IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

GILMORE'S FARM, INC. Plaintiff, v. HERC RENTALS, INC. Defendant,	**No. 1:20-CV-578** **MEMORANDUM OF LAW IN SUPPORT OF HERC RENTALS, INC.'S MOTIONS TO DISMISS**

NOW COMES Defendant Herc Rentals, Inc. ("Plaintiff"), by and through undersigned counsel, and hereby submits this Memorandum of Law in Support of its Motions to Dismiss and shows unto the Court as follows:

STATEMENT OF THE CASE

This case concerns the destruction by fire of an excavator (the "Rental Equipment") which was rented by Plaintiff Gilmore's Farm, Inc. ("Gilmore's Farm") from Herc Rentals, Inc. ("Herc Rentals"). Gilmore's Farm filed the initial action in this matter on or about October 2, 2020 and had a summons issued the same day. It is unclear if the original complaint has been issued, but undersigned counsel obtained a copy from opposing counsel on October 9, 2020. An Amended Complaint (the "Amended Complaint" and cited herein as the "Am. Compl.") was filed on October 23, 2020 to note the cancellation of the lien on real property and to attach an originally omitted Exhibit A.

In this action, removed from Johnston County Superior Court, Plaintiff Gilmore's Home alleges three causes of action. One is grounded squarely on breach of

the rental agreement. The second cause of action implicates the rental agreement and North Carolina's lien law to seek recovery under North Carolina's Unfair and Deceptive Trade Practices Act. The third cause of action asserts a negligence claim.

Each purported cause of action is subject to dismissal for failure to state a claim upon which relief can be granted. The first cause of action seeks, at most, an advisory declaration from this Court. The second cause of action seeks to transmute a breach of contract claim into one arising out of statute, but falls short due to a lack of damages, a failure to allege proximate cause, and a misapprehension of the applicable North Carolina law on liens. Finally, the third cause of action is barred by the economic loss rule, but also falls short of alleging the damages and proximate cause necessary to survive a motion to dismiss.

STATEMENT OF FACTS

Plaintiff Gilmore's Farm was a first-tier subcontractor, hired by Wellons Construction, Inc. ("Wellons") to clear land for a development known as the North Creek Meadows Project (the "Project"). Am. Compl. at ¶¶5¬6. Gilmore's Farm rented the Equipment, an excavator, from defendant Herc Rentals on March 10, 2020. *Id*. at ¶7. Gilmore's Farm and Herc Rentals executed a contract governing the rental of the Equipment at the same time and on the same date (the "Rental Agreement"). Id. That Rental Agreement contained a Rental Protection Program which plaintiff believes limits its liability to defendant in the event the Equipment lost or damaged. *Id*. at ¶¶21¬24.

The Equipment later "burst into flames" and Herc Rentals issued an invoice to Gilmore's Farm for $109,556.39, reflecting the total cost of the Equipment ($95,282.97) and the outstanding rental costs ($14,273.42). *Id*. at ¶26. The cause of the fire is unclear. While Gilmore's Farm alleges in the Amended Complaint that the Equipment "burst into flames" by what was determined by a local fire department to have been an "equipment malfunction," the actual findings by the local fire department in question reveal that the cause of the fire was and remains undetermined. *Id*. at ¶¶10¬11, 25; Am. Compl., Exhibit A.

The Amended Complaint uses the terms "lien on funds" and "lien on real property" interchangeably in apparent error, but the thrust of the allegations are that Herc Rentals filed a lien on real property and served a lien on funds for the amount of the unpaid invoice. *Id*. at Exhibit A, ¶¶13, 27, 33¬34. This lien was filed on August 25, 2020, *id*, and was cancelled on or about October 12, 2020. *Id*. at ¶14.

It is unclear what, if any, damages plaintiff alleges that Gilmore's Farm or any other party has suffered. The Amended Complaint alleges no damages for the first cause of action, with the first, conclusory allegation that plaintiff suffered damages appearing in paragraph 39 wherein plaintiff states that "[a]s a result of the unfair, deceptive, unscrupulous, and unethical conduct of Defendant Herc [Rentals], Plaintiff [Gilmore's Farm] suffered substantial damages in an amount to be determined at trial." Am. Compl. ¶40. The plaintiff goes on to also allege that Gilmore's Farm "suffered damages in an amount to be proven at trial, but in excess of $25,000" due to the alleged failure by Herc Rentals to "maintain the Equipment in good working

condition and free from mechanical defect[.]" *Id*. at ¶45. There are not, however, any factual allegations to support these conclusions that plaintiff suffered damages or glean any understanding of the nature, extent, or cause of damages.

Gilmore's Farm instituted this action on or about October 2nd, 2020. See Am. Compl. The Amended Complaint was only ever served or otherwise provided to Herc Rentals on or about October 9, 2020. Defendant Herc Rentals promptly filed for removal, moved to dismiss, answered, and filed counterclaims and third-party claims.

ARGUMENT

A. Standard of Review

Under the Erie doctrine, a federal court sitting in diversity applies (1) the substantive law of the state in which it sits and (2) federal procedural law. *See Anand v. Ocwen Loan Servicing, LLC*, 754 F.3d 195, 198 (4th Cir. 2014); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. In evaluating whether a claim is stated, "[the] court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff," but does not consider "legal conclusions, elements of a cause of action, ... bare assertions devoid of further factual enhancement[,] ... unwarranted inferences, unreasonable conclusions, or arguments."

Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009) (citations omitted).

A plaintiff's well-pleaded factual allegations must "be enough to raise a right to relief above the speculative level," *i.e.*, allege "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Id.* at 555–56, 127 S.Ct. 1955. A speculative claim resting upon conclusory allegations without sufficient factual enhancement cannot survive a Rule 12(b)(6) challenge. *Iqbal*, 556 U.S. at 678–79, 129 S.Ct. 1937 ("where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not 'show[n]'--'that the pleader is entitled to relief.' " (quoting Fed. R. Civ. P. 8(a)(2)); *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) ("'naked assertions' of wrongdoing necessitate some 'factual enhancement' within the complaint to cross 'the line between possibility and plausibility of entitlement to relief.' " (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955)).

In reviewing a motion to dismiss under Rule 12(b)(6), the court "may consider documents attached to the complaint, *see* Fed. R. Civ. P. 10(c), as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic." *Sec'y of State For Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) (internal citations omitted). In addition, "a court may properly take judicial notice of 'matters of public record' and other information that, under Federal Rule of Evidence 201, constitute 'adjudicative facts.' " *Goldfarb*, 791 F.3d at 508; *see also*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Katyle v.*

Penn Nat'l Gaming, Inc., 637 F.3d 462, 466 (4th Cir. 2011), *cert. denied*, 565 U.S. 825 (2011); *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

B. Analysis

1. Plaintiff's Breach of Contract Claims

Under North Carolina law, the "elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Crosby v. City of Gastonia*, 635 F.3d 634, 645 (4th Cir. 2011) (quotations omitted).

However, the Amended Complaint at issue in this lawsuit has no claim for relief as to the breach of contract, and damages are not even mentioned until paragraphs later in the Amended Complaint. *See*, *generally*, Am. Compl. at ¶¶19¬27. Instead, it appears the plaintiff's first claim for relief seeks a declaratory judgment that lien claims are improper because the underlying debt, or at least part of it, may be covered by insurance. *Id.* A complaint that fails to allege an "actual, genuine existing controversy" is subject to a dismissal under N.C. R. Civ. 12(b)(6). *Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC*, 256 N.C. App. 625, 630, 808 S.E.2d 576, 581 (2017) (quoting *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 234-35, 316 S.E.2d 59, 62 (1984) (citation omitted)). As noted above, there is no existing controversy because the lien has been canceled. *See* Am. Compl. at ¶14.

In North Carolina, actions seeking a declaratory judgment are subject to the Uniform Declaratory Judgment Act ("NCUDJA") and require, as a jurisdictional prerequisite, that there be a specific controversy at the time of the filing of the complaint and when the matter comes before the court for hearing. *Chapel H.O.M.*,

256 N.C. App. at 629–30, 808 S.E.2d at 580 (citing *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 584-85, 347 S.E.2d 25, 29 (1986)). "To satisfy the jurisdictional requirement of an actual controversy, it must be shown in the complaint that litigation appears unavoidable. Mere apprehension or the mere threat of an action or suit is not enough." *See Chapel H.O.M.*, 256 N.C. App. at 630, 808 S.E.2d at 580 (citing and quoting *Tryon v. Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942) (citations omitted)). In other words, "[a]n actual controversy must exist to prevent courts from rendering a 'purely advisory opinion which the parties might, so to speak, put on ice to be used if an when the occasion might arise.'" *Id.* (citing *Tryon*, 222 N.C. at 204, 22 S.E.2d at 453).

Federal law on declaratory judgment claims is the same in these material respects. Declaratory relief sought under the Federal Declaratory Judgment Act does not impose a mandatory obligation on a federal district court, but rather permits a district court to decide the issue if the declaration of rights will serve a useful purpose in affording relief from uncertainty or a controversy that will lead to a legal proceeding. *See Moses H. Cone Mem'l Hosp. Operating Corp. v. Springfield Serv. Corp.*, No. 1:13CV651, 2014 WL 12935967, at *2 (M.D.N.C. July 18, 2014), *report and recommendation adopted*, No. 1:13CV651, 2014 WL 12935968 (M.D.N.C. Sept. 11, 2014) (citing and quoting *Aetna Cas. & Sur. Co. v. Ind-Com Electric Co.*, 139 F.3d 419, 421 (4th Cir. 1998) and *Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 256 (4th Cir. 1996) (parenthetical citation omitted). "Courts have repeatedly recognized that a declaratory judgment serves no 'useful purpose' when it seeks only to adjudicate an

already-existing breach of contract claim." *Moses H. Cone Mem'l Hosp.* at *3 (quoting *Operating Corp. v. Springfield Serv. Corp. Metra Indus., Inc. v. Rivanna Water & Sewer Authority*, No. 3:12CV0049, 2014 WL 652253, at *3 (W.D. Va. Feb. 19, 2014) (unpublished)). Similarly, a district court should dismiss a claim for declaratory relief where it may have "no real-world impact" because "its utility would be contingent upon multiple outcomes that may never occur." *Old Republic Ins. Co. v. C&G Express Trucking, LLC*, No. 5:20-CV-00082-M, 2020 WL 2772767, at *3 (E.D.N.C. May 28, 2020) (slip copy) (dismissing a claim for declaratory judgment seeking to establish limits of liability under and insurance contract). Affirmative defenses may also be improper for a court to determine through a declaratory judgment. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 140, 127 S. Ct. 764, 779, 166 L. Ed. 2d 604 (2007)

As an initial matter, the first claim for relief provides no notice of the actual claim, much less that there is an actual controversy about a specific issue about which the plaintiff seeks clarification. The first claim for relief may be dismissed as simply failing to state any claim for relief.

However, giving the plaintiff the benefit of the doubt, the first claim for relief seeks a declaratory judgment on lien rights that are moot. As the lien has already been cancelled, this claim is unnecessary and of no moment. It is not an actual, existing controversy. To the extent the claim seeks to establish limits of liability or another affirmative defense in anticipation of a lawsuit by defendants, this Court should decline to issue such an advisory opinion just as it did in *Old Republic Ins. Co. v. C&G Express Trucking, LLC*, *supra*.

2. Unfair and Deceptive Trade Practices

"To plead a valid claim for [violation of the UDTPA], a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Krawiec v. Manly*, 370 N.C. 602, 612, 811 S.E.2d 542, 550 (2018) (citation and quotation omitted).

"A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers," *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980), overruled on other grounds, *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988), and is deceptive when it has the capacity or tendency to deceive, *RD & J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 748, 600 S.E.2d 492, 501 (2004). Whether an act is unfair or deceptive is a question of law for the court. *See Gilbane Bldg. Co. v. Fed. Reserve Bank*, 80 F.3d 895, 902 (4th Cir. 1996); *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 96, 331 S.E.2d 677, 681 (1985).

A claim must allege more than an intentional breach of contract to allege a violation of the UDTPA. *See*, *e.g.*, *Harty v. Underhill*, 211 N.C. App. 546, 552, 710 S.E.2d 327, 332 (2011) ("[A] mere breach of contract does not constitute an unfair or deceptive act. Egregious or aggravating circumstances must be alleged before the provisions of the [UDTPA] may take effect."); *Eastover Ridge, LLC v. Metric Constructors, Inc.*, 139 N.C. App. 360, 367–68, 533 S.E.2d 827, 832–33 (2000) ("[I]t is

well recognized ... that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under [N.C. Gen. Stat.] § 75-1.1."); *see also*, *Dalton v. Camp*, 353 N.C. 647, 657, 548 S.E.2d 704, 711 (2001) (quoting *Allied Distribs., Inc. v. Latrobe Brewing Co.*, 847 F. Supp. 376, 379 (E.D.N.C. 1993)). While rare, a breach of contract may support a UDPA claim when the breach is accompanied by "[e]gregious or aggravating circumstances." *Ellis v. La.–Pac. Corp.*, 699 F.3d 778, 787 (4th Cir.2012). "Such circumstances typically involve forged documents, lies, and fraudulent inducements." *Davis v. State Farm Life Ins. Co.*, 163 F. Supp. 3d 299, 307 (E.D.N.C. 2016) (citing *Stack v. Abbott Labs., Inc.*, 979 F.Supp.2d 658, 667 (M.D.N.C.2013)); *see also*, *Window Gang Ventures, Corp. v. Salinas*, No. 18 CVS 107, 2019 WL 1471073, at *20 (N.C. Super. Apr. 2, 2019) (providing list and citations of North Carolina and Federal Court decisions).

Here, the Amended Complaint seems to allege defendant did only one thing to engage in "unfair and deceptive trade practices[,]" and that was to "deliberately, unscrupulously, and deceptively disregard the terms" of the Rental Agreement. Am. Compl. at ¶30. These allegations, even taken as true, reflect nothing more than a mere breach of contract. The Amended Complaint is devoid of any lies, forgery, fraud, or other allegations sufficient to support a claim for violation of the UDTPA. At best, the plaintiff's factual allegations assert an intentional breach of contract that falls short of supporting a claim for unfair and deceptive practices.

The only other allegations, regarding the propriety of the now-dismissed lien, are just incorrect recitations of the law. *See*, *e.g.*, Am. Compl. at ¶¶33-38. Specifically, the decision cited in paragraph 35 and then relied upon through paragraphs 31 through 36 is no longer applicable as the lien statute at issue was amended (in response to the decision in question) to specifically acknowledge and include rental equipment as part of the lien statute. *See Steel Erectors, Inc. v. Inco, Inc.*, 108 N.C. App. 429, 432, 424 S.E.2d 433, 436 (1993) (interpreting prior version of law and noting that "Article 2 of Chapter 44A provides no definition for the term "labor and materials"); *cf* N.C. Gen. Stat. § 44A-7 (definition section clarifying that lien rights extend to "rental of equipment directly utilized on the real property in making the improvement."). As such, these allegations cannot form the basis for the UDTP claim, and the second cause of action should be dismissed with prejudice.

3. Plaintiff's Negligence Claim

"To state a claim for common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Fussell v. N. Carolina Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010) (internal quotations omitted).

To state a claim for negligence sufficiently to withstand a Rule 12(b)(6) challenge, a plaintiff must plausibly allege " 'the essential elements of negligence: duty, breach of duty, proximate cause, and damages.' " *Olds v. United States*, 473 F. App'x 183, 185 (4th Cir. 2012) (quoting *Camalier v. Jeffries*, 340 N.C. 699, 706, 460 S.E.2d 133, 136 (1995)); *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955 (plausibility

standard). The standard is the same for pleading a *prima facie* claim for common law negligence in North Carolina. *See Fussell v. N. Carolina Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010) (internal quotations omitted).

b. Economic Loss Rule Generally

"North Carolina's economic loss rule provides that 'ordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor.' " *Legacy Data Access, Inc. v. Cadrillion, LLC*, 889 F.3d 158, 164 (4th Cir. 2018) (quoting *N. Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 81 (1978), *rejected in part on other grounds*, *Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230 (1985)). "More specifically, it prohibits recovery for purely economic loss in tort when a contract, a warranty, or the UCC operates to allocate risk." *Severn Peanut Co. v. Indus. Fumigant Co.*, 807 F.3d 88, 94 (4th Cir. 2015) (citation and quotations omitted). Under this rule, a "tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract." *Legacy Data Access*, 889 F.3d at 164 (quotations omitted). "It is the law of contract, not tort law, which defines the obligations and remedies of the parties in such a situation." *Id*. (quotations omitted).

"Accordingly, North Carolina law requires courts to limit plaintiffs' tort claims to only those claims which are identifiable and distinct from the primary breach of contract claim." *Id*. (quotations omitted) (quoting *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 346 (4th Cir. 1998)). "Only where a breach of contract also constitutes an 'independent tort' may tort actions be pursued." *Strum v. Exxon Co.,*

U.S.A., a Div. of Exxon Corp., 15 F.3d 327, 330 (4th Cir. 1994). This bar for pleading an independent tort is high because it is "unlikely that an independent tort could arise in the course of contractual performance, since those sorts of claims are most appropriately addressed by asking simply whether a party adequately fulfilled its contractual obligations." *Id.*; *see N. Carolina State Ports Auth.*, 294 N.C. at 83 ("[O]ur research has brought to our attention no case in which this Court has held a tort action lies against a promisor for his simple failure to perform his contract, even though such failure was due to negligence or lack of skill.").

"[T]he relevant inquiry under North Carolina case law is whether the plaintiff 'ha[s] [a] basis for recovery in contract or warranty.' " *Ellis v. Louisiana-Pac. Corp.*, 699 F.3d 778, 786 (4th Cir. 2012) (quoting *Warfield v. Hicks*, 91 N.C. App. 1, 10 (1988)).

Here, plaintiff alleges that it had a contract ¬ the Rental Agreement ¬ with defendant. Am. Compl. at ¶7. That Rental Agreement contains express provisions governing the loss of the Equipment, including a clause that plaintiff seeks to assert as limiting its liability completely. *Id.* at ¶¶7, 21¬24. While plaintiff alleges negligence, the only duty reasonably inferable from the allegations of the Amended Complaint would be ones arising out of the Rental Agreement. *See* Am. Compl. Therefore, plaintiff has essentially alleged that defendant defaulted on its contractual obligations under the Rental Agreement by failing "to maintain the Equipment in good working condition and free from mechanical defects," which is the only

purported failure or negligence by defendant that caused plaintiff to suffer any damages. Am. Compl. at ¶45.

These allegations are similar to those in *North Carolina State Ports Authority*. There, the North Carolina Supreme Court held that a property owner who contracted for construction of buildings was not entitled to recover in tort from the contractor who allegedly did not construct the roofs as agreed. 294 N.C. at 83; *see also*, *Spillman v. Am. Homes of Mocksville, Inc.*, 108 N.C. App. 63, 65 (1992) (applying the economic loss rule to similar facts). Plaintiff's negligence claim here is analogous to the preceding case.

3. Lack of Damages and Proximate Cause

As detailed above, the second and third causes of action require that damages be pled with sufficient specificity or factual support to meet the requirements of Rule 8. Further, the second and third causes of action both require the damages in question be proximately caused by the defendant. Both claims for relief fail as to the same elements, damages and proximate cause.

First, the Amended Complaint is entirely devoid of facts supporting allegations of damages resulting from Defendant's acts or omissions. The conclusory allegation of damages is not entitled to a presumption of truth. *Iqbal*, 556 U.S. at 681 (holding conclusory allegations and "formulaic recitation[s] of the elements of a cause of action" are not entitled to the Court's consideration).

Plaintiff's bald allegations of damages cannot be assumed, deduced, or otherwise supported by well-pled facts. The mere fact plaintiff has incurred attorneys'

fees related to the lien is not a principal damage sufficient to support their claims, s*ee Davis v. State Farm Life Insurance Co.*, 163 F. Supp. 3d 299, 308 (E.D.N.C. 2016) (attorneys' fees not recoverable as principal damage in UDTPA action), though such attorney fee damages are not even implied or asserted in the Amended Complaint. Instead, the Amended Complaint makes clear that all the defendant is alleged to have done is to seek payment and reimbursement from the plaintiff – no money has, or is alleged to have, been recovered by the defendant. The only actual loss at issue is the Equipment, which is the sole property of defendant.

Even assuming there are damages the plaintiff has suffered, the Amended Complaint is devoid of proximate cause or allegations supporting the same. At best, and assuming damages actually were suffered, plaintiff seeks to take defendant to discovery based upon the *post-hoc-ergo-propter-hoc* logical fallacy that courts uniformly reject. *See Deltek, Inc. v. Dep't of Labor*, 649 F. App'x 320, 337 (4th Cir. 2016) ("Post hoc ergo propter hoc is 'a fallacy because it makes an assumption based on the false inference that a temporal relationship proves a causal relationship.' " (Agee, J., dissenting) (emphasis omitted) (quoting *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1243 (11th Cir. 2005)); *J. W. v. Johnston Cnty. Bd. of Educ.*, No. 5:11-CV-707-D, 2014 WL 4771613, at *12, 2014 U.S. Dist. LEXIS 134342, at *30-32 (E.D.N.C. Sept. 24, 2014) (rejecting post-hoc-ergo-propter-hoc theory of causation). As the Amended Complaint has no proximate cause, the second and third causes of action are properly dismissed for failing to state a claim upon which relief may be granted.

Conclusory allegations are not accepted as true by courts adjudicating Rule 12(b)(6) challenges. *Iqbal*, 556 U.S. at 678; *see Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 276 (6th Cir. 2010) ("We need not accept as true legal conclusions or unwarranted factual inferences, and conclusory allegations or legal conclusions masquerading as factual allegations will not suffice." (quotation marks and citations omitted)). Instead, the allegations of harm and damages are nothing more than mere "naked assertions of wrongdoing [without the] factual enhancement [necessary] to cross the line between possibility and plausibility of entitlement to relief." *Francis*, 588 F.3d at 193 (quotation marks and citations omitted). The Court and defendant are left entirely to speculate as to what damages the plaintiff has suffered, if any, and what Herc Rentals might have done or not done when renting the Equipment to avoid those damages (i.e., allegations of proximate cause). Where the court is left to so speculate, the claim at issue fails to "to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555–56, and cannot withstand a Rule 12(b)(6) motion to dismiss.

Conclusion

For the foregoing reasons, each cause of action in the Amended Complaint is subject to dismissal with prejudice.

[Signature page follows]

Respectfully submitted, this 3rd day of November, 2020.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this memorandum of law complies with the applicable word limit set forth in Local Civil Rule 7.2.(f)(3) and contains 4,280 words not including those portions of the memorandum set forth in Local Civil Rule 7.2(f)(1).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **MEMORANDUM OF LAW IN SUPPORT OF HERC RENTALS, INC.'S MOTIONS TO DISMISS** on all counsel of record via U.S. Mail as follows:

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This the 3rd day of November, 2020.

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