objections); *Williams v. W. Chester State Coll.*, 370 A.2d 774, 776 (Pa. Commw. Ct. 1977) (sustaining sovereign immunity where, unlike this case, no provisions existed for waiver); *Finkelstein v. Shippensburg State Coll.*, 370 A.2d 1259, 1260-61 (Pa. Commw. Ct. 1977) (same).

Pennsylvania courts have repeatedly found that agencies can be held liable for punitive damages under the CHRIA. *In re Pittsburgh Citizen Police Review Bd.*, 16 Pa. D. & C.5th 435, 441-42 (Pa. Com. Pl. Sept. 23, 2010), *aff'd*, 36 A.3d 631 (Pa. Commw. Ct. 2011); *Taha v. Bucks Cnty. Pa.*, 172 F. Supp. 3d 867, 873 (E.D. Pa. 2016) (rejecting criminal justice agency's argument that imposing punitive damages was "contrary to public policy"); *see also Schmidt v. Deutsch Larrimore Farnish & Anderson, LLP*, 876 A.2d 1044, 1047 (Pa. Super. Ct. 2005) (quoting § 1983 and explaining "the Act clearly provides for civil actions against criminal and non-criminal agencies as well as individuals; the language excerpted above makes that clear").

SEPTA relies on *Feingold v. SEPTA*, a wholly inapposite tort case analyzing punitive damages under common law and having nothing to do with the CHRIA or even a situation where there was a statutory authorization of punitive damages. 517 A.2d 1270, 1276 (Pa. 1986); *see also id at* 1278 (Larsen, J., dissenting) ("The 'tradition' prohibiting punitive damages against government agencies was, however, largely a by-product of the antiquated doctrine of sovereign immunity which has lost its efficacy in modern times and has been thoroughly discarded by this Court.").

As *Feingold* noted, "the purpose of imposing punitive damages is to punish the wrongdoers and to deter future conduct." *Id.* at 1276. Here, the potential for punitive damages is especially warranted given SEPTA's long history of widespread and continued violation of the CHRIA—as alleged in Plaintiffs' Complaint.

IV. SEPTA's Attempt to Argue Plaintiffs' Claims Fail on the Merits is Itself Meritless.

In its third basis for seeking dismissal ("Individual CHRIA Claims Fail"), SEPTA appears to mix three arguments, that Plaintiffs: (1) failed to state a cause of action under the CHRIA; (2) must allege willfulness to state a cause of action under the CHRIA; and (3) failed to

sufficiently plead willfulness. *See* SEPTA Br. at 11-14. SEPTA's arguments ignore the statutory framework of the CHRIA and the well-pled allegations in Plaintiffs' Complaint.

First, to the extent SEPTA broadly challenges the sufficiency of Plaintiffs' allegations, each Plaintiff alleged that he applied and interviewed for a position at SEPTA, Compl. ¶¶ 21, 22, 24, 25, 27, 28, was qualified for the position, *id*. ¶¶ 35, 46, 57, and was denied the position because of his criminal history, *id*. ¶¶ 39, 40, 51, 52, 61. Each Plaintiff also alleged that his criminal history was not relevant to the position to which he applied because of the nature of the crime, the age of the conviction, his employment history, and the years he has been in the general population without any further convictions. *Id*. ¶¶ 41, 54, 63. Notably, SEPTA does not deny that it refused to hire Plaintiffs because of their past convictions. *See* SEPTA Br. at 11-14. SEPTA also conceded in the federal court action it describes as "identical" (SEPTA Br. at 7), that "under the state law claim . . . Plaintiffs . . . have been injured if they are able to prove their case[.]" Tr. at 11:23:25.

Second, under Section 9125 of the CHRIA, Plaintiffs need not prove willfulness to establish their claim. *See* 18 Pa. C.S. § 9125. Rather, willfulness is required only to establish exemplary and punitive damages once an aggrieved person establishes a violation of the CHRIA. Specifically, Section 9183(b)(2) provides:

> A person found by the court to have been aggrieved by a violation of this chapter or the rules or regulations promulgated under this chapter, shall be entitled to actual and real damages of not less than $100 for each violation and to reasonable costs of litigation and attorney's fees. *Exemplary and punitive damages of not less than $1,000 nor more than $10,000 shall be imposed for any violation of this chapter, or the rules or regulations adopted under this chapter, found to be willful.*

18 Pa. C.S. § 9183(b)(2) (emphasis supplied). Here, Plaintiffs also seek forms of relief that require no showing of willfulness under the CHRIA: (1) declaratory judgment; (2) injunctive

relief; (3) actual and real damages; and (4) reasonable attorney's fees and costs. *See* 18 Pa. C.S. § 9183(b)(2); Compl. at 17. Moreover, SEPTA made this same argument in the federal court litigation and then at oral argument walked it back as unsustainable in light of the statutory text.[12] *Cf.* SEPTA Br. at 11 ("Plaintiffs' individual CHRIA claims depend on whether SEPTA willfully violated the CHRIA.").

Third, Plaintiffs nonetheless have adequately pled facts establishing willfulness for damages purposes.[13] *See, e.g.*, Compl. ¶¶ 4, 32, 66-68. Plaintiffs alleged that SEPTA has repeatedly violated the CHRIA by denying Plaintiffs and the putative class employment for positions involving SEPTA vehicles based on unrelated drug convictions. *Id.* ¶ 66. SEPTA has had decades to comply with the CHRIA, and it has not done so. *See* SEPTA Br. at 22 (noting CHRIA was enacted in 1979); *see also* Compl. ¶¶ 5-7, 66-67. Plaintiffs alleged that SEPTA's obligations are well-established by the plain language of CHRIA, which allows consideration only of convictions that directly relate to the applicant's suitability for employment in the job at issue, and in longstanding case law. *Id.* ¶ 67.

As to this last point, to the extent SEPTA maintains that certain drug convictions forever disqualify applicants when the job involves the operation and/or maintenance of a SEPTA vehicle, that policy is unsustainable in light of numerous Pennsylvania cases recognizing that

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[12] During oral argument in the federal action, SEPTA conceded that Section 9125 contains no willfulness requirement and retracted its argument that Plaintiffs failed to establish willfulness on their CHRIA claim. *Compare* Tr. at 21:6-17 (Plaintiffs' counsel stating: "Plaintiff does not have to allege much less prove willfulness in order to establish a violation of section 9125 . . .") *with* Tr. 25:4-8, 11-14 (SEPTA's counsel stating: "Our sole issue was the pleading of the willfulness. And I do agree with Mr. Hancock, there is a separate penalty for a willful violation and that's what we are referring to."). Contradicting SEPTA counsel's averments made in open court, SEPTA inexplicably recycles the same willfulness argument in this state action.

[13] Although the CHRIA does not define willful, one court has held that "the analysis necessarily focuses on a defendant's conduct rather than the impact on any one plaintiff." *Taha v. Bucks Cnty. Pa.*, No. 12 Civ. 6867, 2016 WL 2345998 at *3 (E.D. Pa. May 4, 2016).

lifetime job bans are unreasonably broad. *E.g.*, *Sec'y of Revenue v. John's Vending Corp*., 309 A.2d 358, 362 (Pa. 1973) (noting "deeply ingrained public policy of [Pennsylvania] to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders" and stating "[t]o forever forego a permissible means of gainful employment because of an improvident act in the distant past completely loses sight of any concept of forgiveness for prior errant behavior and adds yet another stumbling block along the difficult road of rehabilitation"); *Peake v. Commonwealth*, 132 A.3d 506, 521-22 (Pa. Commw. Ct. 2015) (*en banc*) ("[I]t defies logic to suggest that *every* person who has at any time been convicted of any of the [specified] crimes . . . presents a danger to those in an Act-covered facility"); *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10, 25 (Pa. Commw. Ct. 2012) (holding that a lifetime employment ban was "unreasonable, unduly oppressive" and "impose[d] unusual and unnecessary restrictions"); *Warren Cnty. Human Servs. v. State Civ. Serv. Comm'n (Roberts)*, 844 A.2d 70, 74-75 (Pa. Commw. Ct. 2004) (holding that lifetime employment ban of previously convicted applicants is unconstitutional). Further, in *El v. SEPTA*, the Third Circuit put SEPTA on notice of the potential illegality of lifetime employment bans. 479 F.3d at 248.[14]

The federal cases SEPTA cites—all employing the summary judgment standard—are inapplicable at the preliminary objection stage. *See, e.g.*, *id.* at 247-49 (expressing reservation

[14] SEPTA argues that *El* supports its position, SEPTA Br. at 13, but the Third Circuit's opinion shows that the court had serious reservations about the policy and felt constrained to rule in SEPTA's favor only because the plaintiff had failed to provide evidence rebutting SEPTA's case and went out of its way to state that if the plaintiff had provided evidence it "would be a different case." *El*, 479 F.3d at 247 ("Had El produced evidence rebutting SEPTA's experts, this would be a different case. Had he, for example, hired an expert who testified that there is time at which a former criminal is no longer any more likely to recidivate than the average person, then there would be a factual question for the jury to resolve. Similarly, had El deposed SEPTA's experts and thereby produced legitimate reasons to doubt their credibility, there would be a factual question for the jury to resolve. Here, however, he did neither, and he suffers pre-trial judgment for it.").

about SEPTA's policy, but applying summary judgment standard because plaintiff did not present any evidence to rebut defendant's expert testimony); *Dean v. Specialized Sec. Response*, No. 09 Civ. 515, 2011 WL 3734238, at *16 (W.D. Pa. Aug. 24, 2011) (summary judgment); *El v. SEPTA*, 418 F. Supp. 2d 659, 672 (E.D. Pa. 2005), *aff'd sub nom*, *El*, 479 F.3d 232 (summary judgment); *El v. SEPTA*, 297 F. Supp. 2d 758, 764 (E.D. Pa. 2003) (summary judgment).

V. Plaintiffs Properly Pled Class Claims and SEPTA's Challenges are Premature.

SEPTA's attempt to dismiss Plaintiffs' class claims at this early stage in the litigation, *see* SEPTA Br. at 14, is procedurally improper and inconsistent with controlling precedent. "[A] class action should not be dismissed until the pleadings are closed and a class certification hearing is held." *Sears v. Corbett*, 49 A.3d 463, 485-86 (Pa. Commw. Ct. 2012) (citing with approval *Stranahan v. Cnty. of Mercer*, 697 A.2d 1049) (Pa. Commw. Ct. 1997)), *rev'd and vacated sub nom. on other grounds*, *Sears v. Wolf*, 118 A.3d 1091 (Pa. 2015). Thus, "a trial court reviewing preliminary objections should not . . . concern[] itself with the preliminary objections to the class action allegations at all." *Weiler v. SmithKline Beecham Corp.*, 53 Pa. D. & C.4th 449 (Pa. Com. Pl. 2001) (internal quotation marks and citation omitted) (collecting authority).

Rule 1705 prohibits factual challenges to class certification at the preliminary objection stage. *See* Pa. R. Civ. P. 1705 ("Issues of fact with respect to the Class Action Allegations may not be raised by preliminary objections but shall be raised by the answer."). SEPTA violates Rule 1705 by challenging Plaintiffs' factual allegations and whether they can meet commonality. *See, e.g.*, SEPTA Br. at 16. SEPTA's lone case citation was decided at the class certification stage. *See Eisen v. Indep. Blue Cross*, 839 A.2d 369, 370 (Pa. Super. Ct. 2003).

Nonetheless, even if the Court were to consider SEPTA's improperly raised objections,

the question of whether SEPTA's criminal history adjudication criteria violates the CHRIA can be commonly adjudicated on a classwide basis without individual determinations as to whether SEPTA properly excluded an applicant based on his or her individual conviction history. Plaintiffs challenge a "wholesale ban" to employment by SEPTA. Compl. ¶ 3. Such a bar to employment prevents employers from considering how applicants' convictions "relate to the applicant's suitability for employment in the position for which he [or she] has applied[,]" *id.*, which establishes a facial violation of Section 9125 of the CHRIA. As just one example, SEPTA Policy #E20 bars "individuals with any felony or misdemeanor drug related convictions from employment in '[a]ll positions which require the operation of a SEPTA vehicles [sic]' or 'positions requiring the maintenance, repair or operation of power facilities, substations, towers, signals, vehicles or rolling stock.'" *Id.* ¶ 2. The question of whether SEPTA's criminal history policy is illegal is common to the class and does not require individualized inquires.[15]

SEPTA improperly focuses its (premature) objection to commonality on whether Plaintiffs and members of the class would be entitled to employment. This is not a class certification question: it goes to the *merits* (did SEPTA violate the law) and the type of relief to which class members are entitled (was each class member illegally denied employment and is she entitled to the position or other make whole relief).

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[15] Overbroad criminal history adjudication policies are classic examples of a policy whose legality can be determined on a classwide basis. *See, e.g.*, *Houser v. Pritzker*, 28 F. Supp. 3d 222, 254 (S.D.N.Y. 2014) ("If the . . . Adjudication Criteria are found to have had a disparate impact on minority applicants, they necessarily will have caused a uniform injury to all members of the liability class. The only remaining questions at that point will be whether the Census Bureau can maintain personal defenses against individual plaintiffs' claims for backpay, and, if not, the amount of backpay owed. If and when the litigation reaches that stage, the Court will have a number of management tools at its disposal to help resolve these issues."); *see also Little v. Wash. Metro. Area Transit Auth.*, No. 14 Civ. 1289, 2017 WL 1403122, at *8, *22 (D.D.C. Apr. 18, 2017) ("To the extent individual determinations are necessary in a Title VII class action to allow a defendant to present individual defenses or calculate individual damages, the court can conduct individual *Teamsters* hearings after general liability has been established.").

VI. SEPTA Has Been on Notice of Plaintiffs' CHRIA Claims Since Plaintiffs' April 27, 2016 Federal Suit.

Over a year after Plaintiffs filed their initial complaint in federal court, and after a separate motion to dismiss in federal court, SEPTA argues for the first time that Plaintiffs' allegations are insufficiently specific. SEPTA Br. at 17-20. The Court should not permit SEPTA's tardy gamesmanship.

SEPTA's own words establish without doubt that it has been adequately informed of Plaintiffs' claims. SEPTA avers that the legal standard for specificity is that the "pleading must achieve the purpose of informing the court and the adverse party or parties of the matter in issue." SEPTA Br. at 19. However, in federal court SEPTA's counsel: (1) admitted SEPTA understood Plaintiffs' claims sufficiently to opine that, if proven, Plaintiffs' claims stated an injury under the CHRIA, *see* Tr. at 11:23-25; and (2) challenged Plaintiffs' claims only on willfulness grounds and *not* any purported lack of specificity, *see* Tr. at 25:11-12. In turn, SEPTA now argues that the claims at issue in this litigation are "identical" to the CHRIA claims at issue in that litigation. SEPTA Br. at 7. If the claims are identical, and SEPTA understood Plaintiffs' claims in federal court, SEPTA has no basis to now argue that it does not understand Plaintiffs' claims.

Turning to SEPTA's three specific objections, which SEPTA describes in one conclusory paragraph, SEPTA fails to identify any part of Plaintiffs' pleadings that it did not understand and fails to identify any harm that would derive from the supposed pleading errors.

First, SEPTA argues that the Complaint should be dismissed because Plaintiffs "did not attach the policy to the pleadings or quote the policy in its entirety." SEPTA Br. at 19. As discussed *infra* Argument, § VIII.A, Plaintiffs had no legal obligation to attach this form; quoting the entire policy, as SEPTA requests, would run counter to Rule 1019 and unnecessarily

burden the Court with verbiage. *See* Pa. R. C. P. 1019(a) (at pleading, "material facts . . . shall be stated in a *concise* and *summary* form" (emphasis supplied)). To the extent SEPTA might argue that it was harmed because it cannot review the entirety of a policy it created (and even sent to Plaintiff Shipley), sticking one's head in the sand is not a defense. To the extent SEPTA speculates that the Court has been harmed by not having the policy, SEPTA does not include the policy with its own submission or point to any inaccuracies in Plaintiffs' quotation of its language.[16]

Second, SEPTA argues that Plaintiffs allege no facts to support their "conclusory contention" that SEPTA willfully violated the CHRIA. SEPTA Br. at 19. This is an improper repackaging of its argument that Plaintiffs' failed to sufficiently plead willfulness, *see* SEPTA Br. at 13, and should be rejected for the reasons previously discussed, *see supra* Argument, § IV. Again, although SEPTA argues Plaintiffs have "failed to adequately plead a violation of the CHRIA[,]" SEPTA Br. at 20, this is a misrepresentation of the CHRIA's legal framework. Willfulness is not an element necessary to sustain Plaintiffs' action. *See supra id.*

Third, SEPTA argues that Plaintiffs need to allege their actual convictions because "[m]erely contending a conviction was 'minor' is not sufficient to establish the disqualifying conviction was not related to suitability for employment." SEPTA Br. at 20. Again, SEPTA's objection distorts Plaintiffs' burden at the pleading stage. *See supra* Argument, § V. Plaintiffs' claims are based on SEPTA's discriminatory *policy and practices*; it is premature to evaluate

[16] Later, SEPTA states that Plaintiffs "selectively quoted" the policy and that the quotes were "out-of-context[.]" SEPTA Br. at 20-21. SEPTA provides no support for its accusations. To the extent SEPTA disagrees with how the policy was implemented in practice, that is a factual dispute for the finder of fact to resolve at trial. Plaintiffs also note that they have not yet had the opportunity to obtain through discovery an authenticated copy of the policy, or to discover whether variants of the policy were in effect at various times relevant to the lawsuit.

whether Plaintiffs are suitable for hire as part of the merits or the remedial stage of the litigation. Even so, Plaintiffs pled much more than "[m]erely contending a conviction was 'minor'" as SEPTA misleadingly suggests. SEPTA Br. at 20. Plaintiffs each pled that their conviction was drug related and provided the year(s) of conviction. *See* Compl. ¶¶ 41 (Long), 53 (Shipley), 62 (White). SEPTA skips over the fact that it possesses Plaintiffs' criminal history record information from when it denied them employment based on information contained in background checks it ran. *See* Compl. ¶¶ 42 (Long); 50-52 (Shipley); 60-61 (White).

VII. SEPTA's Remaining Objections Also Fail.

A. SEPTA Argues That Plaintiffs Did Not Attach SEPTA Policy #E20, When Plaintiffs' Claims are not Based Entirely on that Policy and SEPTA is Clearly in Possession of that Policy, Which it Drafted.

Plaintiffs' claims are not "based entirely on SEPTA Policy #E20" and SEPTA's claims to the contrary again greatly overstep the mark. *See, e.g.*, Comp. ¶¶ 2, 39, 42, 51, 52, 61, 66, and 67. Plaintiffs allege that SEPTA "rejects job applicants with criminal records even where the criminal history of the applicant does not have a relationship to their suitability for the job." *Id.* ¶ 1. In turn, "SEPTA's overbroad and illegal policies and practices in screening job applicants with criminal records *include* an explicit policy (SEPTA Policy #E20)[.]" *Id.* ¶ 2 (emphasis supplied); *see also* ¶ 67 (describing policy and practice challenged as "*including* SEPTA Policy #E20" (emphasis supplied)). [17] As clearly pled, Plaintiffs' claims are based on an alleged statutory violation of the CHRIA. At this point, SEPTA Policy #E20 is merely one piece of evidence that the Plaintiffs intend to use at trial to show that SEPTA has violated the CHRIA. Accordingly, Rule 1019(i) is not applicable. *See U.S. Bank N.A. ND v. Seeley*, 21 Pa. D. & C.5th 558, 561-62 (Pa. Com. Pl. Jan. 26, 2011).

[17] Plaintiffs' class definition does not depend on that policy either. *See* Compl. ¶¶ 69, 70.

Even so, Rule 1019(i) does not warrant dismissal where the document at issue is in the defendant's possession—like SEPTA Policy #E20. *See, e.g.*, *Pine Run, Inc. v. Balutis*, No. 245 C.D. 2008, 2008 WL 9404938, at *2 (Pa. Commw. Ct. Aug. 28, 2008) (failure to attach a critical document was not fatal to plaintiff's claim where the document was in defendant's possession and the defect could be cured by amendment or affidavit); *Humphrey v. Dep't of Corr.*, 939 A.2d 987, 990 (Pa. Commw. Ct. 2007), *aff'd in part, appeal denied in part sub nom. Humphrey v. Com., Dep't of Corr.*, 955 A.2d 348 (2008) (overruling 1019(i) objection where a pro se inmate attempted to follow the rule, referenced the substance of the DOC policy at issue in his petition and later attached it to his brief, and where the DOC was in possession of the document); *Narcotics Agents Reg'l Comm. ex rel. McKeefery v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 780 A.2d 863, 869 (Pa. Commw. Ct. 2001) ("[W]ritings that are in the possession of the opposing party need not be attached to a pleading" (citing 2 Goodrich-Amram 2d § 1019(h):9 (1991))); *Street v. Siemens Med. Sols. Health Servs. Corp.*, No. 0885 March Term 2003, 2003 WL 21673183, at *1 (Pa. Com. Pl. July 8, 2003) (same); *Oppenheimer v. York Int'l*, No. 4348 March Term 2002, 2002 WL 31409949, at *4 (Pa. Com. Pl. Oct. 25, 2002) (overruling 1019(i) objection where plaintiff's claim was not "solely" based on the writing at issue and were the writing was in defendant's possession).[18]

[18] Moreover, the Rules "shall be liberally construed[.]" Pa. R. C. P. 126. Even if SEPTA was correct that Plaintiffs had technically violated the Rules (they have not), SEPTA has not been harmed because no substantive rights have been impacted and the document in question is SEPTA's *own* policy. Pursuant to Rule 126, if the Court views the decision not to attach the policy as error, the Court should nonetheless disregard it as immaterial to the case. *See* Pa. R. C. P. 126 ("The court at every stage of any . . . action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties."). The issue also could be easily cured through amendment. Underscoring the lack of harm, the policy will almost certainly be produced as part of discovery. Nonetheless, by SEPTA's (incorrect) logic, SEPTA also was obligated to attach the policy given that it purports to rely upon it for a defense, and it did not do so. *See* Pa. R. C. P. 1019(i). SEPTA cannot have it both ways.

B. Paragraph 5 Through 11 Are Directly Relevant to Plaintiffs' Allegations.

The averments presented in the introductory "Statutory Background" section of the Complaint—Paragraphs 5 through 11—are properly pled and, moreover, directly relate to Plaintiffs' allegations and the matter before the Court. *Cf.* SEPTA Br. at 22-23. These paragraphs contextualize the claims brought in the lawsuit, the harms to Plaintiffs and the putative class, and the lawsuit's important public policy objectives. The paragraphs are neither scandalous nor impertinent and, therefore, should not be stricken.

The right to strike impertinent matter should be exercised sparingly. *SEPTA v. Phila. Tranps. Co.*, 38 Pa. D. & C.2d 653, 656 (Pa. Com. Pl. 1965). The standard is sufficiently difficult to meet that even "where [the] matter is impertinent but not injurious, it need not be stricken." *Id*.

In making its motion, SEPTA does not challenge the accuracy of the quoted language. SEPTA does not dispute that criminal history bans (like its policies and practices) unfairly stigmatize "countless Philadelphia residents" with criminal records, and especially the most "vulnerable" and minority populations. Compl. ¶¶ 10, 11. Rather, SEPTA seeks to strike accurately quoted language (including the statutory text that forms the basis for Plaintiffs' suit[19]) and any discussion of how its unfair policies harm the putative class.

Each of the paragraphs identified by SEPTA is properly pled. Plaintiffs challenge SEPTA's employment practices with regard to hiring individuals with criminal histories: Paragraph 5 relates directly to employment and Paragraph 6 relates directly to criminal records.

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[19] SEPTA's objection to Paragraph 8 pushes the limits. In that paragraph, Plaintiffs directly quoted the statute language of Section 9125(b).

It bears noting that SEPTA's argument that Plaintiffs' claims should be dismissed for failure to sufficiently plead willfulness—an argument that is unsupported by the CHRIA's text and contradicted by SEPTA's counsel's own averments in the federal litigation—underscores the need for Plaintiffs to accurately present the statutory framework.

Paragraph 5 directly quotes Pennsylvania's well-recognized public policy that "every citizen has an inalienable right to engage in lawful employment." *Sec'y of Revenue*, 309 A.2d at 361. Paragraph 6 directly quotes Pennsylvania's "deeply ingrained public policy . . . to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders." *Id.* at 362.

In turn, the policies laid out in Paragraphs 5 and 6 reflect the core principles upon which legislation such at the CHRIA are enacted—as stated in Paragraph 7 and endorsed by Pennsylvania courts. *See, e.g., Taha v. Bucks Cnty.*, No. 12 Civ. 6867, 2014 WL 695205, at *8 (E.D. Pa. Feb. 21, 2014) ("The Pennsylvania legislature sought, in enacting the CHRIA, to protect individual privacy and dignity." (citing, as an example, *In re Pittsburgh Citizen Police Review Bd.*, 16 Pa. D. & C.5th at 445). Paragraph 8 provides the text of the statute under which Plaintiffs' claims are brought and thus supports Paragraph 7. It builds off the previous statements by explaining how the CHRIA protects individuals with criminal histories from unfair discrimination in employment—and thus how the CHRIA is an expression of Pennsylvania's strong public policy in the employment sphere. Paragraph 9 of the Complaint further explains Plaintiffs' legal theory and cause of action: that SEPTA's denial of employment to them was contrary to law and a violation of Section 9125 of the CHRIA.

Paragraphs 10 and 11 set forth the harm suffered by Plaintiffs and the residents of Philadelphia and establishes the importance of the case and its public interest—consistent with Pennsylvania's expressed public policies as set forth in Paragraphs 5 and 6. Tellingly, SEPTA does not actually contest that its arbitrary pre-employment ban stigmatizes minority groups. In

truth, such a challenge could not be supported given that Pennsylvania case law,[20] the federal government,[21] and a wealth of social science research[22] recognize this stigmatization.

RELIEF

For the foregoing reasons, this Court should find that SEPTA's Preliminary Objections are without merit and should be overruled.

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[20] *Sec'y of Revenue*, 309 A.2d at 361.

[21] *See Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982)*, U.S. Equal Emp't Opportunity Comm'n (Feb. 4, 1987), https://www.eeoc.gov/policy/docs/convict1.html; *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, U.S. Equal Emp't Opportunity Comm'n (Apr. 25, 2012), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

[22] *See, e.g.*, DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007) (noting that impact of a criminal record is much more severe on Black job applicants than it is on White applicants); *see also* U.S. Department of Justice, Bureau of Justices Statistics Special Report, *Prevalence of Imprisonment in the U.S. Prison Population, 1974-2001*, 5 (2003) (explaining that Blacks interact with the criminal justice system at rates that vastly outnumber the rates of incarceration of Whites).

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