IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE HERTZ CORPORATION and HERTZ GLOBAL HOLDINGS, INC., *Plaintiffs*, v. MARK FRISSORA, ELYSE DOUGLAS, and JOHN JEFFREY ZIMMERMAN, *Defendants*.	Civ. A. No. 2:19-cv-08927 Hon. Esther Salas, U.S.D.J. Hon. Cathy L. Waldor, U.S.M.J. **Oral Argument Requested**

J. JEFFREY ZIMMERMAN'S MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM

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INTRODUCTION

Jeffrey Zimmerman served as General Counsel and an executive officer of Hertz Global Holdings, Inc. and Hertz Corporation (together "Hertz" or the Company) from 2007 to 2014, when he left his position and entered into a Separation Agreement with the Company. Now, four years later, Hertz seeks to claw back certain incentive compensation paid to him and to two other former Hertz executives, former CEO Mark Frissora and former CFO Elyse Douglas (with Zimmerman the "Defendants"). Hertz alleges that Zimmerman and his former colleagues engaged in gross negligence and misconduct during their tenure as officers of the Company, which resulted in the restatement of its financial statements for the years 2011, 2012, and 2013 (the "Restatement").[1]

The Company styles its claims as a breach of contract, alleging that Zimmerman breached Hertz's 2010 Clawback Policy (Count I) and 2014 Clawback Policy (Count III) (together the "Clawback Policies"), and the Separation Agreement (Count IV).[2]

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[1] For purposes of this motion to dismiss only, Zimmerman assumes all well-pleaded factual allegations to be true. Zimmerman does not concede the accuracy of any of Hertz's factual allegations.

[2] Hertz also seeks a declaratory judgment that Defendants are not entitled to advancement in defending against Hertz's claims in this action (Count V). The Defendants filed complaints for advancement and indemnification in the Delaware Court of Chancery and that court granted defendants' motion for partial summary judgment, holding that defendants are entitled to advancement of attorneys' fees and

Hertz's claims are baseless. The allegations in the Complaint[3] fail to state a claim against Zimmerman for two independent reasons.

First, the Complaint is nothing more than a series of vague, general allegations against ***all Defendants***, alleging that they collectively failed to correct accounting errors and weaknesses in the Company's internal controls. Courts routinely reject this type of group pleading. To state a claim, Hertz must put Zimmerman on notice of the specific allegations ***against him***. In its 130-paragraph Complaint, Hertz asserts only two specific allegations against Zimmerman: (i) that Zimmerman was urged to review legal reserves on two separate occasions in 2013 and (ii) that Zimmerman knew about "possible" improper payments to Brazilian government officials. Neither claim alleges any actual misconduct by Zimmerman, nor does Hertz allege any connection between these allegations and the Restatement. Hertz's allegations come nowhere close to supporting an inference of gross negligence or misconduct by Zimmerman.

Second, even if Hertz could proceed against Zimmerman based on group pleading—which it cannot—Hertz's allegations amount to nothing more than a claim that the Company made a series of business decisions with ultimately bad

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expenses in connection with Hertz's clawback claims. Hertz has agreed to abide by that Court's ruling on advancement. The defendants' indemnification claim remains pending in the Delaware Court of Chancery.

[3] Hertz's Complaint Filed March 25, 2019, Dkt. 1 ("Complaint" or "Compl.").

results. These allegations do not state a claim for grossly negligent conduct under the high standard set by Delaware law.

Finally, Hertz's damages claim is untenable. Hertz seeks to recover incentive compensation paid to Zimmerman ***and*** more than $200 million in consequential damages, consisting of costs incurred subsequent to the Restatement (defending a securities lawsuit, shareholder demands, and various government investigations). Hertz alleges that this $200 million in damages is the result of alleged misrepresentations by Zimmerman in his Separation Agreement. But the Separation Agreement was entered into ***after*** all the events triggering the need to restate occurred and ***after*** an associated investigation by outside counsel. Those damages cannot flow from supposed misrepresentations that had not yet occurred. And in any event, Hertz does not set forth factual allegations showing that Zimmerman's conduct proximately caused those damages.

This case is nothing more than a post hoc attempt by Hertz's board of directors to find scapegoats in any possible corner.[4] Forcing Zimmerman to defend this action given the paucity of allegations against him would contravene the Supreme Court's

[4] In the event that this case proceeds to trial, the Defendants intend to show, among other things, that this suit is baseless and a thinly veiled cover up by activist investors who are represented on the Board and have presided over four years of poor performance and declining stock value since acquiring control of the Company and Board in 2014.

admonition that "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). For all these reasons, the Complaint should be dismissed with prejudice.

BACKGROUND

From 2007 to 2014, Jeffrey Zimmerman served as the General Counsel and an executive officer of Hertz. In 2010, the Company established a policy (later amended in 2014) allowing it to claw back certain incentive compensation paid to executives under certain conditions. Ex. A (2010 Clawback Policy) & B (2014 Clawback Policy).[5]

In November 2014, Hertz announced that it would restate its financial statements for the years 2011, 2012, and 2013 as a result of accounting errors. *See* Ex. C (November 14, 2014 Form 8-K). At the same time, Hertz also announced that it had substantially completed an investigation by the audit committee, through outside counsel, into those accounting errors. *Id*.

In December 2014, Zimmerman left his position at Hertz and entered into a Separation Agreement with the Company, which set forth the circumstances under which Hertz could claw back certain incentive-based compensation paid to

[5] "Ex. _" shall refer to those exhibits attached to the Declaration of Sara Norval submitted in support of this motion to dismiss.

Zimmerman. Ex. D. Specifically, Zimmerman's Separation Agreement provides that the Company's Clawback Policies "[1] may only be trigged if Zimmerman engaged in gross negligence, fraud, or willful misconduct…that [2] caused or contributed to the need for the restatement of the Company's financial statements…" *Id*. ¶ 9(b).[6] Consistent with the second requirement, the Separation Agreement also provides that "Zimmerman's decisions unrelated to such financial statements while employed by the Companies…cannot be used as a basis for triggering such claw back and compensation recovery provisions." *Id.* Zimmerman's Separation Agreement is governed by Delaware Law. *Id*. ¶ 15(f) ("this Agreement shall be construed and enforced under the laws of the State of Delaware without regard to its conflict of law rules").

When Hertz announced Zimmerman's departure, it disclosed that it was a "qualifying termination" as defined in the Hertz Severance Plan, which is a

[6] Because Hertz relied upon the Clawback Policies and Zimmerman's Separation Agreement, as well as the Restatement 10-K, in the Complaint, the Court may consider them on a motion to dismiss. *Baldeo v. City of Paterson*, No. 18-5359, 2019 WL 277600, at *5 (D.N.J. Jan. 18, 2019) ("When deciding a motion to dismiss, a court typically does not consider matters outside the pleadings. However, a court may consider documents that are integral to or explicitly relied upon in the complaint or any undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff[']s claims are based on the document.") (internal quotations and citations omitted).

termination not for cause.[7] Tellingly, Hertz paid out approximately $1.6 million in cash compensation and agreed to allow certain non-cash equity awards to vest following Zimmerman's termination ***after*** announcing the need for the Restatement and ***after*** an investigation into the causes of the accounting errors by the audit committee and outside counsel was substantially complete.

STANDARD OF REVIEW

"To survive a motion to dismiss, the plaintiff must provide more than labels and conclusions and a formulaic recitation of the elements of a cause of action will not do." *Connelly v. Steel Valley Sch. Dist.*, 706 F.3d 209, 212 (3d Cir. 2013) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (quotations omitted). "The plaintiff must allege enough facts to state a claim to relief that is plausible on its face." *Id.* The plaintiff must plead facts that "show more than a sheer possibility that a defendant has acted unlawfully." *Id.* The Third Circuit has "cautioned that the factual allegations in the complaint must not be so undeveloped that it does not provide a defendant the type of notice

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[7] *See* Ex. C, November 14, 2014 Form 8-K announcing Restatement and substantial completion of the Audit Committee's investigation into accounting errors; *see also* Ex. E, December 5, 2014 Form 8-K announcing Zimmerman's departure as a "qualifying termination" within the meaning of the Hertz Severance Plan – meaning a termination not for cause. The Court may take judicial notice of SEC filings on a motion to dismiss. *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000) ("[W]e will take judicial notice of the SEC filings" on review of a motion to dismiss ruling).

of claim which is contemplated by Rule 8." *Umland v. PLANCO Fin. Servs.*, 542 F.3d 59, 64 (3d Cir. 2008) (internal quotations omitted).

ARGUMENT

I. The Complaint Fails to State a Claim For Breach of Contract.

A. The Complaint Does Not Plead Specific Allegations Against Zimmerman.

A complaint against multiple defendants must "separate out the liability for each defendant." *Sheeran v. Blyth Shipholding S.A.*, No. 14-5482, 2015 WL 9048979, at *3 (D.N.J. Dec. 16, 2015). It cannot "lump[] Defendants together as a group and assert[] general common factual allegations against all of them." *Id*. This type of "group pleading" does not state a claim "because it does not place Defendants on notice of the claims against each of them." *Id.*; *Japhet v. Francis E. Parker Memorial Home, Inc.*, No. 14-01206, 2014 WL 3809173, at *2 (D.N.J. July 31, 2014) ("Alleging that 'Defendants' undertook certain illegal acts—without more—injects an inherently speculative nature into the pleadings, forcing both the Defendants and the Court to guess who did what to whom when. Such speculation is anathema to contemporary pleading standards."); *Ingris v. Borough of Caldwell*, No. 14-855, 2015 WL 3613499, at *5 (D.N.J. June 9, 2015) ("[T]o the extent Plaintiff seeks to lump several defendants together without setting forth what each particular defendant is alleged to have done, he has engaged in impermissibly vague group pleading"). Where, as here, each defendant "occupied different positions

and…had distinct roles in the alleged misconduct, Plaintiffs cannot merely state that '*Defendants* did *x*' – they must specifically allege *which* Defendants engaged in what wrongful conduct." *Falat v. Cty. of Hunterdon*, No. 12-6804, 2013 WL 1163751, at *3 (D.N.J. Mar. 19, 2013).

Hertz must set forth specific factual allegations supporting an inference that (1) ***Zimmerman*** engaged in gross negligence, fraud, or willful misconduct[8] and that (2) ***Zimmerman's*** conduct caused the Restatement. Ex. D ¶ 9(b). Hertz has not met its burden because nearly all of Hertz's allegations are stated against the Defendants generally rather than against Zimmerman specifically, the minimal allegations asserted against Zimmerman specifically fall far short of sufficiently alleging gross negligence, and Zimmerman's Separation Agreement bars any attempt to invoke the Clawback Policies based on decisions by him that are not related to the Restatement.

Hertz's generalized allegations fall into two categories: a failure to correct internal control deficiencies (Compl. ¶¶ 26-40) and a failure to correct accounting errors, including an inappropriate tone at the top. Compl. ¶ 41. Hertz's allegations of a failure to correct internal control deficiencies contain ***no allegations*** directed at Zimmerman. The Complaint's section supposedly detailing how "Defendants

[8] The 2010 Clawback Policy required proof of "gross negligence, fraud, or misconduct," while the amended and restated 2014 Clawback Policy requires "gross negligence, fraud, or *willful* misconduct." Ex. A (2010 Clawback Policy) & Ex. B (2014 Clawback Policy) (emphasis added).

Materially Weaken[ed] Hertz's Internal Controls" does not even mention Zimmerman's name. *See* Compl. Section IV.A. Instead, Hertz relies solely on impermissible group pleading against the "Defendants" generally. *Id*. ¶ 27 ("Defendants were aware of yet failed to correct" internal control deficiencies); ¶ 31 ("This deficiency was the result of Defendants' effort to aggressively cut costs…"); ¶ 34 ("Defendants chose to push for major changes in its accounting processes…"); ¶ 37 ("As a result of Defendants' poor management…"). This is insufficient to state a claim against Zimmerman.

Similarly, Hertz's allegations of accounting errors, including inappropriate tone at the top, fail to specify Zimmerman's alleged misconduct. Hertz says only that "Douglas and Zimmerman fueled and/or failed to counterbalance" the "inappropriate 'tone at the top.'" Compl. ¶ 41. While Hertz claims to offer "examples" that are "illustrative" of that tone, ***not one of the examples that follows mentions Zimmerman***. And the Complaint is silent regarding specific examples of any inappropriate tone which Zimmerman fueled, failed to oppose, or failed to report to Hertz's Board of Directors. In short, Hertz pleads no specific allegation of Zimmerman's involvement in any accounting errors.

The only two specific allegations involving Zimmerman in the entire Complaint fall far short of supporting an inference of gross negligence or willful misconduct. Initially, Hertz alleges that "during the January 2013 close, Frissora

urged Zimmerman to conduct a granular review of the legal reserves to help the Company 'bridge the gap' for year-end results" and that again in September 2013, Frissora "urged Zimmerman to review legal reserves to help close the quarter." *Id*. ¶ 21(c). But Hertz does not (and cannot) allege that Zimmerman engaged in any adjustment of legal reserves, let alone engaged in gross negligence or misconduct. At most, Hertz's allegations suggest that Frissora pressured Zimmerman, which cannot possibly state a claim against Zimmerman (or Frissora for that matter).

In the only other specific allegation against Zimmerman, Hertz alleges that Zimmerman "was aware of possible improper payments to Brazilian government officials, but failed to disclose what he knew to the Board." Compl. ¶ 21(b). As an initial matter, Zimmerman's awareness of "possible" misconduct ***by others*** does not support an inference of gross negligence or misconduct on his part. But regardless, Zimmerman's Separation Agreement provides that "Zimmerman's decisions unrelated to such financial statements while employed by the Companies…cannot be used as a basis for triggering such claw back and compensation recovery provisions." Ex. D ¶ 9(b). Hertz does not (and cannot) allege that this alleged conduct contributed to the Restatement or is otherwise related to the Company's financial statements. Compl. ¶ 21. Beyond the absence of such allegations, Hertz's Restatement 10-K—which Hertz attached as an exhibit to the Complaint—lists the

items that resulted in the Restatement and makes no mention any "improper payments to Brazilian government officials." Compl. Ex. 1 at 7-8 of 19.

In summary, Hertz's group pleading fails to state a claim because it does not put Zimmerman on notice of the specific allegations against him. Hertz has impermissibly "lump[ed] Defendants together as a group and assert[ed] general common factual allegations against all of them." *Sheeran*, 2015 WL 9048979, at *3. And the minimal specific allegations against Zimmerman do not support an inference that Hertz is entitled to relief. Therefore, all claims against Zimmerman should be dismissed.

B. The Complaint Does Not State A Claim for Gross Negligence.

Even if the Court were to consider the Complaint's impermissible group pleading, Hertz's allegations also fail because they do not clear Delaware's "high bar of gross negligence."[9] *Zucker v. Hassell*, No. 11625, 2016 WL 7011351, at *2 (Del. Ch. Nov. 30. 2016); *see In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 652 (Del. Ch. 2008) ("The definition of gross negligence used in our corporate law jurisprudence is extremely stringent."). Under Delaware law, "gross negligence is conduct that constitutes reckless indifference or actions that are *without the bounds of reason*." *McPadden v. Sidhu*, 964 A.2d 1262, 1274 (Del. Ch. 2008) (emphasis

[9] Zimmerman's Separation Agreement is governed by Delaware Law. Ex. D at ¶ 15(f) ("[T]his Agreement shall be construed and enforced under the laws of the State of Delaware without regard to its conflict of law rules").

added). In order to be grossly negligent, conduct "has to be so grossly off-the-mark as to amount to reckless indifference or a gross abuse of discretion." *Solash v. Telex Corp.*, 13 Del. J. Corp. L 1250, 1264 (Del. Ch. 1988) (internal citations and quotations omitted). "In the context of a motion to dismiss…gross negligence requires the articulation of facts that suggest a *wide* disparity between the process [the defendants] used and the process which would have been rational." *In re TIBCO Software Inc. Stockholders Litig.*, No. 10319, 2015 WL 6155894, at *23 (Del. Ch. Oct. 20, 2015) (internal citations and quotations omitted).

The Complaint alleges a series of supposed failures to prevent certain decisions that Hertz believes, in hindsight, were harmful to the Company, including a failure to "stop, counterbalance, [or] offset" an inappropriate tone at the top, failure to report that tone to the Board of Directors, and failure to correct internal control deficiencies (although, as discussed above, the Complaint does not specifically allege Zimmerman had a role in any of these alleged failures). Compl. ¶¶ 6, 27.

For example, the Complaint alleges that "Defendants collectively employed or otherwise acquiesced in aggressive accounting," and that Defendants supported the acquisition of and integration with Hertz's competitor Dollar Thrifty and the relocation of the Company's headquarters from New Jersey to Florida, which "resulted in the departure of more than half of Hertz's corporate office personnel." Compl. ¶ 7 (emphasis omitted). In effect, Hertz alleges that the Company's

executives made a series of business decisions with regrettable results. These allegations are insufficient to state a claim against any of the Defendants, let alone Zimmerman. Hertz does not (and could not) claim that Zimmerman's role as General Counsel involved control over the Company's accounting department, accounting methodology, the integration of another company into Hertz's systems, the physical location of Hertz's headquarters, or the decision of Hertz employees to leave the Company. Hertz admitted as much in its public filings, in which it told investors that the Company's Chief Risk Officer, not Zimmerman, oversaw the audit functions, including financial risk and internal controls.[10] Even in its Complaint, Hertz admits that the CEO, not Zimmerman, had the ultimate responsibility "to ensure Hertz was adequately mitigating its financial risks." Compl. ¶ 19(a). And even if Zimmerman had authority over these decisions (he did not), Hertz has not alleged any facts suggesting that these decisions amount to reckless indifference or "actions that are ***without the bounds of reason***." *McPadden*, 964 A.2d at 1274. It cannot be the case that run-of-the mill, non-legal business decisions—even taken together—amount to gross negligence by the Company's General Counsel.

Moreover, although Hertz repeatedly complains that Zimmerman failed to "stop, effectively counterbalance, or otherwise offset or report to Hertz's board of directors…Frissora's inappropriately forceful tone," the Complaint does not explain

[10] *See* Ex. F, Hertz Global Holdings' March 28, 2013 Proxy Statement at p. 4.

how this supposed failure amounted to gross negligence. Compl. ¶ 6. Instead, Hertz offers only the conclusory allegation that "Defendants' wrongful 'tone at the top' was a form of misconduct and gross negligence because it exacerbated various risk factors." *Id*. ¶¶ 6, 7. Zimmerman's mere presence at the Company is insufficient to raise even an inference that his alleged failure to challenge or report an inappropriate tone amounted to gross negligence. Plaintiffs' unsupported legal conclusions do not state a claim.

Hertz has not set forth factual allegations supporting the inference that any of the defendants' conduct—including Zimmerman's—rises to the level of gross negligence. For this reason too, the claims against Zimmerman must be dismissed.

II. Hertz's Claim for Damages Beyond Compensation Must Be Dismissed.

Hertz claims that Zimmerman breached the terms of his Separation Agreement (Count IV). Though the pleading is less than clear regarding what terms were breached or what conduct operated as a breach, Hertz nevertheless claims massive damages. Specifically, the Complaint claims more than $200 million in alleged consequential damages above and beyond the supposedly excess compensation that Hertz is seeking to claw back. Hertz alleges no causal link between Zimmerman's conduct and these damages. These claims should be dismissed.

It is hornbook contract law that contract damages "are designed to place the injured party in an action for breach of contract in the same place as he would have been if the contract had been performed. Such damages should not act as a windfall." *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146 (Del. 2009); *Hajoca Corp. v. Sec. Tr. Co.*, 25 A.2d 378, 381–82 (Del. Super. Ct. 1942) ("[T]he law does not hold one liable for all injuries that follow a breach of contract, but only for such injuries as are the direct, natural and proximate result of the breach."); *McClain v. Faraone*, 369 A.2d 1090, 1092 (Del. Super. Ct. 1977) ("[D]amages which are recoverable for breaches of duties created by contract are those injurious consequences which 'might have been foreseen or anticipated' as being likely to follow from the negligent act or breach…").

Hertz claims damages resulting from a class action securities lawsuit, shareholder derivative demands, an SEC investigation, a Department of Justice investigation, and a laundry list of other items, including Hertz's legal fees, audit fees, and excess taxes, totaling more than $200 million. Compl. ¶¶ 54-75.

The alleged connection between these damages and Zimmerman's conduct is illogical because Zimmerman's Separation Agreement was signed ***after*** all these alleged damages were incurred. The class action lawsuit was filed in 2013, the SEC investigation was opened in June 2014, and Hertz's own internal investigation through outside counsel was substantially complete before Hertz and Zimmerman

entered into the Separation Agreement in December 2014. Ex. C (Nov. 14, 2014 8-K announcing Restatement and substantial completion of related investigation) & E (Dec. 5, 2014 8-K announcing Zimmerman's "qualifying termination"). Hertz alleges that Zimmerman's supposed false representation that he had not engaged in gross negligence and misconduct is the breach of contract that caused Hertz's damages. Compl. ¶¶ 116, 118, 119. But any supposed misrepresentation in that agreement did not and could not have proximately caused the consequential damages Hertz now seeks to recover. The costs of litigation and investigation were the result of events that occurred from 2011 to 2013 and led Hertz to restate its financial statements for those years – not any after-the-fact misrepresentations by Zimmerman about his own conduct. Even if there *was* a misrepresentation in the Separation Agreement, the sequence of events makes clear it could not have been a causal factor in Hertz's alleged damages.

All of these damages are far too tenuous to be recoverable for any breach of contract by Zimmerman. In fact, Delaware law explicitly prohibits damages for the cost of defending against a claim by a third party. *Frunzi v. Paoli Servs., Inc.*, No. N11A-08-001, 2012 WL 2691164, at *9 (Del. Super. Ct. July 6, 2012) (affirming trial court decision "declin[ing] to extend Delaware case law when no other authority exists or is asserted for an award of attorneys' fees in defending a third-party action") (internal quotations omitted).

Moreover, Hertz does not allege facts showing that Zimmerman's conduct caused these damages. The Complaint itself sets forth a lengthy list of intervening decisions by a wide range of actors that contributed to the need for a Restatement, which was based on fifteen separately identified errors. Compl., Ex. 1 at 7-8 of 19. Hertz asserts only the conclusory allegation that certain misrepresentations by Zimmerman in his Separation Agreement caused these damages, but does not set forth factual allegations showing how these damages are "the direct, natural and proximate result" of Zimmerman's alleged breach of contract. *Hajoca Corp.*, 25 A.2d at 381–82. Hertz's $200 million claim for damages beyond the alleged excess compensation paid to Zimmerman must therefore be dismissed.

CONCLUSION

For the foregoing reasons, Zimmerman respectfully requests that the Court dismiss Counts I, III and IV against him with prejudice.

Dated: June 20, 2019

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