IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JONAH DELDRAGE AS SURVIVING SPOUSE OF MERLIN HUMBERTO ACOSTA BONILLA, DECEASED, *Plaintiff,* v. ROYAL FOOD SERVICE CO., INC., ZURICH AMERICAN INSURANCE COMPANY, AND MARCUS JONES, *Defendants.*	Civil Action No.: 21EV000532

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO STAY

Plaintiff, by and through counsel, responds and objects to Defendants' motion to stay this civil action pending the resolution of a related criminal matter as follows:

I. OVERVIEW

This is a wrongful death action arising from a motor vehicle crash caused by Defendant Jones. Merlin Bonilla's surviving spouse, Plaintiff Jonah Deldrage, sued Defendant Jones, his employer, and his insurer. In response, Defendants jointly seek to stay discovery – indefinitely – based on an alleged criminal matter against Defendant Jones.[1] As Defendants concede, Defendant Jones has not been indicted (and he may never be). Defendants present no evidence of *any* continuing criminal prosecution. Although they claim that charges for misdemeanor manslaughter have been filed, they did not include the charges – or any other evidence – of the criminal prosecution with their motion, and they failed to include an affidavit from Defendant Jones

[1] Defendants give no details regarding the current status of the criminal matter.

confirming that he plans to assert his Fifth Amendment. In fact, the motion concedes that Defendant Jones has not even decided whether to assert his Fifth Amendment at this point.

More importantly, Georgia courts have routinely rejected the blanket stay of discovery Defendants seek. As discussed in more detail below, in the main case relied on by Defendants (*Austin v. Negareddy*, 344 Ga. App. 636, 638 (2018)) the Court of Appeals overturned a motion to stay by recognizing that a Defendant does not waive his Fifth Amendment right by offering testimony in a civil case, and there is no constitutional protection to avoid disadvantage in a civil action in order to protect the Fifth Amendment rights in a criminal action. Moreover, the weight of authority in Georgia is that a Fifth Amendment argument provides, at most, a basis for a limited protective order depending on the discovery sought, not grounds for a wholesale stay of discovery of the entire civil proceeding.

Finally, even if Jones were entitled to some sort of protection (as discussed below, he is not), his employer and the insurance company (the "corporate Defendants") lack any basis to stay discovery. There is no argument that the corporate Defendants have been charged with a crime, and even if they had, corporations do not have a Fifth Amendment right to silence.

Defendants' motion must be denied.

II. APPLICABLE LAW

"The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Austin v. Negareddy*, 344 Ga. App. 636, 638 (2018) citing *Bloomfield v. Liggett & Myers*, 230 Ga. 484 (1973).

The Fifth Amendment of the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. The Georgia Constitution contains

a similar privilege against self-incrimination, providing that no person shall be compelled to give testimony tending in any manner to be self-incriminating. Ga. Const. of 1983, Art. I, Sec. I, Par. XVI. The privilege is also codified in O.C.G.A. § 24–5–505(a): "No party or witness shall be required to testify as to any matter which may incriminate or tend to incriminate such party or witness or which shall tend to bring infamy, disgrace, or public contempt upon such party or witness or any member of such party or witness's family." This privilege against self-incrimination extends not only to those answers that would in themselves support a conviction, but also to answers creating a "real and appreciable" danger of establishing a link in the chain of evidence needed to prosecute. *Axson v. Nat. Surety Corp.,* 254 Ga. 248, 250 (1985).

In the civil context, however, the Fifth Amendment does not serve as a blanket shield against all discovery. *Austin v. Nagareddy*, 344 Ga. App. 636 (2018) (holding that Defendants' assertion of Fifth Amendment rights did not warrant stay of proceedings); *Axson v. Nat. Surety Corp.*, 254 Ga. 248 (1985) (rejecting blanket stay of discovery); *Chumley v. State of Ga.*, 282 Ga. App. 117 (2006) (rejecting blanket assertion of Fifth Amendment to all inquiries).

III. ARGUMENT

A. Defendants' motion is contrary to Georgia Law.

Georgia courts routinely refuse to grant blanket stays of discovery in a civil case merely because a defendant might assert his Fifth Amendment right in a parallel criminal matter. *Axson v. Nat. Surety Corp.*, 254 Ga. 248, 249 (1985) ("[W]here a party invokes the privilege against self-incrimination in discovery matters, he may not make a blanket refusal to answer all questions, but must specifically respond to every question, raising the privilege in each instance he determines necessary."); *Chumley v. State of Ga.*, 282 Ga. App. 117 (2006) ("It follows that a blanket invocation of the Fifth Amendment privilege against self-incrimination, with no consideration for

the actual implications of each inquiry as to that privilege, would prevent legitimate discovery of nonprivileged information.").

In fact, the Georgia Court of Appeals, as recently as 2006, rejected the very blanket stay of discovery that Defendants propose here:

> The Dempseys first contend that their motions to quash the deposition subpoenas should have been granted because their deposition testimony might tend to incriminate them in the pending criminal matter. This is not the law in Georgia. Although the Dempseys are free to assert their privilege against self-incrimination in response to specific questions at a deposition, they are not permitted to "slide out of [their] obligations by a brash assertion that any and all questions directed to [them] would tend to incriminate [them]." *Tennesco,* supra, 144 Ga. App. at 48(3), 240 S.E.2d 586. Only when the privilege is asserted in response to a specific question could a trial court hold that the claim of privilege is justified.

Dempsey v. Kaminski Jewelry, Inc., 278 Ga. App. 814, 816 (2006).

Even the case relied on heavily by Defendants, *Austin v. Nagareddy*, 344 Ga. App. 636 (2018), does not support their position. Rather, the Court of Appeals in *Nagareddy* overturned the motion to stay because – as here – a criminal defendant is still capable of asserting his Fifth Amendment rights in the criminal case even if forced to proceed with discovery in a parallel civil case:

> Austin asserts that the trial court erred because it misapprehended the prejudicial impact of Dr. Nagareddy fully testifying in the civil case when it balanced the competing interests to grant a stay in this case. In its order granting the stay, the trial court stated: "If Defendant [chooses] to fully testify in this matter, he will waive the right to assert his Fifth Amendment right in the pending criminal matter." But "[i]t is settled by the overwhelming weight of authority that a person who has waived his privilege of silence in one trial or proceeding is not estopped to assert it as to the same matter in a subsequent trial or proceeding." *In re Neff*, 206 F.2d 149, 152 (3d Cir. 1953)...[i]nstead, a person who waives his privilege of silence in a civil case risks that testimony in the civil case will be admissible in the criminal case. See *Brown v. State*, 256 Ga. App. 603, 610 (2), 568 S.E.2d 727 (2002). In this case, the trial court linked the exercise of its discretion to stay the case to a stated desire to avoid "requiring Defendant to wa[i]ve his Fifth Amendment rights in the criminal matter." As this exercise of discretion was based upon an erroneous view of the law, we must vacate the trial court's order and

> remand this case to the trial court to exercise its discretion on the motion with the correct view of the interests at stake.

If *Nagareddy* stands for anything it is that a criminal defendant's Fifth Amendment right is not infringed by a decision to provide testimony or respond to discovery in a parallel civil matter. This is so because "there is no unconstitutional infringement of the Fifth Amendment privilege by forcing an individual to risk disadvantage in a civil case by refusing to provide material facts for fear of self-incrimination in a pending criminal case." *Anderson v. Southern Guar. Ins. Co.*, 235 Ga. App. 306, 311 (1998).

But this case does not even warrant the balancing analysis set forth in *Nagareddy* because the procedural posture is quite different. In *Nagareddy*, the stay of proceedings was requested *after* the discovery period had already passed and Plaintiff had not engaged in any discovery. *Nagareddy*, 344 Ga. App. at 638 ("Indeed, the record before us shows that the discovery period expired before the plaintiff propounded any discovery to Dr. Nagareddy."). That is not the case here. Here, this case is in its early stages and Plaintiff has already submitted discovery requests, many of which have nothing to do with Defendant Jones's driving at the time of the collision. See e.g., *First Requests for Admissions to Defendant Royal Food Service Co., Inc.*, **Exhibit 1**. Under these circumstances, the Court should look to the holdings in *Axson* and *Chumley*, which mandate a denial of the request for a blanket stay of discovery and require Defendant Jones to assert the Fifth Amendment on a question-by-question basis (to the extent he plans to assert the privilege at all).

B. Defendant Jones is not prejudiced by moving forward with discovery.

Defendant Jones is still deciding whether to assert his Fifth Amendment rights: "If no stay is granted, and the parties move forward with discovery, Defendant Jones will have to decide whether to invoke his Fifth Amendment privilege and weigh the associated risks." *Motion*, pp.7-

8. The fact that Defendant Jones has not even decided whether to assert his Fifth Amendment right weighs heavily against an indefinite stay. At best it means Defendants' motion is premature; at worst it highlights a dilatory motive on the part of Defendants.

C. The lack of an indictment requires denial of the motion.

Defendants argue – without citation to any authority – that the lack of an indictment supports a stay of the proceedings. *Motion*, p.6. Defendants have it backwards. Pre-indictment requests for a stay of civil proceedings are generally denied. *U.S. v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc.*, 811 F. Supp. 802 (E.D.N.Y. 1992) ("As a preliminary matter, since [Defendant] has yet to be indicted by any grand jury, his motion to stay may be denied on that ground alone."); *State Farm Mut. Automobile Ins. Co. v. Beckham-Easley*, 2002 WL 31111766, *2 (E.D.Penn. Sept. 18, 2002) ("[B]ecause the risk of self-incrimination is reduced at the pre-indictment stage, and because of the uncertainty surrounding when, if ever, indictments will be issued, as well as the effect of the delay on the civil trial, pre-indictment requests for a stay are typically denied."); see also *S.E.C. v. Dresser Indus., Inc.*, 628 F.2d 1368, 1376 (D.C.Cir. 1980).

D. Plaintiff would be prejudiced by an indefinite delay.

Defendants give short shrift to the prejudice Plaintiff would suffer by an indefinite delay. Defendants speculate – without giving any details about the current status of the criminal matter – that "Defendant Jones's criminal case will resolve well before this case" and argue that Plaintiff can just complete discovery after the criminal matter resolves, whenever that may be. *Motion*, p.8. The reality is that the longer time passes, the more witness memories fade, documents get lost or misplaced, and witnesses leave the state or die. It is for this very reason that the rules of civil procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." O.C.G.A. § 9-11-1. An indefinite stay creates unnecessary delay, adds unnecessary

expense, and weakens this Court's ability seek the truth. Moreover, an indefinite delay causes Plaintiff continued pain while he waits indefinitely for justice for his loss. What Plaintiff wants is closure, and an indefinite delay – especially during current times when courts are already backlogged – will only lead to delayed justice and closure.

E. The corporate Defendants have no standing to request a stay of discovery.

Corporations, such as Defendant Royal Food Service Co. and Defendant Zurich American Insurance Co., do not have Fifth Amendment rights to assert. See e.g., *Eagle Hospital Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1303 n.2 citing *Braswell v. United States*, 487 U.S. 99, 102 (1988). Moreover, there is no allegation that they have been charged with a crime, and no argument in the motion that either corporation's constitutional rights will be harmed by discovery. Thus, even if Defendant Jones was entitled to some limited Fifth Amendment protections in this civil case (he is not), discovery can proceed full bore against the corporate Defendants.

IV. CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Court DENY Defendants' motion to stay, allow discovery to proceed without limitation, and grant any such further relief as the Court deems appropriate.

Respectfully submitted this 24th day of March, 2021.

[Signature on Following Page]

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JONAH DELDRAGE AS SURVIVING SPOUSE OF MERLIN HUMBERTO ACOSTA BONILLA, DECEASED, *Plaintiff,* v. ROYAL FOOD SERVICE CO., INC., ZURICH AMERICAN INSURANCE COMPANY, AND MARCUS JONES, *Defendants.*	Civil Action No.: 21EV000532

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on all parties via statutory electronic service addressed to the following attorneys of record:

Scott H. Moulton
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Respectfully submitted this 24th day of March, 2021.

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EXHIBIT 1

**\IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA**

JONAH DELDRAGE AS SURVIVING SPOUSE OF MERLIN HUMBERTO ACOSTA BONILLA, DECEASED, *Plaintiff*, v. ROYAL FOOD SERVICE CO., INC., ZURICH AMERICAN INSURANCE COMPANY, AND MARCUS JONES, *Defendants*.	Civil Action No.: _____

FIRST REQUESTS FOR ADMISSIONS OF PLAINTIFF JONAH DELDRAGE AS SURVIVING SPOUSE OF MERLIN HUMBERTO ACOSTA BONILLA, DECEASED, TO DEFENDANT ROYAL FOOD SERVICE CO., INC.

Plaintiff serves these Requests for Admission upon the above-named Defendant and requests that they be fully admitted in writing under oath within the time provided by law. These Requests for Admission are served pursuant to the Georgia Civil Practice Act, including O.C.G.A. §§ 9-11-26 and 9-11-36.

Note that a request for admission is *not* objectionable on the grounds that it calls for a legal conclusion or contains a mixed question of law and fact. To the contrary, "requests for admission under O.C.G.A. § 9–11–36(a) are not objectionable even if they require opinions or conclusions of law, as long as the legal conclusions relate to the facts of the case." *G.H. Bass & Co. v. Fulton Cnty. Bd. of Tax Assessors*, 268 Ga. 327, 329 (1997).

As to timing: If you need a reasonable extension of time to complete your responses and you timely notify the undersigned of that need, Plaintiff will agree to a reasonable extension. However, *Defendant must agree to provide all discoverable and properly-requested evidence by*

that extended deadline, except for evidence withheld pursuant to claims of privilege in compliance with USCR 5.5. Let us know how much time you need to do that. What Plaintiff seeks to avoid are protracted discovery disputes and motions practice. For that reason, Plaintiff will agree to any reasonable extension as long as, by the extended deadline, Defendant responds as specified above so that no more back-and-forth will be required before Plaintiff is in possession of all properly-requested, non-privileged evidence and information.

Each matter of which an admission is required shall be deemed admitted unless, within the time allowed by law after service of these requests, you serve Plaintiff with a written answer or objection to such matter. If you fail to admit the genuineness of any document or the truth of any matter addressed below, and Plaintiff later proves the genuineness of that document or truth of that matter, Plaintiff will seek an Order from the Court requiring you to pay Plaintiff the reasonable expenses incurred by Plaintiff in making that proof, including attorney fees.

If you would like an electronic copy of these requests in Microsoft Word format so that you can type your response underneath the request to which it responds, please let us know and we will provide a Word version for your convenience.

DEFINITIONS

The terms used below have the following meanings:

1. "**Collision**" refers to the motor vehicle collision involving Defendant Marcus Jones and Merlin Humberto Acosta Bonilla, Deceased, that occurred on October 30, 2020 on Interstate 85 North in Gwinnett County, Georgia.
2. "**Document**" includes, but is not limited to, emails, papers, correspondence, reports, memoranda, publications, policies, procedures, training materials, notes, audio or video

recordings, pictures, photographs, maps, calculations, and other written communications.

3. "**Identify**"

   (a) With respect to any *person*, "**identify**" means to provide that person's last known contact information (phone, postal address, and email address), and a description of the person's connection with the events in question.

   (b) With respect to any *document*, "**identify**" means to provide the title of the document, the date the document was created, the name of the creator, the name of the person who directed that the document be created, and the identity of the person or group to whom the document was distributed.

4. "**Person**" means any natural person, corporation, partnership, proprietorship, association, organization, legal entity, or group of persons.

5. "**Plaintiff**" refers to Plaintiff Jonah Deldrage in his role as Surviving Spouse of Merlin Humberto Acosta Bonilla, Deceased.

6. "**Subject truck**" refers to the 2017 truck driven by Defendant Marcus Jones at the time of the October 30, 2020 collision.

7. "**Royal Food**" refers to Royal Food Service Co., Inc.

8. "**Zurich**" refers to Zurich American Insurance Company.

9. "**You**" or "**your**" refers to the Defendant to whom these requests are addressed.

REQUESTS FOR ADMISSION

Procedural

1.

You have been correctly named in this case insofar as your legal name is concerned.

2.

You have been properly served as a party defendant.

3.

Process is sufficient with regard to you in this case.

4.

Service of process is sufficient with regard to you in this case.

5.

This Court has jurisdiction over the subject matter of this case.

6.

This Court has personal jurisdiction over you in this case.

7.

Venue is proper in this Court.

8.

Plaintiff has not failed to join an indispensable party under O.C.G.A. § 9-11-19.

9.

You will produce to Plaintiff all records that you request and receive from non-parties. [1]

Insurance & Coverage

10.

On the date of the Collision, Royal Food was insured with liability insurance for a total of $12,000,000.00 (Twelve Million Dollars).

[1] Sometimes in this context, copying costs come up. In case that's an issue, please feel free to produce these records in electronic form. Please also note that Plaintiff has not charged Defendant for the copies of records that Plaintiff has produced, so Plaintiff would appreciate Defendant not charging copying costs either. If Defendant *does* insist on charging copying costs, please let the undersigned know what per-page rate Defendant proposes. Plaintiff will pay it *provided that* Defendant reimburses Plaintiff, at the same rate, for the copying costs of all documents that Plaintiff has produced to date and produces in the future.

11.

On the date of the Collision, Royal Food was insured with liability insurance for more than a total of $12,000,000.00 (Twelve Million Dollars).

12.

In addition to Zurich, more than two other insurance companies provided liability insurance to Royal Food at the time of the Collision.

13.

There is a total of $12,000,000.00 (Twelve Million Dollars) in available liability insurance to protect Royal Food for this Collision.

14.

There is more than a total of $12,000,000.00 (Twelve Million Dollars) in available liability insurance to protect Royal Food for this Collision.

15.

Royal Food's CEO will testify under oath that there is a total of only $12,000,000.00 (Twelve Million Dollars) in available liability insurance to protect Royal Food for this Collision.

16.

Royal Food's CFO will testify under oath that there is a total of only $12,000,000.00 (Twelve Million Dollars) in available liability insurance to protect Royal Food for this Collision.

17.

Royal Food showed a net profit of over $2,000,000.00 (Two Million Dollars) in each of the last 3 years.

18.

Royal Food showed a net profit of over $3,000,000.00 (Three Million Dollars) in each of

the last 3 years.

19.

Royal Food showed a net profit of over $4,000,000.00 (Four Million Dollars) in each of the last 3 years.

20.

Royal Food showed a net profit of over $5,000,000.00 (Five Million Dollars) in each of the last 3 years.

21.

Royal Food showed a net profit of over $6,000,000.00 (Six Million Dollars) in each of the last 3 years.

22.

Royal Food showed a net profit of over $7,000,000.00 (Seven Million Dollars) in each of the last 3 years.

23.

Royal Food showed a net profit of over $8,000,000.00 (Eight Million Dollars) in each of the last 3 years.

24.

Royal Food showed a net profit of over $9,000,000.00 (Nine Million Dollars) in each of the last 3 years.

25.

Royal Food showed a net profit of over $10,000,000.00 (Ten Million Dollars) in each of the last 3 years.

26.

At the time of the Collision, Royal Food had over 100 employees.

27.

At the time of the Collision, Royal Food had over 120 employees.

28.

At the time of the Collision, Royal Food had over 150 employees.

29.

At the time of the Collision, Royal Food had over 170 employees.

30.

At the time of the Collision, Royal Food had over 200 employees.

31.

At the time of the Collision, Royal Food had over 250 employees.

32.

Royal Food currently has over 200 employees.

33.

Royal Food reported total annual revenue of over $15,000,000.00 (Fifteen Million Dollars) in each of the last 3 years.

34.

Royal Food reported total annual revenue of over $25,000,000.00 (Twenty-Five Million Dollars) in each of the last 3 years.

35.

Royal Food reported total annual revenue of over $40,000,000.00 (Forty Million Dollars) in each of the last 3 years.

36.

Royal Food reported total annual revenue of over $50,000,000.00 (Fifty Million Dollars) in each of the last 3 years.

37.

Royal Food reported total annual revenue of over $75,000,000.00 (Seventy-Five Million Dollars) in each of the last 3 years.

38.

Royal Food reported total annual revenue of over $100,000,000.00 (One Hundred Million Dollars) in each of the last 3 years.

39.

Royal Food reported total annual revenue of over $150,000,000.00 (One Hundred Fifty Million Dollars) in each of the last 3 years.

40.

Royal Food reported a gross profit of over $10,000,000.00 (Ten Million Dollars) in each of the last 3 years.

41.

Royal Food reported a gross profit of over $15,000,000.00 (Fifteen Million Dollars) in each of the last 3 years.

42.

Royal Food reported a gross profit of over $25,000,000.00 (Twenty-Five Million Dollars) in each of the last 3 years.

43.

Royal Food reported a gross profit of over $40,000,000.00 (Forty Million Dollars) in

each of the last 3 years.

44.

Royal Food reported a gross profit of over $50,000,000.00 (Fifty Million Dollars) in each of the last 3 years.

45.

As part of its "compensation of officers", Royal Food paid its officers over $1,000,000.00 (One Million Dollars) in each of the last 3 years.

46.

As part of its "compensation of officers", Royal Food paid its officers over $2,000,000.00 (Two Million Dollars) in each of the last 3 years.

Substantive

47.

Defendant Marcus Jones was solely responsible for causing the Collision.

48.

Defendant Marcus Jones was an employee of Royal Food at the time of the Collision.

49.

Marcus Jones's driving is what killed Merlin Humberto Acosta Bonilla.

50.

If Defendant Marcus Jones is found to be liable for the death of Plaintiff's husband, Royal Food would be found liable based on theories of *respondeat superior* or vicarious liability.

51.

A truck driven by a Royal Food employee killed Merlin Humberto Acosta Bonilla.

52.

Defendant Marcus Jones was 100% at fault for the Collision.

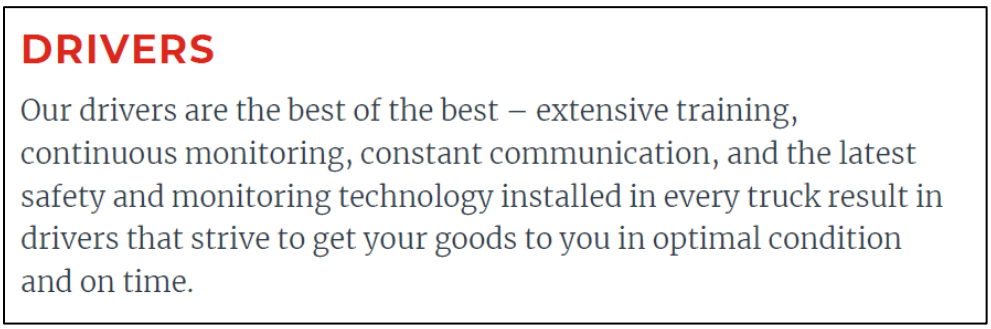
Royal Food's Advertisement

53.

The image below is an excerpt from Royal Food's website.

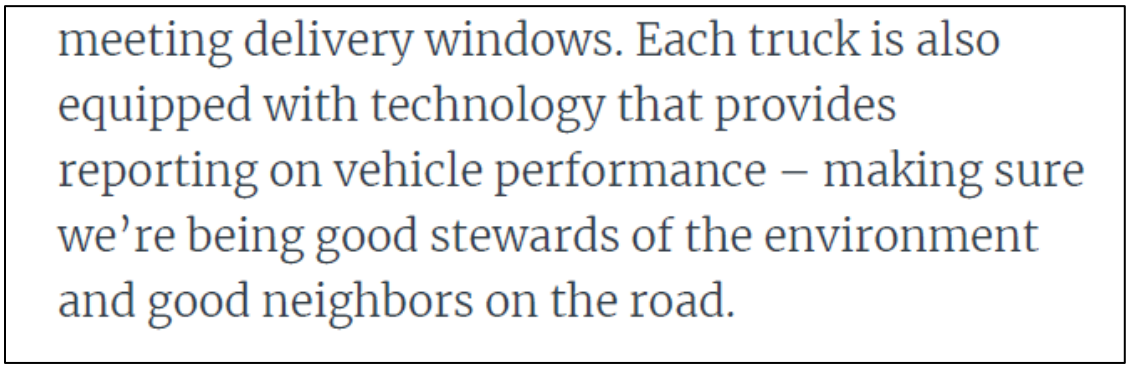
54.

The image below is an excerpt from Royal Food's website.



55.

The image below is an excerpt from Royal Food's website.



Respectfully submitted this 26th day of January, 2021,

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