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IN THE SUPREME COURT OF THE STATE OF DELAWARE

HERTZ GLOBAL HOLDINGS, INC. and THE HERTZ CORPORATION, Plaintiffs Below, Appellants, v. NATIONAL FIRE & MARINE INSURANCE COMPANY; STEADFAST INSURANCE COMPANY; AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY; GREAT AMERICAN INSURANCE CO. OF NEW YORK; QBE INSURANCE CORPORATION; NAVIGATORS SPECIALTY INSURANCE COMPANY; ENDURANCE ASSURANCE CORPORATION; SWISS RE CORPORATE SOLUTIONS ELITE INSURANCE CORPORATION, F/K/A NORTH AMERICAN ELITE INSURANCE COMPANY; SWISS RE CORPORATE SOLUTIONS AMERICA INSURANCE CORPORATION, F/K/A NORTH AMERICAN SPECIALTY INSURANCE COMPANY; and GREAT AMERICAN SPIRIT INSURANCE COMPANY, Defendants Below, Appellees.	)	No. 106,2025 Court Below – Superior Court of the State of Delaware C.A. No. N22C-05-130 SKR (CCLD) **PUBLIC VERSION**

APPELLANTS' REPLY BRIEF

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NATURE OF PROCEEDINGS

Insurers cannot escape or rewrite the "occurrence" definition in their Policies to evade Hertz's claim. Nor can they ignore Delaware's governing "cause" test for determining the number of occurrences under their Policies, *see Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1258 (Del. 2010), by invoking cases from other jurisdictions involving different facts and policy language. But that is what their brief seeks to do, in an effort to avoid the coverage they sold to Hertz.

By improperly equating the term "offense" with the term "act," as those terms are used in the *first* sentence of their Policies' "occurrence" definition, and by ignoring the plain text and manifest effect of the *second* sentence of the "occurrence" definition (the "Deemer Clause"), Insurers offer an interpretation of their Policies that is circular and that renders the Deemer Clause a dead letter. Under Insurers' reading, the Policies require every "act" of false arrest against *each claimant* to be considered a separate "offense" and thus, a separate "occurrence," such that virtually no damages arising from repeated and frequent acts of false arrest against multiple different claimants could ever be aggregated or would ever exceed Hertz's $10 million retention. The Deemer Clause thus could never take effect, and the Policies' promise of false-arrest coverage above a $10 million retention would be illusory.

But the policy language and Delaware law require otherwise, making clear that "*[a]ll damages*" arising from the same act or general conditions at issue "are

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considered to arise out of the same 'occurrence'"—expressly "*regardless* of the frequency or repetition [of such act or conditions] or the number of claimants." A0258 (emphasis added).[1] Here, because the underlying claims all seek damages based on allegedly "systemic" flaws in Hertz's theft-prevention policies and practices, there is only one "occurrence." Insurers' contrary construction is untenable. And their attempt to individualize the facts of the claims at issue in an effort to disaggregate the one "occurrence" at issue into hundreds of discrete occurrences does violence to the claimants' own characterization of their claims and to controlling Delaware law applying the "cause" test. *See* Part I, *infra*.

Insurers' argument on trigger, like their argument on the damages-aggregating "occurrence," invents similar limitations found nowhere in the policy text or Delaware law. Insurers describe the Policies as providing "offense-based" coverage for "offenses committed *against each claimant* during the *triggered policy period*." AB 16 (emphasis added). Insurers then equate each such claimant-specific "offense" with an arrest "at a *discrete moment in time*." *Id.* 1, 10, 16 (emphasis added). But that is not what the Policies say.

[1] Hertz quotes the "occurrence" definition that is the centerpiece of this appeal at page 2 of its Opening Brief ("OB"). Tellingly, Insurers do not quote the definition until page 35 of their Answering Brief ("AB"). There, they emphasize (but misconstrue) the first sentence of the definition and then largely ignore the second sentence (the Deemer Clause).

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Instead, the Policies are triggered by an "'*occurrence*' … committed during the policy period." A0240 (emphasis added). The first sentence of the "occurrence" definition defines "occurrence" as "a covered offense," i.e., one of the enumerated categories of offense insured against, such as false arrest. A0258. An "occurrence" is *not* each discrete "act" of "a covered offense" against each individual claimant. The second sentence of the "occurrence" definition, the Deemer Clause, underscores this point, aggregating "*[a]ll damages*" arising out of an "act" or "general conditions" that recur "*frequen[tly]*", "*repe[atedly]*", and as to *multiple* "*claimants*" into one "occurrence." *Id*. (emphasis added). If a Policy is triggered, the insuring agreement broadly promises coverage for "those sums" (A0240)—i.e., "[a]ll damages"—without limitation to a particular policy period or claimant, corresponding to the single, damages-aggregating "occurrence." The insuring agreement does not confine the covered damages to *only* those damages arising from the part of the "occurrence" that transpires during the policy period.

Applied here, each of the Policies was *triggered* because the ongoing "occurrence" at issue "was committed during the policy period"—i.e., the "covered offense" of false arrest arising from Hertz's theft-prevention policies and practices took place in each of the three policy periods at issue (2014-2016). Thus triggered, the *scope* of coverage under each Policy expressly extends to "*[a]ll* damages" (without limitation) arising from the triggering "occurrence." *See* Part II, *infra*.

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ARGUMENT

The parties agree that this appeal presents "purely legal issue[s] subject to de novo review" (AB 24, 34, 44)—i.e., this appeal can and should be resolved based on the plain policy language and Delaware law. But Insurers' interpretation inserts non-existent limitations on both damages-aggregation and the trigger of coverage that flout the Policies' broad "occurrence" language and this Court's precedents.

I. Insurers' Effort to Disaggregate the Single "Occurrence" at Issue Flouts the Plain Policy Language and Controlling Delaware Law.

Insurers' effort to disaggregate the single "occurrence" at issue lacks merit. *First*, Insurers advance a circular reading of the "occurrence" definition's Deemer Clause, under which "[a]ll damages" shall be aggregated only for "acts" or "general conditions" that comprise a single false arrest against "each individual." AB 51. But on that reading—or more accurately, rewriting—the Deemer Clause does no work: there is only one incident from which all covered damages arise, and thus, nothing to aggregate. *Second*, while the Policies cover Hertz with respect to an "'occurrence' … *arising out of [Hertz's] business*," A0240 (emphasis added), Insurers refuse to link the number-of-occurrences determination to Hertz's underlying theft-prevention policies and practices, seeking instead to measure the number of "occurrences" by each claimant's interactions with *law enforcement*. *Third*, Insurers disregard this Court's directive to aggregate occurrences based on the common "underlying" cause. *Stonewall*, 996 A.2d at 1258. *Lastly*, Insurers attempt to particularize each

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claimant's experience with Hertz, ignoring that all claimants uniformly alleged damages arising from (i.e., caused by) "systemic" flaws in Hertz's theft-prevention policies and practices.

A. Insurers Insert Non-Existent Limitations into the Policies that Disregard the Expansive Terms of the Deemer Clause.

Insurers assert restrictions on aggregation that are unsupported by the policy language, contrary to the "occurrence" definition, and inconsistent with established Delaware law.

First, Insurers urge this Court not to aggregate the number of occurrences based on the common underlying "cause" of the false arrest claims. AB 9-10, 44-46. That argument cannot be squared with the Deemer Clause or this Court's number-of-occurrences precedents. The Deemer Clause is drafted in broad causal terms, expressly aggregating "[a]ll damages" that "arise from" the same "act" or "general conditions." In Delaware, when used in an insurance-coverage-granting provision, the phrase "arising out of" is "broadly construed" to require only "some meaningful linkage" to the predicate matter—i.e., "some causal connection," even if not the "proximate cause." *Pacific Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1256-57 & n.42 (Del. 2008) (citation omitted).

Even in cases involving insurance policies that lack language as broad as the Policies' Deemer Clause, this Court has held that the number of "occurrences" is determined by "the underlying circumstances" or "cause" of the claimed damages,

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not, as Insurers urge, by the "individual" injuries or incidents that result therefrom. *Stonewall*, 996 A.2d at 1258. Delaware's approach accords with insurance precedents nationwide that look to "the original cause" in "determining the number of occurrences in liability insurance coverage cases." *E.I. du Pont de Nemours & Co. v. Stonewall Ins. Co.*, 2009 WL 1915212, at *4 & n.7 (Del. Super. Jan. 12, 2009) (collecting cases).

Second, Insurers argue that "[p]ersonal injury 'offenses' occur at a discrete moment in time." AB 11; *id.* 10, 41. But the Policies do not restrict "a covered offense" to a discrete moment or episode. *See Monzo v. Nationwide Prop. & Cas. Ins. Co.*, 249 A.3d 106, 129 (Del. 2021) ("Adding a limitation on coverage that [an insurer] failed to include in its policy would be contrary to Delaware law[.]"). Instead, the Policies' "occurrence" definition requires aggregation "regardless of the frequency or repetition" of the causative "act" or "general conditions"—i.e., irrespective of how many times the act or conditions are repeated and whether the act or conditions occur frequently over time. A0258.

Third, Insurers assert over and over again that an "'occurrence' is defined as the specific 'covered offense' *committed against the claimant*." AB 10 (emphasis added); *id.* 1, 4, 9-10, 12, 16, 23, 25, 27-28, 31, 46 n.10. But that is just wrong. The "occurrence" definition does *not* restrict an "occurrence" to each individual claimant. The definition's first sentence defines "occurrence" as a "covered

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offense," and the Policies identify "1. false arrest, detention or imprisonment" as a type or category of "covered offense" without limitation to the arrest of a *single individual*. A0258. The definition's second sentence then expressly forecloses any such limitation, aggregating "[a]ll damages" arising from the same act or general conditions into "the same 'occurrence,' *regardless of … the number of claimants*." *Id.* (emphasis added).

Fourth, Insurers concede the Policies "allow[] for aggregation of offenses arising from 'the same act or conditions," but they argue that "[t]he 'acts or conditions' that the 'occurrence' definition references are those 'acts or conditions' that *comprise* the 'covered offenses' in the first instance." AB 51 (emphasis added). Thus, Insurers say, if a single arrest entails multiple acts or conditions (e.g., detention, handcuffing, questioning), then aggregation in such circumstances "could potentially" be warranted. *Id.* 52.

But again, the Policies do not include Insurers' limitation. Nothing in the "occurrence" definition specifically, or the policy language generally, requires an (aggregation-inducing) "act" or "general conditions" to *comprise* the "covered offense." Instead, the words "act," "general conditions," and "offense" are different words that presumptively carry different meanings. OB 33. Indeed, the Deemer Clause would have *no* meaning if—rather than aggregating "[a]ll damages" for multiple false arrests arising from the same repeated or persistent "act" or "general

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conditions"—the Policies only aggregated damages arising from acts or conditions that make up a single false arrest.

Finally, Insurers insist that "the aggregating language of the 'occurrence' definition" applies only to conduct "committed within the *same policy period*[.]" AB 8-9. Once again, the Policies contain no such limitation. Instead, the Deemer Clause aggregates "all damages" (without any policy-period or temporal limitation) arising from recurrence of the same "act" or "general conditions," regardless of when or how frequently such act or conditions repeat over time. And, as detailed in Part II, while the Policies' insuring agreement requires that the "occurrence" be committed during the subject policy period to *trigger* coverage, neither the insuring agreement nor the Deemer Clause confines an ongoing "occurrence" to one policy period or otherwise limits the *scope* of coverage to only the portion of damages incurred within that period.

B. Insurers' Interpretation Disregards the Policies' Manifest Purpose and Would Render Coverage for an Offending Corporate Practice Above Hertz's Retention Illusory.

Insurers' proposed interpretation is not only textually unsound; it also contravenes the Policies' manifest purpose and nullifies Insurers' coverage promise.

First, Insurers' effort to disaggregate claimants' damages based on each claimant's "discrete interactions with law enforcement" misses the mark. AB 10. The Policies insure "personal and advertising injury" that is "caused by an

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'occurrence' … *arising out of [Hertz's] business*." A0240 (emphasis added). The proper measure for the number of "occurrences" is *Hertz*'s causative theft-prevention policies and practices, not the ensuing actions of *third-party police officers*. Hence, in *Stonewall*, this Court aggregated multiple claims into one occurrence based on the corporate insured's defective production of its products, "not on the location of injury or the specific means by which injury occurred" after each product was sold. 996 A.2d at 1258; *accord Valley Forge Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 2012 WL 1432524, at *11 & n.124 (Del. Super. Mar. 15, 2012) ("courts look to the cause of the claimed injuries with a focus on the insured's conduct").

Insurers retort that Hertz's alleged "corporate deficiencies" are "not in and of themselves a triggering personal injury offense." AB 12. But the Deemer Clause aggregates "[a]ll damages" based *not* on the "act" or "general conditions" that *comprise* "a covered offense," but on the repeated "act" or "general conditions" from which the covered-offense damages "*arise*." Here, all false-arrest damages at issue arose from the "general conditions" imposed by Hertz's theft-prevention policies and practices and the repeated "act" of a vehicle theft report pursuant to those policies and practices. Aggregation is required not because Hertz *performed* the false arrests, but because its policies and practices were the common alleged *cause* thereof. *Stonewall*, 996 A.2d at 1258. Indeed, to require Hertz itself to have

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performed the underlying arrests would render false-arrest coverage in the context of a corporate insurance policy illusory.[2]

Second, the Policies have $10 million per-occurrence retentions. And as this Court has recognized, an eight-figure per-occurrence retention only makes commercial sense if the parties intended to aggregate occurrences based on a common underlying "cause." *Id.* The contrary interpretation, under which "each separate claim would constitute its own separate occurrence" subject to its own retention, would "produce an absurd, unacceptable result that would render meaningless" the coverage Hertz purchased and "deprive [the insured] of the protection for which it paid." *Id.*

Indeed, the average claim here settled for [redacted], and the maximum settled for under [redacted] (A1201-10), so on Insurers' reading, the $10 million per-

[2] Because Hertz's conduct allegedly caused the covered offense of "false arrest," Insurers' reliance on cases rejecting coverage for an insured's alleged wrongdoing, untethered to any enumerated personal-injury offenses, is misplaced. *Fibreboard Corp. v. Hartford Acc. & Indem. Co.*, 20 Cal.Rptr.2d 376, 388-89 (Cal. App. 1993) (no coverage because "trespass" and "nuisance" were not covered offenses); *Women & Families Cntr. v. St. Paul Fire & Marine Ins. Co.*, 2009 WL 1754469, at *2 n.1 (Conn. Super. May 28, 2009) (no coverage because "negligent supervision" in sexual-abuse context "does not fall within any of the[] defined personal injury offenses"); *United Ohio Ins. Co. v. Myers*, 2002 WL 31716117, at *5 (Ohio App. Dec. 4, 2002) (no coverage because insured's "acts and omissions do not fit within th[e] exclusive list of [covered] offenses"); *cf. Reeves v. S.C. Municipal Ins. & Risk Financing Fund*, 434 S.C. 18, 30-31 (2021) (personal-injury exclusion inapplicable where liability resulted from offenses "not list[ed]").

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occurrence retention would bar coverage entirely, despite Hertz incurring approximately [redacted] in damages. Even Insurers' examples of a detained family in a single vehicle (i.e., the Holmes and Henry claims) still correspond to roughly [redacted] in damages (AB 37)—sums that likewise would yield no recovery over Hertz's retention. To get to that coverage-defeating result, Insurers must invent limitations on aggregation that flout the Deemer Clause and Delaware law.

C. Insurers Ignore Binding Delaware Law and Rely on Inapposite, Out-of-State Authority.

Insurers' position not only contravenes the Policies' text and context; it also ignores this Court's insurance-law precedents in number-of-occurrence cases and rests on out-of-state decisions involving materially different facts and policies.

In *Stonewall*, this Court invoked "the commonly accepted cause test," and, *using language that mirrors the Deemer Clause here*, "reaffirmed the principle that 'where a single event, process or condition results in injuries, it will be deemed a single occurrence *even though the injuries may be widespread in both time and place and may affect a multitude of individuals*.'" 996 A.2d at 1257 (emphasis added; brackets and citation omitted). *Stonewall* thus held that a corporation's mass "production and dispersal" of a defective product—i.e., the "underlying" cause of all claimants' injuries—constituted "a single 'occurrence,'" notwithstanding that the insured faced "469,000 plus liability claims" spanning years of operations. *Id.*

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Similarly, here, the underlying alleged cause of all Hertz's false-arrest liabilities is Hertz's theft-prevention policies and practices; this unifying cause yields one "occurrence" under Delaware law.

Insurers largely ignore *Stonewall*, waiting until page 45 of their brief to try to distinguish it on grounds that it was a products-liability case and involved an "occurrence" definition that referenced an "accident," not an "offense." But these proffered distinctions have no substance. *Stonewall* described the "cause" test as a "general[]" and "commonly accepted" test for analyzing "the number-of-occurrences issue" and mentioned the products-liability context only to note that the "cause" in such cases is typically the "production and dispersal" of products—not to limit the cause test's application to products-liability matters. *Id.* at 1257-58.

Moreover, *Stonewall*'s aggregation reasoning did not turn on the term "accident," but on the distinction between "claims-made policies" and "occurrence-based policies"—with the former reflecting an "inten[t] to base coverage" on "individual" claims, and the latter reflecting an "inten[t] to base coverage on the underlying circumstances" culminating in the claimed damages. *Id.* at 1258. Here, Insurers sold Hertz occurrence-based "personal and advertising injury" coverage; under *Stonewall*, coverage for repeated acts of a personal-injury offense are properly aggregated based on the common "underlying circumstances" of Hertz's theft-prevention policies and practices. *Id.*

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Insurers respond that "[t]he 'cause test' for number of occurrences does not apply to 'personal injury' claims." AB 9. But this sweeping assertion ignores *Appalachian Insurance Co. v. Liberty Mutual Insurance Co.*, 676 F.2d 56 (3d Cir. 1982), where the Third Circuit applied the "cause" test to aggregate numerous personal-injury claims (employment discrimination claims) arising from a common "cause" (deficient corporate employment policies) into one occurrence, *id.* at 61. This Court relied on *Appalachian* in adopting the "cause" test for Delaware. *See Stonewall*, 996 A.2d at 1257 n.4.

Insurers dismiss *Appalachian* because the "occurrence" definition there referred to an "accident" and "continuous or repeated exposure to conditions." AB 45. But the term "accident" accommodates aggregation to no greater extent than the Policies' term "covered offense," and Insurers' arguments to the contrary rest on contrived limitations for the latter term found nowhere in the Policies. *Supra*, pp.5-8. Further, Hertz's Deemer Clause is even *broader* than the *Appalachian* policy's: the latter referenced "continuous or repeated exposure to conditions … existing at or emanating from one premises," *Appalachian*, 676 F.2d at 58 n.8, whereas Hertz's Deemer Clause has no "premises" limitation and includes the Repetition, Frequency, and Number-of-Claimants Aggregators.

Citing *Mattel, Inc. v. XL Insurance America, Inc.*, 2025 WL 948008 (Del. Super. Mar. 28, 2025), Insurers contend that "Delaware law" does "not permit

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aggregation of claims from outside a given policy period" or treat an aggregating provision in an "occurrence" definition as a "deemer clause." AB 7. But *Mattel* applied California law, not Delaware law. 2025 WL 948008, at *5 n.55. And *Mattel* merely held that where one set of policies had a "Deemer Clause" that aggregated all damages arising out of one "lot" of products, *id.* at *2, and another set of policies did not, a court could not "rewrite the [latter] policies" to "insert a Deemer Clause," *id.* at *10. By contrast, *all* of the 2014-2016 Policies contain the Deemer Clause at issue. AB 35. And while Insurers may recoil from the term, there is no denying what the Deemer Clause here says and does.

Unaided by Delaware law, Insurers assert that "[n]ational caselaw uniformly holds that personal and advertising injury 'offenses' occur at a discrete moment in time and thus are not continuing torts." AB 10. But this is an insurance contract case, not a tort case. The meaning and scope of an "occurrence"—which is the defined term that the Policies' insuring agreement uses (A0240)—is governed by the *policy language* and Delaware law, not out-of-state tort law. Here, the Policies do not limit an "occurrence" to a discrete "act" or moment; instead, they define "occurrence" to mean "a covered offense" (without any limitation on duration), and then expressly aggregate "[a]ll damages" arising from the same act or general

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conditions into a single occurrence, "*regardless* of the *frequency* or *repetition* [of the act or conditions] or the *number of claimants*."[3]

None of the cases on which Insurers rely features such an expansive "occurrence" definition. Instead, those cases reject efforts by insureds to cast personal-injury offenses as continuing-trigger events under *tort* principles—which is not Hertz's position here.[4] Further, those cases involve underlying claims against the defendants responsible for performing the challenged arrests or prosecutions—not, as here, challenges to corporate policies or practices that, allegedly, commonly *caused* those arrests.

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[3] For similar reasons, Insurers' reference to Hertz's comment in bankruptcy proceedings that false arrest is not a "continuing tort" is irrelevant. AB 11. The scope of the "occurrence" for *insurance* purposes is measured by the Policies' aggregating definition of the term and the aggregating principles of Delaware insurance law—i.e., by the underlying "general conditions" (Hertz's theft-prevention policies and practices) and "act" (vehicle theft reports under those policies and practices)—*not* by tort law.

[4] *City of Erie, Pa. v. Guaranty Nat'l Ins. Co.*, 109 F.3d 156, 164-75 (3d Cir. 1997) (rejecting "continuing tort" argument for "multiple trigger"); *High Voltage Beverages, LLC v. Hartford Cas. Ins. Co.*, 2011 WL 7063295, at *3 (Del. Super. Nov. 30, 2011) (North Carolina law) (same); *Genesis Ins. Co. v. City of Council Bluffs*, 677 F.3d 806, 815-16 (8th Cir. 2012) (same); *Consulting Engineers, Inc. v. Insurance Co. of N. Am.*, 710 A.2d 82, 86 (Pa. Super. 1998) (same); *City of Lee's Summit v. Missouri Public Entity Risk Mgmt.*, 390 S.W.3d 214, 221 (Mo. App. 2012) (same); *North River Ins. Co. v. Broward County Sheriff's Office*, 428 F.Supp.2d 1284, 1290-92 (S.D. Fla. 2006) (declining to link coverage to timing of "the essential elements of the tort"); *Paterson Tallow Co., Inc. v. Royal Globe Ins. Cos.*, 89 N.J. 24, 35 (1982) (same).

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Lastly, Insurers invoke an Eleventh Circuit decision treating underlying lawsuits against a police department for various arrests of multiple individuals over time as implicating multiple occurrences. *State Nat'l Ins. Co. v. Lamberti*, 362 F. App'x 76 (11th Cir. 2010) (Florida law). But *Lamberti* did not involve Delaware law or include the subject Deemer Clause, both of which require aggregation of "[a]ll damages" arising from the same causative act or general conditions into a single occurrence, "regardless of" the repetition or frequency thereof or the number of claimants.

D. Insurers' Effort to Particularize Each Claimant's Allegations to Avoid Aggregation Is Unavailing.

Lacking support in both the policy language and the law, Insurers seek (ineffectually) to recast the claimants' allegations to support their multiple-occurrence argument.

First, Insurers assert that aggregation is unwarranted because the underlying claims arose from an "amalgam" of distinct corporate policies and practices. But this contention disregards both the policy text and the record. AB 47. On the policy text, the Deemer Clause does not refer to a *specific* or *discrete* corporate condition, but broadly to "*general conditions*" that may persist, or be repeated with frequency, vis-à-vis multiple different claimants. *See Stonewall*, 2009 WL 1915212, at *8 (emphasizing "use of the plural 'conditions' in the policy's unifying definitional provisions") (citation omitted). Indeed, Insurers' hair-splitting runs contrary to the

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manifest intent of the Deemer Clause and violates *Stonewall*'s admonition to avoid "misguidedly" turning "the number-of-occurrences analysis into a number-of-conditions question." 996 A.2d at 1257.

Insurers' argument also ignores precedents finding a single common "cause," and thus, one "occurrence," for purposes of personal-injury coverage, where a case involves various distinct but related corporate policies. *See, e.g., Appalachian*, 676 F.2d at 58 & n.4 (finding one "cause" and thus, one "occurrence" based on challenges to "discriminatory employment policies" variously addressing "hiring, promoting and compensating females," "pregnancy leave," and "disability benefits").

Second, the false arrest claimants challenged Hertz's policies and practices not as an incongruous "amalgam" of disparate things, but as targeted "systemic problems" that caused "false police reports to be submitted." A0520. The claimants consistently identified these "systemic problems" as deficiencies in the terms and implementation of Hertz theft-prevention policy "W7-02"—including a W7-02 provision that allegedly mandated the generation of police reports showing non-payment before the customer is charged (thus, allegedly "guarantee[ing] that every Hertz theft report contains falsified payment information," A0520), plus alleged systemic non-compliance with W7-02's investigation and checklist requirements (A0538).

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As pleaded in the first-filed Ayoub complaint, which every bankruptcy proof of claim incorporated by reference (A0228, A1101-1102), "W7-02 is severely flawed in both its language, intent, purpose, and execution," and "[t]hese flaws with W7-02 and Hertz's related policies and procedures have directly and proximately led to the Plaintiffs being wrongfully reported to the police, and wrongfully detained, arrested, imprisoned, and prosecuted." A0537-38. *All* of the other underlying complaints similarly alleged flaws within, or in the implementation of, W7-02. *See* A0683-84 (Flannery Complaint); A0833-34 (Morgan Complaint); A0887 (Vangelis Complaint); A0977-78 (Lovelace Complaint); A1055-56 (Lizasoain Complaint).[5] The commonality of claimants' allegations is unsurprising, as the same plaintiffs' counsel filed all 388 of the underlying claims. A0228.

Third, Insurers' belated effort to sow doubt that the claims are "false arrest claims" likewise comes up empty. AB 8. In *every* example Insurers cite, the claimant clearly alleged the "covered offense" of "1. false arrest, detention or imprisonment." A0258. Insurers, for instance, cite malicious-prosecution allegations in the Ayoub complaint, *see* AB 18 (citing A0583), but that complaint

[5] Insurers vaguely suggest (at 49) that there may be a group of claimants differently situated from the others, yet the very document they cite supports *Hertz's* position that all claims [redacted] B1362.

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included a "False Arrest/Imprisonment" count brought by "All Plaintiffs," A0590. Insurers also cite identity-theft allegations in the Drew Arvary proof-of-claim declaration, *see* AB 18 (citing B255-57), but that declaration averred that, [redacted] B257.[6] Indeed, Insurers themselves described *all* of the claims at issue as the [redacted] in their briefing before the Superior Court. *E.g.*, B1137, B1143.

In sum, "[a]ll damages" for which Hertz seeks coverage in this case relate to false arrest claims and arose from Hertz's allegedly faulty theft-prevention policies and practices (the "same … general conditions") and ensuing theft reports to law enforcement ("the same act"). Accordingly, all such damages are contractually "considered" to arise out of "the same 'occurrence'"—regardless of "the frequency or repetition" of such act or conditions or "the number of claimants." A0258.

[6] Even Insurers' cherry-picked "exemplar" claimants all alleged false arrest, detention, and/or imprisonment. *See* B208 (the Holmes family alleging that [redacted] B084 (Ms. Jones alleging that [redacted]); B1369-70 (Ms. Higgs alleging [redacted]); B176 (Mr. Henry alleging that [redacted]); AB 20-21 ("Mr. Henry, along with his wife and grandson, were detained by police"); B095 (Mr. Burnside alleging [redacted]); *supra* p.19, regarding Mr. Arvary's arrest.

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II. Insurers Fail to Rebut Hertz's Showing Under the Policy Language and Delaware Law that All of the Policies Are Triggered.

Because the "occurrence" was committed during each policy period from 2014 through 2016—i.e., there were false arrests pursuant to Hertz's challenged theft-reporting policies and practices throughout each of these years—each of the 2014-2016 Policies is triggered. OB 39-46.

Insurers' contrary argument rests on the erroneous syllogism that: (a) the Policies have an "offense-based" trigger of coverage; (b) an "offense" is a false arrest committed against *each* individual "claimant" (or vehicle) at "a discrete moment in time"; and, (c) accordingly, coverage is triggered for, and only extends to, individualized arrests (each subject to its own $10 million retention) that occur within a given "policy period." AB 1, 10, 16. That is simply not what the Policies say. Further, Insurers' argument conflates "trigger" of coverage with "scope" of coverage.

The Policies' insuring agreement promises coverage for "those sums" that Hertz "becomes legally obligated to pay as damages … because of … 'personal and advertising injury' … caused by an 'occurrence' … arising out of your business, but *only if the 'occurrence' was committed during the 'policy period.'*" A0240 (emphasis added). Thus, for a Policy to be *triggered* (i.e., to provide any coverage at all), an "occurrence" must be "committed during the policy period." Importantly, an "occurrence" is not limited to a discrete *act* of a covered offense. Rather, it may

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encompass an ongoing covered offense (e.g., repeated false arrests rooted in a common cause)—a point underscored by the Deemer Clause's aggregation of "all damages" (without limitation) arising from "the same act … or general conditions" into a single "occurrence," regardless of the repetition or frequency thereof or the number of claimants. A0258.

By contrast, the *scope* of coverage (i.e., what damages a Policy covers, once triggered) extends to "those sums" (i.e., "[a]ll damages") arising from the damages-aggregating and policy-triggering "occurrence," *not only* to individual "acts" or "damages" that occur "during the policy period." Nothing in the insuring agreement or any other provision of the Policies limits coverage to only that part of the "occurrence" that triggers coverage, or to only those "damages" corresponding to the triggered policy period. Hence, "[t]he 'policy period' language is a limit on the *trigger* of coverage, not the *scope* of coverage" for a policy, once triggered. *Caterpillar v. Century Indem. Co.*, 2007 WL 7947740, at *4 (Ill. App. Feb. 2, 2007) (emphasis added); *see also California Pacific Homes, Inc. v. Scottsdale Ins. Co.*, 83 Cal.Rptr.2d 328, 332 (Cal. App. 1999) ("the event which triggers coverage does not define the scope of coverage").

Insurers thus attack a strawman in suggesting that Hertz believes that arrests committed in 2009, 2018, or 2019 "trigger" the 2016 policy period. AB 18-20. What Hertz contends is only what the plain language and caselaw provide: (1) the 2014-

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2016 Policies are *triggered* by the portion of the "occurrence"—i.e., false arrests arising from Hertz's challenged policies and practices—committed during their respective policy periods; and (2) once triggered, the *scope* of coverage under the Policies is for "all damages" above the retention and up to their respective policy limits (without limitation to policy period) arising from the triggering and aggregating "occurrence." Here, it is undisputed that covered arrests transpired in each policy period from 2014 through 2016. *See, e.g.*, A1111, A1154, B034-035, B163-165. Therefore, all Policies within that timeframe are triggered and obligated to cover "all damages" arising from the single, damages-aggregating "occurrence" at issue. A0258.

Again, this interpretation is not only textually required; it aligns with Delaware law. As previously explained, this Court's decisions in *Stonewall* and *Hercules, Inc. v. AIU Insurance Co*., 784 A.2d 481 (Del. 2001), illustrate that the *scope* of coverage under an "occurrence"-based policy may extend to damages beyond those corresponding to the particular events that transpire during, and thus trigger, a given policy period. OB 42-43, 45. Insurers attempt to distinguish these cases based on the types of liabilities they involved or the allocation models they employed. AB 53-54. But none of these arguments rebuts the simple proposition that these precedents confirm—namely, that insurance policies may provide a *scope* of coverage broader than the events that *trigger* the policy period.

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As a final proposition, Insurers suggest that the issue of "allocation" is "not yet" presented here. AB 12 n.5. Once again, Insurers conflate the issues. Hertz acknowledged below that the issue of allocation—and specifically, "allocation issues as between different covered towers" (i.e., policy years)—is not currently for decision. B1408. But the present issue is not whether and how to *allocate* Hertz's damages to each triggered policy year from 2014 through 2016. It is whether, as Insurers argued in the Superior Court and on appeal, Insurers may avoid coverage in *each* of these three policy years by arguing that each year of coverage is only triggered by, and only covers, the fraction of damages (not "all damages") attributable to individual "acts" that transpire within that policy period. AB 8-9, B073, B287. The Policies and caselaw say otherwise.

Notably, *on page 1* of Hertz's summary-judgment motion below, the denial of which Hertz now appeals, Hertz requested judgment declaring that "all damages" arising from the same, repeated act or general conditions are "contractually deemed to involve a single 'occurrence,'" and that "the insurance policies in effect during any part of the 'occurrence' (specifically, for purposes of this motion, Hertz's 2014-2016 general liability policies) are *triggered and obligated to cover* Hertz for such damages." A0189 (emphasis added). This Court can and should rule in Hertz's favor on these issues.

CONCLUSION

Hertz respectfully requests that this Court reverse the Superior Court's rulings and order that judgment be entered for Hertz and against Insurers, declaring that each Policy, from 2014 through 2016, is obligated to cover "[a]ll damages" arising from the single "occurrence" at issue, up to its policy limits, in excess of underlying limits and a single $10 million per-"occurrence" retention. *See* OB 47.

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