UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FRANCES YVONNE SCHULMAN, Plaintiff, vs. ZOETIS, INC. and ZOETIS REFERENCE LABS, LLC, Defendants.	: : : : : : : : : :	Civil Action No. 2:22-cv-01351 **Return date: June 17, 2024**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, TO STRIKE PLAINTIFF'S PRAYER FOR PUNITIVE DAMAGES

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PRELIMINARY STATEMENT

Defendants, Zoetis, Inc. and Zoetis Reference Labs, LLC ("ZRL") (collectively, "Defendants"), are entitled to summary judgment as to Plaintiff, Dr. Frances Yvonne Schulman's ("Plaintiff"), claims in the Amended Complaint, including equal pay act claims under the Federal Equal Pay Act, 29 U.S.C. § 206(d), et seq. ("Federal EPA") and New Jersey's Diane B. Allen Equal Pay Act, N.J.S.A. § 10:5-12(t) ("NJEPA"), as well as gender discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII") and the New Jersey Law Against Discrimination, N.J.S.A. § 10:5-12, et seq. ("LAD").

As an initial matter, Plaintiff's claims are procedurally deficient. First, Zoetis, Inc. is not a proper party. ZRL, not Zoetis, Inc., was Plaintiff's employer. Other than the fact that Zoetis, Inc. is the ultimate parent company of ZRL, there is simply no evidence to establish liability against Zoetis, Inc. Second, New Jersey law is not applicable to Plaintiff's claims as it is undisputed Plaintiff was at all times employed in New Hampshire, not New Jersey. Thus, there is no basis to support application of New Jersey law to the facts of this case.

Plaintiff's claims are also substantively deficient. The undisputed record evidence establishes a legitimate, business decision was made to enter the market of diagnostic laboratory pathology services for animals, which would allow Zoetis, Inc. to compete with larger, established competitors through its various subsidiaries. To achieve this initiative, Zoetis Lab Holdings, LLC acquired Phoenix Central Laboratory for Veterinarians Health, Inc. ("Phoenix") and ZNLabs, LLC ("ZNLabs") on October 3, 2019 and November 21, 2019, respectively. In addition, on February 7, 2020, ZNLabs finalized its purchase of certain assets of Ethos Veterinary Health, LLC ("Ethos"). These three entities — each with separate pay practices — were thereafter integrated on January 1, 2021, to create a new entity. ZRL was formed after the Integration of ZNLabs, Phoenix, and the purchase of certain assets of Ethos Veterinary Health, LLC ("Ethos") (hereinafter

referred to as the "Integration"). It cannot be overstated that, as a new entity in this field, it was vital for ZRL to retain the talent and employees from the acquired companies, who had the expertise necessary.

As a result of these acquisitions, and, specifically, the asset purchase of Ethos, every legacy ZNLabs and Phoenix Pathologist, including Plaintiff, who was hired into ZNLabs before ZNLabs was integrated into ZRL on January 1, 2021, was being paid less than all of the legacy Ethos Pathologists, male and female, not just the two male legacy Ethos Pathologists, Dr. Eugene Ehrhart and Dr. Samuel Jennings, whom Plaintiff identifies as her comparators in her Amended Complaint. ZRL conducted pay equity reviews both prior to Integration, and after Plaintiff complained about unequal pay in March 2021. The pay equity reviews made clear that any pay disparity was not based on gender or any other protected characteristic. Rather, any discrepancy was the direct result of acquiring and integrating ZNLabs, Phoenix, and Ethos, three separate companies with three distinct pay practices, to form ZRL. There is no factual dispute that the business decision to acquire the Ethos assets accounted for the ***entire*** wage differential between Plaintiff and the other Ethos Pathologists, including Drs. Ehrhart and Jennings who, but for the ZNLabs' asset purchase agreement with Ethos, would not have been ZRL employees.

Importantly, pursuant to the terms of the contract governing the asset purchase of Ethos, employee compensation was required to be maintained for a period of no less than twelve (12) months. Therefore, ZRL made the legitimate business decision, applied uniformly to male and female employees, not to reduce or raise any salaries, instead relying on attrition, and future adjustments to compensation to address any disparity. This decision was not based on and does not perpetuate a difference in compensation based on sex, as ZRL did not reduce the salaries of the acquired female Ethos Pathologists, all of whom made significantly more than the ZNLabs and

Phoenix – male and female.[1] This decision was also based on a legitimate business necessity for ZRL to retain the talent of the acquired companies given that it was a new entity in the field of laboratory diagnostic services. These facts establish a valid affirmative defense to Plaintiff's Federal EPA and NJEPA claims.

Plaintiff also cannot establish a prima facie case under either the Federal EPA or NJEPA as it is uncontested Drs. Ehrhart and Jennings had responsibilities the other Pathologists, including Plaintiff, did not have, including, but not limited to, taking specialty cases from Ethos legacy clients (which were more difficult and required additional expertise), training Pathologists, and drafting standard operating procedures ("SOPs") for ZRL. As such, Plaintiff has failed to establish she was performing "equal work" (as required under the Federal EPA) or "substantially similar work" (as required under the NJEPA) when compared to Drs. Ehrhart or Jennings. However, even if Plaintiff could establish her prima facie case, which she cannot, Defendants have introduced legitimate reasons for the pay disparity, unrelated to gender, as explained further herein.

Plaintiff likewise fails to establish gender discrimination claims under Title VII and/or the LAD. Plaintiff testified that, other than the pay disparity (which, as set forth above, is unrelated to gender), she was not subjected to any discrimination during her employment at ZRL. Thus, Plaintiff's LAD claim based on the alleged pay disparity is subject to dismissal for the same reasons as her Federal EPA claim. Further, Plaintiff cannot establish a prima facie claim under Title VII and cannot rebut the evidence that establishes that any alleged pay disparity was based on a factor other than sex.

Finally, at an absolute minimum, Plaintiff's claim for punitive damages should be dismissed as there is no evidence to establish the requisite egregious conduct for such an award.

[1] ZRL also decided not to raise the salaries of male Pathologists from ZNLabs who were earning less than the acquired Ethos colleagues.

For these reasons, and those set forth further below, Defendants respectfully request the Court grant its motion for summary judgment in its entirety, with prejudice.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to L. Civ. R. 56.1, the uncontested material facts relevant to Defendants' motion for summary judgment are set forth in separately numbered paragraphs in Defendants' Rule 56.1 Statement Of Undisputed Material Facts ("SOMF").

LEGAL ARGUMENT

POINT I

SUMMARY JUDGMENT IS APPROPRIATE WHERE, AS HERE, THERE IS NO GENUINE ISSUE OF MATERIAL FACT.

Summary judgment is appropriate when no genuine issue of material fact exists entitling the movant to judgment as a matter of law. Fed. R. Civ. P. 56(c). In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), the United States Supreme Court enunciated the standard for analyzing a summary judgment motion. In Matsushita, the Court stated that once the moving party has established the absence of a fact issue:

> its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a *genuine issue for trial*' . . . [w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'

475 U.S. at 574 (emphasis added) (internal citations omitted).

The Court has further explained that summary judgment is required when evidence proffered by the nonmoving party "is merely colorable or is not significantly probative." Anderson, 477 U.S. at 249-50 (internal citations omitted). Instead, "there must be evidence on

which the jury could reasonably find for the plaintiff." Id. at 252. Thus, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which the party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. The material facts in this case are undisputed and fail to support any of Plaintiff's claims as a matter of law.

POINT II

ZOETIS, INC. SHOULD BE DISMISSED AS IT IS NOT A PROPER PARTY.

Zoetis, Inc. was admittedly never Plaintiff's employer. (SOMF, ¶¶ 29, 32, 53, 58). Rather, ZNLabs and then ZRL, a subsidiary of Zoetis, Inc., were at all relevant times Plaintiff's employer. (Id.). While the factual allegations in the Amended Complaint conflate ZRL and Zoetis, Inc., the evidence underscores that Plaintiff's allegations as to Zoetis, Inc. are unsupported and must be dismissed from this action, with prejudice.

To maintain a claim under the Federal EPA, Title VII, and the LAD, a plaintiff must first establish the existence of an employment relationship with the defendant. See 29 U.S.C. §206(d), et seq. (prohibiting discrimination in the payment of wages by an employer to its employees); 42 U.S.C. §2000e-2(a) (stating that it is an "unlawful employment practice for an employer" to discriminate against an employee with respect to wages, among other things, based on the individual's race, color, religion, sex, or national origin); N.J.S.A. § 10:5-12(a) (prohibiting an employer from discriminating against an individual in the terms or conditions of employment, including compensation, based on any protected characteristic enumerated in the statute, including sex). Thus, the absence of an employment relationship will preclude liability under the Federal EPA, Title VII and the LAD. See, e.g., Thomas v. Cnty. of Camden, 386 N.J. Super. 582, 594 (App. Div. 2006) ("the absence of an employment relationship between a plaintiff and a

defendant will preclude liability" under the LAD); see also Tyrrell v. City of Scranton, 134 F. Supp. 2d 373, 380 (M.D. Pa. 2001) ("the lack of an employment relationship between the plaintiff and the defendant will preclude liability under Title VII") (citing United States v. Bd. of Educ. for Sch. Dist. of Phila., 911 F.2d 882, 891 (3d Cir. 1990)).

Here, Plaintiff was employed by ZNLabs and then ZRL, a subsidiary of Zoetis, Inc. (SOMF, ¶¶ 3, 29, 32, 53, 58, 103). Plaintiff was initially hired in a full-time capacity by ZNLabs on September 16, 2020. (Id., ¶ 58). From on or about September 16, 2020 through December 31, 2020, Plaintiff was employed by (and received her pay from) ZNLabs and the W-2 issued to Plaintiff in 2020 reflects that ZNLabs was her employer. (Id., ¶¶ 58, 59). On or about January 1, 2021, ZNLabs, along with Phoenix and Ethos, were integrated into ZRL, a newly created subsidiary of Zoetis, Inc., focused on providing veterinary diagnostic services to veterinary clinics throughout the United States. (Id., ¶¶ 1, 3, 4). As of January 1, 2021, Plaintiff was employed by (and received her pay from) ZRL and the W-2 issued to Plaintiff in 2021 reflects that ZRL was her employer. (Id., ¶ 103). During her employment, Plaintiff's direct supervisors were Dr. Gardiner, who was initially employed by ZNLabs and then ZRL as of January 1, 2021, and Dr. Ackermann, who was at all times employed by ZRL. (Id., ¶¶ 8, 33, 112, 113, 129). This evidence establishes Zoetis, Inc. was never Plaintiff's employer and, therefore, is not a proper party to this action.

Importantly, the fact that ZRL is a subsidiary of Zoetis, Inc. does not establish an employment relationship between Plaintiff and Zoetis, Inc. (Id., ¶¶ 3, 6). Indeed, the Third Circuit recognizes that a subsidiary is a "separate entity" and where, as here, "a subsidiary hires employees, there is strong presumption that the subsidiary, not the parent company, is the employer." Marzano v. Computer Science Corp., Inc., 91 F. 3d 497, 513 (3d Cir. 1996) (quoting Johnson v. Flower Industries, Inc., 814 F.2d 978, 980 (4th Cir. 1987)). Therefore, "courts have

found parent corporations to be employers only in extraordinary circumstances." Id. (citing Johnson, 814 F. 2d at 981); see also Pearson v. Component Tech. Corp., 247 F.3d 471, 484 (3d Cir. 2001) ("mere ownership of a subsidiary does not justify the imposition of liability on the parent"); Fulton v. Johnson & Johnson Pharm. Research & Dev., LLC, 2008 U.S. Dist. LEXIS 14163, at *20 (D.N.J. Feb. 26, 2008) (observing that, in general, a parent company cannot be held liable for its subsidiary's alleged employment discrimination).

In the employment discrimination context, courts in this Circuit generally use the "integrated enterprise" test to determine if a parent company is an "employer." See Martin v. Safeguard Scientifics, Inc., 17 F. Supp. 2d 357, 363 (E.D. Pa. 1998); Johnson v. Cook Composites & Polymers, Inc., 2000 U.S. Dist. LEXIS 2330, at *10 (D.N.J. March 3, 2000) (finding the "'integrated enterprise" test is the most appropriate test to determine whether a parent corporation is an 'employer' in the employment discrimination context"). The "integrated enterprise" test is comprised of an examination of four factors: "(1) inter-relation of operations; (2) [c]ommon management; (3) centralized control of labor relations; and (4) common ownership or financial controls." Johnson, 2000 U.S. Dist. LEXIS 2330, at *10 (quoting McNeal v. Maritank Philadelphia, Inc., 1999 U.S. Dist. LEXIS 895, at *7 (E.D. Pa. Jan. 29, 1999)).

Examination of these four factors establishes there is simply no support for extending liability to Zoetis, Inc. with respect to the employment discrimination claims asserted in this litigation. Zoetis, Inc. and ZRL are not an "integrated enterprise." As an initial matter, in the Amended Complaint as well as throughout the discovery phase of this litigation, Plaintiff has attempted to conflate the allegations as to Zoetis, Inc. and ZRL, improperly referring to "Zoetis" as opposed to the distinct legal entities at issue, despite repeated objections. Such an approach is not only improper at the pleading stage but is also certainly improper during discovery and cannot

serve as a basis for extending liability to a parent corporation. See Green v. 712 Broadway, LLC, 2018 U.S. Dist. LEXIS 96657, at *8-9 (D.N.J. June 8, 2018) ("Courts within this district have not permitted complaints with group pleadings to go forward"); see also Ingris v. Borough of Caldwell, 2015 U.S. Dist. LEXIS 74255, 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.").

Further, Plaintiff cannot point to any evidence to support any of the required factors. At best, the evidence simply establishes ZRL may have consulted with employees of Zoetis Services, LLC and Zoetis U.S., LLC, i.e., Tracey DaCosta, Phillip Hoertz, Catherine Matus, Ivelisse Williams, Kelly Winder, and Alisa Zelmanovich, regarding general Human Resources and Compensation issues. (SOMF, ¶¶ 15, 39, 56, 68, 79, 141-187). This is insufficient to establish the required inter-relation of operations, common management, centralized control of labor relations or common ownership or financial interest by Zoetis, Inc. As noted supra, Plaintiff was employed by ZNLabs and ZRL, not Zoetis, Inc. (Id., ¶ 103). Further, the individuals who supervised Plaintiff during her employment were not employed by Zoetis, Inc., but by ZN Labs or ZRL. (Id., ¶¶ 33, 112, 113, 129). Thus, because Plaintiff has failed to introduce evidence sufficient to establish Zoetis, Inc. was her "employer," Zoetis, Inc. should be dismissed.

POINT III

PLAINTIFF CANNOT ESTABLISH A VIOLATION OF THE FEDERAL EQUAL PAY ACT.

The uncontroverted record evidence establishes any pay disparity within ZRL was the direct result of the asset purchase with Ethos, and Integration of three distinct entities to form ZRL: ZNLabs, Phoenix, and Ethos. (SOMF, ¶ 7-24, 62-162, 173-187). It is also not disputed the terms of the asset purchase were applied uniformly, without regard to gender. (Id.). Further, although

Plaintiff improperly singles out Drs. Ehrhart and Jennings alone as her comparators, ZRL's decision not to reduce or increase pay of any Ethos Pathologist applied to all Pathologists, male and female, at the time of Integration.[2] As set forth in more detail below, based on these undisputed facts, Plaintiff cannot establish a violation of the Federal EPA.

Initially, Plaintiff cannot establish a prima facie case under the Federal EPA because the evidence does not support that Plaintiff was performing equal work to the comparators identified in the Amended Complaint. Even if Plaintiff could establish a prima facie case, Defendants can satisfy the fourth affirmative defense under the Federal EPA: that any pay disparity was attributable to a factor other than sex.

The Federal EPA provides:

> No employer . . . shall discriminate between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on **any other factor** other than sex . . . .

29 U.S.C. §206(d) (emphasis added). Claims brought pursuant to the Federal EPA follow a two-step burden shifting framework. See Stanziale v. Jargowsky, 200 F.3d 101, 107 (3d Cir. 2000). The employee must first establish a prima facie case of pay discrimination based on sex and, if successful, the burden will shift to the employer to establish one of four affirmative defenses. See Stanziale, 200 F.3d 107. Specifically, the Federal EPA allows an employer to pay individuals of the opposite sex differently if such payment is made pursuant to: (i) a seniority system; (ii) a merit

[2] Importantly, as set forth herein, Plaintiff was employed by ZNLabs until the January 1, 2021 Integration. Conversely, Drs. Ehrhart and Jennings were employed by Ethos until Integration. Thus, because Plaintiff and Drs. Ehrhart and Jennings were not employed by Zoetis, Inc. or ZRL prior to January 1, 2021, any EPA and NJEPA claims that pre-date the Integration date must be dismissed.

system; (iii) a system which measures earnings by quantity or quality of production; or (iv) ***a differential based on any other factor other than sex***. Id. (emphasis added). The employer's burden at this stage is one of persuasion.

A. Summary Judgment Is Appropriate As Plaintiff Cannot Establish A Prima Facie Case Of Pay Discrimination Based On Sex Under The Federal EPA.

Plaintiff cannot establish a prima facie case of pay discrimination based on sex as the evidence fails to support a conclusion "that employees of the opposite sex were paid differently for performing 'equal work' – work of substantially equal skill, effort and responsibility under similar working conditions."[3] Stanziale, 200 F.3d at 107 (citing E.E.O.C. v. Delaware Dept. of Health and Social Services, 865 F.2d 1408, 1413-13 (3d Cir. 1989)). To determine whether employees were performing equal work and whether jobs are similar, the Federal EPA is "more concerned with substance than title" and "the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation." Ingram v. Brink's, Inc., 414 F.3d 222, 232 (1st Cir. 2005) (citing 29 C.F.R. § 1620.17)). Thus, where one employee has a "considerable, additional degree of responsibility which may materially affect the business operations of the employer . . . payment of a higher wage rate to this employee would be permissible." 29 C.F.R. § 1620.17(b)(2). Further, in evaluating this factor, consideration should only be given to the qualifications and skills required to perform the job, as opposed to the qualifications of the employees in the position. See Cox v. Office of Attorney Ethics of the Supreme Court of N.J., 2006 U.S. Dist. LEXIS 93974, at *6 (D.N.J. Dec. 28, 2006).

While it is true Drs. Ehrhart and Jennings, the only two named male comparators in Plaintiff's Amended Complaint, had the same title as Plaintiff, the evidence establishes they had

[3] Notably, this Court has recognized the Federal EPA's requirement to establish "equal work" is a higher burden than the NJEPA's requirement to establish "substantially similar work". See Spiewak v. Wyndham Destinations, Inc., 2023 U.S. Dist. LEXIS 14473, at *12 n.12 (D.N.J. Jan. 26, 2023).

different responsibilities. Indeed, Plaintiff testified her responsibilities as an Anatomic Pathologist centered only on reading cases. (SOMF, ¶¶ 60, 102, 111). Plaintiff conceded however that both Drs. Ehrhart and Jennings had additional responsibilities beyond reading cases while employed by Ethos and continued those responsibilities at ZRL. (Id., ¶¶ 163-172). For example, while at Ethos Drs. Ehrhart and Jennings were involved in creating the Pathology department, supervised and trained Pathologists, and prepared Standard Operating Procedures ("SOPs"). (Id., ¶¶ 163-165). Additionally, cases from the Ethos specialty hospitals are "almost always multi-site bizarre cases" involving more complex diseases. After Integration, at ZRL, Drs. Ehrhart and Jennings continued to receive all cases from the Ethos Specialty Hospitals. (Id., ¶¶ 167-171). As such, at ZRL, Drs. Ehrhart and Jennings' cases significantly differed from Plaintiff's. (Id.). Indeed, Dr. Gardiner testified, the cases Drs. Ehrhart and Jennings were responsible for reading came "from the Ethos specialty hospitals which are almost always multisite, bizarre cases." (Id., ¶ 170). It is not disputed that all cases from the specialty hospitals went to Drs. Ehrhart and Jennings. (Id., ¶¶ 167-171). Further, it was important for Drs. Ehrhart and Jennings to work the complex Ethos cases to maintain continuity of care. (Id., ¶ 171). As such, because Plaintiff was not performing equal work to Drs. Ehrhart and Jennings, which is required to establish a prima facie claim under the Federal EPA, this claim should be dismissed.

B. Summary Judgment Is Appropriate As Defendants Establish The Fourth Affirmative Defense Under The Federal EPA.

There is no question Defendants can establish "so clearly that no rational jury could find to the contrary" that any pay differential was based on a factor other than sex. Stanziale, 200 F.3d at 107 (citing Delaware Dep't of Health, 865 F.2d 1408, 1414 (3d Cir. 1989). Specifically, the "grandfathering" of a salary that results in a pay disparity due to a merger or acquisition has been held a legitimate factor other than sex sufficient to justify any disparity.

In Arthur v. College of St. Benedict, two universities – one with a primarily male faculty (St. John's) and one with a primarily female faculty (St. Benedict) – merged. 174 F. Supp. 2d 968, 972-974 (D. Minn. 2001). As a result of this merger, it was decided that faculty members who joined St. John's prior to 1998 would retain certain tuition benefits, but that no faculty going forward would receive the same benefits. Id. at 973. The plaintiffs, female professors at St. Benedict, brought suit under the Federal EPA. Id. In granting summary judgment for the defendant, the Arthur court held that "grandfathering" was a legitimate factor other than sex. Id. at 977-78[4]. Specifically, the court stated, "the difference in benefits between St. Ben's and St. John's ***has its origins in the different financial resources and approaches to employee compensation***. The grandfathering of benefits…has not been shown to be based on any past or present discrimination." Id. (emphasis added).

Similarly, in Hubers v. Gannett Co., the Court found that an employer's decision to maintain a male employee's salary at the same level following a job transfer did not violate the Federal EPA, even though it resulted in a pay disparity. 2019 U.S. Dist. LEXIS 38725 (N.D. Ill. March 11, 2019). In Hubers, the female plaintiff argued the defendant violated the Federal EPA because she was paid a lower base salary than a male employee in the same position, who transferred into the role from a subsidiary of the defendant. Id. at *10. It was not disputed different decision makers were involved in setting the plaintiff's salary as well as the salary of the male employee, and that base salaries at the subsidiary company, both male and female, were generally

[4] Other courts across the Country have found similarly. See, e.g., Russell v. Placeware, Inc., 2004 U.S. Dist. LEXIS 21465 (D. Or. Oct. 15, 2004) (granting employer summary judgment because gender-neutral policy to maintain pre-transfer salary levels was sufficient to establish affirmative defense to unequal pay claim); Wachter-Young v. Ohio Cas. Group, 236 F. Supp. 2d 1157 (D. Or. 2002) (***granting employer summary judgment where employer chose to grandfather salaries of legacy employees pursuant to a purchase agreement with the legacy company, finding this was a legitimate business reason for the disparity that was unrelated to sex***); Pettiford v. N.C. HHS, 228 F. Supp. 2d 677 (M.D.N.C. 2002) (granting employer summary judgment where male employee's higher salary was due to the grandfathering of his pre-transfer salary).

higher. Id. at *10-11. Further, the evidence established the defendant's decision not to lower the male employee's salary was based on the company's need to retain him as an employee, not because of his gender. Id. Further, the employer had no obligation to increase the female employee's salary to match that of the male employee. Id. In granting summary judgement in favor of the defendant, the Court held that, based on this evidence, the defendant established the pay disparity was based on a factor other than sex. Id. at *12-13.

Here, based on the evidence, the same result as in Arthur and Hubers is warranted. Plaintiff was hired as a full-time Anatomic Pathologist by ZNLabs earning $125,000 annually in or about September 2020. (SOMF, ¶¶ 53, 54, 58). Dr. Gardiner, Director of Anatomic Pathology at ZNLabs, made the salary decision with respect to Plaintiff, and Plaintiff has set forth no evidence to suggest this decision was in any way discriminatory. (Id., ¶ 31). In fact, at the time of her hiring, Plaintiff's salary was higher than the majority of her ZNLabs colleagues, both male and female. (Id., ¶ 55). The salary decisions with respect to Drs. Ehrhart and Jennings, the two named male comparators in Plaintiff's Amended Complaint, were made by Ethos' Chief Medical Officer, years before the asset purchase and subsequent Integration on January 1, 2021[5]. (Id., ¶¶ 123-128).

Further, as in Arthur, any pay disparity here was created by and through the Integration of three distinct companies acquired by ZRL with three different approaches to compensation. Importantly, there is no evidence to suggest any of these approaches was discriminatory.[6] In fact, the opposite is true. Prior to Integration, the compensation of colleagues acquired from ZNLabs, Phoenix, and Ethos, was reviewed and analyzed and a pay equity analysis was completed. (SOMF, ¶¶ 84-99). The analysis revealed that ***all*** Ethos colleagues, both male and female, were paid

[5] Dr. Ehrhart was hired by Ethos on or about July 1, 2016. (SOMF, ¶ 123). Dr. Jennings was hired by Ethos on or about June 29, 2018. (Id., ¶ 128).

[6] Notably, the Ethos Pathologists who were paid higher than the other acquired entities' Pathologists consisted of males and females. (Id., at ¶¶ 114-120, 146, 177, 178).

substantially more than colleagues at ZNLabs and Phoenix. (Id.). The decision was made to not lower the compensation of the Ethos colleagues for at least two reasons.

First, the Asset Purchase Agreement and Transition Services Agreement between ZNLabs and Ethos required that the salary of any Ethos employee must be maintained for a period of no less than twelve (12) months following the purchase. (Id. at ¶¶ 18, 19). Second, and similar to Hubers, there was concern that reducing fixed pay would hinder Zoetis' ability to retain the acquired employees, which was crucial to building up the new reference labs business unit and an express goal of the acquisitions. (Id., at ¶¶ 71-74, 78-81, 87-93). As Catherine Matus, former Head of Compensation, Zoetis Services LLC, made clear in her testimony, in deciding how to integrate three different companies with distinct approaches to compensation "you start with the business needs and then you come up with different alternatives on how to integrate ***based on those business needs***." (Id., at ¶ 71). The "business needs" specific to the Integration included a focus on retaining employee talent to assist with the early development and growth of ZRL to allow it to compete with larger, more established competitors. Indeed, a key objective for Integration, as early as October 2020, was to "***retain colleagues <u>needed</u> to achieve acquisition goals***." (Id., ¶ 80). Because diagnostic laboratory services was a new venture for ZRL, talent retention was vital. (Id., ¶¶ 71-74, 78-81, 87-93).

Under these circumstances, the decision to "grandfather" and not change the salaries of Ethos legacy employees, which were set by Ethos prior to the acquisition, was a business decision and a legitimate factor other than sex for any resulting pay disparity following Integration. While Plaintiff may disagree with ZRL's gender-neutral decision to "grandfather" the salaries of Ethos legacy employees, both male and female, it is well-settled that Courts should not act as "super-

personnel departments" or otherwise question the legitimate business decisions of a company. See Taylor v. White, 321 F.3d 710, 719 (8th Cir. 2003). Specifically, the Taylor Court stated:

> We "do not sit as a super-personnel department that re-examines an entity's business decisions." Kipp v. Mo. Highway and Transp. Comm'n, 280 F.3d 893, 898 (8th Cir. 2002). As such ***we are reluctant to establish a per se rule that might chill the legitimate use of gender-neutral policies and practices***. In this regard, we reach the same conclusion as the Seventh Circuit which refused to adopt a per se rule that would exclude salary retention or past salary as qualifying "factors other than sex." Covington v. Southern Illinois Univ., 816 F.2d 317, 322-23 (7th Cir. 1987).

Taylor, 321 F.3d at 719 (emphasis added); see also Russell, 2004 U.S. Dist. LEXIS 21465, at *27 ("the Ninth Circuit has warned courts to be careful not to punish employers for making valid business decisions. 'The Equal Pay Act entrusts employers, not judges, with making the often uncertain decision of how to accomplish business objectives.'") (quoting Maxwell v. City of Tuscon, 803 F.2d 444, 448 (9th Cir. 1986)).

Similar positions have been expressly recognized by statute and by Courts in this and other Circuits. For example, 5 U.S.C. § 5362 includes a saved-pay provision, which allows employers to maintain the higher salaries, for a period of up to two years, of employees who are moved to a position with a lower grade due to a reduction in force. While the situation here differs slightly, 5 U.S.C. § 5362 expressly recognizes the considerable time needed to balance any gender-neutral pay inequity. It further recognizes that a company's decision to reconcile pay disparities caused by changes in positions or mergers/acquisitions by relying on the passage of time to balance any gender-neutral inequities is not unlawful.

Likewise, the implementing regulations under the Federal EPA make clear that a "red-circle rate" can be a valid "factor other than sex." 29 C.F.R. § 1620.26. The term "red-circle" describes "certain unusual, higher than normal, wage rates which are maintained for many

reasons." 29 C.F.R. §800.146. Courts have recognized that Congress intended to include the practice of "red circling" as a "factor other than sex" to explain a wage differential and have, accordingly, accepted such defenses as an affirmative defense to an unequal pay claim. See, e.g., Price v. N. States Power Co., 664 F.3d 1186 (8th Cir. 2011) (affirming summary judgment for employer where company used a red circle policy that resulted in field representatives having non-uniform starting salaries because employees kept their base pay from their previous position at company when they started in the position of field representative within the company); Timmer v. Michigan DOC, 104 F.3d 833, 844 (6th Cir. 1997) (holding employer established an affirmative defense to liability where red circle practice was a factor other than sex that explained pay difference between men and women at the company); Gosa v. Bryce Hosp., 780 F.2d 917, 919 (11th Cir. 1986) ("The flexibility of the red circling concept has been preserved in anticipation of the need to reconcile legitimate business interests with the Act's purpose").In sum, it is undisputed the asset purchase of Ethos, followed by the Integration account for the entire wage differential at ZRL. (SOMF, ¶¶ 7-24, 62-162, 173-187). In other words, and as confirmed by Plaintiff during her deposition, *but for* the asset purchase with Ethos and subsequent Integration, neither of Plaintiff's "comparators" would have been employed by ZRL. These facts, as well as those set forth above, support the conclusion that any pay disparity was due to a factor other than sex. Accordingly, Defendants have established the fourth affirmative defense and are, therefore, entitled to summary judgment as to Plaintiff's Federal EPA claim as a matter of law.

POINT IV

PLAINTIFF CANNOT ESTABLISH A VIOLATION OF THE NEW JERSEY DIANE B. ALLEN ACT.

New Jersey law should not be applied to Plaintiff's claims in this matter as New Jersey does not have the most significant relationship to the claims stemming from Plaintiff's

employment in New Hampshire. Even if it is applied, however, Plaintiff's claim under the NJEPA fails as a matter of law as she cannot show that she performed substantially similar work to the two identified comparators, Drs. Ehrhart and Jennings, which is required. More importantly, Defendants are able to establish the affirmative defense available under the NJEPA that a legitimate factor other than sex accounts for the wage differential. Indeed, the business decision to acquire and integrate ZNLabs, Phoenix, and certain assets of Ethos to form ZRL accounts for the ***entire*** wage differential at issue in this litigation. This decision was not based on and does not perpetuate a difference in compensation based on sex and was based on a legitimate, business necessity. Accordingly, summary judgment as to Plaintiff's NJEPA claim is appropriate.

A. New Jersey Law Does Not Apply To Plaintiff's Claims.

As an initial matter, Plaintiff's claims under New Jersey's Diane B. Allen Act must fail as New Jersey law is not applicable to her claims. It is not disputed Plaintiff has never been a resident of New Jersey and was never employed in New Jersey. (SOMF, ¶¶ 58-61, 102-104). Rather, Plaintiff was at all times a resident of and employed in New Hampshire. (Id.). Further, Plaintiff's pay, which is the central issue in this case, was issued to her in New Hampshire and was paid pursuant to applicable New Hampshire law. (Id.). Based on case law and interpretive guidance, Plaintiff cannot invoke the protections of the LAD to her out-of-state employment where, as here, there is simply no evidence to establish any significant contact with New Jersey.

It is well established the LAD does not extend to employment that is exclusively based outside of New Jersey. See, e.g., Seibert v. Quest Diagnostics, Inc., 2012 U.S. Dist. LEXIS 42708, at *15 (D.N.J. March 28, 2012) ("[T]he opinions are explicit that the []LAD does not apply to the discrimination claims of . . . (3) non-residents of New Jersey who work outside of the state for companies headquartered in New Jersey . . . ."). "New Jersey courts have consistently applied the

law of the state of employment to workplace claims, and have therefore only applied the []LAD if the plaintiff worked in New Jersey." Id. at *10-11 (listing cases holding same); see also Kelman v. Foot Locker, 2006 U.S. Dist. LEXIS 83465, at *18 (D.N.J. Nov. 16, 2006) (dismissing LAD claim brought by New Jersey resident for claims arising in New York); Wagner v. Catalent Pharm. Sols., LLC, 2019 U.S. Dist. LEXIS 66305 (D.N.J. Apr. 18, 2019) (even though the plaintiff's supervisor was based in New Jersey, New Jersey did not apply to the plaintiff's claims as the plaintiff was a resident of Kentucky; was at all relevant times employed in Kentucky; complained about conduct occurring in Kentucky; and was terminated from her employment in Kentucky).[7]

In an Opinion and Order issued on July 14, 2023, denying Defendants' motion to dismiss Plaintiff's New Jersey claims, the Court — without the benefit of the factual record available on summary judgment — looked at whether New Jersey law *could* reach a remote worker who worked for a New Jersey company, but outside New Jersey. See Schulman v. Zoetis, Inc., 2023 U.S. Dist. LEXIS 121702 (D.N.J. July 14, 2023). However, at this stage, whether New Jersey law *could* be applied based on the factual allegation in the Complaint is no longer the issue.[8] Rather, the issue now is whether it ***should*** be applied given the record evidence in this matter.

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[7] The interpretative guidance of the NJEPA issued by the New Jersey Division on Civil Rights unequivocally states the NJEPA **does not** apply to out-of-state employees. In March 2020, the DCR issued guidance stating, "[e]mployees can bring a claim under the Equal Pay Act **as long as they have a primary place of work in New Jersey**." See DCR, Guidance on the Diane B. Allen Equal Pay Act, March 2020, available at https://www.nj.gov/lps/dcr/downloads/DCR-Equal-Pay-Guidance-3.2.20.pdf (last visited Apr. 28, 2022) (emphasis added). Importantly, this guidance is not necessarily inconsistent with Calabotta v. Phibro Animal Health Corp., 460 N.J. Super. 38, 45 (App. Div. 2019), which the Court cited in its earlier opinion denying Defendants' motion to dismiss. In Calabotta, the plaintiff did not assert a claim under the NJEPA. Further, the plaintiff was an Illinois resident who alleged he was denied a promotion and prospective employment in New Jersey with the parent company of his then employer. Id. Thus, in Calabotta, the plaintiff established some employment connection to New Jersey. Id. In this matter, Plaintiff does not allege she was employed in New Jersey or that she ever sought employment in New Jersey.

[8] During the course of discovery, several allegations included within the Amended Complaint, which Plaintiff utilized to support her opposition to Defendants' motion to dismiss, have been shown to be inaccurate or unsupported by the record. For example, in the Amended Complaint, Plaintiff alleges "upon information and belief" that during her employment, she utilized equipment shipped from New Jersey. (See Amended Complaint, ECF No. 52, ¶40). Plaintiff, however, produced no evidence to support this "upon information and belief" allegation. In fact, the record evidence established Plaintiff was directed to return her ZRL equipment to Zoetis' IT Department located in Malvern, Pennsylvania. (SOMF, ¶ 191). In the Amended Complaint, Plaintiff alleged her initial pay was not determined by Dr. Gardiner, who was based in Utah, but by Dr. Goldstein, Lisa Lee and Abhay Nayak. (Cino Cert., Exh. B, ¶ 51;

Based on application of New Jersey's choice of law principles, as set forth below, New Jersey law should not be applied to Plaintiff's claims. A federal district court applies the forum state's choice of law rules to determine controlling substantive law. Barbey v. Unisys Corp., 256 F. App'x 532, 533 (3d Cir. 2007). Thus, because Plaintiff filed a lawsuit in New Jersey, New Jersey's choice-of-law rules control. Fairfax Fin. Holdings Ltd. v. S.A.C. Capital Mgmt., L.L.C., 450 N.J. Super. 1, 34 (App. Div. 2017) (citing McCarrell v. Hoffmann–La Roche, Inc., 227 N.J. 569, 588 (2017) ("When New Jersey is the forum state, its choice-of-law rules control."). In New Jersey, the first step in the choice of law analysis is to determine whether there is an actual conflict by examining the substance of the potentially applicable laws. McCarrell, 227 N.J. at 584 ("The first inquiry in any choice-of-law analysis is whether the laws of the states with interests in the litigation are in conflict."). If an actual conflict is found, the next step is to determine which state has the "greatest interest" in governing the specific issue in the litigation. P.V. ex Rel. T.V. v. Camp Jaycee, 197 N.J. 132, 159 (2008) (quoting Fu v. Fu, 160 N.J. 108, 118 (1999)).

1. An Actual Conflict Exists Between The Applicable Laws In New Jersey And New Hampshire.

Here, an actual conflict exists between the applicable discrimination laws in New Jersey and New Hampshire, including differences in the requirements for administrative exhaustion, statutes of limitations, and available remedies. Further, with respect to each state's equal pay laws, differences in the laws include the scope of potential claims and available defenses to those claims. It is precisely these differences that likely prompted Plaintiff to file her claim under New Jersey law, as opposed to New Hampshire law, as the LAD, including the NJEPA, include more employee-friendly provisions with respect to burdens of proof and available damages.

SOMF, ¶ 57). This allegation is false as discovery established Dr. Gardiner made the decision as to Plaintiff's initial pay. (SOMF, ¶¶ 31, 56, 57).

a. An Actual Conflict Exists Between The New Jersey And New Hampshire Discrimination Laws.

As an initial matter, the protected classes recognized under New Jersey law are far more comprehensive than under New Hampshire law. New Hampshire prohibits all forms of discrimination, including on the basis of "age, sex, race, color, marital status, physical or mental disability, religious creed, or national origin," with respect to "compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification." N.H. Rev. Stat. Ann. § 354-A:7. The protected classes recognized under New Jersey law, not only include those recognized by New Hampshire law, but also include civil union status, domestic partnership status, affectional or sexual orientation, genetic information, gender identity or expression, atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer." N.J.S.A. § 10:5-12(a).

Further, while New Hampshire law requires administrative exhaustion as a prerequisite to filing suit, New Jersey law does not. Specifically, New Hampshire requires that a party alleging discrimination must file a complaint with the New Hampshire Commission for Human Rights. See N.H. Rev. Stat. Ann. § 354-A:21-a. By contrast, there are no administrative prerequisites to filing suit in New Jersey. See Lemke v. Int'l Total Svcs., Inc., 56 F. Supp. 2d 472, 482 (D.N.J. 1999) (observing that, under the LAD, "exhaustion of administrative remedies is not required").

Moreover, the statute of limitations period provided by New Hampshire law is greater than provided by New Jersey law. At the expiration of 180 days after filing a complaint with the New Hampshire Commission for Human Rights (or sooner if the commission consents in writing), a party may file a suit within three years of the alleged unlawful practice. See N.H. Rev. Stat. Ann.

§ 354-A:21-a. In New Jersey, the statute of limitations period requires that all claims be filed within the two-year statute of limitations. See Montells v. Haynes, 133 N.J. 282, 286 (1993) (applying the two-year personal-injury statute of limitations to LAD).[9] These differences create an actual conflict. See Majdipour v. Jaguar Land Rover N. Am., LLC, 2015 U.S. Dist. LEXIS 33377, at *28-29 (D.N.J. March 18, 2015) ("[S]tates' contradictory statutes of limitations create an actual conflict of law.").

Further, remedies available to plaintiffs in each state differ significantly. In New Hampshire, damages to a successful plaintiff include back pay, front pay, compensatory damages (which may include a component for emotional distress) and enhanced compensatory damages. See McPadden v. Wal-Mart Stores E., L.P., 2016 U.S. Dist. LEXIS 126789, at *8 (D.N.H. Sept. 16, 2016). LAD damages are more expansive and include back pay, front pay, compensatory damages, emotional distress damages, punitive damages, attorneys' fees, interest, and costs.[10] See Andujar v. Gen. Nutrition Corp., 2018 U.S. Dist. LEXIS 32926 (D.N.J. Feb. 28, 2018).

Thus, the primary differences with respect to remedies includes punitive damages and attorneys' fees. Whereas a successful plaintiff in New Jersey may be entitled to recover uncapped punitive damages, punitive damages are generally unavailable in New Hampshire. See N.J. Model Civil Jury Instruction 8.60, Punitive Damages Actions – General, n.2 ("Punitive damages awarded in LAD cases (8.61) and in CEPA cases (8.63) are exempt from the punitive damage cap under N.J.S.A. 2A:15-5.14."); N.H. Rev. Stat. Ann. § 507:16 ("No punitive damages shall be awarded in any action, unless otherwise provided by statute."). Rather, a New Hampshire plaintiff may seek "enhanced compensatory damages" where the offending conduct is "wanton, malicious, or

[9] The LAD's two-year statute of limitations likewise applies to claims under the NJEPA, however, the NJEPA allows an employee who establishes a violation of the statute to have a six-year lookback period. See N.J.S.A. 10:5-12(a).
[10] As noted supra, the NJEPA expands the potential recovery of back pay to up to six years.

oppressive." Stewart v. Bader, 154 N.H. 75, 87 (2006). Importantly, "enhanced compensatory damages" are only meant to compensate the successful plaintiff for the resulting actual material loss, but is not intended to replace "the punitive function of exemplary damages," which "has been rejected in forceful and colorful language…" Vratsenes v. N.H. Auto, Inc., 112 N.H. 71, 72 (1972).

In New Jersey, a successful plaintiff is also entitled to attorneys' fees and the LAD contains an express fee-shifting provision. N.J.S.A. § 10:5-27.1. By contrast, the New Hampshire statute does not expressly authorize attorneys' fees. Rather, in New Hampshire, attorneys' fees are generally borne by the parties individually, unless a statute, contract, or other special circumstances provides otherwise, which is not the case under New Hampshire's anti-discrimination laws. See generally Nordica S.P.A. v. Icon Health Fitness, Inc., 2009 U.S. Dist. LEXIS 71385, at *22 (D.N.H. Aug. 11, 2009) ("New Hampshire common law empowers courts to depart from the 'general rule that parties pay their own fees . . . when overriding considerations so indicate.'") (citations omitted); E. D. Swett, Inc. v. N.H. Comm. for Human Rights, 124 N.H. 404, 412 (1983) (finding attorneys' fees may be granted on a case-by-case basis for claims resolved by the New Hampshire Commission for Human Rights, because "[a]lthough the statute does not expressly authorize the award of attorney's fees, their award in appropriate cases is consistent with the discretion granted the commission . . .").

Because the New Hampshire and New Jersey laws provide for different remedies, an actual conflict exists between the states' anti-discrimination laws. See Babcock v. Sears, Roebuck & Co., 2005 N.J. Super. Unpub. LEXIS 45 (App. Div. Dec. 28, 2005) (citations omitted) ("The LAD allows an award of attorney fees to the prevailing party… and punitive damages[.] The NYHRL does not allow either…. Thus, there is a conflict of laws."); Miller v. Samsung Elecs. Am., Inc.,

2015 U.S. Dist. LEXIS 84359, at *12-13 (D.N.J. June 29, 2015) (actual conflict exists where NJCFA provided for treble damages and FDUTPA only provided for actual damages, and NJCFA only permitted recovery of attorneys' fees by prevailing plaintiffs and FDUTPA allowed recover by either party).

b. An Actual Conflict Exists Between The Respective New Jersey And New Hampshire Equal Pay Act Provisions.

The New Hampshire and New Jersey equal pay laws also diverge in several important respects, including with respect to the scope of potential claims and available defenses to those claims. These differences create an actual conflict between New Hampshire and New Jersey equal pay laws.[11] With respect to the scope of potential claims, New Hampshire, subject to certain defenses, prohibits pay discrimination on the basis of gender for equal work. Specifically, the statute states:

> Equal Pay. No employer shall discriminate in the payment of wages as between the sexes, or shall pay any female in his employ salary or wage rates less than the rates paid to male employees for equal work or work on the same operations.

N.H. Rev. Stat. Ann. § 275:37 (emphasis added). The New Hampshire EPA is regarded as the "state law analog" of the Federal EPA. Masso v. City of Manchester, 2012 U.S. Dist. LEXIS 42457, at *2-3 (D.N.H. March 28, 2012). By contrast, New Jersey's LAD requires a plaintiff to demonstrate differences in pay for "substantially similar work" and prohibits an employer to "pay

[11] Importantly, Plaintiff also previously took the position that New Hampshire law was applicable to her employment claims by filing a charge of discrimination with the New Hampshire Commission for Human Rights, and by asserting violations of the New Hampshire Equal Pay Act and New Hampshire Law Against Discrimination, not the LAD. Plaintiff should not be permitted to now change course to capitalize on the more lucrative penalties that may be available under the NJEPA. See Seibert, 2012 U.S. Dist. LEXIS 42708, at *21 ("That a former employee from Colorado lodged a complaint with the Colorado Civil Rights Division and a former employee from Missouri lodged a complaint with the Missouri Commission on Human Rights demonstrates that these non-New Jersey former [] employes used the law of their state of employment to vindicate their rights. A blanket of New Jersey employment law thrown over such claims is not what the []LAD is meant for.").

any of its employees who is a member of a protected class at a rate of compensation, including benefits, which is less than the rate paid by the employer to employees who are not members of the protected class for substantially similar work, when viewed as a composite of skill, effort and responsibility." N.J.S.A. § 10:5-12(t) (emphasis added). As such, the standard for demonstrating an equal pay violation in New Jersey for "substantially similar work" is much broader than the "equal work" standard of New Hampshire, thereby creating an actual conflict of law. See, e.g., Pennsylvania Employee v. Zeneca, Inc., 710 F. Supp. 2d 458, 475 (D. Del. 2010) (concluding that the differing burdens of awareness and reliance created an actual conflict); Sharma v. Gupta, 2022 U.S. Dist. LEXIS 60972, at *1 (D.N.J. March 31, 2022) (because the elements of conversion claims in Illinois and New Jersey are not the same, an actual conflict exists).

Likewise, the available defenses under the New Hampshire and New Jersey equal pay laws differ. While New Hampshire is consistent with the federal EPA and recognizes numerous potential defenses to an equal pay claim, New Jersey only recognizes three. In New Hampshire, an employer can establish a defense to an equal pay claim by showing that pay decisions are based on a seniority system; a merit or performance-based system; a system which measures earnings by quantity or quality of production; expertise; shift differentials; or a demonstrable factor other than sex, such as education, training, or experience. N.H. Rev. Stat. Ann. § 275:37.

Under the LAD, the only defenses available are: (1) the existence of a seniority system; (2) the existence of a merit system, or (3) proof that all of the following five factors establishing a legitimate, business reason are true:

> (1) That the differential is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production;

> (2) That the factor or factors are not based on, and do not perpetuate, a differential in compensation based on sex or any other characteristic of members of a protected class;
>
> (3) That each of the factors is applied reasonably;
>
> (4) That one or more of the factors account for the entire wage differential; and
>
> (5) That the factors are job-related with respect to the position in question and based on a legitimate business necessity. A factor based on business necessity shall not apply if it is demonstrated that there are alternative business practices that would serve the same business purpose without producing the wage differential.

N.J.S.A. § 10:5-12(t). A comparison of the New Hampshire and New Jersey statutes clearly establishes the available defenses under the respective equal pay laws differ and, thus, an actual conflict exists.

B. New Hampshire Has The Most Significant Relationship To The Dispute And, Therefore, Plaintiff Cannot Bring Her Claims Under New Jersey Law.

Having determined an actual conflict of laws exists between the New Jersey and New Hampshire equal pay and anti-discrimination laws, the next step in the choice-of-law analysis is to determine which jurisdiction has the most significant relationship to the dispute. This determination requires application of the choice of law principles in the Second Restatement, and more specifically sections 6, 145, and 146. See In re Accutane Litig., 235 N.J. 229, 254 (2018). Based on the evidence, New Hampshire has the most significant relationship to the dispute.

1. Application Of Section 146 Of The Second Restatement Demonstrates A Strong Presumption That New Hampshire Law Applies To Plaintiff's Claims.

A choice-of-law analysis begins with section 146 of the Second Restatement "and the presumption that the law of the state where the injury occurred applies." In re Accutane Litig., 235 N.J. at 259 (citations omitted). Specifically, Section 146 provides:

> . . . the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship . . . to the occurrence and the parties, in which event the local law of the other state will be applied.

Id. (citing Restatement § 146). Here, the injury occurred in New Hampshire and, thus, New Hampshire law is presumed to apply to Plaintiff's claims. See Chinchilla v. Geo Dis Am., Inc., 2024 U.S. Dist. LEXIS 38658, at *19-20 (D.N.J. March 5, 2024) (finding the law of the state where the plaintiff lived and worked presumptively applied to the plaintiff's claims).

Plaintiff was not a resident of New Jersey, but instead resided in New Hampshire during the entirety of her employment with ZNLabs and ZRL. (SOMF, ¶¶ 58-61, 102-104). Prior to commencing full-time employment with ZNLabs, Plaintiff completed the "ZNLabs Employee Information Form," noting her "[w]orked in State" and "[l]ived in State" were both New Hampshire. (Id. at ¶ 59). As such, her wages with ZNLabs and ZRL, which were paid to her in New Hampshire, were subject to tax withholdings consistent with New Hampshire Law. (Id., ¶¶ 58-61, 102-104). Further, during the entirety of her employment with both ZNLabs and ZRL, Plaintiff's position was fully remote, and she worked exclusively from her home in New Hampshire. (Id.).

Dr. Gardiner, Plaintiff's direct supervisor and the individual responsible for deciding to hire Plaintiff, as well as setting Plaintiff's starting salary with ZNLabs, did not live or work in New Jersey. (Id., ¶¶ 8, 34, 50, 51). Rather, Dr. Gardiner, at all relevant times, resided and worked in Utah. (Id.). Dr. Mark Ackermann, who also supervised Plaintiff's employment for a period of time, likewise did not live or work in New Jersey, but in Iowa. (Id., ¶ 113). Further, according to Plaintiff, she did not have any regular contact with individuals within New Jersey as she did not receive any cases or samples to review from New Jersey at any time during her employment and,

to the best of her knowledge, ZRL did not have any labs or Pathologists in New Jersey. (Id., ¶¶ 61, 106, 110). Moreover, Plaintiff admittedly never even came to New Jersey during the entirety of her employment. (Id., ¶ 104). Accordingly, it is undisputed that Plaintiff was not located in New Jersey, nor did the performance of her work require contacts with New Jersey, during the entirety of her employment. Thus, New Jersey cannot be the "place of injury." Rather, the place of injury is New Hampshire.

2. Application Of Section 6 And Section 145 Of The Second Restatement Fail To Overcome The Presumption That New Hampshire Law Applies To Plaintiff's Claims.

This presumption may only be overcome if "'some other state has a more significant relationship with the part[y] and the occurrence based on an assessment of each state's contacts' viewed through the prism of section 145 ... and section 6." In re Accutane Litig., 235 N.J. at 259 (citations omitted). As set forth in detail below, Plaintiff cannot overcome the presumption that the law of the place of injury, New Hampshire, applies to her claims.

a. The Section 6 Factors Favor Application Of New Hampshire Law.

Section 6 sets forth seven, non-exclusive factors that a Court should consider when deciding which state's law applies:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Second Restatement § 6(2). Application of these factors definitively tips the scales in favor of applying New Hampshire law to Plaintiff's state law discrimination and equal pay act claims.

As to the first factor under section 6(2)(a), the needs of the interstate systems are best served by applying the law of the state where Plaintiff was employed: New Hampshire. See Calabotta, 460 N.J. Super. at 70 ("we are persuaded that under section 6(2)(a), the "needs of the interstate ... systems" are generally best served by applying the law of the state where a job opening will be filled."); see also Weinberg v. Interep Corp., 2006 U.S. Dist. LEXIS 23746 (D.N.J. Apr. 26, 2006)("[l]ooking to the state of employment ensures that the law in the jurisdiction with the strongest interest in the outcome of the litigation controls."). Indeed, "New Jersey law does not regulate conduct outside the state." D'Agostino v. Johnson Johnson, Inc., 133 N.J. 516 (1993).

As to Sections 6(2)(b), (c), (d), and (e), the policies of New Jersey and other jurisdictions are fairly accommodated by applying the law of the state where the job is located: New Hampshire. See Diana v. AEX Group, 2011 U.S. Dist. LEXIS 100928, at *7-8 (D.N.J. Sept. 7, 2011) (rejecting public policy arguments urging application of the LAD to out-of-state employees, reasoning that the "law of the state of the employee's workplace applies to claims arising from his employment because the state has an unusually strong interest in applying its own law to employment contracts involving work in [its] state."); see also Calabotta, 460 N.J. Super. at 66 (noting "[a] key purpose of our multi-factor choice-of-law jurisprudence, . . . is to promote interstate comity and due respect for the laws and interests of sister states, rather than automatically impose New Jersey law in some provincial or overly aggressive fashion). Here, Plaintiff was hired by ZNLabs and then ZRL to work in New Hampshire and, as such, it was reasonable for both Plaintiff and Defendants to assume they would have been subject to the laws of New Hampshire. (SOMF, ¶¶ 58-61, 102-110). Plaintiff's offer letter, which references her residence and work location in New Hampshire, confirms these expectations, as do Plaintiff's pay statements and W-2 forms, which were issued to Plaintiff in New Hampshire. (Id., ¶¶ 50, 58-61, 102-104).

Likewise, certainty, predictability and uniformity as set forth in Section 6(2)(f) are best preserved by application of New Hampshire laws to a New Hampshire resident and employee. It is well-established an employee is generally governed by the laws of the state in which they are employed. See Norris v. Harte-Hanks, Inc., 122 Fed. App'x 566, 569 (3d Cir. 2004) ("[I]t is well-established in New Jersey that [CEPA] claims of a New Jersey resident, relating to out-of-state employment, are governed by the law of the state in which that New Jersey resident was employed.") (citations omitted). Given the lack of evidence linking her claim to New Jersey, Plaintiff fails to meet her burden to establish that, based on application of the Section 6 factors above, New Jersey – not New Hampshire – has the "greatest interest" or "most significant relationship" to her claim.

b. The Section 145 Factors Favor Application Of New Hampshire Law.

In addition to considering the Section 6 factors, a Court must also consider the factors in Section 145 to determine which state has the most significant contacts with the parties and the dispute. Specifically, those factors include:

> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil[e], residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.

Second Restatement § 145(2). The "contacts" analysis is qualitative, not quantitative, and courts are directed to measure the significance of the contacts to determine whether the presumption has been overcome. P.V. ex Rel. T.V., 197 N.J. at 143.

Here, the Section 145 factors support application of New Hampshire, not New Jersey, law. The place of Plaintiff's injury is New Hampshire. It is undisputed Plaintiff lived and worked in

New Hampshire, reported to supervisors in Utah and Iowa, and received her work from a laboratory in Kentucky. (SOMF, ¶¶ 8, 33, 58-61, 102-113, 129). As evidenced by the pay statements and W-2 forms issued to Plaintiff by ZNLabs and ZRL, Plaintiff's pay, which is the central issue in this case and what Plaintiff contends to be the "injury" she sustained, was issued to her in New Hampshire and was paid pursuant to applicable New Hampshire law. (Id., ¶ 58-61, 102-104). Based on these facts, the employment relationship is clearly centered in New Hampshire, not New Jersey. See Second Restatement § 145(2)(d); see also Chinchilla, 2024 U.S. Dist. LEXIS 38658, at *21 (finding New Jersey law did not apply where the plaintiff did not establish any "control and supervision" by and through his employer's New Jersey location).

In sum, Plaintiff does not meet her burden of establishing that New Jersey has the "greatest interest" or "most significant relationship" to her claims. See Donovan v. W.R. Berkley Corp., 566 F. Supp. 3d 224 (D.N.J. 2021); see also Chinchilla, 2024 U.S. Dist. LEXIS 38658, at *24 (recognizing the LAD only applies to out-of-state plaintiffs that have the most significant relationship to New Jersey).

C. Even If New Jersey Law Applies, Plaintiff Has Not, And Cannot, Establish A Violation Of New Jersey's Diane B. Allen Act.

Even applying New Jersey law, Plaintiff's claims are nonetheless subject to dismissal as, just as with her Federal EPA claim, Plaintiff cannot establish a violation of the NJEPA. Specifically, and for the reasons set forth above, Plaintiff cannot show she performed substantially similar work to the purported comparators, Drs. Ehrhart and Jennings, other than pointing to job titles, which the interpretive guidance of the New Jersey Division on Civil Rights ("NJDCR") makes clear is not dispositive. Indeed, the NJDCR, in March 2020 stated, "What is most important to determining whether two employees perform substantially similar work is the work itself…Job titles and job descriptions do not necessarily keep pace with the actual nature of duties and

responsibilities performed by employees." Further, the evidence clearly establishes any wage differential was based on legitimate, non-discriminatory factors, which is an affirmative defense under the NJEPA. Plaintiff's claim under the NJEPA, therefore, must be dismissed.

In order to establish a viable claim under the NJEPA, Plaintiff must establish that (1) she is a member of a protected class, (2) who was paid a "rate of compensation, including benefits, which is less than the rate paid by the employer to employees who are not members of the protected class," and (3) that she was performing "substantially similar work, when viewed as a composite of skill, effort, and responsibility, as the comparators." N.J.S.A. § 10:5-12(t). As set forth in Point III, A, supra, Plaintiff cannot establish she was performing "substantially similar work" to the two comparators identified in her Complaint, Drs. Ehrhart and Jennings, who were both previously employed by and had their salaries established by Ethos years before the asset purchase and ultimate Integration on January 1, 2021. (SOMF, ¶¶ 123-125, 128, 163-172).

However, even if Plaintiff establishes a prima facie case under the NJEPA, Defendants can establish each of the factors set forth in Point IV, A, 1, b, entitling it to an affirmative defense. See N.J.S.A. § 10:5-12(t); see also Bento v. Plainfield Pub. Sch. Dist., 2022 N.J. Super. Unpub. LEXIS 2366 (App Div. Nov. 30, 2022) (upholding the trial court's dismissal of the plaintiff's New Jersey Equal Pay Act claim on summary judgment finding the defendant established each of the factors entitling it to an affirmative defense), certif. denied, 2023 N.J. LEXIS 624 (May 31, 2023).

First, there is no dispute the pay differential was based on a legitimate, bona fide factor other than the characteristics of members of the protected class, in this case, gender. The alleged pay disparity was the direct result of the acquisition and integration of Phoenix, ZNLabs, and Ethos to create ZRL. Importantly the Integration included a focus on the diagnostic laboratory services of the three acquired companies to allow ZRL to compete with its larger, established competitors.

(SOMF, ¶¶ 71-74, 78-81, 92-93). To accomplish its business objective, ZRL focused on four discrete goals, including retaining the talent and personnel from the acquired companies. (Id., ¶ 80). Indeed, as Kelly Winder, Vice President and Human Resources Lead for Zoetis Services, LLC, testified, "the piece with Reference Labs was we had a large growth initiative to open all of the new labs to retain and bring in their techs and other talent across the organization, which was a key mix to that, and bringing on the talent across the three acquisitions." (Id., ¶ 74).

Second, it is clear the wage differential was not based on and does not perpetuate a wage differential based on sex. Indeed, as explained in-depth in Point III, supra, each of the entities integrated into ZRL – Phoenix, ZNLabs, and Ethos – had different approaches to compensation. (Id., ¶ 77). As previously stated, there is no evidence to establish, insinuate, or otherwise suggest the prior pay practices at any of the three acquired entities were discriminatory, including and especially Ethos. Further, a pay equity analysis was completed prior to Integration, which confirmed that any wage differential between the three entities was not based on sex, or any other protected characteristic. (Id., ¶¶ 84-99). Rather, the wage differential was attributable to the irrefutable fact that all Ethos colleagues, both male and female, were paid substantially more than colleagues at ZNLabs and Phoenix, including, but not limited to, Plaintiff. (Id., ¶¶ 62-99, 114-162, 173-187). As such, the acquiring of all Ethos Pathologists, who were all paid significantly higher, does not perpetuate a wage differential *based on* sex.

Third, the decision not to lower the compensation of the Ethos colleagues to eliminate any wage differential was reasonable and necessary.[12] ZRL had a contractual obligation to maintain employee compensation at the same level for at least twelve (12) months. (Id., ¶¶ 18-21). Even if ZRL could reduce the salaries, however, there was concern that doing so would limit ZRL's ability

[12] Moreover, reducing pay to address a pay disparity is expressly prohibited under the NJEPA.

to retain the Ethos colleagues, which was one of the primary goals of the acquisitions. (Id., ¶¶ 71-74, 78-81, 87-99). Indeed, Ms. Winder testified, "Reference Labs was a new area. We did not have a Reference Labs business. So, these acquisitions were to acquire talent." (Id., ¶ 93). Philip Hoertz, Compensation Director, testified similarly, "we wanted to avoid anything disruptive for the colleagues that are being acquired and make sure they come into our organization successfully." (Id., ¶ 81). Thus, given that ZRL was a new venture seeking to compete with larger, more established entities, talent retention was not only reasonable, but essential. (Id., ¶¶ 3-4, 62, 71-74, 78-82, 87-99). ZRL, therefore, made the decision not to reduce any salaries. (Id., ¶¶ 97-99, 115). It cannot be disputed this decision to not lower compensation was applied uniformly. (Id.). That is, ZRL did not lower the compensation of any Ethos colleagues, male and female, who were paid more than colleagues at ZNLabs and Phoenix.

Fourth, it cannot be disputed the three acquisitions account for the entire wage differential and but for the Integration following the acquisitions and asset purchase, there would be no wage differential. (Id., ¶¶ 7-24, 62-162, 173-187). Finally, as to the last factor, as set forth above, any wage differential was based on the decision to not reduce the salaries of any Ethos colleagues. (Id., ¶ 97-99, 115). This approach is consistent with the express terms of the statute, which provides, "[a]n employer who is paying a rate of compensation in violation of this subsection shall not reduce the rate of compensation of any employee in order to comply with this subsection." N.J.S.A. § 10:5-12(t). Importantly, the evidence further establishes there were no reasonable "alternative business practices that would serve the same business purpose without producing the wage differential." Id. In fact, during her deposition, Ms. Winder was specifically questioned whether ZRL considered raising all salaries to the level of Ethos salaries. (Id., ¶ 186). Ms. Winder responded that this was clearly not a viable alternative as the business "would not have been able

to afford to do that," and was nevertheless "not a right or fair business decision[.]" (Id.). Accordingly, because Defendants have established the affirmative defense under the NJEPA, dismissal of this claim on summary judgment is warranted.

POINT V

PLAINTIFF CANNOT ESTABLISH CLAIMS FOR GENDER DISCRIMINATION UNDER TITLE VII AND THE LAD.[13]

Plaintiff's gender discrimination claim is based entirely on her allegations that a pay disparity existed between herself and Drs. Ehrhart and Jennings. Plaintiff's sole allegation of pay disparity, however, is insufficient to establish a gender discrimination claim under Title VII and/or the LAD.

A. Plaintiff's Gender Discrimination Claims Under Title VII And The LAD Are Based Entirely On Her Allegations Regarding A Pay Disparity.

During her deposition, Plaintiff unequivocally conceded that other than being paid less than Drs. Ehrhart and Jennings, she was not discriminated against because of her gender at any time during her employment with ZRL. (SOMF, ¶ 202). Specifically, Plaintiff testified as follows:

> Q. Prior to your conversation with Dr. Gardiner on March 10, 2021, when he advised you what Drs. Jennings and Ehrhart were making, had you raised any complaints to anyone at Zoetis Reference Labs about being treated unfairly because of your gender?
>
> A. No.
>
> . . .
>
> Q. You were hired in August of 2020, correct, the very end of the month, and I believe you started in September?
>
> A. Correct.

[13] As an initial matter, and for the same reasons outlined in Point IV, A, supra, there is no support for the application of New Jersey law, including the LAD, to the claims asserted in this litigation. As such, Plaintiff's claim for gender discrimination in violation of the LAD should be dismissed as a matter of law for that reason alone.

> Q. So the approximate six-months time that you were employed as a full-time employee at Zoetis Reference Labs, prior to being told what Dr. Jennings and Dr. Ehrhart were making, did you feel like you were being discriminated against because you were a woman by Zoetis Reference Labs?
>
> A. No, I did not.

(SOMF, ¶ 202). Thus, Plaintiff concedes she did not suffer any discrimination based on gender during her employment with ZRL, with the exception of her claims related to pay, which, for the reasons set forth below, are subject to dismissal.

B. Plaintiff's Gender Discrimination Claims Under The LAD Based On A Pay Disparity Must Be Dismissed For The Same Reasons As Plaintiff's EPA Claim.

Claims of gender discrimination under the LAD based on the payment of unequal wages are generally analyzed under the same framework applicable to claims under the Federal EPA. See Spiewak v. Wyndham Destinations, Inc., 2023 U.S. Dist. LEXIS 14473, at *26-27 (D.N.J. Jan. 26, 2023) ("[]LAD claims based on gender discrimination in wages are analyzed under the [Federal] EPA or Title VII framework"). In Zulauf v. Stockton Univ., 2017 U.S. Dist. LEXIS 24457, at *19 (D.N.J. Feb. 22, 2017), the Court set forth in detail the New Jersey Supreme Court's holding with respect to the standard to be applied to such claims. The Court noted:

> . . . in a case brought under the LAD presenting a gender-discrimination claim based on the payment of unequal wages for the performance of substantially equal work, the standards and methodology of the EPA [Equal Pay Act] should be followed. These encompass the elements that comprise both a prima facie case and the corresponding transfer of the burden of proof. . . . If the complainant establishes a case of 'substantially equal' work that is compensated at different rates of pay, then the defendant has the burden of proof to establish by a preponderance of the evidence the affirmative defenses delineated under the EPA and incorporated into Title VII to overcome the charge of unlawful discrimination.
>
> We further determine that if such a complainant in an action brought under the LAD based on gender-discrimination fails to satisfy the standards of a prima facie case of 'substantially equal' work, as

> prescribed by the EPA, but the evidence demonstrates a lesser degree of job similarity that would nonetheless satisfy the less-exacting standards of a prima facie case under Title VII, the burden that shifts to the defendant should be only the burden of production or explanation. Thus, if such a complainant is able to show only that the work is 'similar,' then the defendant will be required to articulate a legitimate non-discriminatory reason for the treatment of the plaintiff, and the ultimate burden of persuasion shall remain on the plaintiff.

Id. (citing Grigoletti v. Ortho Pharm. Corp., 118 N.J. 89, 109-10 (1990). Thus, applying the standards and methodology of the Federal EPA, Plaintiff's unequal pay claim under the LAD is subject to dismissal. As set forth in Point III, supra, Plaintiff cannot establish a prima facie case under the Federal EPA because the evidence does not support that Plaintiff was performing equal work to the comparators identified in the Amended Complaint. Even if Plaintiff could establish a prima facie case, Defendants can satisfy the fourth affirmative defense under the Federal EPA: any pay disparity was attributable to a factor other than sex.

C. Plaintiff's Gender Discrimination Claim Under Title VII Based On A Pay Disparity Must Be Dismissed.

Plaintiff's unequal pay claims are likewise subject to dismissal even if considered under the Title VII framework. Title VII claims are evaluated using the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this framework, a plaintiff bears the burden of first establishing a prima facie case of discrimination. Id. at 802-03. In the context of a pay disparity claim under Title VII, this requires that a plaintiff "demonstrate that 'employees . . . were paid differently for performing 'equal work'—work of substantially equal skill, effort and responsibility, under similar working conditions.'" Kumar v. Johnson & Johnson, Inc., 2014 U.S. Dist. LEXIS 154650, at *21 (D.N.J. Oct. 31, 2014) (citing Noel v. Boeing Co., 622 F.3d 266, 274 (3d Cir. 2010)). In other words, a plaintiff "needs to show that a male employee with the same or similar job was paid more for equal work." Id. As set forth in Point

III, A, supra, Plaintiff cannot meet this prima facie burden as she has not established that her job duties at ZRL were "similar" to the two purported comparators identified by Plaintiff in her Amended Complaint, Drs. Ehrhart and Jennings.

Nevertheless, even if Plaintiff could establish a prima facie case, the burden shifts to Defendants to produce a legitimate, non-discriminatory reason for the treatment of plaintiff by "showing that the wage differential resulted from a factor other than sex," which Defendants have clearly done in this matter. See Grigoletti, 118 N.J. at 103 (citations omitted). Importantly, defenses available to a defendant to rebut the prima facie showing include, but are not limited to, the defenses available to employers under the Federal EPA. See Grigoletti, 118 N.J. at 103 (noting that, while Title VII incorporates the EPA defenses, a defendant is not limited to these defenses in rebutting a plaintiff's prima facie case). Title VII provides:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C. §2000e-2(h). Here, for the reasons set forth in Point III, B, supra, Defendants have clearly established that any wage differential was based on a factor other than sex. Indeed, the evidence clearly establishes that any wage differential was the result of the acquisitions and integration of ZNLabs, Phoenix and certain assets of Ethos. (SOMF, ¶¶ 7-24, 62-162, 173-187). Again, it is undisputed Ethos simply had different and much higher pay practices than ZNLabs and Phoenix for both male and female employees. (Id., ¶¶ 77, 87, 90, 114-120, 137, 160, 177, 185-186).

Here, because Defendants have established a defense to the wage differential, Plaintiff must submit evidence that Defendants' explanation is a pretext for discrimination. McDonnell

Douglas Corp., 411 U.S. at 804-05. ***The ultimate burden of proving that the employer engaged in unlawful discrimination remains at all times with the plaintiff.*** See Davis v. City of Newark, 285 F. App'x 899, 903 (3d Cir. 2008). Here, Plaintiff has not and cannot meet her burden of establishing Defendants engaged in unlawful discrimination as the undisputed facts establish that any wage differential was based not based on gender. Accordingly, Plaintiff's gender discrimination claims under the LAD and Title VII fail as a matter of fact and law and should be dismissed with prejudice.

POINT VI

IN THE ALTERNATIVE, PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES UNDER TITLE VII AND THE LAD SHOULD BE DISMISSED.[14]

The evidence does not support Plaintiff's claim for punitive damages under Title VII and the LAD. (See Amended Complaint, ECF No. 52, Count II and IV). Plaintiff has not produced any evidence that Defendants engaged in unlawful, discriminatory conduct, much less conduct that was particularly egregious. It is a well-established principal of law that punitive damages are limited to particularly egregious behavior or, in other words, conduct that was "wantonly reckless or malicious." Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 48-49 (1984) ("[t]here must have been an intentional wrongdoing in the sense of an 'evil-minded act' or an act accompanied by a wanton and willful disregard of the rights of others." Id. at 49 (internal citations omitted); see also Griffin v. Harrisburg Prop. Servs., 421 Fed. Appx. 204, 208 n. 4 (3d Cir. 2011) ("Punitive damages are available in Title VII claims and 'are limited . . . to cases in which the employer has engaged in intentional discrimination and has done so "with malice or with reckless

[14] For the same reasons outlined in Point IV, A, supra, there is no support for application of New Jersey law, including the LAD, to the claims in this litigation. Thus, for this reason alone, Plaintiff's claim for punitive damages under the LAD is subject to dismissal.

indifference[.]'") (internal citations omitted). Thus, a precursor to a punitive damages award is a finding of "'actual malice.'" Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 353 (App. Div), certif. denied, 152 N.J. 189 (1997) (citation omitted).

Punitive damages "are only awarded in exceptional cases" even where a violation of law occurred. Catalane v. Gilian Instrument Corp., 271 N.J. Super. 476, 501 (App. Div.), cert. denied, 136 N.J. 298 (1994). A "plaintiff must show more than the minimum conduct necessary to prove the underlying [LAD or Title VII claim] before an award of punitive damages becomes appropriate." Weiss v. Parker Hannifan Corp., 747 F. Supp. 1118, 1136 (D.N.J. 1990). As explained in-depth, supra, Plaintiff is unable to introduce any evidence to support her discrimination claims, much less the type of egregious conduct required for an award of punitive damages. Since Plaintiff is unable to present any genuine triable issues of material fact on her Title VII or LAD discrimination claims, it necessarily follows that Plaintiff cannot present any evidence of conduct that exhibits the malice or reckless disregard for her rights required to justify an award of punitive damages. See Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 392 (Law Div. 2002) (finding that "in light of the court's ruling with regard to plaintiff's underlying claims, her additional claim for punitive damages must also be dismissed").

Even if Plaintiff could establish her claims under Title VII and the LAD, there is no evidence to support a finding Defendants engaged in conduct that exhibits malice or reckless disregard for Plaintiff's rights. Rather, the evidence shows ZRL undertook numerous good faith efforts to comply with anti-discrimination laws and maintain a workplace free of discrimination, which Plaintiff does not dispute with the exception of concerns raised regarding a pay disparity. Importantly, to address these concerns, ZRL conducted two separate pay equity analyses to ensure there were no significant differences related to gender or race. (SOMF, ¶¶ 84-99, 151-162); see

Cavouti v. N.J. Transit Corp., 161 N.J. 107, 119-121 (1999) (employer's good faith effort to comply with anti-discrimination provisions insulate employer from punitive damages). Accordingly, Plaintiff's demands for punitive damages under Title VII and the LAD must be dismissed, as a matter of law, based on the undisputed material facts.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion for summary judgment and dismiss Plaintiff's Amended Complaint, in its entirety, with prejudice. In the event Plaintiff's Title VII or LAD claims survive summary judgment, Defendants respectfully request that the Court strike Plaintiff's prayer for punitive damages.

Respectfully Submitted,

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