

**IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA**

TIMOTHY FROST,

Plaintiff,

v.

XYX CO., AICHTRAXX, LLC,
REDHAT, INC.

Defendants.

CIVIL ACTION

FILE NO. 12-A-12345

**PLAINTIFF'S BRIEF IN SUPPORT OF HIS RESPONSE TO DEFENDANT
AICHTRAXX'S MOTION TO DISMISS**

COMES NOW Plaintiff Timothy Frost and respectfully submits this Brief in Support of his Response to Defendant Aichtraxx's Motion to Dismiss. In support of his motion, Plaintiff shows this Court the following:

I. INTRODUCTION

Defendant Aichtraxx, in collaboration with Defendants XYZ and Redhat, failed to create a tracking application that warned XYZ deliverymen of potentially dangerous situations in their route or alert XYZ customers that their packages had been flagged and seized. As this Court will learn, Aichtraxx is the leading manufacturer of fleet management software applications. In addition to collaborating with XYZ to create its global tracking system, Aichtraxx has worked with companies such as TomTom, Peloton, and Samsung to revolutionize package delivery in the United States. A leader in its field, Aichtraxx provides technological solutions that make package delivery faster, cheaper, and more efficient. It is because of its technical expertise and its intimate relationship with the package delivery business that Aichtraxx had a duty to create an alternative design to XYZ's tracking system that would have alerted the customer that their

flagged package had been seized and alerted the driver to a potentially dangerous XYZ customer in their route. This Court will learn that creating this alert was well within Aichtraxx technological capabilities and would have neither reduced the efficacy of the tracking app nor made the app prohibitively expensive (especially not for a company like XYZ that invests \$1 *billion* a year in technology). This Court will learn that Defendant Aichtraxx's failure to make this minor change was the catalyst that set in motion a chain of events that left Plaintiff with a bullet in his chest.

Defendant attempts to evade its responsibility for Plaintiff's injury through a number of arguments that ultimately fail on their merits. Its argues that Aichtraxx, the leading provider of software for XYZ and companies like it, could not have foreseen the kind of criminal attack that Plaintiff endured. As this Court will learn, this injury was foreseeable to Aichtraxx – a company intimately intertwined with XYZ and its ilk that conducts independent, comprehensive research to anticipate and solve customer problems. This Court will also learn that design alternatives to this app were not only feasible but straightforward and easily implementable, especially for a company like Aichtraxx. Finally, Aichtraxx's position that Plaintiff was involved in mutual combat with Freeman is meritless and legally unsound – as is evident from the facts of this case, Freeman fought in self-defense and neither possessed nor intended to use a deadly weapon.

Because Defendant failed to make a case that there is no set of facts under which Plaintiff could recover for his negligent/defective product design claim, its motion should be DENIED.

II. STATEMENT OF RELEVANT FACTS

Defendant Aichtraxx, in collaboration with XYZ and Redhat, developed a universal tracking app that provides XYZ customers with continuously updated package tracking information. This tracking technology keeps XYZ clients abreast of their package's location from

the moment the XYZ shipping label is created to the moment the package arrives at the customer's door.¹ The app includes a feature that informs XYZ customers whether their package is en route and the estimated time of its arrival.² The tracking technology does not inform XYZ customers if their package has been flagged as potential contraband. The app does not notify XYZ customers if their packages have been removed from the delivery route. If a package being shipped through XYZ is identified as potential contraband and removed from the route, the tracking app behaves as though the delivery was never interrupted – the app continues to tell the customer that the package is en route, even when it's not. The app also doesn't inform XYZ parcel deliverymen if a package has been labeled contraband, intercepted by XYZ, and removed from their route.

On July 15, 2022, John Freeman was looking for a package that the XYZ global tracking app told him was en route to be delivered that day. Plaintiff's Complaint ¶ 4. However, the package was not en route to be delivered that day – it had been flagged as contraband and removed from the delivery route. But Freeman didn't know that. And neither did Plaintiff, the XYZ parcel deliveryman assigned to the delivery route where Freeman was expecting his package. Id., ¶¶ 16-20. Freeman confronted Plaintiff during his route and claimed that he was trying to retrieve an urn containing the remains of a dead relative that he believed to be on Plaintiff's truck. Sympathetic to Freeman's story, Plaintiff searched his truck but couldn't locate the package. Plaintiff informed Freeman that he didn't have the package and continued on his delivery route. But Freeman didn't take no for an answer. Trusting the information being fed to him by the XYZ global tracking app, Freeman believed that his package had to be on Plaintiff's truck – so Freeman followed Plaintiff. Once Plaintiff stopped in a parking lot, Freeman

¹ XYZ.com, XYZ Tracking, <https://www.XYZ.com/mz/en/services/tracking/information.page>.

² Id.

confronted Plaintiff again, demanding the package. Plaintiff once again told Freeman that he didn't have the package. Freeman attacked Plaintiff. Plaintiff defended himself. Freeman pulled out a gun and shot Plaintiff in the chest. *Id.*, ¶¶ 22-23.

Police later determined that Freeman's package contained illegal drugs.

III. STANDARD FOR MOTION TO DISMISS

"[A] motion to dismiss for failure to state a claim cannot be granted unless the plaintiff would not be entitled to relief *under any state of provable facts* asserted in support of the allegations in the complaint and *could not possibly introduce evidence* within the framework of the complaint sufficient to warrant a grant of the relief sought" Maynard v. Snapchat, Inc., 313 Ga. 533, 540-41 (2022) (emphasis added). "[T]he standard for granting a motion to dismiss is a demanding one because a complaint need only give fair notice of the claim." *Id.* at 553.

IV. ARGUMENT AND CITATION TO AUTHORITY

A. AICHTRAXX IS NEGLIGENT FOR DEFECTIEVLY DESIGNING THE GLOBAL TRACKING SYSTEM.

Aichtraxx confuses the allegations outlined in the complaint and misstates Plaintiff's argument. Specifically, Aichtraxx fails to recognize the claim for defective product design is brought under a negligence framework. "Because a manufacturer may owe a design duty under Georgia's product-liability statute or under this State's decisional law, a plaintiff injured by a defectively designed product can pursue a claim against a manufacturer under either a statutory strict-liability theory or a decisional-law negligence theory or both." Maynard, 313 Ga. at 537. Plaintiff brings his claim under the decisional-law design duty theory. Under a decisional law defective design claim, "the factfinder performs a risk-utility analysis, assessing the reasonableness of choosing from among various alternative product designs by asking whether the risk of harm outweighs the utility of a particular design to determine whether the product is

not as safe as it should be." Id. at 537-38 (internal citations and punctuation omitted). The plaintiff must then show "that the defect proximately caused the plaintiff's injury." Id. at 538.

1. The particular risk of harm was reasonably foreseeable, triggering Aichtraxx's design duty.

Aichtraxx attempts to evade the duty that it had to design a tracking system that would not cause reasonably foreseeable harm by arguing that because it is "not in the package business," the shooting could not have been foreseeable to it, "an alleged designer of a GPS app." Defendant Aichtraxx's Motion to Dismiss at 2.

First and importantly, Aichtraxx is not just the designer of a GPS app. On its website, Aichtraxx describes itself in the following way:

Aichtraxx is the leading provider of fleet management software applications, information services, and hardware platforms. The company's intuitive technologies, including solutions for safety and compliance, fuel efficiency, driver retention, GPS fleet tracking, and fleet maintenance, enable its customers to solve common fleet problems and achieve their business objectives. Aichtraxx pioneered the fleet telematics industry over 25 years ago and continues to serve over 2,500 private and for-hire fleet customers and more than 270,000 vehicles throughout North America and Latin America.³

Not only is Aichtraxx "in the package business," the modern package and product shipping business would not be what it is today without Aichtraxx. As it says clearly on its website, Aichtraxx only works with trucking fleets – the purpose of which is to transport *packages* of goods. Aichtraxx designs its tools specifically and exclusively for the "package business." Aichtraxx touts itself as the company that "solves problems" for the "package business" and helps them "achieve their business objectives." Aichtraxx's work is so intimately

³ <https://www.Aichtraxx.com/news/Aichtraxx-completes-acquisition-roadnettechnologies>

intertwined with the package business as it works today that one could not exist without the other.

Because the business of Aichtraxx is facilitating the movement of packages, it must have comprehensive knowledge of the industry's problems to create cost-effective ways to mitigate the potentially profit-draining effects of these problems. To that end, Aichtraxx even initiates its own studies to determine ways to find solutions to problems that its clients in the "package business" have yet to anticipate. For example, in 2021, Aichtraxx conducted the "Delivering on Demand: Consumer 2021 Insights Survey," a study that found that 65% of consumers were willing to pay more for faster *package* deliveries post COVID-pandemic.⁴

But faster and more efficient package delivery is not the only problem that Aichtraxx's clients face. Another problem that faces those who operate fleet trucks is the rising violence against their drivers. Truck drivers are routinely targeted by armed robbers who seek to steal their cargo.⁵ According to FBI statistics from 2007, "859 trucks were robbed in 2009, up from 767 trucks in 2008 and 672."⁶ Truck drivers face constantly increasing levels of armed robbery and other violent crimes.⁷ XYZ drivers, in particular, face incessant and increasing gun violence. Over a dozen XYZ delivery drivers have been kidnapped, robbed, or threatened at gunpoint in the United States in the past year alone.⁸ Only two months before Plaintiff was gunned down by

⁴ Aichtraxx, *Consumers Demand Sustainable Delivery Options After Pandemic Experience*, <https://www.Aichtraxx.com/sites/default/files/files/2021-06/Consumer%20Survey%20Infographic.pdf>

⁵ Maxine Park, *Armed Robbery Growing Problem for Truckers: The FBI reports an increase in robberies at rest stops.*, March 9, 2010, ABC NEWS, <https://abcnews.go.com/Business/armed-robbery-growing-problem-truckers/story?id=10053720>.

⁶ *Id.*

⁷ Summer Smith, *40% of crimes against truck drivers are violent, including rape and assault, according to survey*, CDL life, July 21, 2020, <https://cdllife.com/2020/40-of-crimes-against-truck-drivers-are-violent-including-rape-and-assault-according-to-survey/>.

⁸ Mira Wassef, *XYZ driver robbed at gunpoint in Brooklyn, police say*, PIX11, Oct. 18 2022, <https://pix11.com/news/local-news/brooklyn/XYZ-driver-robbed-at-gunpoint-in-brooklyn-police-say/>; *XYZ driver robbed at gunpoint in Annapolis shopping center, police say*, WBALTV11, Apr. 20 2022, <https://www.wbalTV.com/article/XYZ-driver-robbed-gunpoint-annapolis/39788604>; FOX5 Atlanta Digital Team, *XYZ driver tied up, robbed in NW Atlanta*, FOX5 ATLANTA, Dec. 28 2021, <https://www.fox5atlanta.com/news/XYZ->

a XYZ customer, Atlanta-based XYZ drivers publicly called upon XYZ to implement security measures to protect them against the constant gun violence that they faced on their route and even started an online petition to rally support.⁹ Moreover, it is common knowledge that XYZ has long served as a reliable delivery service for traffickers of illegal and illicit drugs.¹⁰ It is a universally known and accepted truth that there is a "direct nexus between illegal drugs and crimes of violence." Harmelin v. Michigan, 501 U.S. 957, 1003, 111 S. Ct. 2680, 2706, 115 L.Ed.2d 836, 870 (1991).

In the face of such ceaseless and pervasive gun violence against XYZ drivers, it was highly foreseeable, if not downright expected, that Mr. Frost would be shot on his XYZ route. This foreseeability was compounded by Defendants' failure to simply update Freeman's package tracking information to inform him that his package of illegal drugs was not on Mr. Frost's truck or inform Mr. Frost that the package had been removed – a negligible change that could have literally removed Mr. Frost from the line of fire, and a conscious failure that put his life at risk.

[driver-kidnapped-robbed-in-nw-atlanta](#); *Police Arrest Suspect in String of Armed Robberies of XYZ Drivers, Carjacking in Oakland*, CBS SAN FRANCISCO, Dec. 27, 2021, <https://www.cbsnews.com/sanfrancisco/news/police-arrest-suspect-in-string-of-armed-robberies-of-XYZ-drivers-carjacking-in-oakland/>; *XYZ driver robbed at gunpoint in North Philadelphia, police say*, FOX 29 NEWS PHILADELPHIA, Mar. 9, 2022, <https://www.fox29.com/news/XYZ-driver-robbed-at-gunpoint-in-north-philadelphia-police-say>; *Summer Poole, XYZ delivery driver threatened with a gun in Pensacola*, Mar. 14, 2022, NEWS5WKRG, <https://www.wkrg.com/northwest-florida/escambia-county/XYZ-delivery-driver-threatened-with-gun-in-pensacola/>; *Charles E. Ramirez, Police seek tips after XYZ driver robbed on Detroit's west side*, THE DETROIT NEWS, Apr. 12, 2022, <https://www.detroitnews.com/story/news/local/detroit-city/2022/04/12/video-shows-XYZ-driver-being-robbed-detroit-west-side-man-escaped/7290216001/>; *Police: XYZ driver short returning home from work in Hunting Park*, ACTION NEWS WPVI-TV, July 16 2022, <https://6abc.com/philadelphia-shooting-philly-gun-violence-hunting-park-north-7th-street/12055980/>;

⁹ Denise Dillon, *Some XYZ drivers want more safety measures in place* (Apr. 27, 2022) FOX 5 ATLANTA, <https://www.fox5atlanta.com/news/some-XYZ-drivers-want-more-safety-measures-in-place>.

¹⁰ Arelis Hernández, *XYZ employees allegedly ran massive drug shipment operation, evading authorities for a decade*, WASH. POST, Nov. 27 2019, https://www.washingtonpost.com/national/XYZ-employees-allegedly-ran-massive-drug-shipment-operation-evading-authorities-for-a-decade/2019/11/27/00f432e8-10cb-11ea-bf62-eadd5d11f559_story.html; Press Release, United States Attorney's Office Northern District of California, XYZ Agrees to Forfeit \$40 Million in Payments from Illicit Online Pharmacies for Shipping Services (Mar. 29, 2013), <https://www.justice.gov/usao-ndca/pr/XYZ-agrees-forfeit-40-million-payments-illicit-online-pharmacies-shipping-services>; Ankit Ajmera, Lisa Baertlein, *Answering Trump, XYZ, FedEx and USPS say they already fight illegal drug shipments*, REUTERS, Aug. 23, 2019, <https://www.reuters.com/article/us-usa-trade-china-fentanyl/answering-trump-XYZ-fedex-and-usps-say-they-already-fight-illegal-drug-shipments-idUSKCN1VD200>.

Gun violence against parcel deliverymen, especially XYZ drivers, is highly foreseeable. And Aichtraxx knew that. Aichtraxx knew that because it is Aichtraxx's job to stay abreast of the challenges that those in the "package business" face. In its quest to make product delivery faster, cheaper, and more efficient, Aichtraxx has surely considered how violence against drivers can affect those basic calculations. Not only have those calculations been considered, the ability to protect a driver against a threat of violence has likely been discarded because of its potentially negative impact on the bottom line.

2. Aichtraxx acted unreasonably in choosing the product design.

Georgia courts "evaluate design defectiveness under a test balancing the risks inherent in a product design against the utility of the product so designed." Banks v. Ici Ams., 264 Ga. 732, 734 (1994).

This risk-utility analysis incorporates the concept of 'reasonableness,' i.e., whether the manufacturer acted reasonably in choosing a particular product design, given the probability and seriousness of the risk posed by the design, the usefulness of the product in that condition, and the burden on the manufacturer to take the necessary steps to eliminate the risk.

Id.

The Georgia Supreme Court has recognized that there is no finite number of factors to be considered under a risk-utility analysis but has set forth a non-exhaustive list of general factors that include:

[T]he gravity and severity of the danger posed by the design; the likelihood of that danger; [...]; the user's ability to avoid danger; the state of the art at the time the product is manufactured; the ability to eliminate danger without impairing the usefulness of the product or making it too expensive; [...] the feasibility of an alternative design [...].

Maynard, 313 Ga. at 538 n.4 (internal citations and punctuation omitted). Plaintiff will address these factors below.

a. Alternative designs were both feasible and easily implementable.

"One factor consistently recognized as integral to the assessment of the utility of a design is the availability of alternative designs, in that the existence and feasibility of a safer and equally efficacious design diminishes the justification for using a challenged design." Banks, 264 Ga. at 735.

Aichtraxx is the country's "leading provider of fleet management software applications." Aichtraxx develops technology that allows its customers to "see every route, stop, and event" that their trucks make.¹¹ Aichtraxx's technology can "track driving habits, such as harsh cornering and speeding," as well as "proactively plan routine truck maintenance."¹² To help keep their clients' cargo safe, Aichtraxx developed Spireon Trailer Tracking to provide its clients with near real-time trailer location information to improve its clients' operational efficiency and profitability by improving asset visibility.

To create the tracking system at issue, Aichtraxx paired with XYZ – a company with a \$1 *billion* technology budget dedicated to improving the speed and efficiency of its deliveries.¹³ Together, they created a global tracking system that compiles continuously updated data to inform XYZ customers about the location of their package from the time it leaves the distributor to the moment it arrives at their front door. As it currently works, when a package is flagged as contraband and removed from a parcel deliveryman's route, the app continues to tell the customer that the package is en route for delivery. The alternative design feature at issue in this case is exceedingly simple – XYZ's global tracking app should have included an alert that

¹¹ Aichtraxx.com, Monitor Critical Fleet Events and Reach Proactively, <https://www.Aichtraxx.com/Aichtraxx-fleet-telematics>

¹² Aichtraxx.com, Aichtraxx Asset Tracking, <https://www.Aichtraxx.com/asset-tracking>

¹³ XYZ.com, XYZ Technology and Innovation, <https://www.XYZ.com/us/en/supplychain/insights/innovation-technology.page>.

notified XYZ customers that their packages had been flagged and removed from the route and alerted the deliverymen that a package was flagged as contraband and removed from their route.

"Alternative safe design factors include: the feasibility of an alternative design; the availability of an effective substitute for the product which meets the same need but is safer; the financial cost of the improved design; and the adverse effects from the alternative." Banks, 264 Ga. at 736 n.6. While neither Plaintiff nor his attorney are app developers or technology gurus, it is reasonable to believe that two corporations with the budget, background, and technological capability of Aichtraxx and XYZ could have *easily* implemented an additional alert among the dozens that are already in use to inform a customer that their package has been flagged and removed from the delivery route and alert the driver of the same information. If the tracking app can inform a customer that the distributor has printed out the XYZ label, that the package has arrived at a XYZ distribution center, and that a package is currently on a XYZ truck, it seems feasible that it was well within XYZ's and Aichtraxx's capabilities to alert a customer and driver that a package had been flagged as potential illegal contraband and removed from the delivery route. Regarding the financial cost, Plaintiff asserts that the cost of adding such a minor tracking feature would have been nominal at best, especially in the context of XYZ's \$1 *billion* technology budget.

Finally, the adverse effects of not having this feature are obvious. This scenario is far from a simple theoretical – if the global tracking app had informed Freeman that his flagged package had been intercepted and removed from its route, Plaintiff would have never been shot. Had the app informed Plaintiff that Freeman's package had been held as contraband, Freeman could have taken greater steps to avoid being violently confronted by Freeman.

b. The state of the art at the time the global tracking app was created allowed for the introduction of additional alerts.

Aichtraxx has an impressive track record of improving fleet management software applications. In 2017, Aichtraxx partnered with Samsung to "help the transportation industry address the Federal Motor Carrier Safety Administration (FMCSA) Electronic Logging Device (ELD) Mandate."¹⁴ The partnership combined "Samsung mobile devices (smartphones and tablets) and security solutions with Aichtraxx's XRS fleet management software to improve safety, data security, and productivity for U.S.-based fleets." The FMCSA-compliant solution increased the speed and accuracy of driver reporting and "provide[d] fleets with driver performance analytics, including fuel usage, drive time, speed, driving behavior, driver vehicle inspection reporting (DVIR) and trip data to improve driver safety, lower costs and increase productivity."

That same year Aichtraxx also partnered with Peloton Technology, a developer of connected and automatized vehicle systems, to create technology that "synchronizes braking and acceleration between pairs of trucks through the integration of vehicle-to-vehicle (V2V) communications with state-of-the-art, radar-based collision avoidance systems, enabling the trucks to travel safely at aerodynamic following distances."¹⁵

Aichtraxx has also partnered with TomTom, a multinational developer and creator of location technology, to gain access to "global map coverage, vehicle-specific logistics data, and road-speed information."¹⁶

Aichtraxx solution leverages TomTom's power with map data, including speed profiles, address points, and logistics. These powerful tools provide geospatial

¹⁴ Fleet Equipment Staff, *Aichtraxx, Samsung pair up on ELD solution* (Nov. 1, 2017) FLEET EQUIPMENT, <https://www.fleetequipmentmag.com/Aichtraxx-samsung-pair-eld-solution/>

¹⁵ Press Release, *Aichtraxx partners with peloton technology on Driver-Assistive Truck Platooning and Development of Combined Fleet management* (Feb. 15, 2017), <https://www.Aichtraxx.com/news/Aichtraxx-partners-peloton-technology-driver-assistive-truck-platooning-and-development>.

¹⁶ Kenneth Clay, *Transforming the fleet and logistics industry with Aichtraxx and TomTom*, tomtom.com, Nov. 17, 2020, <https://www.tomtom.com/newsroom/partner-stories/transforming-fleet-and-logistics-with-map-data-for-geospatial-insights/>.

insights critical to fleet management solutions. TomTom delivers robust and scalable map data that enables fleet and logistics software companies to build fleet solutions that suit the specific business needs of their customers. [...]The Aichtraxx solution is further enhanced with the TomTom logistics data set, which considers vehicle attributes, such as the size and weight of cargos, so that commercial drivers follow travel restrictions and compliant routes.¹⁷

These examples of collaborations that resulted in design breakthroughs that improved how the "package business" works evidence not just the state of the art of fleet management software, but how Aichtraxx specifically drives, elevates, and directs the growth of the fleet management software industry. Thanks in large part to Aichtraxx, the fleet management software industry is a fast-paced, ever-developing, ever-growing, ever-advancing industry. The state of the art continues to meet, if not outpace, the industry demand for cheaper, faster, more efficient shipments.

The issue before the Court today is a simple one – the introduction of an alert that would inform a XYZ customer and the parcel deliveryman that a package was removed from the delivery route. That's it. The app that already informs a customer when a distributor has prepared a XYZ shipping label, when the package arrives at a distribution center, and when a package is out for delivery. In addition to alerting a customer and driver about the whereabouts of a package in its journey from its distributor to the client's front door, the global tracking app should tell both customer and deliveryman if a package has been removed from the route. The fact that the state of the art exists to create the alerts that XYZ customers and drivers already receive is evidence that an additional alert would have been relatively simple and cheap to incorporate into the app. It is beyond a doubt that Aichtraxx, a company that drives so much technological growth in this industry, had the capability to introduce into the global tracking app at issue a simple alert

¹⁷ *Id.*

to inform the driver of a truck that a flagged package had been removed from its route or inform a customer that a flagged package had been intercepted by XYZ personnel.

c. The gravity and severity of the danger posed by the design.

The injuries that Plaintiff sustained in this case illustrate the gravity and severity of the danger posed by the current design of XYZ's global tracking system.

d. The likelihood that a XYZ parcel deliveryman will be confronted by a violent drug dealer is high.

As has been discussed at length *supra*, XYZ drivers face incessant gun violence. Atlanta-based XYZ drivers specifically called upon XYZ to put in place security measures to protect them against increasing gun violence only six weeks before Plaintiff was gunned down on his delivery route. XYZ drivers have been the victims of increasing violent robberies that XYZ has done nothing to protect them against.¹⁸ As has also been discussed *supra*, XYZ has long been regarded as a quick and efficient means of trafficking illegal drugs. It is also universally known that illegal drugs and violence are inextricably linked.

XYZ flags and intercepts thousands of packages annually and never updates the customers tracking information. Each time that the tracking data is not updated, a target is placed on an unwitting XYZ parcel deliveryman's back. The likelihood that something like what happened to Plaintiff will happen again, and has happened before, is patent and undeniable.

e. XYZ parcel deliverymen are incapable of avoiding the danger because they are ignorant to the threat posed.

XYZ parcel deliverymen *cannot* avoid this danger. They are given zero information to help protect themselves against potentially armed and dangerous XYZ customers who are using the delivery service to traffic illegal drugs – something that happens regularly.

¹⁸ Denise Dillon, *Some XYZ drivers want more safety measures in place* (Apr. 27, 2022) FOX 5 ATLANTA, <https://www.fox5atlanta.com/news/some-XYZ-drivers-want-more-safety-measures-in-place>.

3. Aichtraxx's breach proximately caused Plaintiff's injuries.

A breach of a duty constitutes a proximate cause of an injury only if the injury is the probable result of the breach [...]. We have explained that it is important to recognize that 'probable,' in the rule as to causation, *does not mean 'more likely than not'* but rather '**not unlikely**'; or, more definitely, 'such a chance of harm as would induce a prudent man not to run the risk; such a chance of harmful result that a prudent man would foresee an appreciable risk that some harm would happen.'

Maynard, 313 Ga. at 538-39 (internal citations and punctuation omitted) (emphasis added).

Mr. Frost's injury was not unlikely. Because Freeman got alerts from XYZ's global tracking system that his package was en route to being delivered that day, it was likely that he would seek out his package. Because Freeman knew that his package contained contraband, it was likely that he would seek out that package with greater intensity than most. Because that package contained illegal contraband and considering the link between the distribution of illicit drugs and violence, it is likely that, when faced with the possibility that Mr. Frost was withholding his package, Freeman would use violent force to retrieve such package.

Not only was this injury probable in Plaintiff's specific context, it is generally probable in the context of XYZ parcel deliverymen. Given the sheer volume of gun violence that XYZ drivers – specifically Atlanta-based XYZ drivers – face, it is likely that an XYZ driver will encounter gun violence on their routes. Also, given the frequency with which XYZ is used to traffic illegal drugs, it is probable that XYZ drivers will encounter a customer attempting to retrieve a package of contraband. It is also highly probable that someone trafficking illegal drugs through XYZ could be armed and dangerous. Finally, it is likely that an XYZ driver who has no knowledge of the potential danger that awaits him on his route would be gravely wounded by a XYZ customer searching for a package of drugs that the global tracking system told him was on its way.

a. Freeman's intervening act does not relieve Aichtraxx of liability.

[U]nder the well-established doctrine of intervening causes, a defendant's breach of a duty does not constitute a proximate cause of a plaintiff's injury when there has intervened between the act of the defendant and the injury to the plaintiff, an independent act or omission of someone other than the defendant, which *was not foreseeable by the defendant, was not triggered by the defendant's act, and which was sufficient of itself to cause the injury.*

Maynard, 313 Ga. at 438.

As has been set forth at length *supra*, the injury that Plaintiff endured was foreseeable. And while it is indisputable that Freeman's action was sufficient to cause Plaintiff's injury, Defendant Aichtraxx absolutely triggered Defendant's act.

Freeman targeted Plaintiff because he believed that his illegal drugs were on Plaintiff's truck. Freeman believed his drugs were on Plaintiff's truck because the global tracking system that Aichtraxx developed told him that his drugs were on Plaintiff's truck. Such was his faith in the accuracy of the tracking system – possibly because he had successfully used XYZ for such purposes before – he confronted Plaintiff not once, but *twice* demanding that Plaintiff look for the drugs. Had Freeman's tracking information been updated, he would have never confronted Plaintiff. Had Freeman's tracking information been updated, he would have never demanded that Freeman *twice* search his truck for the illegal drugs. Had Plaintiff's tracking information been updated, he could have simply told Freeman that the package was not on his truck. In either of these alternative scenarios, Plaintiff would have never been shot in the chest.

Under the facts that are currently undisputed, without even the benefit of discovery, the issues of proximate cause and foreseeability of an intervening act are not plain and undisputed and are therefore not properly dismissible under statute.

b. Frost's act of self-defense does not relieve Aichtraxx of liability.

Aichtraxx's description of the confrontation that occurred between Freeman and Plaintiff as "mutual combat" is absolutely without merit. Plaintiff did not engage in "mutual combat" – Plaintiff defended himself against a deadly, unprovoked attack.

"[F]ighting to repel an unprovoked attack, is self-defense, and should not be confused with mutual combat." Watson v. State, 298 Ga. 348, 350 (2016). The facts of the confrontation are undisputed: Freeman confronted Plaintiff and requested that Plaintiff search his truck for a package that XYZ's global tracking app told Freeman was en route to be delivered that day. Plaintiff searched the truck but could not find the package. Freeman *followed Plaintiff* to his next destination, where he *again confronted* Plaintiff and demanded his package. When Plaintiff again failed to turn over the package, Freeman violently attacked Plaintiff. Plaintiff attempted to repel the attack and managed to briefly defend himself before Freeman shot him in the chest.

Further, "[m]utual combat is not a mere fight or scuffle. It generally involves deadly weapons and the *mutual intention* of using them." Donaldson v. State, 249 Ga. 186, 188 (1982) (emphasis added). First, while Freeman had a deadly weapon, Plaintiff did not, and Defendant points to no facts which would suggest otherwise. Second, because Plaintiff had no weapon, there was no "mutual intent" to use a deadly weapon – only Freeman had the weapon, and only Freeman had the intent to use it. "A mutual combat situation arises when both parties are at fault and are willing to fight because of a sudden quarrel." Bangs v. State, 198 Ga. App. 404, 404 (1991). Plaintiff does not share in the fault of this confrontation – he was attacked for reasons absolutely unknown to him. The "fight" that Defendant repeatedly refers to in its brief is Plaintiff's attempt to protect himself against the violence that Freeman initiated because he believed that Plaintiff was withholding his illegal contraband.

Finally, Defendant's reliance on *Fair v. CV Underground, LLC* (340 Ga. App. 70) is misplaced. *Fair*, and cases like it, deal with a plaintiff's superior knowledge of a dangerous condition on a defendant's property in a premises liability context.

[E]ven if an intervening criminal act may have been reasonably foreseeable, the true ground of liability is the superior knowledge *of the proprietor* of the existence of a condition that may subject the invitee to an unreasonable risk of harm. Specifically, when a person is injured in the course of mutual combat, the combatants are deemed to have superior knowledge of the risk of harm, because by their voluntary participation, the combatants have selected the time, date, and place for the altercation.

Fair v. CV Underground, LLC, 340 Ga. App. 790, 792-93, (2017) (internal citations and punctuation omitted) (emphasis added). See also Habersham Venture v. Breedlove, 244 Ga. App. 407, 411 (2000); Sailors v. Esmail Int'l, 217 Ga. App. 811, 813 ("In a case of mutual combat, the superior knowledge must always remain with the combatants, as they, by their voluntary participation, have selected the time, date, and place for the altercation. Any injuries to the combatants resulted from their own conduct and under such circumstances, the existence of prior criminal acts on the premises is irrelevant and *cannot form a basis for liability on the premises owner*").

This rule makes sense in a premises liability context because mutual combatants, through their combat, create dangerous conditions on the land. While this rule is inapplicable to the instant controversy, it is worthwhile to point out that Plaintiff did not, in fact, have superior knowledge of the danger that he was facing. First, Plaintiff was completely oblivious to the fact that he was being confronted by a drug dealer who was trying to intercept illegal contraband that he had shipped through XYZ. Freeman told Plaintiff that he was searching for the ashes of a family member. The information that Freeman relayed to Plaintiff could not have produced in a reasonable person the anticipation that Freeman was armed and dangerous. Conversely, the

knowledge that Freeman was actually looking for illegal drugs that he had shipped through XYZ would have alerted Plaintiff to the possibility that Freeman might be armed and dangerous – as the distribution of legal drugs and illegal violence are inextricably linked. Plaintiff didn't have this superior knowledge because Defendants' tracking app did not provide him with this knowledge.

4. Plaintiff is entitled to damages.

Because of Defendant Aichtraxx failure to implement an alternative design which would have alerted Plaintiff and Freeman that Freeman's package had been removed from Plaintiff's route, Plaintiff was shot in the chest. The result of this injury has caused Plaintiff incredible pain and suffering. See Plaintiff's Complaint ¶¶ 77-92. Because Defendant's negligence was the proximate cause of his injuries, Plaintiff is entitled to recover damages from Defendant.

5. Plaintiff is entitled to punitive damages.

An award of punitive damages may be authorized when it is proven by clear and convincing evidence that the circumstances of the tort show an entire want of care and an indifference to consequences. Wilful and intentional misconduct is not essential. [...] Because punitive damages require a finding of some form of culpable conduct under OCGA § 51-12-5.1 (b), conscious indifference to consequences requires a finding that a defendant had "an intentional disregard of the rights of another, knowingly or wilfully.

Ga. Clinic, P.C. v. Stout, 323 Ga. App. 487, 490-91 (2013) (internal citation and punctuation omitted).

Regarding punitive damages, evidence that appellant knew from complaints of similar incidents that the probable consequence of a certain defect would be to inflict injury was relevant to the question of malice or wanton misconduct. Also, the manufacturer's knowledge of dangerous propensities is relevant to its duty to adequately warn of same.

Rose v. Figgie Int'l, 229 Ga. App. 848, 850 (1997) (internal citation and punctuation omitted).

As Plaintiff has already discussed at length, Defendant Aichtraxx is essential to the technological advancements that make the package delivery business faster, cheaper, and more

efficient. Aichtraxx doesn't just solve the problems that its customers bring to them, it anticipates new problems and find ways to develop and improve. Aichtraxx's intimate knowledge of the package business undoubtedly includes knowledge surrounding the violence that the operators of the fleet businesses that they service face, if for no other reason than that this violence – through its disruption of deliveries – affects its clients' bottom lines. Despite Aichtraxx's knowledge of the risks inherent in creating a global tracking device that did not alert the customer nor the deliveryman that a package had been flagged as contraband and removed from the delivery route, Aichtraxx took no steps to reduce the risk. Aichtraxx's current app allows parcel deliverymen to continue along their routes unaware of the fact that a drug dealer expecting their package of illegal drugs is currently waiting in their route. And Aichtraxx could have completely eliminated the risk of violence associated with this situation by simply alerting the driver and deliverymen of the status of the package. This is the very definition of conscious indifference.

V. CONCLUSION

A motion to dismiss/motion for judgment on the pleadings can only be granted where there exists no way in which a plaintiff could make out a claim for relief based on the complaint. Here, Mr. Frost has identified Defendants' design defects and failure to implement a safer alternative design that directly led to his catastrophic injuries. Plaintiff has also negated Defendants' argument that Freeman's act relieves it of liability or that Plaintiff and Freeman were involved in mutual combat. Because Plaintiff has set forth issues of fact and law that create the possibility of recovery on the issue of negligence/defective product design, this Court should DENY Defendant's motion to dismiss.