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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| HERTZ GLOBAL HOLDINGS, INC., and THE HERTZ CORPORATION,<br><br>Plaintiffs Below, Appellants,<br><br>v.<br><br>NATIONAL FIRE & MARINE INSURANCE COMPANY, *et al.*,<br><br>Defendants Below, Appellees. | No. 106, 2025<br><br>Court Below – Superior Court of the State of Delaware<br><br>C.A. No. N22C-05-130 SKR (CCLD)<br><br>**PUBLIC VERSION OF TRANS. ID 76335570** |

# APPELLEES' OMNIBUS ANSWERING BRIEF

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## I. NATURE OF PROCEEDINGS[1]

In this appeal, Hertz pursues insurance coverage for its settlements of 388 individual false arrest, malicious prosecution, and other personal injury claims that rental customers asserted against it over fifteen years. Hertz's Opening brief obscures the reality that the judgment it asks this Court to review is actually comprised of five separate rulings, each of which turns on the "offense-based" trigger of coverage that applies to personal injury claims.

Coverage B of Appellees' commercial general liability insurance policies specifically sets forth the offense-based trigger requirement for personal injury claims. As defined there, "personal injury" offenses are specifically enumerated "covered offenses," including, for example, malicious prosecution, false arrest, false detention, libel and slander. In order for the policies to potentially apply, such "covered offenses" must have been "committed" against the claimant during the policy period.[2] There is no case in any applicable jurisdiction that has interpreted

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[1] This brief is filed on behalf of Swiss Re Corporate Solutions Elite Insurance Corporation ("SRCS Elite"), Navigators Specialty Insurance Company ("Navigators"), Steadfast Insurance Company, American Guarantee & Liability Insurance Company, Great American Insurance Company of New York, QBE Insurance Corporation, and National Fire & Marine Insurance Company (collectively, the "Insurers").

[2] Contrary to Hertz's assertion, the policies do not require that the personal injury offense be committed by Hertz's own actions, as if Hertz employees were the police officers conducting a false arrest, or the prosecutors conducting a malicious prosecution. Instead, the policies insure amounts that Hertz is "legally obligated to

an "offense-based" trigger to provide coverage for personal injury offenses committed outside of the policy period. Tellingly, Hertz has failed to identify a single case in *any* jurisdiction that does so. Based upon this clear and unambiguous policy language and well-settled caselaw governing offense-based personal injury claims, the Superior Court correctly ruled for the insurers and against Hertz, as further summarized below:

1. **The Exemplar Trigger Ruling:** The December 21, 2014 to December 21, 2015 SRCS Elite policy provides umbrella coverage above a $10 million self-insured retention for any claim against Hertz alleging that a "covered offense" was committed against the claimant during the policy period. As exemplars, SRCS Elite moved for summary judgment regarding three individual claimants, each of whom signed a settlement agreement with Hertz in which the parties specified the date(s) of each individual's interactions with law enforcement (i.e., the personal injury "covered offense") for which the damages were paid. Each exemplar "trigger claimant" recovered damages for distinct personal injury offenses committed outside of the 2014-2015 policy period. The Superior Court properly ruled that because each of these exemplar "trigger claimants" alleged covered offenses committed against

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pay" for such personal injuries, acknowledging that the actual acts that comprise the personal injury offense are often acts of another party, giving rise to liability against Hertz.

them outside of the 2014-2015 policy period, the 2014-2015 insurance policies did not cover their claims. (Hertz Br. Ex. A, Memorandum Opinion and Order ("Mem. Op.") at 21).

**2. The Number of Occurrences Ruling:** When multiple personal injury claims trigger the same policy period, a question may arise as to whether they are part of the same personal injury offense, such that they can share the same per occurrence retention or limit.[3] The "occurrence" definition may allow such personal injury "covered offenses" within the same policy period to be aggregated but only if the damages are paid for the same "covered offense." For example, family members wrongfully detained in the same car at the same time might potentially recover individual damages that are part of the same "per occurrence" retention or policy limit. Aggregation is not, however, limitless. The Superior Court properly ruled that with respect to the three "occurrence" exemplar families who alleged unrelated personal injury offenses committed against them in different states at different times during the 2015-2016 period, each derived damages from separate "covered offenses." (Mem. Op. at 22-24).

[3] As the Superior Court noted, the "number of occurrences" analysis sometimes benefits a policyholder where many small claims can be aggregated to exceed a retention, and it sometimes benefits an insurer where it results in the payment of a single policy limit rather than multiple limits. (Mem. Op. at fn 58).

**3. Navigators' Trigger and Exhaustion Motion**: Navigators Specialty Insurance Company ("Navigators"), and other high-excess Insurers, moved for summary judgment on the basis that (i) each underlying claim triggers the policy period during which the "offense" was committed against a claimant and (ii) applying that correct standard, Hertz could not satisfy its burden to show that its settlements reached Navigators' $110 million excess attachment point through the payment of covered "loss" in any policy year, *even assuming* that the claims in each policy year could be deemed to arise out of a single "occurrence," which the insurers dispute. The Superior Court agreed with Navigators and granted its motion.

**4. The Stipulated Allocation Ruling:** From the claimants' undisputed underlying declarations and settlement agreements with Hertz, and with the benefit of the Superior Court rulings above, Hertz and the Insurers were able to determine the appropriate policy period for each "covered offense" committed against a claimant and, for each policy period, the total losses if combined. Neither the 2013-2014 nor 2014-2015 policy periods at issue in Hertz's appeal involve enough triggering losses to exceed the $10 million self-insured retention, *even if aggregated*. (B33-37). Therefore, assuming the settlement payments for the 388 claims are properly allocated to the specific policy periods triggered, the "number of occurrences issue" discussed below is only relevant to the 2015-2016 year, and is

only relevant to SRCS Elite in that year, because the aggregated losses only reach the SRCS Elite layer.

In the 2015-2016 policy period, the settlements, if aggregated, reached $[redacted]. (B163-165). But given the court's ruling that the three exemplar "occurrence claims" in that year were separate occurrences, the damages for those three claims may not be aggregated. When the damages for these claims were separated, there was no possibility that any remaining claims in the 2015-2016 period could exceed $10 million, even if aggregated. Rather than continue discovery to prove these facts, the parties stipulated that, based on the Superior Court's rulings, there was no occurrence in 2014, 2015, or 2016 that could exceed the $10 million retention.[4]

**5. Hertz's "Continuing Occurrence" Motion:** The rulings set forth above should be affirmed, which would also necessitate this Court to affirm the Superior Court's denial of Hertz's separate motion arguing that 388 personal injury "offenses" taking place over different years are all one "continuous occurrence." Hertz's "continuous occurrence" motion suffered from various mistakes of law,

[4] For the years 2017, 2018, 2019 and 2020, the personal injury offenses in each year, if aggregated, fell between $[redacted] to $[redacted] in each year. (B33-40, 310) Hertz settled with the insurers in those years whose policies were arguably reached by the potential aggregation of claims in each year. (Final Judgment ¶¶ 5-6).

which are set forth below in response to the specific paragraphs in Hertz's Summary of Argument.

## II. RESPONSE TO HERTZ'S SUMMARY OF ARGUMENT

**I.** Denied. Hertz argues that any damages it paid for "false arrest claims" in different years can be treated as if they are part of a single "personal injury occurrence" because Hertz's theft-prevention protocols were the triggering "occurrence" for all claims. This is wrong. Hertz's pervasive record-keeping deficiencies are not the triggering "offenses" of "false arrest, detention or imprisonment" or "malicious prosecution" "committed" against any claimant. The Superior Court recognized that Hertz's argument depends on an "unreasonably broad and tortured" interpretation of the policy that amounts to "contractual gymnastics," (Mem. Op. at 16-17) by which Hertz tries to make its inventory protocols masquerade as a defined "covered offense." Delaware law has recognized that where a policy permits aggregation for injuries from the *same acts* within a single policy period, that aggregation language does not allow the aggregation of different injuries from outside the policy period. *See Mattel, Inc. v. XL Ins. America, Inc.*, 2025 WL 948008, at *8-9 (Del. Super. Ct. Mar. 28, 2025) (holding that an "occurrence" definition which allows aggregation of certain claims within a policy period is not a "deemer clause" and does not permit aggregation of claims from outside that period).

**A.** The insurers do not dispute that the policies provide coverage for defined enumerated offenses including false imprisonment and malicious

prosecution. However, Hertz is wrong in labeling the 388 personal injury claims with the common label of "false arrest claims." Some claimants were "falsely arrested," and some were not. Some claimants were "maliciously prosecuted" and some were not. Some alleged they were "falsely detained" and some did not. Therefore, the hundreds of claimants presented different and individualized types of "offenses," as discussed below. Furthermore, the plain language of the policy only permits any claimant's "covered offense" to trigger the single period in which that "offense" was committed.

**B.** While the personal injury "occurrence" definition allows the potential for damages from multiple "covered offenses" committed within the same policy period to be aggregated as if they were paid for a single "covered offense," this is only possible where each offense *involved "the same act or general conditions."* This aggregation language does not allow Hertz to combine individual "covered offenses" involving unrelated claimants, taking place in different policy periods and move them through time so that Hertz can somehow "deem" those "offenses" to have been committed in years in which they were not. Nor does the aggregation provision morph the nature of the offense-based personal injury coverage turning it into a broader accident-based bodily injury coverage.

**C.** Hertz misconstrues the aggregating language of the "occurrence" definition which allows for aggregation of damages for "covered offenses"

committed within the *same policy period* if they involve *the same* act or conditions. Under no caselaw or facts does this aggregating language within a policy definition supersede the policy's insuring prerequisite that a "covered offense" be "committed" during the policy period, and thereby allow a policy to cover personal injuries that took place outside the period. Hertz's contrary interpretation would abrogate the policies' express requirement that the specifically enumerated "offense" be "committed" against the claimant "during the 'policy period,'" as the Superior Court properly held.

**D.** As stated in B and C above, the aggregation language of the "occurrence" definition is a not a "Deemer Clause" because it does not allow an individual personal injury offense committed one policy period to be "deemed" as if the offense was committed in some different policy period, as Hertz argues. The Superior Court correctly held that Hertz's effort to use the aggregation language within a definition to change the nature and timing of a "covered offense," is tantamount to "contractual gymnastics" that completely "ignores the language that an occurrence means a 'covered offense'" committed during the period. (Mem. Op. at 15).

**E.** The "cause test" for number of occurrences does not apply to "personal injury" claims. It applies to "bodily injury" or "property damage" claims, for which policies define an "occurrence" as an "accident or happening." For such claims,

certain courts have applied a "cause test" to analyze whether the claims are caused by the same "accident or happening," thereby allowing aggregation. However, for "personal injury" claims, the "occurrence" is defined as the specific "covered offense" committed against the claimant. National caselaw uniformly holds that personal and advertising injury "offenses" occur at a discrete moment in time and thus are not continuing torts that may be aggregated under the guise of a "cause test." Hertz's own settlement documents expressly confirm that the claimants' injuries are all separate and divisible and occurred at discrete moments in time, in different locations, and based upon discrete interactions with law enforcement.

**F.** Because the policy language is clear and unambiguous, Hertz's "reasonable expectations" are irrelevant. In any event, Hertz did not present evidence in the Superior Court of any such expectations. There was evidence presented that, in later policy years (2017, 2018, 2019, 2020), the total of the personal injury damages assigned to each year far exceeded $10 million in each of those years, and Hertz settled with those insurers it had sued. Moreover, the plain language of the policies and cases from around the country confirm that Hertz's belatedly articulated expectations of "personal injury" trigger are incorrect and unreasonable.

**G.** The Insurers deny that the Superior Court held that "each false arrest constitutes a separate occurrence." Neither the Insurers nor Hertz put before the

court evidence of the facts or circumstances of all 388 personal injury "incidents" or offenses that were detailed in the settlements of the claimants. Instead, the Insurers argued that the undisputed facts of three specific personal injury claims alleging offenses within the 2015-2016 policy period do not arise from the same personal injury act or the same general conditions. Hertz did not contest the facts, and the Superior Court ruled that the three families that brought these personal injury claims were not the same "occurrence" as each other. (Mem. Op. at 22). The parties then stipulated that as a result of the Superior Court's ruling that those three groups of "personal injury" damages could not be aggregated, the remaining claims within the 2015-2016 period (even if aggregated) did not allege sufficient loss to exceed the $10 million per-occurrence retention. (Hertz Br. Ex. B, Final Order and Judgment ("Final Judgment") at ¶ 3).

**II.** Denied. Personal injury "offenses" occur at a discrete moment in time and are not subject to the "continuous trigger" theory that Hertz now presents. Indeed, Hertz argued this very point in the bankruptcy court, asserting that "[f]alse arrest and malicious prosecution claims are not 'continuing torts' because each arises from a discrete act at a specific moment in time." (B971). Hertz's new position is foreclosed by a large body of law holding that the continuous trigger theory, often applicable to asbestosis or other latent injury claims, is inapplicable to false arrest and malicious prosecution cases, where the injuries to the claimant are readily

identifiable at a single moment in time and known at the outset when the personal injury offense is committed.[5]

**A.** The 2014-2016 policies are only triggered where a personal injury "covered offense" was committed against the claimant during the policy period. Negligent hiring or training, or inadequate inventory tracking procedures are not among the enumerated "covered offenses" in the policies. While such corporate deficiencies may make Hertz liable for a later personal injury offense, they are not in and of themselves a triggering personal injury offense

**B.** As set forth above, in response to summary allegation I., I.B., and I.C., Hertz attempts to use the second clause of the "occurrence" definition to perform an end run around the policies' insuring prerequisite that the specifically enumerated "offense" be "committed" against the claimant "during the 'policy period.'" The Superior Court properly rejected Hertz's linguistic "gymnastics" and did not permit the aggregation language to move covered offenses into different policy periods.

**C.** As set forth above, in response to summary allegation I.G, the Superior Court was not asked to and did not rule that "each individual arrest constituted its own occurrence." Even so, the 388 personal injury claimants alleged different "covered offenses," including but not limited to "false arrest" and "malicious

[5] In the event a single occurrence is found, Hertz made clear that its theory on allocation among the triggered years is not yet at issue. (*See* B1233-1234, 1407).

prosecution," and for the reasons below, the Superior Court properly held that "each arrest [in the three exemplar claims] arose from different interactions with law enforcement" and constituted separate occurrences.

## III. STATEMENT OF FACTS

### A. The Insurance Program at Issue

The 388 personal injury claims involve "offenses" alleged to have been committed against individuals over two decades. (A231; B895). Hertz sought coverage for the claims under its commercial general liability insurance policies in place from 2013 to 2021, which included: (a) fronting primary policies, in which the deductibles equal the policies' limits of liability; (b) umbrella policies, incepting over $10 million self-insured retentions and providing $50 million in limits[6]; and (c) excess policies, which each contained varying attachment points above $60 million. (A226, A482-488).

In this appeal, Hertz seeks coverage in three policy periods: December 21, 2013 to December 21, 2014, December 21, 2014 to December 21, 2015, and December 21, 2015 to December 21, 2016. For each policy period, Hertz must pay, as its self-insured retention, the first $10 million of loss "per occurrence," with the next $50 million per covered "occurrence" falling under SRCS Elite policies issued for those three consecutive annual periods. A series of other insurers' high-excess policies provide "follow-form" coverage at various attachment points above that. (A482-484).

[6] The sole exception is the umbrella policy for the 2020 policy year, in which the umbrella limits are $25 million.

For the December 21, 2016 to January 1, 2021 policy periods, *not at issue here*, the $50 million layer above Hertz's $10 million "per occurrence" retention was insured by ACE Property and Casualty Insurance Company, with a series of other insurers' high-excess policies attaching above that. (A485-488).

Navigators, which moved for summary judgment below, issued five high-excess Follow Form Excess Liability Policies to Hertz for successive policy periods from December 21, 2015 through January 1, 2021 (collectively, "the Navigators Excess Policies"). Subject to their terms, conditions, limitations, and exclusions, the Navigators Excess Policies each provide $25 million in limits, excess of $110 million in Underlying Limits. Coverage under the Navigators Excess Policies is triggered only through the exhaustion of the underlying limits through payment of covered "loss." The 2015-2016 Navigators policy follows form to the 2015-2016 SRCS Elite policy. The remaining Navigators policies follow form to ACE policies.

The SRCS Elite policies provide, in relevant part, that "[w]e will pay on behalf of the 'insured' those sums in excess of the 'retained limit' that the 'insured' becomes legally obligated to pay as damages by reason of liability imposed by law because of 'bodily injury,' 'property damage' or 'personal and advertising injury' to which this insurance applies[.]" (A240, A318, A400). Hertz's claims for coverage for each of the false arrest, malicious prosecution, and other personal injury claims is based solely on the policies' "personal and advertising injury" coverage. The

insurance applies to "personal and advertising injury" but only if it is caused by an "occurrence" committed during the policy period:

> 2. the "personal and advertising injury" is caused by an "occurrence" that takes place in the "coverage territory" arising out of your business, but only if the "occurrence" was committed during the "policy period."

(*Id.*)

The SRCS Elite Policies define a "personal injury" "occurrence" as one of the enumerated "covered offenses," including "false arrest, detention or imprisonment," "malicious prosecution," and "oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." (A258, A336, A418). For any "covered offense" that is committed during an SRCS Elite policy period, coverage is triggered only if the "loss" paid for the "covered offense" exceeds Hertz's $10 million self-insured retention. (A262, A266, A344, A386, A423, A427). Losses paid for different covered offenses in the same period potentially can be part of the same personal injury "covered offense," but those offenses committed against each claimant during the triggered policy period must share the "same act" or "same general conditions." (A258, A336, A418).

The December 21, 2016 to January 1, 2021 ACE policies, *which are not at issue in this appeal*, contain substantially the same terms and conditions as the SRCS

Elite Policies, including the offense-based trigger requirement for personal injury claims.

### B. The Individualized Nature of the Claims Against Hertz

Hertz paid $[redacted] to settle 388 separate claims individual claimants asserted against it. (A231). Those claimants were not members of a class and were not parties to a single lawsuit. Those claimants asserted their claims in no less than six different lawsuits in four different states. (A513, A669-670, A824, A868, A966, A1044). One of those lawsuits, *Ayoub*, involved 20 individual plaintiffs, not one of which was the victim of a "covered offense" committed during the December 21, 2013 to December 21, 2014, December 21, 2014 to December 21, 2015, or December 21, 2015 to December 21, 2016 policy periods. (A513).

Many claimants submitted proofs of claim in Hertz's bankruptcy proceedings supported by signed declarations detailing the specific circumstances that led to the various offenses committed against them. (A1097-1164; B1364-1365). For the vast majority, the damages Hertz paid to each claimant were paid pursuant to individualized settlement agreements between Hertz and that claimant alone, which detailed the dates and circumstances of that claimant's interactions with law enforcement that were the subject of the release. In the Superior Court, the Insurers did not contest the accuracy or authenticity of such declarations or settlement agreements upon which Hertz sought indemnity.

Not every claimant alleged that he or she was falsely arrested as a result of "W7-02," the corporate inventory management policy that Hertz contends is the common cause of every one of those claims. Some claimants sought damages for malicious prosecution perpetuated by Hertz refusing to withdraw charges or providing false testimony in court. (A583). Another claimant was a victim of identity theft due to Hertz failing to check customer identification at the point of rental. (B255-257). [redacted]. (B1184-1185). There is no record of how many other alleged personal injury offenses involved licensee stores.

### 1. The Three "Exemplar Trigger Claimants" Addressed in the Superior Court

The insurers filed various motions for summary judgment in the Superior Court addressing issues involving trigger and attachment. One of the SRCS Elite motions asked the Superior Court to rule that claims involving three "exemplar" claimants—Michelle Jones, Julius Burnside and Shontrell Higgs—who alleged covered offenses committed outside of the 2014-2015 policy period could not trigger that policy as a matter of law.

Ms. Jones entered a settlement agreement with Hertz for $[redacted] in which Hertz agreed that [redacted]

[redacted]." (B87). Ms. Jones alleged in a Declaration submitted in the underlying case that, in March of 2009 (six years before the 2014-2015 SRCS Elite policy at issue), she rented a car in Georgia and returned the car to Hertz's lot around June 16, 2009. (B82). She alleged that Hertz improperly reported the car as stolen, and that she was wrongfully arrested and jailed (the "covered offense") on August 28, 2009. (B82-83). She alleges she was prosecuted for several months before pleading no contest to charges on October 7, 2009. (B83).

Mr. Burnside entered a settlement agreement with Hertz for [redacted], in which Hertz agreed that [redacted]." (B100). Mr. Burnside alleged in a Declaration that [redacted] (B95). Mr. Burnside alleged that [redacted]. (B95-96). [redacted] (*Id.*).

Ms. Higgs entered a settlement with Hertz for [redacted] in which Hertz agreed that [redacted] (B111). Ms. Higgs asserted that [redacted] (B1368). She alleged that [redacted]. (B1369-1370). [redacted] (B1370).

### 2. The Three "Exemplar Occurrences Claimants" Addressed in the Superior Court.

To apply the "number of occurrences" language of the policies, SRCS Elite asked the Superior Court to examine three exemplar family groups – Dethaniel Henry, Arinthia Holmes, and Drew Arvary – who each alleged "covered offenses" committed against them during the same December 21, 2015 to December 21, 2016 policy period.

Mr. Henry rented a vehicle in Joplin, Missouri in April 2016 after losing his personal vehicle in a collision. (B174). Mr. Henry 's auto insurer arranged and paid for the rental. (*Id.*). Mr. Henry extended the rental twice, although Hertz apparently reported the car stolen. (*Id.*). On June 30, 2016 (during the 2015-2016 period) Mr. Henry, along with his wife and grandson, were detained by police in Virginia Beach, Virginia (the "offense"). (*Id.*). Hertz paid [redacted] to settle the claims brought by

Mr. Henry , his wife, and their grandson. (B179, B187, B196). The resolution of their claims is documented in three separate settlement agreements, each of which states [redacted] (*Id.*).

Ms. Holmes, a ride-share driver, rented a vehicle from Hertz via LYFT in Atlanta, Georgia in 2016. (B205). According to her Declaration, Hertz reported the vehicle stolen, after which she and her family were pulled over by Clayton County police in Jonesboro, Georgia on October 1, 2016. (B206-207). Ms. Holmes was arrested, spent 10 days in jail (the "offense"), and eventually accepted a plea deal to avoid additional jail time. (B207). Hertz paid the Holmes family [redacted] to settle their claims. (B211, B220, B229, B238, B247).

Unlike the Ms. Holmes and Mr. Henry, Mr. Arvary never even rented the vehicle he was accused of stealing. (B255). In an alleged case of identity fraud, someone rented a vehicle from Hertz under Mr. Arvary's name and did not return it. (*Id.*). Hertz, which had not checked the renter's identification to confirm he was Mr. Arvary, reported the vehicle stolen. (B256-257). After learning a warrant had been issued for his arrest, Mr. Arvary turned himself in on May 20, 2016 and spent four days in jail, and was prosecuted until April 2017 (the "offense"), when charges were dropped. (B256-258). Hertz paid Mr. Arvary [redacted] to settle his false arrest and

malicious prosecution personal injury claim. (B261). His settlement states that [redacted] (*Id.*).

# IV. ARGUMENT

## A. TRIGGER: An Individual's Alleged Personal Injury "Offense" Triggers Only the Policy Period in Which that "Offense" Was Alleged to Have Been Committed

### 1. QUESTION(S) PRESENTED

Whether the general liability lead umbrella and follow-form excess policies' "personal and advertising injury" coverage requires the "covered offense"—i.e., false arrest, detention or imprisonment or malicious prosecution—to have been committed against a claimant during the policy period (and not in another policy period) to trigger coverage in that policy period and, as a result, damages paid to settle a personal injury offense committed outside the policy period do not erode the policy's $10 million self-insured retention? (B53, B287, B1092, B1098, B1104, B1110).

### 2. SCOPE OF REVIEW

In determining whether a duty to indemnify exists, the Court must consider "actual facts developed through discovery or at trial." *Premcor Ref. Grp., Inc. v. Matrix Serv. Indus. Contractors, Inc.*, 2013 WL 6113606, at *3 (Del. Super. Ct. Nov. 18, 2013). Here, the facts of the three 2014-2015 exemplar trigger claimants have been established through their undisputed declarations and settlement agreements in the summary judgment record. (B74-119, B1366-1372). Similarly, the facts of those claims discussed in Navigators' separate summary judgment motion were

undisputed. Therefore, the question of which period is triggered by these claims is a purely legal issue subject to de novo review. *See Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 100 (Del. 1992) (noting that, on cross-motions for summary judgment, "the parties implicitly concede the absence of material factual disputes and acknowledge the sufficiency of the record to support their respective motions.").

"[W]hen the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning...." *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997); *accord USAA Cas. Ins. Co. v. Carr*, 225 A.3d 357, 360 (Del. 2020) ("[I]f the language of an insurance contract is clear and unambiguous[,] a Delaware court will not destroy or twist the words under the guise of construing them.").

### 3. MERITS OF ARGUMENT

#### a) The Policy Language Unambiguously Confines Coverage For Each Claim to the Policy Period in Which the Particular "Offense" Took Place

The Superior Court properly held that the policy language is unambiguous and means that "covered offenses that occur outside a policy period do not trigger coverage for underlying claims for that period." (Mem. Op. at 14). The SRCS Elite Policy's Insuring Agreement makes this clear. It provides "[t]his insurance applies to . . . 'personal and advertising injury,' *but only if* . . . the 'personal and advertising injury' is caused by an 'occurrence' that takes place in the 'coverage territory'

arising out of your business, *but only if the 'occurrence' was committed during the 'policy period*.'" (A240, A318, A400) (emphasis added). The policy clearly defines "occurrence" as, "[w]ith respect to 'personal and advertising injury,' a covered *offense*." (A258, A336, A418) (emphasis added). The relevant "covered offense[s]" are listed in the policy's definition of "personal and advertising injury" as "false arrest, detention or imprisonment" or "malicious prosecution." (*Id.*).

**b) Delaware, New Jersey and Florida Agree That an "Offense-Based" Trigger for Personal Injury Claims Means There is no Coverage for Offenses Committed Against the Claimant Outside the Policy Period.**

Regardless of whether the Court applies the law of New Jersey (Hertz's headquarters in 2014 and 2015), Florida (where Hertz has maintained its corporate headquarters since 2016), or the forum state, Delaware (where Hertz is incorporated), the result is the same. The law of each state provides that policies with an "offense-based" trigger for "personal injury" claims, do not cover claims which allege a "covered offense" committed outside of the policy's period.

For example, New Jersey's highest court holds that, for an "offense-based" trigger as in this case, a "personal injury" offense is "committed" only in the period when the offense first causes personal injury, and that is the only policy period that responds. *Paterson Tallow Co. v. Royal Globe Ins. Co.*, 444 A.2d 579, 585-586 (N.J. 1982). Florida law likewise holds that, for an "offense-based" trigger, there is

no coverage for a malicious prosecution instituted outside the policy's period. *See North River Ins. Co. v. Broward Cnty. Sheriff's Office*, 428 F. Supp. 2d 1284, 1286, 1290 (S.D. Fla. 2006).

While Hertz contends that its "reasonable expectation" was that each policy would pay for "covered personal injury offenses" committed outside of its period, no evidence was submitted to support this position, no court has ever adopted this position, and the *Broward County* decision explained why such expectations are in fact not reasonable:

> While (the insurer) has a duty to defend lawsuits . . . for malicious prosecution or false imprisonment claims occurring during the Policy period, it is inconceivable that the calculation of the premium that (the policyholder) paid in order to purchase a policy included an analysis of *any* earlier prosecutions . . . and the likelihood of malfeasance over the course of those prosecutions. ***The better rule, and the rule that is consistent with Florida law, is to consider the time of the arrest and incarceration the 'trigger' in both malicious prosecution and false imprisonment cases.***

*Id*. at 1290 (emphasis added).

In *High Voltage Bev. v. Hartford Cas. Ins. Co.*, 2011 WL 7063295, at *3 (Del. Super. Ct. Nov. 30, 2011) (applying North Carolina law), a Delaware court found that an "offense-based" policy providing "personal injury" coverage only "if the offense was committed during the policy period" did not cover a personal injury claim because the putative offense at issue, malicious prosecution, was committed before the policy period. The court in *High Voltage* cited with approval *City of Erie,*

*Pa. v. Guar. Nat. Ins. Co.*, 109 F.3d 156, 160 (3d Cir. 1997), in which the Third Circuit examined coverage for a malicious prosecution claim brought by a plaintiff who was maliciously charged outside of the insurer's policy period. The Third Circuit explained that, for a policy triggered by law enforcement "acts committed during the policy period," the personal injury is that injury which is inflicted at the time of the alleged enumerated offense. The court explained, "the injuries caused by the tort—incarceration, humiliation, suspense, physical hardship, and legal expenses—first manifest themselves and become evident to a reasonable plaintiff at the time of arrest and filing of charges," *id. at* 163, and therefore only a single policy is triggered. The Third Circuit explained that "[t]he risk of insurance coverage termination which justifies use of the multiple trigger in asbestosis and other latent disease cases is not present here" and is why "no federal or state court has adopted the multiple trigger theory in malicious prosecution cases." *Id.* at 165.

Indeed, until filing this coverage action, Hertz agreed with the indisputable principles on which its insurers and the Superior Court relied. As Hertz argued in the bankruptcy court: "[f]alse arrest and malicious prosecution claims are not 'continuing torts' because each arises from a discrete act at a specific moment in time." (B971). Hertz does not present any case law from any jurisdiction disagreeing with the conclusion that, when personal injury coverage is triggered by an enumerated "covered offense" "committed" against the claimant during a policy

period, then alleged offenses taking place *outside that policy's period* are simply not covered.

### c) Hertz's Systemic Inventory Deficiencies are Not "Covered Offenses" that Trigger Insurance Coverage.

Seeking to circumvent the plain language of the policies' insuring agreement, which states that the "occurrence" is the "offense" committed against the claimant, Hertz argues that the personal injury "occurrence" is its alleged systemically deficient inventory procedures. (Hertz Br. 40-41). But under the policy's plain language, Hertz's systemic wrongful conduct is not the triggering "personal injury offense."

Indeed, the Superior Court expressly rejected Hertz's argument that its inventory procedures are a "covered offense." As the Superior Court explained, Hertz cannot advance its position by "broadly identifying an amalgam of practices and policies":

> If an allegedly deficient corporate policy or practice constitutes an "occurrence" that gives rise to several covered offenses, *when* did the "occurrence" first arise for purposes of triggering coverage? Hertz argues that a policy's coverage applies if the allegedly defective policies were in effect at any point during the policy's coverage period. Yet, in *Appalachian Ins. Co. v. Liberty Mut. Ins. Co*., the Third Circuit found that coverage is based on when injury is first manifested, not on a continuous trigger theory. Further, the Court would need to determine *which* allegedly deficient company policy or practice at Hertz constitutes the "act, publication or general conditions" that allegedly resulted in the several hundred personal injury claims for which Hertz seeks coverage. Hertz does not advance its position by broadly

> identifying an amalgam of practices and policies at Hertz and making generalized conclusions that each of the personal injury claims arose as a result of those practices and policies.

(Mem. Op. at 16).

The Superior Court's analysis is consistent with other decisions holding that an enumerated offense committed during the period, not the policyholder's generic or "systemic negligence", is what triggers coverage. *See generally Fibreboard Corp. v. Hartford Accident & Indem. Co.*, 20 Cal. Rptr. 2d 376, 388 (Cal. Ct. App. 1993) (explaining that "[i]n the world of liability insurance, personal injury coverage applies to injury which arises out of the commission of certain enumerated acts or offenses," with coverage triggered by the offense); *Reeves v. S.C. Mun. Ins. & Risk Fin. Fund*, 862 S.E.2d 248, 255 (S.C. 2021) (injuries resulting from negligent hiring, retention, or supervision are not "personal injuries" where no enumerated offense is alleged,); *Women & Fams. Ctr. v. St. Paul Fire & Marine Ins. Co.*, 2009 WL 1754469, at *2 n. 1 (Conn. Super. Ct. May 28, 2009) (enumerated "personal injury offenses" is separate claim from a negligent supervision claim); *United Ohio Ins. Co. v. Myers*, 2002 WL 31716117, at *5 (Ohio Ct. App. Dec. 4, 2002) (holding that insured's negligent acts and omissions did not fit within exclusive list of personal injury offenses).

When law enforcement is caused to falsely arrest or detain individuals, or a county prosecutor is caused to prosecute a defendant, those law enforcement actions

are the "covered offenses" triggering coverage, notwithstanding that Hertz's liability for those personal injuries may be rooted in historic malfeasance within Hertz's inventory or training systems. Negligent hiring or training may make Hertz *liable* for a later personal injury offense, but the negligent hiring or training is not in and of itself a triggering personal injury offense. The importance of analyzing the proper triggering offense to determine trigger of coverage is demonstrated through the "exemplar trigger claims" below, for which summary judgment was granted.

**d) The Three "Exemplar Trigger Claims" Presented by SRCS Elite's Motion are Not Covered Under the 2014-2015 Period Because They Present "Covered Offenses" "Committed" Outside the Period.**

There is no factual dispute that these three exemplar claimants allege "covered offenses" outside of the 2014-2015 SRCS Elite period.

Ms. Jones was arrested in August 2009 and pled no contest to charges in October 2009. (B83). [redacted] (B95-96). [redacted] (B1369-1370). Each of these claimants signed settlement agreements with Hertz which all detailed [redacted] (B87, B100, B111).

The 2014-2015 SRCS Elite Policy was effective from December 21, 2014 to December 21, 2015. (A316). Therefore the personal injury offenses allegedly committed against Ms. Jones, Mr. Burnside, and Ms. Higgs do not trigger the 2014-2015 SRCS Elite Policy and amounts paid by Hertz to settle their claims do not erode the 2014-2015 SRCS Elite Policy's $10 million retention.

**e) Hertz Failed to Establish a Covered Loss in the High Excess Layers.**

Because trigger turns on whether a "covered offense" was committed against a claimant during the policy period, the Superior Court correctly granted Navigators' motion seeking a ruling that Hertz had failed to meet its burden to prove that loss in any potentially applicable policy period reached Navigators' $110 million attachment point. It is Hertz's burden under any potentially applicable state law to prove that its "claim falls within the basic scope of coverage." *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 906 (Del. 2021)*; see also Evanston Ins. Co. v. Haven South Beach, LLC*, 152 F. Supp. 3d 1370, 1374 (S.D. Fla. 2015) (applying Florida law) ("A person seeking to recover on an insurance policy has the burden of proving a loss from causes within the terms of the policy . . . .") (citation and internal quotation marks omitted); *Selective Ins. Co. of Am. v. Singer*, 2023 WL 4055648, at *6 (N.J. Super. Ct. App. Div. June 19, 2023) (under New Jersey law, "the insured bears the burden of bringing their claims within the policy's coverage provisions").

Applying the correct trigger standard—under which the date of the "offense" causing the "personal and advertising injury" determines which specific policy period applies—is fatal to Hertz's claim against its excess carriers. Under the correct trigger standard the Superior Court applied, Hertz cannot demonstrate a covered "loss" in Navigators' high-excess layers even if all the settlements for claims alleging "covered offenses" during any given policy period are aggregated together. Even aggregating the claims in each period, [redacted]—the total amount paid for all claims asserting "covered offenses" committed during the 2015-2016 policy period—is the highest amount that could be allocated to any specific policy period. This is fatal to Hertz's claim for coverage against Navigators and its other high-excess carriers.

In other words, if this Court affirms the Superior Court's trigger ruling, the 2015-2016 policy period is the only policy period in which all aggregated settlement payments even potentially exceed the $10 million self-insured retention. Because all insurers in this matter, other than SRCS Elite, issued policies that attach well above $60 million, Hertz cannot show the payment of covered "loss" reaching anywhere near the $110 million necessary to reach Navigators' attachment point (or the high-excess attachment points above Navigators).

With respect to the 2015-2016 year, SRCS Elite, the insurer attaching at $10 million, filed a contemporaneous motion asking the court to find that three

"exemplar occurrence claimants" within the 2015-2016 year were not part of the same "occurrence." (B120-160). If the damages paid to each of these three claimants were to be treated as separate "occurrences" from one another, then the remaining claims within the 2015-2016 policy period could not possibly exceed the $10 million retention, as discussed below.

## B. NUMBER OF OCCURRENCES: The Three "Exemplar Occurrence Claims" Do Not Present Damages From The Same Act or the Same General Conditions, and are Separate Occurrences Within the 2015-2016 Policy Period.

### 1. QUESTION(S) PRESENTED

As a matter of law, can one "personal injury offense" committed against one family during the 2015-2016 SRCS Elite policy period be treated as the same "personal injury offense" committed against two different families in different states at different times during the policy period, such that Hertz can then combine the damages paid for the different personal injury offenses in an effort to erode its $10 million "per occurrence" self-insured retention? (B133, B1115, B1136-1137, B1199-1200, B1294, B1296, B1301, B1305).

### 2. SCOPE OF REVIEW

The facts of the three 2015-2016 exemplar "occurrence" claimants have been established through their undisputed declarations and settlement agreements in the summary judgment record. (*See* B171-266). Therefore, the question of whether they are part of the same "covered offense" is a purely legal issue subject to de novo review. *See Merrill*, 606 A.2d at 100.

## 3. MERITS OF ARGUMENT

### a) The Aggregating Language of the "Occurrence" Definition Only Applies to "Covered Offenses" That Otherwise Trigger the Policy Period.

The Superior Court properly held that the SCRS Elite Policies restrict the scope of coverage to a "covered offense," and "because an occurrence must be committed during the policy period to trigger coverage under the SRCS Elite Policies, the covered offense must occur during the policy period to obtain coverage for the underlying claim." (Mem. Op. at 14). The SRCS Elite policies define "occurrence" with respect to "personal and advertising injury" specifically as "a covered offense":

> O. "Occurrence" means:
> . . .
>
> 2. *With respect to "personal and advertising injury," a covered offense*. All damages that arise from the same act, publication, or general conditions are considered to arise out of the same "occurrence," regardless of the frequency or repetition thereof, the number or kind of media used or the number of claimants.

(A258, 336, 418) (emphasis added). The relevant "covered offense[s]" are enumerated in the policy's "personal and advertising injury" definition, which includes (as relevant here) "false arrest, detention or imprisonment" or "malicious prosecution":

> R. "Personal and advertising injury" means injury, including consequential "bodily injury," arising out of one or more of the following offenses:

1. false arrest, detention or imprisonment;

2. malicious prosecution;

***

(*Id*.)

The policy, in other words, is clear: with respect to "personal advertising injury," an "occurrence" is an "offense," which expressly includes false arrest and malicious prosecution.

This policy language reflects the fundamental difference between "personal and advertising injury" coverage and coverage for "bodily injury or property damage." "Unlike liability coverage for property damage or bodily injury, personal injury coverage is not based on an accidental occurrence." *Gen. Accident Ins. Co. v. W. Am. Ins. Co*., 49 Cal. Rptr. 2d 603, 606 (Cal. Ct. App. 1996). Rather, "personal injury coverage applies to injury which arises out of the commission of certain enumerated acts or offenses." *Cap. Factors, Inc. v. Fed. Ins. Co*., 166 F.3d 1217, *1 (9th Cir. Feb. 10, 1999) (unpublished) (quoting *Fibreboard Corp.*, 20 Cal. Rptr. 2d at 388)).

As set forth below, the acts that comprise the "covered offenses" for the three "exemplar occurrence claimants" are entirely distinct from one another, and therefore do not comprise the same "occurrence."

### b) The Three "Exemplar Occurrence Claimants" Do Not Present Damages that Arise From the Same Act or Same General Conditions.

The Superior Court was presented with the facts of three specific exemplar families, each of whom was the subject of different "covered offenses" committed in the 2015-2016 period. The total damages paid to the three groups of claimants was [redacted]. (B179, B187, B196, B211, B220, B229, B238, B247, B261). The three groups of exemplar claimants were: (1) Dethaniel Henry, his wife LaDonna, and their grandson; (2) Arinthia Holmes, her three minor children, and Iyhania Brown; and (3) Drew Arvary. The acts and general conditions that comprise each of the subject "covered offenses" were in no way "the same" or even related in any way.

Hertz and Mr. Arvary signed a settlement agreement stating that [redacted]. (B261). Hertz and the Holmes family signed settlement agreements which [redacted] (B211, B220, B229, B238, B247). Hertz and the Henrys signed settlement agreements which [redacted] (B179, B187, B196).

Mr. Henry was handcuffed and held for three hours in a Virginia parking lot, while six months later, the Holmes family was detained, with their car searched in Georgia. (B175, B206). By contrast, Mr. Arvary was never detained at all, but rather turned himself in upon learning of the outstanding warrant. (B256). The three sets of "covered offenses" were all different, and did not have "the same" overlapping acts or conditions.

Even if Ms. Holmes' malicious prosecution and Mr. Henry's false arrest were both caused by a common flaw in Hertz's corporate computer system (they were not)[7], the two personal injury offenses that were committed against Mr. Henry and Ms. Holmes are still separate personal injury offenses under the policy. The facts and conditions of the three exemplar groups are entirely unrelated, and therefore are not part of an aggregated 2015-2016 "covered offense." Therefore, the damages recovered by these three groups of exemplar claimants cannot be combined together for purposes of Hertz building toward the erosion of the $10 million SIR.

[7] Hertz's alleged culpability for the Henrys is based on its decision to report the vehicle stolen despite Mr. Henry extending the rental on multiple occasions. (B174-175). For Ms. Holmes, Hertz's alleged culpability was in reporting the vehicle stolen without contacting Ms. Holmes directly and failing to appear in court or otherwise withdraw the charges against her. (B206-208).

### c) Delaware Law Recognizes that the Aggregating Language of the "Occurrence" Definition is Neither an Insuring Agreement nor a Deemer Clause.

No matter how many times Hertz refers to the policies' "occurrence" definition as a "Deemer Clause" (52 times so far), it will always remain the case that the "occurrence" definition is in no way a Deemer Clause, and does not permit Hertz to take personal injury offenses committed in one year and magically "deem them" as if they happened in a different year.

In insurance law, a "deemer" clause is a policy provision that allows a claim or injury that triggers coverage in a given policy period to be moved into a different year, and "deemed" as though it took place in that different year. (B1174-1175); *see also* Restatement of the Law - Liability Insurance § 33, Comment E (Am. L. Inst. 2019) (explaining that deemer clauses "define a triggering event to take place at a designated time even when that event did not only take place at that time, or perhaps not even at that time at all."). By contrast, the "occurrence" definition in the policies at issue simply allows multiple personal injuries *committed within the same policy period* to be aggregated as a single "occurrence" in certain circumstances. There is no mention whatsoever of "deeming" a "covered offense" to be moved out of one policy period and into a different policy period, or changing the trigger requirements of the policies, as Hertz now suggests.

The Superior Court recently rejected the identical argument Hertz now makes. In *Mattel,* a series of injuries[8] took place over nine years of Mattel's insurance. *Mattel*, 2025 WL 948008, at *1. The primary policies contained a provision that was labeled a Deemer Clause. The provision stated that if multiple injuries over time arise out of one "lot" of the policyholder's product, then the injuries will all be deemed to have taken place when the first claim occurred against the policyholder, and will be treated as a single occurrence in that year. *Id.* at *2.

By contrast, the 2012-2017 umbrella policies in *Mattel*, had an identical "occurrence" definition to the one in this case, which simply stated that claims that otherwise trigger the policy's coverage can be aggregated together if the bodily injury accidents involve "substantially the same" conditions or the personal injury covered offenses involve "the same" acts. The court first noted that these umbrella policies "lack a Deemer Clause or similar provision which would allocate one multi-injury 'occurrence' into a particular policy year." *Id.* at *4.

Because *Mattel* was a product defect case, and not personal injury the court found that all of the claims arose out of substantially the same "accident," namely

[8] The *Mattel* case dealt with "bodily injury" claims arising from alleged product liability, for which the "occurrence" is typically defined as "an accident including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at *1. This is contrasted with "personal injury" suits in which the "occurrence" is defined as a "covered offense" and aggregation is permitted only when the facts of two offenses are "the same."

the defective design of the product. However, when one party pointed to the aggregation language of the umbrella policies (the same as in this case), and argued that it allowed claims across many years to be treated as if they all happened in a single year (as Hertz argues here), the court squarely rejected the argument. The court explained that discrete injuries happening at discrete points in time are not subject to a "continuing trigger" theory as with latent environmental claims. The court next explained that the umbrella policies lack a Deemer Clause and "the Court will not rewrite the policies at issue to insert a Deemer Clause into the (umbrella) policies where one does not exist." *Id.* at *10. The court then explained that regardless of the number of "occurrences" that could be found in any umbrella policy's period, the aggregation language only applies to bodily injuries that occur in that single period. *Id.*[9]

[9] Interestingly, the SRCS Elite Policy – in a section completely unrelated to the claims at issue here – includes such a "deemer clause." That deemer clause, contained in the "Sunrise Endorsement," states that "'[p]ersonal and advertising injury' caused by an 'occurrence' committed on or after December 15 2003 and prior to December 21, 2005 will be deemed to have been caused by an 'occurrence' committed during the 'policy period'". (A386). This suit does not involve any "covered offenses" committed between 2003 and 2005, but this provision is referenced here to show that the type of "deemer" provision which moves claims from one period into another is simply not present within the personal injury "occurrence" definition.

In this case, the Superior Court properly concluded that "it is self-evident that each personal injury offense that occurred against a family—whether it be the false detention or imprisonment—was not the same offense as that against another family in the three proofs of claim at issue." (Mem. Op. at 22). After the proper ruling that the damages paid to these three families cannot be aggregated together, the parties then stipulated in a final judgment that there is no personal injury "occurrence" within the 2015-2016 period that exceeds the $10 million retention. (Final Judgment at ¶ 3). This judgment should be affirmed.

## C. "HERTZ'S CONTINUOUS OCCURRENCE" MOTION: Hertz Failed to Establish that All 388 Claims Present Damages Arising From the Same Covered Acts, Publications or General Conditions.

### 1. QUESTION(S) PRESENTED

Whether Hertz's nationwide corporate deficiencies within its rental system over a fifteen-year period constitute a single "personal injury offense" or "single occurrence" causing damages for 388 claims? (B133, B1115, B1136-1137, B1199-1200, B1294, B1296, B1301, B1305).

Whether Hertz briefed or preserved an argument to allocate a single occurrence to any year of its choosing? In the court below, Hertz stated that, if there is a single occurrence, then "no party has affirmatively moved on the issue of allocation" (B1233-1234). Hertz stated that, how it picks which triggered policy pays for a single occurrence is "an issue that is not [teed] up before Your Honor [on number of occurrences]. That's an issue of allocation. And assuming this case proceeds, we'll get to that issue, but that's not before the Court today." (B1407). The case did not proceed past trigger and number of occurrences, therefore Hertz did not present the issue of "all sums" allocation to the Superior Court; it was not briefed, ruled upon or preserved as Hertz now argues.

### 2. SCOPE OF REVIEW

The facts of the three 2015-2016 exemplar "occurrence" claimants have been established through their undisputed declarations and settlement agreements in the

summary judgment record. (*See* B171-266). Therefore, the question of whether these claims are part of the same "covered offense" is a purely legal issue subject to de novo review. *See Merrill*, 606 A.2d at 100.

### 3. MERITS OF ARGUMENT

#### a) Hertz's "Cause Test" Precedent Does Not Apply to the "Offense-Based" Trigger for Personal Injury Claims, and Even If It Did, Hertz Did Not Present Evidence Upon Which the Test Can Be Applied to All 388 Claims.

The Delaware cases Hertz touts are not cases involving personal injury insurance triggered by a "covered offense" "committed" during the policy period. Instead, Hertz relies upon Delaware *product liability cases*, wherein coverage was triggered by "bodily injury or property damage" caused by an "occurrence," *defined differently* as "an accident." In a product liability case, it is not uncommon to question what exactly is the "accident" for many different claims, and whether the "accident" is "substantially the same" for all injuries. For this reason, a body of case law suggests, in order to pinpoint the "accident" for multiple product liability claims, a court should apply the "cause test." But those are not questions that need to be answered here, where "[t]he Policies expressly confine the range of potentially triggering events – with respect to personal and advertising injury – to the commission of covered offenses." (Mem. Op. at 17).

Hertz derives its "cause test" from *Stonewall Ins. Co. v. E.I. Du Pont de Nemours & Co.*, 996 A.2d 1254, 1257 (Del. 2010). In *Stonewall*, thousands of homes suffered property damage due to a defect in resin piping. Unlike the offense-based trigger in this case, the policy in *Stonewall* stated that the "occurrence" is "an accident or happening." Unlike the aggregation language in this case, the *Stonewall* policy allowed aggregation of damages if the exposure was "to substantially the same conditions" and "emanated from one premises location." *Id.* at 1257. This Court explained that, "when determining the number of occurrences in a product liability case the proper focus is on the production and dispersal" of the defective product. This Court concluded that, in such instances, the defect of the product itself is the single accident, or the single "occurrence" at issue. *Stonewall*, at 1258 (emphasis added); *see also Valley Forge Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2012 WL 1432524, at *9 (Del. Super. Ct. Mar. 15, 2012) (holding that, in a product liability case, the single "accident" or "occurrence" was the insured's production and dispersal of defective chenille robes.) Similarly inapplicable is Hertz's discussion of *Appalachian Ins. Co. v. Liberty Mutual Ins.*, 767 F.2d 56 (3d Cir. 1982), which involved a class action, not individually alleged separate offenses, and also contained an "accident" trigger for any "accident or continuous or repeated exposure to conditions" which resulted in personal injury during the period. As with a product liability claim, the *Appalachian* decision found

that the "accident" at issue was adoption of a discriminatory employment policy, constituting a single occurrence triggering only the policy in force when the act took place.[10]

Even *assuming arguendo* that: 1) the acts to be examined here are Hertz's "systemic negligence" rather than the acts within each "covered offense"; 2) the "occurrence" definition can move "covered offenses" into periods other than when they took place and; 3) the "cause test" from the product liability realm can dictate the number of occurrences for "personal injury" claims, Hertz still comes nowhere close to satisfying its burden of proof that all "offenses" arose from a common cause.

In fact, in one case where the "cause test" was relevant to personal injury claims, *State National Insurance Co. v. Lamberti*, 362 F. App'x 76 (11th Cir. 2010), the United States Court of Appeals for the Eleventh Circuit recognized that the analysis should focus on each arrested individual's specific interactions with law enforcement to determine the number of occurrences, and that the policyholder's

[10] Fifteen years after *Appalachian*, the Third Circuit examined personal injury trigger in *City of Erie v. Guaranty Nat'l Ins. Co.*, 109 F.3d 156 (3d Cir. 1997). The Third Circuit explained that *Appalachian* was aimed at preventing insurance for "events which had already taken place or were taking place." *Id.* at 162. Then, explaining the importance of "a uniform national rule, an important consideration in view of the interstate nature of insurance," the Third Circuit found that, for insurance policies triggered by "acts committed during the policy period," a malicious prosecution claim only triggers coverage in place at the time the offense was committed against the claimant.

corporate "overall strategy" is not the conduct to be examined, and cannot serve as the basis for a single occurrence. *Id.* The arrests in *Lamberti* were made in connection with a single event, in a single jurisdiction, pursuant to a single, coordinated police strategy, and the court still held that the arrests did not arise out of a single "occurrence." Here, it is not disputed that the individual false arrest claims are based on separate arrests throughout the United States, by different law enforcement agencies, over the course of at least 15 years.

Factually, Hertz attempts to establish a "single cause" by pointing to an amalgam of generalized allegations against it found in the *Ayoub*[11] complaint and the boilerplate addenda included in proofs of claim filed in the bankruptcy proceedings which incorporated that complaint by reference. Hertz concludes that these documents "all assert[ed] substantially similar allegations'" tying the claimants' injuries to W7-02. (Hertz Br. at 11, citing A668-1164).

But, as the Superior Court noted, Hertz does not advance its position simply by "broadly identifying an amalgam of practices and policies at Hertz and making generalized conclusions that each of the personal injury claims arose as a result of those practices and policies." (Mem. Op. at 19). Indeed the documents Hertz relies

[11] The *Ayoub* complaint was filed by Hanna Ayoub and 19 other individuals. In this 547-paragraph complaint, each individual plaintiff details the unique circumstances that led to his or her respective personal injury "offense" in different states over the span of several years. (A489-667).

on demonstrate that *individualized* facts and circumstances gave rise to the injuries sustained by each of the underlying claimants.

With respect to the *Ayoub* complaint, Hertz obscures the fact that the *Ayoub* complaint does not allege a single personal injury offense "committed" against any of the plaintiffs during the 2014-2016 periods. (A542-573). The *Ayoub* complaint, moreover, consists of allegations, whereas the duty to indemnify is determined based on "actual facts," as set forth in the applicable settlement agreements. *See Premcor Ref. Grp.,* 2013 WL 6113606, at *3.

Hertz next tries to establish a single cause by pointing to the boilerplate language from Declarations and Addenda submitted in the bankruptcy case in order to feign that all "offenses" are traced to common corporate inventory deficiencies. (Hertz Br. at 11, citing A668-1164). However, beyond the boilerplate allegations repeated by Hertz are "actual facts" that tell stories of different acts and conditions that led to different, unrelated personal injuries. Those "actual facts" are contained within sworn declarations included in each proof of claim which the boilerplate addenda acknowledges describes the "personal injury tort committed" against each claimant. (A1101-1102, A1144-1145). Of course the referenced "personal injury tort committed" is exactly what triggers coverage; not the inventory control procedures that allegedly created Hertz's liability.

Furthermore, all claimants did not even submit Declarations and Addenda in the bankruptcy. Hertz has never explained how those "Group 5 claimants," as Hertz described them, can be bound by the allegations or addenda in the bankruptcy when the Group 5 claimants submitted no such documents themselves. Hertz offered no explanation as to what documents otherwise support the "same act" or "general conditions" that gave rise to the Group 5 claimants' damages as well as every other claimant's damages. (B1364-1365).

Hertz next touts its corporate policy W7-02 as the "common cause" of all 388 personal injuries for which it seeks coverage. (Hertz Br. at 10, citing A683-684, Hertz Br. at 24). However, while it is true that some claimants trace their claims to W7-02(D), which instructed employees to report cars stolen before charging customers for the rental, (A533) other claimants relied on an entirely different corporate policy, W7-02(a)(17), which required that vehicle thefts be promptly investigated by a corporate security manager. One corporate policy the claimants alleged was absurd on its face, while the second corporate policy the claimants argued was valid and should have been enforced. (A530-532). Hertz presented no evidence that either or both of these failures was the "same act" or "general condition" that gave rise to the damages of Ms. Holmes, Mr. Henry and Mr. Arvary, much less all 388 claimants. In fact, W7-02 did not even apply to the personal injuries of all claimants. By way of example, Mr. Henry's arrest resulted from a

[redacted] (B1183-1185).

Hertz's reliance on a corporate policy as the single cause of all 388 claims also fails to account for the many distinct acts of alleged negligence that are unique from one claim to the next. For example, some claimants alleged Hertz deleted rental extension requests and then backdated the rental due date (A520-521, A528-529). Others sought damages for malicious prosecution that Hertz perpetuated either by providing false testimony or refusing to withdraw charges after Hertz was informed that the charges were meritless. (A583). Mr. Arvary claimed he was a victim of identity theft due to Hertz not properly checking identification at the time of rental. (B255-256).

Hertz has presented no set of facts to demonstrate that the Henry, Holmes, and Arvary families' damages arise from "the same" personal injury acts or conditions. Hertz has similarly failed to prove that the remaining 379 claimants suffered damages that are part of "the same acts or general conditions" that allow for the aggregation of every personal injury claim for which Hertz seeks coverage.

### b) The Superior Court Did Not Insert Terms Into the "Occurrence" Definition or Create the Ambiguities Hertz Suggests.

Hertz is incorrect in arguing that the Superior Court failed to give meaning to the policy language allowing for aggregation of offenses arising from **"the same act or conditions."** The "acts or conditions" that the "occurrence" definition references are those "acts or conditions" that comprise the "covered offenses" in the first instance. In other words, if Hertz negligently created a single training video that improperly trained five individuals across the country on the same day as to how to handle rental extensions, that improper training *will never be a personal injury "occurrence" because that conduct is not a "covered offense" in the first place.* If that improper training then leads to four "false arrests" of customers in four states, four years apart from each other, the improper training that was never a "covered offense" in the first place still is not a massive aggregating "covered offense," as Hertz now suggests.

Hertz argues that the Superior Court's ruling invalidates the policy language that allows offenses to be aggregated **"regardless of the frequency or repetition."** (Hertz Br. at 35). This also is wrong. In the "false detention" context,[12] the Henry

[12] The aggregation language of the "occurrence" definition applies not only to false detention claims, but also publication claims of libel and slander. In the libel context, the language allowing for aggregation of multiple publications "regardless of frequency or repetition" has particularly relevant meaning.

family had three people, each of whom was subject to a "felony stop" and surrounded by troopers with guns drawn. (B174). Mr. Henry was then handcuffed, separated from his family and moved into a patrol car. (*Id.*) His wife and grandson were separated, subject to questioning and not permitted to leave, and were themselves "terrified and scared." (B176). The "frequency and repetition" of the acts and conditions that befell the Henry family could potentially all be part of a single "covered offense" while still making the Henry claim a separate "occurrence" from that of Mr. Arvary or the Holmes family.

Hertz is similarly wrong in arguing that the Superior Court's ruling renders meaningless the language of the definition that allows aggregation due to the **"same general conditions."** (Hertz Br. at 35) There were five people in Ms. Holmes' car when four police vehicles stopped them at gunpoint. (B206). One family member had a seizure during this interaction with law enforcement. (*Id.*). The children were not allowed to leave. Ms. Holmes was handcuffed, while the others were not. Ms. Holmes was transported to jail, held for days and prosecuted, while the others were not. (B206-207). Certainly, it is possible that the various legal claims, damages and experiences suffered by five members of the Holmes family could be said to arise from **"the same general conditions"** as each other. However, it remains true that the "general conditions" to which the Holmes family was subjected are in no way

part of the same "covered offenses" committed against Mr. Arvary or the Henry family, as the Superior Court properly concluded.

### c) Hertz's "Continuous Occurrence" and "All Sums" Arguments Do Not Apply to Personal Injury Claims and an "Offense Trigger."

Hertz now argues that Delaware law (allegedly consistent with similar trigger decisions nationwide) treats Hertz's continuously deficient theft-prevention policies as "a continuing occurrence" which entitles the policyholder to select any policy to cover even those damages that occurred years before or years after a policy's time on the risk. (Hertz Br. at 42). In support of this "continuous occurrence" theory, Hertz relies on *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 489 (Del. 2001).

In *Hercules*, the policyholder sought over $100 million in indemnity for pollution damages arising at 20 sites from insurers intermittently spanning 1963 to 1980. *Id.* at 485-87. The policies were triggered by "an accident or happening" that resulted in property damage during the period. Such "accidents" were able to be grouped if they presented "exposure to substantially the same general conditions existing at or emanating from one premises location." *Id.* at 490. So, *Hercules* involved an "accident-based" trigger, not an "offense-based" trigger, and it aggregated "similar" "accidents or happenings" by location, not by "covered offense" with "the same" acts as in this case. Relying upon this court's analysis in *Monsanto Co. v. C.E. Heath Comp. & Liab. Ins. Co.*, 652 A.2d 30 (Del. 1994),

*Hercules* held that for "accident-based" triggers with continuing environmental harm, once an insurer is triggered by an "accident" that causes property damage during the period, then that insurer must pay "all sums" for that same, continuing property damage, even if it continues into later periods. *Id.*[13]

Of course, unlike claims involving latent and indivisible disease or environmental harm, the "covered offense" committed against Ms. Jones in 2009 did not then continue against her or anyone else in the years after. Rather than the 2009 "covered offense" committed against Ms. Jones being indivisible from the later years' "covered offenses," the personal injury "occurrences" in this case were so overtly divisible that Hertz signed settlement agreements with each claimant identifying the specific dates of the different "covered offenses" and then arriving at different and unique damages amounts for the different infringements committed upon each claimant.

Other courts have recognized that the "continuous occurrence" theory for latent disease or environmental harm simply does not apply to the policy wording and nature of "personal injury" coverage. For example, in *City of Lee's Summit v. Missouri Public Entity Risk Management*, 390 S.W.3d 214 (Mo. Ct. App. 2012), a

[13] As set forth above, Hertz pointed out in the Superior Court that no party had yet affirmatively moved for a ruling on how allocation would apply in the event that a single occurrence was found. (B1233-1234). Therefore, the "all sums" issue was not briefed or ruled upon.

personal injury claimant alleged claims for "malicious prosecution, false arrest, use of unreliable and fraudulent investigatory techniques, procurement of unreliable and fabricated evidence, wrongful conviction and imprisonment, conspiracy, suppression of exculpatory evidence, and violation of policies, practices, and procedures." *Id*. at 217. The court found that the only policy triggered was the one in effect when the personal injury "occurrence" was committed, which was the time of the initial tortious offense upon the claimant. *Id*. at 221.

*Lee's Summit* rejected a continuous trigger theory, the kind which Hertz argues for in this case. *Id.* at 221-22 (noting that "[t]he multiple trigger theory has been adopted in very limited circumstances…where the injuries caused by exposure do not manifest themselves until a substantial time after the exposure causing the injury," whereas "Courts that have analyzed malicious prosecution and § 1983 claims have found that the rationale underlying application of the multiple trigger theory is not well-suited in those cases, where any injury was evident from the outset."*)*; *see also Consulting Eng'rs, Inc. v. Ins. Co. of N. Am.*, 710 A.2d 82, 87-88 (Pa. Super. Ct. 1998) (holding that continuous occurrence theory for toxic tort cases does not apply to personal injury matters where the triggering "offense" results in simultaneous and evident harm to the injured individual); *Sarsfield v. Great Am. Ins. Co. of N.Y.*, 833 F. Supp. 2d 125, 130-32 (D. Mass. 2008) (rejecting application of gradual injury triggers to personal injury claims such as malicious prosecution);

*Genesis Ins. v. City of Council Bluffs*, 677 F.3d 806, 815-16 (8th Cir. 2012) (applying Iowa law) (holding that continuous trigger does not apply to malicious prosecution claims); *Muller Fuel Oil Co. v. Ins. Co. of N. Am.,* 232 A.2d 168, 174 (N.J. Super. Ct. App. Div. 1967) (observing that, with malicious prosecution, wrong and damage are practically contemporaneous); *City of Erie,* 109 F.3d at 165 (observing that "no federal or state court has adopted the multiple trigger theory in malicious prosecution cases.").

## V. CONCLUSION

1. The Superior Court properly ruled that the policies in this case do not insure damages from "covered offenses" committed outside of the period.

2. The Superior Court properly entered a stipulated judgment, finding that when the claims at issue are properly allocated to the period in which the offenses were committed, there is no "occurrence" in the 2013-2014 or 2014-2015 periods that exceeds the $10 million retention, even if all "occurrences" in those years are aggregated.

3. The Superior Court properly ruled that the three sets of "exemplar occurrence claimants" in the 2015-2016 period are not part of the same aggregating "occurrence."

4. The Superior Court properly entered a stipulated judgment, finding that there is no "occurrence" within the 2015-2016 period for which damages exceed the $10 million retention.

5. The Superior Court properly ruled that Hertz's "continuous occurrence" motion should be denied in its entirety.

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