IN THE STATE COURT OF LYNDON COUNTY
STATE OF GEORGIA

RYAN LAKESHORE, Plaintiff, v. APS CO. SOLIDTRACS, LLC, BLUECOAT, INC., PATRICE RICHARDSON, AMELIA LODGKINS, ALBERTO MENDEZ, AND LINDA CHO, Defendants.	CIVIL ACTION FILE NO. 12-A-12345

PLAINTIFF'S BRIEF IN SUPPORT OF HIS RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND/OR FOR JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

"The most important stop for our drivers is when they return home safely after work."
-Martino Rusconni, Executive Vice President and President U.S. of ADS

ADS drivers are routinely subjected to violence in the form of kidnappings, armed robberies, and shootings. In the face of this ceaseless violence and even when its employees begged them to implement security measures, ADS has done – and continues to do – nothing. Despite claiming that a ADS driver's most important stop of the day is their home, ADS does nothing to ensure their drivers actually make it there. In fact, as this Court will learn, many drivers do not make it home at all, and some, like Mr. Lakeshore, make it home via a months-long hospital stay with bullets lodged in their bodies.

ADS attempts to shirk its responsibility to protect its employees by relying on inapplicable, incorrect, and incoherent legal arguments. As this Court will learn, ADS committed fraud in April of 2022 when it misrepresented to its drivers that their safety was the company's highest priority and that security measures were in place to protect them

against the kind of gun violence that befell Mr. Lakeshore. ADS tries to dodge this bullet by arguing that the fraud it committed occurred before Mr. Lakeshore was injured and not after and is therefore protected by the Workers Compensation Act's exclusivity clause. This distinction is wholly irrelevant because the Workers' Compensation Act doesn't protect fraud of any form, completed at any time – it protects *accidents*. ADS' fraudulent acts were not accidents – these statements were made to ensure that ADS drivers, the lifeblood of the company and the foundation for its ever-growing profits, stay on the road and make the efficient deliveries that make ADS billions.

ADS goes on to argue that it cannot be held liable for Mr. Lakeshore's injury because he was not actually shot at its distribution center. Unfortunately for ADS, the fact that Mr. Lakeshore was not shot on their property does not relieve them of liability, as their negligence was the catalyst that set in motion a chain of events that left Mr. Lakeshore with a bullet in his chest.

I. STATEMENT OF RELEVANT FACTS

The following facts are undisputed. On or around July 15, 2022, ADS's shipping and distribution center, located at 101 Main Road, 120, Anytown, GA 10101, received a package en route to be delivered to Patrice Richardson via Mr. Lakeshore's delivery route. ADS' global tracking system had informed Richardson that the package would be delivered that day. Based on undisclosed information obtained by ADS, Richardson's package was labeled as potential contraband. The package was removed from Mr. Lakeshore's truck and held at the distribution center. ADS did not update its global tracking system to reflect that the package had been removed from the route and still showed that it was on track to be delivered that day. Mr. Lakeshore was never informed about the package, that it had been labeled as contraband, that it had been removed from his truck, or that the ADS customer was still expecting it to be delivered on that day.

On the morning of July 15, 2022, Mr. Lakeshore began his workday by collecting his packages at the ADS shipping and distribution center located at 101 Main Road. While on his route, Mr. Lakeshore was confronted by Richardson. Richardson claimed that he was trying to intercept a family burial urn that he had been notified would be delivered that day and that he believed to be on Mr. Lakeshore's truck. Mr. Lakeshore searched for the package but could not locate it. Mr. Lakeshore was unaware that Mr. Richardson was searching for a package that had been labeled contraband and removed from the truck. Due to Richardson's belief that the flagged package was on Mr. Lakeshore's truck, Richardson confronted Mr. Lakeshore with a firearm and shot him in the chest. Per Lyndon County Police Department, "the shooting was in reference to a package, later located, which contained marijuana." Pl. 's Ex. 1, Lyndon County Police Report attached.

Mr. Lakeshore's tragic shooting took place amidst an ongoing epidemic of violence, particularly gun violence, against ADS parcel deliverymen. Less than two months before Mr. Lakeshore was shot, Atlanta-based ADS deliverymen publicly called upon ADS to enact security measures to protect them against the gun violence they faced on their routes.[1] Complaining that they'd "had people shot at, trucks shot up, [and] people kidnapped," Lynette Bravery, an ADS delivery driver of 16 years, publicly pleaded with ADS to put in place life-saving security measures. Another driver complained of an ADS customer shooting through the windshield of his truck because the customer suspected that the driver had stolen something from a package. Lynette Bravery even started a change.org petition urging ADS to implement safety protections for ADS delivery drivers. The petition currently has over 2,500 signatures.

[1] Denise Dillon, *Some ADS drivers want more safety measures in place* (Apr. 27, 2022) FOX 5 ATLANTA, https://www.fox5atlanta.com/news/some-ADS-drivers-want-more-safety-measures-in-place.

In direct response to these public complaints, on April 27, 2022, ADS issued a statement assuring their drivers that their safety was the company's "highest priority" and stating that they had security measures that they refused to specify "in order to maintain their effectiveness."[2]

II. ARGUMENT AND CITATION TO AUTHORITY

A. Motion to Dismiss/Motion for Judgment on the Pleadings Standard.

> It is well established that: a motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose *with certainty* that the claimant would not be entitled to relief *under any state of provable facts* asserted in support thereof; and (2) the movant establishes that the claimant *could not possibly introduce evidence* within the framework of the complaint sufficient to warrant a grant of the relief sought.

Scouten v. Amerisave Mortg. Corp., 283 Ga. 72, 73 (2008) (internal citation and punctuation omitted) (emphasis added).

"In making this analysis, [courts] view all of the plaintiff's well-pleaded material allegations as true, and view all denials by the defendant as false […]." Love v. Morehouse Coll., Inc., 287 Ga. App. 743, 743 (2007). "[A] complaint is not required to set forth a cause of action, but need only set forth a claim for relief. If, within the framework of the complaint, evidence *may be introduced* which will sustain a grant of relief to the plaintiff, the complaint is sufficient." Love v. Morehouse Coll., Inc., 287 Ga. App. 743, 744 (2007) (internal citation and punctuation omitted) (emphasis added).

B. The dual persona doctrine applies in this case because Defendants' alternate persona as an owner or occupier of land is codified by statute.

1. Georgia has not rejected the dual persona doctrine.

Defendants' argument that Georgia has rejected the dual persona doctrine is based on its failure to differentiate between two related – yet distinct – doctrines.

[2] Dillon, *supra* note 1.

The dual capacity doctrine is an earlier iteration of the dual persona doctrine. In *Porter v. Beloit Corp.*, the Georgia Court of Appeals thoroughly recounts the history of the doctrines and the reasons behind the increasing rejection of the dual *capacity* doctrine. The court noted that under the dual capacity doctrine, an employer could become liable to an employee "when acting in a capacity outside the employer-employee relationship, which capacity may impose obligations apart from those imposed as an employer application." Porter v. Beloit Corp., 194 Ga. App. 591, 593 (1990). The court further noted that "application of [the dual capacity doctrine] has been curtailed more recently as it is recognized that the doctrine has been expanded beyond that point at which it ceases to be fundamentally sound." Id. The court then recognized the surviving portion of the concept, referred to as the "dual persona doctrine," which recognizes that "an employer may become a third person, vulnerable to tort suit by an employee, if – and only if – he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person." Id.

The Georgia Court of Appeals goes on to recognize its acceptance of the dual persona doctrine in *Dogget v. Patrick* and *Cowart v. Crown Am. Props.* – both cases that Defendants recognize and cite in their brief. In *Dogget*, the Court of Appeals reversed the trial court's grant of summary judgment on the issue of the dual persona doctrine. Distinguishing itself from *Porter*, the *Dogget* court unmistakably accepted the dual persona doctrine and held that the trial court had failed to consider the employer's liability as a second independent persona, i.e., the owner of the building where the incident occurred. Doggett v. Patrick, 197 Ga. App. 420, 422 (1990).

As is set forth above, the dual capacity doctrine may not be recognized in Georgia, but the dual persona doctrine is.

2. *The dual persona doctrine applies in this case because Defendants' alternate persona is codified by statute.*

The ambit of the dual persona doctrine is both small and clearly defined. It is small, in that Georgia has declined to join other jurisdictions in adopting a standard that "removes employer immunity where claims … are predicated upon a mere separate relationship or theory of liability." Porter v. Beloit Corp., 194 Ga. App. 591, 593 (1990). It is clearly defined in that it will apply without exception, if and only if the employer has a statutory duty to Plaintiff which duty is in no way tethered to the employer-employee relationship, and on which the tort claims are predicated.

The dispositive issue is whether the alternate persona is defined by and codified in ***statute***. See Larson's Workmen's Compensation Law, § 72.81 (c); compare Dogget, 197 Ga. App. at 421 (separate legal relationship of landlord-tenant) with Cowart, 258 Ga. App. at 23 (statutory general contractor relationship, but no nexus between that relationship and the product defect which caused the harm). O.C.G.A. § 51-3-1 imposes upon an owner of land the nondelegable duty to exercise ordinary care to keep the premises and approaches safe for invitees. "The nondelegable duty to keep one's premises safe requires that the owner or occupier must use ordinary care to guard, cover, or protect the dangerous or defective portion of the premises[…]." Towles v. Cox, 181 Ga. App. 194, 197 (1986).

Here, Defendants' alternate persona of owners or occupiers of land is clearly codified by statute, namely O.C.G.A. § 51-3-1, et. seq. As owners or occupiers of land, Defendants owed a duty of care to all invitees, including Plaintiff, to keep the premises reasonably safe from foreseeable harm of which they had superior knowledge. This duty was wholly unrelated to the employer-employee relationship. Plaintiffs' injuries were caused by a direct breach of those duties. For these reasons, the dual persona doctrine is applicable to the instant set of facts.

C. Plaintiff's premises liability claim is not proper for dismissal under O.C.G.A. 9-11-12(b)(6).

1. *Defendant is not relieved from liability because Plaintiff was not injured on its property.*

Defendants argue that to recover under a premises liability claim, the plaintiff must sustain injury on the defendant's property. This is a patently incorrect misstatement of the law. On the contrary, it is well-settled Georgia law that, "although the landowner's duty is to maintain safety and security within its premises and approaches, liability may arise from a breach of that duty that proximately causes injuries *even if the resulting injury ultimately is completed beyond that territorial sphere.*" Martin v. Six Flags Over Ga. II, L.P., 301 Ga. 323, 330, 801 S.E.2d 24, 31 (2017) (emphasis added); See also Wilks v. Piggly Wiggly Southern, 207 Ga. App. 842 (429 SE2d 322) (1993). "Nothing in OCGA § 51-3-1 requires that the injuries caused by a property owner's failure to exercise due care actually be inflicted within the four corners of a landowner's premises and approaches in order for liability to attach." Martin v. Six Flags Over Ga. II, L.P., 301 Ga. at 329.

Other jurisdictions have adopted identical policies. In *Bridges v. Dahl*, the Sixth Circuit Court of Appeals addressed a case in which a trespassing minor stole a box of dynamite caps and a piece of fuse from the warehouse of a construction company. "At different times thereafter ***off the premises***, appellee exploded some of the caps by placing the fuse in the open end, clamping them together with his teeth and, after lighting the fuse, throwing them." Bridges v. Dahl, 108 F.2d 228, 229 (6th Cir. 1939). During one of these times, he sustained severe injuries after a fuse he was trying to light exploded in his face. The court held that the appellant's primary negligence – leaving the dynamite caps in a place where children could access them – set in motion "a chain of events from which an ordinarily prudent person might reasonably anticipate injury." Bridges v. Dahl, 108 F.2d 228, 230 (6th Cir. 1939). The court dismissed the argument that because the final injury did not occur on appellants' property did not nullify their liability.

> To say as a matter of law that this causation was broken by appellee taking the dynamite caps from the premises and later exploding them to his great injury, […] would entirely ignore the duty resting on appellant to exercise reasonable care commensurate with the danger […].

Bridges v. Dahl, 108 F.2d 228, 230 (6th Cir. 1939).

It is irrelevant that Plaintiff was not shot on ADS property. When Plaintiff went to 101 Main Road to pick up his truck on the morning of July 15, 2022, he was not told that a package designated to be delivered that day had been removed from his truck as suspected contraband. This is the catalyst that set in motion a chain of events that left Plaintiff with a bullet in his chest.

a. Richardson's attack was foreseeable.

"[I]n assessing the scope of a landowner's duty to invitees with respect to *off-premises incidents*, one key is the foreseeability of the incident giving rise to such injuries." Martin v. Six Flags Over Ga. II, L.P., 301 Ga. at 330 (emphasis added). The incident causing the injury must be substantially similar in type to previous criminal activities, such that a reasonable landowner would have taken precautions to protect invitees against injury. Tomsic v. Marriott Int'l, Inc., 321 Ga. App. 374, 384 (2013).

Less than two months before Mr. Lakeshore was shot, Atlanta-based ADS drivers publicly aired their complaints about their exposure to incessant gun violence on their delivery routes.[3] Citing shootings, kidnappings, and armed robberies, these Atlanta-based ADS delivery drivers called upon ADS to put in place security measures to protect them on their daily routes, noting that, at the time, they had no means of protecting themselves against this ceaseless and increasing violence. These ADS employees even created a petition, signed by nearly 2,500 ADS delivery drivers, urging ADS to use some of their billions of dollars in revenue to protect the people who form the very backbone of the company.[4] Nothing

[3] Dillon, *supra* note 1.
[4] *Id.*

changed. Six weeks after this petition and the news coverage, Mr. Lakeshore was lying in a parking lot with a bullet wound in his chest, fighting for his life.

Moreover, it is commonly known that ADS has long served as a reliable delivery service for traffickers of illegal and illicit drugs.[5] Despite insisting that they have security systems in place to prevent illegal drug shipments, ADS was cited as a "fast and reliable" shipping tool for Chinese vendors of Fentanyl as late as November of 2022.[6] In addition to repeatedly failing to intercept both domestic and international drug shipments for years, Defendants' own employees ran a drug shipment operation, managing to evade law enforcement for a decade, thanks in part to ADS' refusal to participate with law enforcement.[7] 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). [8]

In the past year alone, more than a dozen ADS delivery drivers have been kidnapped, robbed, or threatened at gunpoint in the United States.[9] Crime against ADS and other parcel

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[5] Arelis Hernández, *ADS employees allegedly ran massive drug shipment operation, evading authorities for a decade*, WASH. POST, Nov. 27 2019, https://www.washingtonpost.com/national/ADS-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, ADS Agrees to Forfeit $40 Million in Payments from Illicit Online Pharmacies for Shipping Services)Mar. 29, 2013), https://www.justice.gov/usao-ndca/pr/ADS-agrees-forfeit-40-million-payments-illicit-online-pharmacies-shipping-services; Ankit Ajmera, Lisa Baertlein, *Answering Trump, ADS, 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-ADS-fedex-and-usps-say-they-already-fight-illegal-drug-shipments-idUSKCN1VD20O.

[6] Emily Feng, *We are Shipping to the US: Inside China's Online Synthetic Drug Networks*, NPR, Nov. 17, 2020, https://www.npr.org/2020/11/17/916890880/we-are-shipping-to-the-u-s-china-s-fentanyl-sellers-find-new-routes-to-drug-user.

[7] Arelis Hernández, *ADS employees allegedly ran massive drug shipment operation, evading authorities for a decade*, WASH. POST, Nov. 27 2019, https://www.washingtonpost.com/national/ADS-employees-allegedly-ran-massive-drug-shipment-operation-evading-authorities-for-a-decade/2019/11/27/00f432e8-10cb-11ea-bf62-eadd5d11f559_story.html.

[8] *See also* Harvey Redgrave, *Two Sides of the Same Coin? The Link Between Drug Markets and Serious Violence*, TONY BLAIR INSTITUTE FOR GLOBAL CHANGE, Mar. 31, 2022, https://institute.global/policy/two-sides-same-coin-link-between-drug-markets-and-serious-violence

[9] Mira Wassef, *ADS driver robbed at gunpoint in Brooklyn, police say*, PIXII, Oct. 18 2022, https://pix11.com/news/local-news/brooklyn/ADS-driver-robbed-at-gunpoint-in-brooklyn-police-say/; *ADS driver robbed at gunpoint in Annapolis shopping center, police say*, WBALTV11, Apr. 20 2022, https://www.wbaltv.com/article/ADS-driver-robbed-gunpoint-annapolis/39788604; FOX5 Atlanta Digital Team , *ADS driver tied up, robbed in NW Atlanta*, FOX5 ATLANTA, Dec. 28 2021,

delivery drivers is so rampant that at-home package delivery has been declared one of the most dangerous jobs in America.[10] In the face of such incessant and pervasive gun violence against ADS drivers, it was highly foreseeable, if not downright expected, that Mr. Lakeshore would be shot on his ADS route. This foreseeability was compounded by Defendants' failure to simply update Richardson's package tracking information to inform him that his package of illegal drugs was not on Mr. Lakeshore's truck – a minimal change that could have literally removed Mr. Lakeshore from the line of fire, and a conscious failure that put his life at risk. It is likely that Defendants don't update the tracking information so that contraband seekers don't come looking for their drugs on Defendants' premises, since Defendants seem to believe that they can only be held liable for violence carried out on their premises. In any case, ADS' refusal to update Richardson's tracking information put a target on Plaintiff's back.

b. ADS had superior knowledge of an unreasonable risk.

In a premises liability case, "the true ground of liability is the proprietor's superior knowledge of danger." Hightower v. City Council of Augusta, 124 Ga. App. 537, 539, 184 S.E.2d 678, 680 (1971). It is undisputed that ADS was aware of the incessant onslaught of

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https://www.fox5atlanta.com/news/ADS-driver-kidnapped-robbed-in-nw-atlanta; *Police Arrest Suspect in String of Armed Robberies of ADS 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-ADS-drivers-carjacking-in-oakland/; *ADS driver robbed at gunpoint in North Philadelphia, police say*, FOX 29 NEWS PHILADELPHIA, Mar. 9, 2022, https://www.fox29.com/news/ADS-driver-robbed-at-gunpoint-in-north-philadelphia-police-say; Summer Poole, *ADS delivery driver threatened with a gun in Pensacola*, Mar. 14, 2022, NEWS5WKRG, https://www.wkrg.com/northwest-florida/escambia-county/ADS-delivery-driver-threatened-with-gun-in-pensacola/; Charles E. Ramirez, *Police seek tips after ADS 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-ADS-driver-being-robbed-detroit-west-side-man-escaped/7290216001/; *Police: ADS 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/;

[10] Beth Braverman, *The 10 most dangerous jobs in America*, CNBC, Dec. 28 2019, https://www.cnbc.com/2019/12/27/the-10-most-dangerous-jobs-in-america-according-to-bls-data.html; Tribute Media Wire, *15 Most Dangerous Jobs in the United States*, Prince George County VA, https://www.princegeorgecountyva.gov/news_detail_T6_R1402.php; Andy Kiersz and Madison Hoff , *The 34 Deadliest Jobs in America*, Dec. 16 2021, BUSINESS INSIDER, https://www.businessinsider.com/the-most-dangerous-jobs-in-america-2018-7 (last visited 14 November 2021); Nancy Clanton, *These are the most dangerous jobs in America*, AJC, Mar. 5 2020, https://www.ajc.com/business/employment/these-are-the-most-dangerous-jobs-america/x2MOTeEYCgkt2zYCLfqfJJ/.

gun violence that their parcel delivery drivers faced. As noted, *supra,* not even two months before Mr. Lakeshore was shot, ADS employees had called upon the company to take action to prevent exactly the kind of injury that Mr. Lakeshore endured. It is also undisputed that ADS knew that a package flagged as contraband had been removed from Plaintiff's truck and did not share this information with Plaintiff. Finally, it is undisputed that Plaintiff was not aware that someone anticipating a delivery of contraband – someone who had been informed through ADS' tracking system that their package of contraband was in fact, *en route* – was waiting in his route. It would be disingenuous to argue that Defendant – an international, multi-billion-dollar corporation – was not aware that the significant threats of gun violence that their drivers face were exacerbated by the fact that they are often the unwitting distributors of illegal drugs. ADS had superior knowledge that they were sending out into a community in which he had a high probability of experiencing gun violence in a situation that exacerbated that risk, i.e., the fact that a drug dealer was waiting on him to deliver a package that he *should have* but didn't have. ADS sent Plaintiff into the literal line of fire.

2. Because Plaintiff's claim against ADS is not barred by the Workers' Compensation Act, his claims against his managers are likewise not barred.

Defendants argue that Plaintiff cannot bring a claim against his managers Sheldrice Taiwan Archer ("Archer") and Cimenar Banks ("Banks") because the workers compensation act excludes claims against an employee of the same employer. Defendants' Motion to Dismiss at 5. However, because Defendants' are not immune to a premises liability suite based on the dual persona doctrine, Banks and Archer can likewise be held liable for their roles as managers of ADS's shipping and distribution center, located at 101 Main Road, 120, Anytown, GA 10101. "[A] store manager […] may be liable under Georgia's premises liability statute." Haddock v. Wal-Mart Stores E., LP, No. 4:20-cv-00136, 2020 U.S. Dist. LEXIS 268180, at *7 (N.D. Ga. July 20, 2020); See also Poll v. Deli Mgmt., No. 1:07-CV-0959-RWS, 2007 U.S. Dist. LEXIS 62564, at *12 (N.D. Ga. Aug. 24, 2007) ("[T]he weight

of the Georgia cases recognizes that liability under O.C.G.A. § 51-3-1 may also be established where the individual had supervisory control over the subject premises at the time of injury"). In the instant case, Banks and Archer, as managers of the shipping and distribution center, had general charge, control and supervision of the center, and it was their duty to ensure that precautions were taken to ensure that the employees under their charge were not exposed to foreseeable danger of which they and ADS had superior knowledge. In light of the excessive gun violence that ADS drivers were exposed to, Archer and Banks had the duty to ensure that Plaintiff's risk of falling victim to gun violence was not exacerbated by placing him in an even more dangerous situation – unwittingly confronting a frustrated drug dealer who believed Plaintiff to be withholding his contraband. Archer and Banks' liability in this case is premised on their failure to take reasonable steps to sure that Plaintiff did not confront the dangerous situation that led to his injury.

> Where an agent fails to use reasonable care or diligence in the performance of his duty, he will be personally responsible to a third person who is injured by such misfeasance. The agent's liability in such cases is not based upon the ground of his agency, but upon the ground that he is a wrong-doer, and as such he is responsible for any injury he may cause.

Coffer v. Bradshaw, 46 Ga. App. 143, 147 (1932).

D. Plaintiff's Fraud Claim against Defendant is not proper for dismissal under O.C.G.A. 9-11-12.

1. The Workers' Compensation Act does not protect fraud committed before or *after an employee is injured.*

Defendants argue that Plaintiff's fraud claim is barred by the exclusivity provision of the Workers' Compensation Act because it alleges "fraud that occurred before the on-the-job injury" instead of after it. Defendant's Brief at 12. This is an irrelevant distinction. Contrary to Defendants' argument, the Workers Compensation Act doesn't protect fraud before or after the injury. It doesn't protect fraud, at all. The Workers' Compensation Act protects *accidents.* "Fraud, however, is not an 'accident' […]." Griggs v. All-Steel Bldgs., 209 Ga.

App. 253, 255, 433 S.E.2d 89, 90 (1993). Further, "Georgia courts have held that intentional torts *cannot be considered accidents* arising out of and in the course of employment." Betts v. Medcross Imaging Ctr., 246 Ga. App. 873, 874 (2000) (emphasis added).

Defendants' reliance on *Zaytzeff v. Safety-Kleen Corp.* is erroneous. First, and importantly, the plaintiff in *Zaytzeff* **never made an allegation of fraud, either before or after the fact**. See Zaytzeff v. Safety-Kleen Corp., 222 Ga. App. 48, 48 (1996) ("Griggs v. All-Steel Bldgs., 209 Ga. App. 253 (433 S.E.2d 89), involving the intentional tort of fraud, is distinguishable from this case and is not controlling"). The issue in *Zaytzeff* was whether non-compensable injuries were exceptions to the exclusivity provision of the workers' compensation act. In *Zaytzeff*, the plaintiff originally filed a workers' compensation claim on "the primary [issue] of injury by *accident* arising out of and in the course of employment […]." Id. (emphasis added). Finding against him, the ALJ noted that plaintiff had failed to show that "he suffered an injury by accident arising out of and in the course of his employment." Id. The ALJ did, however, find that plaintiff had suffered psychological problems related to the incident, but that these psychological problems alone were not compensable under the Workers' Compensation Act. The plaintiff then filed a complaint with state court seeking damages on the basis that since these psychological injuries were not compensable under the Act, that they were exceptions to the Acts' exclusivity provisions. Affirming the lower court's ruling, the court of appeals held that "[m]erely because the ALJ concluded appellant's claims for 'psychological problems' were not compensable does not insulate such claims from exclusivity provisions of the act." Id. at 50.

The portion of the case to which Defendants' cite is irrelevant to the holding. Further, Plaintiff completely misunderstands the court's fleeting reference to fraud in the context of the case. The court said that because the evidence did not reflect a tortuous act that the plaintiff could not seek redress. The court noted that *if the plaintiff could show fraud, then the*

outcome could have been different. Further, the issues that the court addressed had to do with intentional torts between co-workers, and had nothing to do with fraudulent behavior on the part of an employer. "[T]he Workers' Compensation Acts' exclusivity bar also applies to intentional torts *committed by one worker against a co-worker*, unless the tortious act was committed for personal reasons unrelated to the conduct of the employer's business." Id. The court does not hold, as Defendants claim, that an *employer* must have personal reasons for committing an intentional tort against an employee. This case, and the dicta that Defendants cite, is absolutely irrelevant to the argument at hand.

Plaintiff's reliance on *Johnson v. Hames Contracting, Inc.* is similarly misplaced. The *Johnson* court's holding was narrowly written and specific to injuries based on "accident due to *occupational disease*." Johnson v. Hames Contracting, Inc., 208 Ga. App. 664, 667, 431 S.E.2d 455, 458 (1993). O.C.G.A. § 34-9-280 defines an occupational disease as:

> A disease which arises out of and in the course of the particular trade, occupation, process, or employment in which the employee is exposed to such disease, provided the following is proven: (A) a direct causal connection between the conditions under which the work is performed and the disease; (B) that the disease followed as a natural incident of exposure by reason of the employment; (C) that the disease is not of a character to which the employee may have had substantial exposure outside of the employment; (D) that the disease is not an ordinary disease of life to which the general public is exposed; (E) that the disease must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence.

Putzel Elec. Contractors v. Jones, 282 Ga. App. 539, 545, 639 S.E.2d 540, 545 (2006). The court held that because occupational disease was compensable under the Workers' Compensation Act, redress was barred by the Act's exclusivity provision.

> Where applicable, the Workers' Compensation Act provides the exclusive remedy to an employee injured by accident arising out of and in the course of the employment. Pursuant to O.C.G.A. § 34-9-281 (a), an occupational disease is considered to be a compensable, accidental injury. When an employee's injuries are compensable under the Act, he is absolutely barred from pursuing a common law tort action to recover for such injuries, even if they resulted from intentional misconduct on the part of the employer.

Johnson v. Hames Contracting, Inc., 208 Ga. App. 664, 667 (1993) (internal citations and punctuation omitted).

Plaintiff is not and has never alleged injury due to occupational disease. Employer fraud is not compensable under the Workers Compensation Act. This case and the dicta that Defendant cites is irrelevant to the issue at hand.

Dove v. Sentry Ins. (236 Ga. App. 754) is applicable to the issue at hand and provides necessary guidance. In *Dove*, the court addressed a case in which an employee who had been injured on the job and accepted workers' compensation benefits later committed suicide because of the pain that he endured as a result of his injury and his employer's failure to approve additional medical treatment. The employee's wife brought suit in state court on behalf of herself and her adult son against the employer alleging wrongful death, among other things. The Court of Appeals affirmed the lower courts grant of summary judgment. The crux of the court's holding was the fact that the original injury that the employee suffered was rightfully qualified as an accident pursuant to O.C.G.A. § 34-9-1. The court held that the employer's refusal to approve medical treatment was an exacerbation of this original accidental injury and therefore fell under the Act. Importantly, the court noted:

> Only if [the employee's] death falls outside the purview of the Act would Regan have a separate common law cause of action for the wrongful death of his father, specifically, ***if the death were caused by fraud or other intentional tort committed by the employer*** or its insurer, and then only if the tortious act was not an accident arising out of and in the course of employment and where a reasonable remedy for such conduct is not provided by the Workers' Compensation Act.'

Dove v. Sentry Ins., 236 Ga. App. 754, 756 (1999) (internal citation and punctuation omitted) (emphasis added).

The facts of the instant case conform with the exception carved out in *Dove.* Plaintiff's injury falls outside the purview of the Act because his injury was caused by fraud that was not an accident arising out of his employment.

2. ADS committed fraud.

a. ADS made false representations concerning the safety of their parcel delivery people.

In April of 2022, just two months before Mr. Lakeshore was shot in the chest by a disgruntled ADS customer, Atlanta-based ADS delivery drivers started an online petition calling for increased protection due to the incessant gun violence that they faced on their routes.[11] Citing multiple shooting incidents, the Atlanta-based ADS drivers called for ADS and union leaders to work together to put in place security measures to protect drivers.[12] Their petition was signed by over 2,500 ADS drivers.[13]

In direct response to this outcry, ADS issued a statement on April 27, 2022. The statement said that the safety of its drivers is ADS' "highest priority." The company also claimed to have safety measures in place, but refused to disclose them, stating, "We do not share our safety methods in order to maintain their effectiveness."[14] These statements are demonstrably false.

If you trace ADS' priorities to their pocketbook, it is clear that their highest priority is driver efficiency *not* driver safety, and the company dedicates its annual $1 *billion* technology budget to improving the speed and efficiency of its deliveries.[15] ADS was one of the first companies to implement tracking technology that collected information on what drivers did during the day – *down to the millisecond*. ADS explained the necessity of this data collection because "[j]ust one minute per driver per day over the course of a year adds up to $14.5 million."[16] Based on data gathered with this technology, ADS realized that drivers

[11] Dillon, *supra* note 1.
[12] *Id.*
[13] Avery, *supra* note 2.
[14] Dillon, *supra* note 1.
[15] ADS.com, ADS Technology and Innovation, https://www.ADS.com/us/en/supplychain/insights/innovation-technology.page.
[16] Jacob Goldstein, *To Increase Productivity, ADS Monitor's Drivers' Every move,* NPR, Apr. 17, 2014, https://www.npr.org/sections/money/2014/04/17/303770907/to-increase-productivity-ADS-monitors-drivers-every-move.

were wasting valuable ***seconds*** inserting keys into the doors of their trucks, so ADS gave them pushbutton key fobs attached to their belt loops.[17] The change led to a savings of 6.5 minutes per driver per day and over $14.5 million. The data also led to the implementation On-Road Integrated Optimization and Navigation (ORION), a route optimization tool based on heuristics.[18] The system tells the drivers how to load their trucks in the morning and the best way to deliver packages.[19] ADS has also equipped its vehicles with "sensors that allow it to collect data about things like fuel consumption, chosen routes and how much time its engines spend idling."[20] This billion-dollar budget helped ADS become the most efficient parcel delivery service in the country. [21]

In contrast, ADS dedicates roughly $343 million to driver safety – **$657 million less than their technology budget**.[22] Its drivers continue to get kidnapped, chased, and shot. So much so that they started an online petition to pressure ADS to create security measures that would help *save their lives.* ADS refuses to disclose their security measures, likely because they amount to paltry platitudes such as "be aware of your environment" and "think of your own safety first."[23] It is obvious from how ADS chooses to allocate its profits that driver safety is not even close to its highest priority.

Defendants will likely claim that their public statement about driver safety being their highest priority cannot trigger liability because it was mere puffery.

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[17] Jennifer Levitz, *Delivery Drivers to Pick Up Pace by Surrendering Keys,* WALL ST. J., Sept. 16, 2011, https://www.wsj.com/articles/SB10001424053111904060604576572891040895366.
[18] Marcus Wohlsen, *The Astronomical Math Behind ADS' New Tool to Delivery Packages Faster*, WIRED.COM, Jun. 13, 2013, https://www.wired.com/2013/06/ADS-astronomical-math/.
[19] Goldstein, *supra* note 17.
[20] Reuters, *ADS invests $1 billion in technology to cut costs*, Mar 26, 2010, https://www.reuters.com/article/urnidgns002570f3005978d8002576ef0072ff5e-idUS106737111320100325
[21] ADS.com, *ADS is leading the industry in on-time performance*, Dec. 16, 2021, https://about.ADS.com/gb/en/our-stories/people-led/ADS-on-time-performance.html.
[22] Post & Parcel, ADS: Safe Driving is No Accident (Mar. 29, 2023), https://postandparcel.info/152454/news/e-commerce/ADS-safe-driving-is-no-accident/#:~:text=Our%20culture%20of%20safety%20spans,million%20on%20safety%20training%20courses.
[23] Dillon, *supra* note 1.

> Representations under the general head of 'dealer's talk' are regarded as mere commendations, 'puffing,' or expressions of opinion, and do not, though untrue, constitute false representations [...]. The representations to support a claim must relate to an existing fact and not a future event [...]. Mere broken promises, unfulfilled predictions, and erroneous conjectures do not meet this test.

Am. Food Servs., Inc. v. Goldsmith, 121 Ga. App. 686, 688, 175 S.E.2d 57, 59 (1970) (internal citation and punctuation omitted). See also EarthCam, Inc. v. OxBlue Corp., No. 1:11-cv-02278-WSD ("The distinguishing characteristics of puffery are vague, highly subjective claims as opposed to specific, detailed factual assertions"). ADS' statement that driver safety is its "highest priority" is not an opinion – it was a statement that ADS meant to be understood as an existing fact. As discussed at length, *supra,* it is specific, verifiable, and measurable. Moreover, context is "instrumental in determining whether a statement is 'misleading.'" Stone v. Life Partners Holdings, Inc., 26 F. Supp. 3d 575, 595 (W.D. Tex. 2014). ADS made the statement to address the safety concerns of Atlanta-based ADS drivers experiencing gun violence. The context in which the statement was made supports the conclusion that ADS intended for its statement to assuage Atlanta-based ADS drivers who were complaining about their heightened risk of gun violence to convince them that ADS was taking the necessary steps to protect them. ADS made this statement because it is aware of the potentially profit plummeting consequences of their drivers walking out on the job and wanted to avoid this financial catastrophe.

b. ADS knew that driver safety was not their "highest priority" when they issued that April 2022 statement.

Defendant's argument that Plaintiff's fraud claim should be dismissed because he does not include an allegation of scienter fails.

> [W]hen pleading fraud, malice, intent, knowledge, and other condition of mind of a person may be averred generally, not specifically. This holds true because, except in plain and indisputable cases, scienter in actions based on fraud is an issue of fact for jury determination. Indeed, scienter deals with a subjective state of mind seldom capable of direct proof.

Goldston v. Bank of Am. Corp., 259 Ga. App. 690, 698 (2003) (internal citation and punctuation omitted).

As noted *supra*, ADS made public representations that they are committed to driver safety and have assured their drivers that they are taking the necessary steps to ensure they are safe on their routes. Despite publicly proclaiming that it had security measures in place to protect their drivers against violence, ADS hid behind a veil of secrecy about its specific tools while ensuring its workers that it was taking all necessary steps to ensure safety. It was not.

ADS – a global enterprise with offices in 220 countries and profits of $97.3 *billion* – knew it was not taking the necessary steps to protect its drivers against violence. ADS knew that it did not have a system in place to ensure that drivers didn't confront violent situations, specifically gun violence. ADS knew that it hadn't dedicated a single cent of its $1 *billion* technology budget to create a system to inform drivers that they might face a potential drug dealer while on their route. ADS didn't dedicate one cent of that $1 *billion* to create alternative GPS routes that could help drivers avoid high crime areas, or the home of a potentially disgruntled ADS customer anxiously awaiting a shipment of illicit drugs. While fraud is inherently subtle, there is nothing subtle about ADS actions (or inaction) in regard to protecting their drivers against gun violence. See Ades v. Werther, 256 Ga. App. 8, 11, 567 S.E.2d 340, 344 (2002) ("As fraud is inherently subtle, a claimant may survive summary judgment if there is slight, circumstantial evidence supporting a fraud claim"). Prioritizing profits over people, ADS preferred to simply represent that they protected their drivers, instead of spending the money to actually do so.

Apropos of nothing, ADS argues that any statement that it made that Plaintiff could have considered fraudulent is simply an innocent misstatement. Defendants' Motion to Dismiss at 14. Again, ADS doesn't identify any statement that it is challenging; however, the misrepresentation that Plaintiff alleges was not an innocent misstatement. ADS – an

international corporation with officers in over 220 countries and number 34 on the Fortune 500 list – does not make "innocent misstatements." Every statement that ADS issues is carefully crafted to make a specific impact or have a particular result. Telling its fearful, disgruntled drivers that their safety was its highest priority and that ADS' safety measures were so specific that they could not be disclosed to the general public was a statement specifically crafted to keep those drivers on the road, to keep their packages delivered on time, to keep ADS' profit margin high.

From the acts specifically asserted in the pleadings and accepted as true for purposes of the motion to dismiss, it is certainly possible – and, Plaintiff believes, inevitable – to conclude that ADS intended to conceal their knowledge of the intercepted contraband in order to ensure that Mr. Lakeshore's delivery route remained uninterrupted. It is also possible to conclude that ADS has knowingly and intentionally failed to protect their parcel deliverymen against incessant gun violence to protect its bottom line.

c. ADS lied to keep its drivers on the road.

Deliverymen are the lifeblood of ADS and keeping their drivers on the road is essential to the company's continued success.[24] In 1997, 185,000 ADS drivers, loaders and sorters walked out on the job.[25] This resulted in a loss of at least $630 million in revenue in just fifteen (15) days – and this was back when their *profits* were only $1 billion, not their technology budget.[26] This was also before the implementation of ORION and tracking technology that revolutionized the company by making deliveries more efficient, the key-fob,

[24] Bernard Marr, *The Brilliant Ways ADS Uses Artificial Intelligence, Machine Learning and Big Data*," FORBES, June 15, 2018, https://www.forbes.com/sites/bernardmarr/2018/06/15/the-brilliant-ways-ADS-uses-artificial-intelligence-machine-learning-and-big-data/?sh=7f171ee25e6d ("In a business where shaving off a mile per day per driver can result in savings of up to $50 million per year, ADS has plenty of incentive to incorporate technology to drive efficiencies in every area of its operations").
[25] Bob Herbert, *A Worker's Rebellion*, N.Y. TIMES, Aug. 7, 1997, https://www.nytimes.com/1997/08/07/opinion/a-workers-rebellion.html
[26] Peter Behr, Beth Berselli, *ADS Ready to Roll after 15-Day Strike*, WASH. POST, Aug. 20, 1997, https://www.washingtonpost.com/archive/politics/1997/08/20/ADS-ready-to-roll-after-15-day-strike/6e2a1eb0-7703-4aa6-919e-22153b0e7261/ .

and the current profits of almost $98 billion. If ADS drivers were to walk out today, losses would be in the billions.

As obsessive about profit as they are about efficiency,[27] ADS won't take any chances that their drivers might refuse to go on their delivery routes because they fear gun violence. That is why, when faced with a bevy of terrified drivers in April 2022, ADS assuaged their fears by telling them that they were the company's highest priority, and that their security measures were so potent and effective that they couldn't risk disclosing them to the general public. This was a sham statement made by ADS to keep their drivers on the road.

d. Mr. Lakeshore relied on ADS' misrepresentation.

Mr. Lakeshore worked for ADS for 16 years. He worked for ADS when his fellow Atlanta-based colleagues created their online petition and voiced their concerns about driver safety to local news outlets. Mr. Lakeshore was a ADS employee in April of 2022 when ADS assured their drivers that they were the companies "highest priority" and that the company had security measures in place to protect them against gun violence. Mr. Lakeshore and his colleagues relied on these representations when they got into their trucks every day. They hoped that the full force of the nearly 100 billion dollar company they worked for was investing in them and ensuring that they made it to "their most important stop on any day – when they return home."[28] On June 15, 2022, Mr. Lakeshore, like too many drivers before him, didn't make it to his most important stop. And it is because he relied on ADS' promise that he was safe and secure in his job.

Relying on ADS' public and private representations that driver safety was their highest priority, Lakeshore and other ADS drivers continued along their routes, unknowing driving directly into the line of fire.

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[27] Rick Brooks, *Privacy Become Issue for ADS, FedEx as Drug Seizures by U.S. Officials Surge,* WALL ST. JRNL, Oct. 12, 2000, https://www.wsj.com/articles/SB971300729293819162.
[28] ADS.com, Keys to safety: preparation, care and collaboration, ADS.com, Aug 3, 2022, https://about.ADS.com/us/en/our-stories/people-led/working-together-to-stay-safe.html

3. There is no reasonable remedy within the Worker's Compensation Act for the injuries that Plaintiff suffered as a result of ADS' fraudulent actions.

The Workers ' Compensation Act provides no reasonable remedy for employer fraud because fraud is not an accident and the damages resulting from fraud do not arise out of the course of employment. Betts v. Medcross Imaging Ctr., 246 Ga. App. 873, 874 n.7 (2000).

III. 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. Lakeshore has identified Defendants' direct misrepresentations that led to his catastrophic injuries and has also ruled out Defendants' argument that recovery for his injury is barred by the exclusivity clause of the Workers' Compensation Act. Plaintiff has also negated Defendants' argument that the dual persona doctrine doesn't apply in this case and the argument that Defendant is not liable to Plaintiff because the injury did not occur on ADS' premises. Because Plaintiff has set forth issues of fact and law that create the possibility of recovery on the issues of premises liability and fraud, this Court should **DENY** Defendants' motion to dismiss.