



Plaintiff Patricia Halbert (“Plaintiff”), by and through her attorneys, on behalf of herself and the consumer Class set forth below, brings the following Class Action Complaint against Defendant Penn National Gaming, Inc. (“Defendant”). The following allegations are based on personal knowledge as to Plaintiff’s own conduct and are made on information and belief as to the acts of others.

### **INTRODUCTION**

1. This consumer class action is brought under the Fair Credit Reporting Act (“FCRA”) against a company who routinely and systematically violates the FCRA’s basic protections by failing to provide required disclosures prior to procuring background reports on applicants and employees.

2. As Defendant’s practices were routine and systematic, Plaintiff asserts claims for damages on behalf of herself and a Class of similarly situated individuals on whom Defendant caused a consumer report to be procured without first providing the required disclosure.

### **PARTIES**

3. Plaintiff Patricia Halbert is an individual residing at 141 N. 6th Street, Sikeston, Missouri 63801. During all times relevant to the claims in this lawsuit, Plaintiff was a resident of Clarksdale, Mississippi.

4. Defendant Penn National Gaming, Inc. is a corporation that owns and operates gaming and racing facilities throughout the United States, including in this County. Defendant is incorporated and headquartered in Pennsylvania.

### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over Plaintiff’s claims pursuant to 15 U.S.C. § 1681p, which allows claims under the FCRA to be brought in any appropriate court of competent jurisdiction.

6. The Courts of Common Pleas of this Commonwealth are endowed with full authority as provided by law, which extends to causes of action arising under federal law. 42 Pa. C.S.A. § 931.

7. The Court has personal jurisdiction over Defendant.

8. Venue in this Court is proper under Pennsylvania Rules of Civil Procedure 1006 and 2179 because Defendant regularly conducts business in Philadelphia County.

### **STATUTORY BACKGROUND**

9. Enacted in 1970, the FCRA's passage was driven in part by two related concerns: first, that consumer reports were playing a central role in people's lives at crucial moments, such as when they applied for a job or credit, and when they applied for housing. Second, despite their importance, consumer reports were unregulated and had widespread errors and inaccuracies.

10. While recognizing that consumer reports play an important role in the economy, Congress wanted consumer reports to be "fair and equitable to the consumer" and to ensure "the confidentiality, accuracy, relevancy, and proper utilization" of consumer reports. 15 U.S.C. § 1681.

11. Congress was particularly concerned about the use of background reports in the employment context, and therefore defined the term "consumer reports" to explicitly include background reports procured for employment purposes. *See* 15 U.S.C. § 1681a(d)(1)(B).

12. Through the FCRA, Congress required employers to disclose that a consumer report may be obtained for employment purposes before procuring the report. 15 U.S.C. § 1681b(b)(2)(A)(i).

13. Specifically, Congress made it unlawful for an employer or prospective employer to "procure, or cause a consumer report to be procured, for employment purposes with respect to

any consumer, unless ...a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, *in a document that consists solely of the disclosure*, that a consumer report may be obtained for employment purposes.” 15 U.S.C. § 1681b(b)(2)(A)(i) (emphasis added). This requirement is frequently referred to as the “stand-alone disclosure requirement.”

14. Many other provisions of the FCRA are also notice provisions. *See* 15 U.S.C. § 1681b(b)(3)(A) (pre-adverse employment action notice requirement); § 1681b(4)(B) (notification of national security investigation); § 1681c(h) (notification of address discrepancy); § 1681d(a) (disclosure of investigative report); § 1681g (full file disclosure to consumers); § 1681k(a)(1) (disclosure regarding the use of public record information); § 1681h (form and conditions of disclosure); § 1681m(a) (notice of adverse action).

15. Like the other notice provisions in the FCRA, the stand-alone disclosure provision puts consumers on notice that a report about them may be prepared. This knowledge enables consumers to exercise a variety of other substantive rights conferred by the statute, many of which work to ensure accuracy, confidentiality, and fairness. 15 U.S.C. § 1681c(a) (limiting temporal scope of information that can be reported); § 1681e(b) (mandating that consumer reporting agencies employ procedures to ensure “maximum possible accuracy” in reports); § 1681k (requiring consumer reporting agencies that report public record information to employers to either provide notice to the consumer that information is being reported or have “strict procedures” to ensure that information is “complete and up to date”); § 1681i (requiring that consumer reporting agencies investigate any disputed information); § 1681g (requiring that consumer reporting agencies provide a complete copy of the consumer’s file to the consumer).

16. Without a clear notice that a consumer report is going to be procured on them, applicants are hindered in their ability to preserve their privacy, and to correct errors or other

problems with the reports.

17. As discussed below, Defendant routinely violated the FCRA, and consumers' rights, by failing to provide the required stand-alone disclosure before procuring consumer reports for employment purposes.

### **ALLEGATIONS RELATING TO PLAINTIFF**

18. Throughout the two years preceding the filing of this action, Defendant has routinely procured consumer reports on applicants and employees from Chequed.com ("Chequed").

19. Chequed is a consumer reporting agency because it sells background reports for employment purposes.

20. As part of Defendant's online application process, applicants are required to complete an online form that asks for a wide variety of information including previous employment, certifications, education, languages spoken, military service, and professional references. (Exhibit 1).

21. At the bottom of this page in a section titled "Pre-Employment Statement," applicants are asked to click four separate boxes labeled "Click here to indicate you accept the above Statement" appearing below four separate statements pertaining to the job application. *Id.*

22. The first statement asks, among other things, the applicant to certify that all information contained in the application is true and correct and to agree that employment with Defendant is "at the will of my employer." *Id.*

23. The second statement pertains to the verification of the applicant's educational background and contains a liability release purported to release any entities providing information to Defendant as well as Defendant from any liability relating to the provision of educational information. *Id.*

24. The third statement is a disclosure that a background check will be obtained about the applicant. *Id.*

25. The final statement is a disclosure and authorization pertaining to drug testing. *Id.*

26. The disclosure provided in the third statement is not a stand-alone disclosure and does not meet the requirements of 15 U.S.C. § 1681b(b)(2) because it appears in the same “document,” on the same page, and in the same section as other extraneous information. *Id.*

27. The FCRA allows only a single exception to the requirement that employers provide applicants and employees with a document consisting solely of the disclosure that a consumer report will be procured for employment purposes. Specifically, the statute states that the disclosure may include a written authorization for the employer to procure the report. 15 U.S.C. 1681b(b)(2)(a) states:

Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer unless—

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

28. The job application here violates the FCRA by including other extraneous information, including the sections of the application asking for educational, work experience, certifications, and other personal information as well as the other “Pre-Employment Statements” which ask applicants to certify the accuracy of the job application information, agree that employment with Defendant is “at will,” and agree that the employment agreement can only be modified in writing.

29. Because the only information permitted to appear on a form with the disclosure is the authorization by the consumer for the employer to obtain a consumer report, the liability waiver and other extraneous information violate the FCRA.

30. In or around August 2014, Plaintiff applied for a position at Defendant's Robinsonville, Mississippi Hollywood Casino. She applied through Defendant's online application process.

31. During Plaintiff's online application process, she was presented with Defendant's online job application substantially in the same form as attached hereto as Exhibit 1.

32. Despite not providing Plaintiff with a FCRA-compliant disclosure and authorization, Defendant obtained a consumer report on Plaintiff from Chequed.

33. In August 2014, Defendant informed Plaintiff that she was being denied employment based on her consumer report.

34. The next month, September 2014, Defendant ultimately hired Plaintiff as a cook, which she was employed as until approximately March 2015.

35. Defendant's online application contained the only documents Defendant gave Plaintiff prior to procuring her consumer report that purported to disclose that Defendant may procure a consumer report on her for employment purposes.

#### **ALLEGATIONS RELATING TO DEFENDANT'S PRACTICES**

36. The text of the FCRA is pellucid and clear. Defendant is required to obtain written authorization and provide a disclosure in a document consisting solely of the disclosure before procuring consumer reports for employment purposes.

37. Defendant does not provide job applicants with a disclosure that is compliant with the FCRA's plain language because the documents provided include, *inter alia*, extraneous information.

38. More than fifteen years ago, the Federal Trade Commission emphasized that including waivers of rights in disclosure forms, as Defendant did here, is a violation of the FCRA. *FTC Ltr. to Hauxwell*, 1998 WL 34323756 (June 12, 1998) (explaining that “inclusion of a ... waiver [of rights] in a disclosure form will violate Section [1681b(b)(2)(A)] of the FCRA, which requires that a disclosure consist ‘solely of the disclosure that a consumer report may be obtained for employment purposes’”).

39. Numerous courts have found the inclusion of a purported liability release violates the FCRA. *See, e.g., Harris v. Home Depot U.S.A., Inc.*, No. 15-cv-1058, --- F. Supp. 3d ---, 2015 WL 4270313, at \*2 (N.D. Cal. June 30, 2015) (holding that “a release of liability is separate and distinct from the disclosure and authorization” and finding plausible allegation that defendant “inserted this [release] into the disclosure form despite knowing that to do so would violate the FCRA, or at least with reckless disregard for the FCRA’s requirements”); *Dunford v. American Databank, Inc.*, 64 F. Supp. 3d 1378, 1388 (N.D. Cal. Aug. 12, 2014) (finding document that contained a liability release to “not consist solely of the disclosure because it added a paragraph exonerating [the defendant]”); *Singleton v. Domino’s Pizza, LLC*, No. 12-cv-823, 2012 WL 245965, at \*9 (D. Md. Jan. 25, 2012) (“both the statutory text and FTC advisory opinions indicate that an employer violates the FCRA by including a liability release in a disclosure document.”); *Reardon v. ClosetMaid Corp.*, No. 08-cv-1730, 2013 WL 6231606, at \*10 (W.D. Pa. Dec. 2, 2013) (finding disclosure with liability waiver to be “facially contrary to the statute at hand, and all of the administrative guidance”); *Groshek v. Time Warner Cable, Inc.*, No. 15-cv-157, 2015 WL 4620013, at \*2 (E.D. Wis. July 31, 2015) (“the Court agrees with the plaintiff and those courts which maintain that the language of the statute is simple and straightforward. [Defendant] acted recklessly by including extraneous information in the disclosure.”).

40. Courts have also found the inclusion of other extraneous information violates the plain language of the FCRA. *See, e.g., Jones v. Halstead Mgmt. Co., LLC*, 81 F. Supp. 3d 324, 333 (S.D.N.Y. 2015) (finding disclosure to not stand-alone when it included “information regarding time frames within which the applicant must challenge the accuracy of any report; an acknowledgement that ‘all employment decisions are based on legitimate non-discriminatory reasons;’ . . . and all sorts of state-specific disclosures”); *Martin v. Fair Collections & Outsourcing, Inc.*, No. GJH-14-3191, 2015 WL 4064970, at \*4 (D. Md. June 30, 2015) (denying motion to dismiss where form “contain[ed] an authorization to obtain the report, information on when the applicant must challenge the accuracy of any report, an acknowledgement that the employee understands that ‘all employment decisions are based on legitimate non-discriminatory reasons,’ the name, address and telephone number of the nearest unit of the consumer reporting agency designated to handle inquiries regarding the investigative consumer report, and several pieces of state-specific information”); *Moore v. Rite Aid Hdqtrs Corp.*, No. CIV.A. 13-1515, 2015 WL 3444227, at \*12 (E.D. Pa. May 29, 2015) (“[T]he text of the statute and the available agency guidance demonstrate[] that the inclusion of information on the form apart from the disclosure and related authorization violates § 1681b(b)(2)(A).”); *Rawlings v. ADS Alliance Data Sys., Inc.*, No. 2:15-CV-04051-NKL, 2015 WL 3866885, at \*6 (W.D. Mo. June 23, 2015) (stating “[w]here the FCRA’s language is clear, a dearth of guidance does not justify an objectively unreasonable interpretation of the statute” and denying motion to dismiss where form contained extraneous state law disclosures and plaintiff alleged that defendant “knowingly used a disclosure form . . . that contained extraneous information in violation of the FCRA”); *Miller v. Quest Diagnostics*, 85 F. Supp. 3d 1058, 1061 (W.D. Mo. 2015) (finding “inclusion of the state-mandated consumer report information, administrative sections, *and* release language in the disclosure violates 15 U.S.C. § 1681b(b)(2)”); *Johnson v. Casey’s Gen. Stores, Inc.*, \_\_\_ F. Supp.

3d \_\_\_, No. 6:15-CV-30860MDH, 2015 WL 4542143, at \*3 (W.D. Mo. July 27, 2015) (denying motion to dismiss stand-alone disclosure claim where it was alleged that defendant “certified compliance with the stand-alone disclosure requirement, knowingly violated that requirement and acted in willful violation of the FCRA”); *see also E.E.O.C. v. Video Only, Inc.*, No. CIV. 06-1362-KI, 2008 WL 2433841, at \*11 (D. Or. June 11, 2008) (granting summary judgment against the defendant-employer who made disclosure “as part of its job application which is not a document consisting solely of the disclosure.”); *Avila v. NOW Health Grp., Inc.*, No. 14 C 1551, 2014 WL 3537825, at \*2 (N.D. Ill. July 17, 2014) (finding inclusion of liability waivers to be “contrary to the express language of the FCRA, which requires a disclosure ‘in a document that consists solely of the disclosure’”); *Speer v. Whole Food Mkt. Grp., Inc.*, No. 8:14-CV-3035-T-26TBM, 2015 WL 1456981, at \*3 (M.D. Fla. Mar. 30, 2015) (finding that plaintiff had stated a claim wherein plaintiff alleged that “the inclusion of the waiver along with the disclosure violated the FCRA”); *Lengel v. HomeAdvisor, Inc.*, 102 F. Supp. 3d 1202, 1211 (D. Kan. 2015) (“[I]t may be plausibly asserted that the standalone disclosure provision was recklessly violated by the use of the Release form because it did not consist solely of the disclosure that a consumer report may be obtained for employment purposes.”); *Milbourne v. JRK Residential Am., LLC*, 92 F. Supp. 3d 425, 432 (E.D. Va. 2015) (“Thus, judging by the text of the statute alone, inclusion of a waiver within the document containing the disclosure would violate [the FCRA].”).

41. Defendant knew that it had an obligation to provide a stand-alone disclosure and obtain the consumer’s authorization before procuring a consumer report.

42. The FCRA requires that, prior to procuring consumer reports, employers must certify to the consumer reporting agency that they will comply with the FCRA’s stand-alone disclosure and authorization requirements. *See* 15 U.S.C. § 1681b(b)(1).

43. In accordance with their standard procedures, the consumer reporting agencies

from which Defendant acquired consumer reports during the two years preceding the filing of this Complaint, including Chequed, required Defendant to certify that it would comply with the stand-alone disclosure provisions of the FCRA.

44. Before procuring Plaintiff's report, Defendant did, in fact, certify to Chequed and other consumer reporting agencies that it would comply with the stand-alone disclosure and authorization provisions of the FCRA.

45. In its contract with Chequed, Defendant also agreed that before obtaining a consumer report, Defendant would provide a disclosure in writing to the consumer that a consumer report will be obtained for employment purposes and that such disclosure will be made in a document consisting solely of the disclosure.

46. Defendant did not procure Plaintiff's report in connection with any investigation of suspected misconduct relating to employment, or compliance with federal, state, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer.

47. By systematically inserting a liability release and other extraneous information into Plaintiff's and other class members' disclosures, Defendant willfully violated 15 U.S.C. § 1681b(b)(2)(A).

48. Plaintiff experienced a concrete injury in the form of being deprived of a disclosure to which she was statutorily entitled as a result of Defendant's failure to comply with the FCRA's stand-alone disclosure requirement.

#### **CLASS ACTION ALLEGATIONS**

49. Plaintiff brings this action pursuant to Pa. R. Civ. P. 1701-16 on behalf of the following proposed Class:

All individuals on whom Defendant obtained a consumer report for employment purposes in the two years predating the filing of this

Complaint and continuing through the date the class list is prepared.

50. The Class satisfies the requirements of Pa. R. Civ. P. 1702.

51. Numerosity: The Class is so numerous that joinder of all class members is impracticable. Defendant employs thousands of workers, many of whom are members of the Class.

52. Typicality: Plaintiff's claims are typical of the members of the Class. It is typical for Defendant to procure consumer reports for employment purposes, and Defendant typically does not provide the stand-alone disclosure required by the FCRA when obtaining consumer reports for employment purposes. The FCRA violations suffered by Plaintiff are typical of those suffered by other class members, and Defendant treated Plaintiff consistently with other class members in accordance with its standard policies and practices.

53. Adequacy: Plaintiff will fairly and adequately protect the interests of the Class pursuant to Pa. R. Civ. P. 1709 because she and her experienced and well-financed counsel are free of any conflicts of interest and are prepared to vigorously litigate this action on behalf of the Class.

54. Commonality: Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class, including but not limited to:

- a. Whether Defendant uses consumer report information to conduct background checks for employment purposes;
- b. Whether Defendant's forms satisfy the stand-alone disclosure requirements of 15 U.S.C. § 1681b(b)(2)(A)(i);
- c. Whether Defendant violated the FCRA by procuring consumer report information without making proper disclosures in the format required by the Act;
- d. Whether Defendant was on notice of the stand-alone disclosure requirements of the FCRA;

- e. Whether Defendant's violations of the FCRA were negligent, knowing, and/or willful; and
- f. The proper measure of damages against Defendant.

55. The Class satisfies the requirements of Pa. R. Civ. P. 1708.

56. Class certification is appropriate under Rule 1708 because, *inter alia*, questions of law and fact common to the Class predominate over any questions affecting only individual members of the Class, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. Defendant's conduct described in this Complaint stems from common and uniform policies and practices, resulting in common violations of the FCRA. Class certification also will obviate the need for unduly duplicative litigation that might result in inconsistent judgments concerning Defendant's practices. Moreover, management of this action as a class action will not present any likely difficulties. In the interests of justice and judicial efficiency, it would be desirable to concentrate the litigation of all class members' claims in a single forum.

57. In view of the complexities of the issues and the expenses of litigation, the separate claims of individual class members are insufficient in amount to support separate actions.

58. Yet, the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action. The administration of this action can be handled by class counsel or a third party administrator, and the costs of administration will represent only a small fraction of the ultimate recovery to be achieved.

59. Plaintiff intends to send notice to all members of the Class to the extent required by Rule 1712. The names and addresses of the class members are available from Defendant's

records.

**CLAIM FOR RELIEF**  
**Failure to Provide a Stand-alone Disclosure**  
**15 U.S.C. 1681b(b)(2)(A)(i)**  
**(On Behalf of Plaintiff and the Class)**

60. Defendant violated the FCRA by procuring consumer reports on Plaintiff and class members without making the stand-alone disclosure required by the FCRA. *See* 15 U.S.C. § 1681b(b)(2).

61. Defendant acted willfully and in knowing or reckless disregard of its obligations and the rights of Plaintiff and the other class members.

62. Defendant's willful conduct is reflected by, among other things, the fact that it violated a clear statutory mandate set forth in 15 U.S.C. § 1681b(b)(2), and that Defendant certified that it would comply with 15 U.S.C. § 1681b(b)(2).

63. Defendant's willful conduct is still further reflected by the following:

- (a) The FCRA was enacted in 1970, Defendant was founded in 1982; Defendant has had since its creation to become compliant;
- (b) Defendant's conduct is inconsistent with the FTC's longstanding regulatory guidance, judicial interpretation, and the plain language of the statute;
- (c) Defendant repeatedly and routinely uses the same unlawful documents with all of its employees and applicants on whom it procured consumer reports or otherwise failed to provide them with the required stand-alone disclosure;
- (d) Despite the pellucid statutory text and there being a depth of guidance, Defendant systematically procured consumer reports without first disclosing in writing to the consumer *in a document that consists solely of*

*the disclosure*, that a consumer report may be obtained for employment purposes; and

- (e) By adopting such a policy, Defendant voluntarily ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.

64. Plaintiff and the Class are entitled to statutory damages of not less than \$100 and not more than \$1,000 for each and every one of these violations, pursuant to 15 U.S.C. § 1681n(a)(1)(A). Plaintiff and the Class are also entitled to punitive damages for these violations, pursuant to 15 U.S.C. § 1681n(a)(2). Plaintiff and the Class are further entitled to recover their costs and attorneys' fees, pursuant to 15 U.S.C. § 1681n(a)(3).

#### **JURY TRIAL DEMANDED**

Plaintiff demands a jury trial as to all claims so triable.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, on behalf of herself and the Class, seeks the following relief:

- A. Determining that this action may proceed as a class action under Rule 1710 of the Pennsylvania Rules of Civil Procedure;
- B. Designating Plaintiff as the class representative for the Class;
- C. Designating Plaintiff's Counsel as counsel for the Class;
- D. Issuing proper notice to the Class at Defendant's expense;
- E. Declaring that Defendant committed multiple, separate violations of the FCRA;
- F. Declaring that Defendant acted willfully in deliberate or reckless disregard of the rights of Plaintiff and the Class under the FCRA;
- G. Awarding actual and/or statutory damages as provided by the FCRA;
- H. Awarding punitive damages;

I. Awarding reasonable attorneys' fees and costs and expenses, as provided by the FCRA;

J. Granting other and further relief, in law or equity, as this Court may deem appropriate and just.

BERGER & MONTAGUE, P.C.

Date: February 24, 2016

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