IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

O'RHONDE CHAPMAN, *Plaintiff*, v. SHETOS INC., BULLDOG NATIONAL RISK RETENTION GROUP, INC., KHALED ELSAYED, AND JOHN DOE *Defendants*.	Civil Action No.: 1:24-cv-00455-SEG

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTIONS TO SET ASIDE DEFAULT AND BRIEF IN SUPPORT OF PLAINTIFF'S REVISED MOTION FOR ENTRY OF DEFAULT

COMES NOW, Plaintiff O'Rhonde Chapman ("Plaintiff") and files this *Response to Defendants' Motions to Set Aside Default and Brief in Support of Plaintiff's Revised Motion for Entry of Default*, and shows the Court as follows:

INTRODUCTION

These brief addresses two equally important issues: (1) Plaintiff's response to Defendants' Motions to Set Aside Default and (2) Plaintiff's brief in support of Plaintiff's Revised Motion for Entry of Default. Because both issues are related and consider identical facts and analysis, Plaintiff's counsel consolidated their

responses into this one brief.

FACT SUMMARY

This lawsuit arises from a hit-and-run tractor-trailer collision that occurred October 12, 2023, in Atlanta, Georgia. Plaintiff was driving his 2021 Honda Accord in the right (inside) lane on Williams Street at its intersection with Ivan Allen Boulevard when a commercial truck driver operating a Shetos, Inc. tractor-trailer turned right into the intersection and collided with Plaintiff's car. The collision caused serious personal injuries to Plaintiff requiring surgery and destroyed his car.

Despite striking Plaintiff's car, the truck driver fled from the scene of the collision. The truck driver never stopped to speak to Plaintiff. The truck driver never stopped to check on Plaintiff's condition.

Fortunately, a witness named Tony Parker witnessed Plaintiff's collision, and followed the offending truck driver. When Mr. Parker caught up to the truck driver and said, "you hit a car" to the truck driver, the truck driver gave an expletive filled response and kept driving.

Mr. Parker took a photograph of the driver's side door of the tractor-trailer to document the company name (Shetos, Inc.) and the Department of Transportation number. *See* Photo of Defendant Shetos Truck Door Taken by Witness Tony Parker

attached as Exhibit A.[1]

Plaintiff's counsel informed Defendant Bulldog National Risk Retention Group, Inc. ("Defendant Bulldog") of their representation in two November 7, 2023, letters of representation sent to the South Carolina and North Carolina addresses found for Defendant Bulldog. *See* Plaintiff's Letters of Representation attached as Exhibit B. Plaintiff's counsel received an acknowledgement of the letter of representation on November 8, 2023 from Doug Klemme, a casualty claims representative as the third-party administrator for Defendant Shetos, Inc. and Defendant Bulldog. *See* Doug Klemme's acknowledgment letter attached as Exhibit C. Plaintiff's counsel then received a letter from Mr. Klemme on January 15, 2024, denying liability on behalf of Defendant Shetos, Inc. and Defendant Bulldog. *See* Doug Klemme's liability denial letter attached as Exhibit D. In the liability denial letter, Mr. Klemme explained that Shetos Inc. is a "one driver one vehicle company and they state they were not involved in any accidents in/near Atlanta, GA on or about 10/12/2023."[2]

Plaintiff filed his Complaint January 31, 2024, and served a copy of the

[1] On May 7, 2024, prior to the filing of this brief, Plaintiff's counsel provided Defendants' counsel with Exhibit A and the witness, Tony Parker's, contact information.

[2] Plaintiff's counsel believes, based on the information shared by Mr. Klemme in his January 15, 2024 letter, that Defendant Khaled Elsayed is, in fact, the at-fault driver; however, Plaintiff included Defendant John Doe in order to preserve the relation back protection afforded by Georgia law due to the hit-and-run nature of the October 12, 2023 collision. Plaintiff's counsel intended on proving that Defendant Elsayed and Defendant John Doe were one in the same through discovery, but unfortunately Defendants' have continued to ignore the serious nature of this matter by ignoring Plaintiff's Complaint and choosing not to participate in Plaintiff's lawsuit.

Summons and Complaint on Defendant Shetos, Inc., Defendant Bulldog National Risk Retention Group Inc., and Defendant Khaled Elsayed ("Defendants") on February 21, 2024. *See* Docs 1, 5, 6, and 7. Defendants' time limit to appear or otherwise respond to Plaintiff's action expired on March 14, 2024. Fed. R. Civ. P. 12.

Plaintiff sent yet another letter to Mr. Klemme on February 21, 2024 pursuant to O.C.G.A. § 33-7-15(c) placing Defendant Bulldog's third-party claims handler on notice of the Plaintiff's January 31, 2024 lawsuit and provided Mr. Klemme with the Summons to the Defendants and the Complaint. *See* Plaintiff's February 21, 2024 letter to Mr. Klemme attached as Exhibit E. Plaintiff's counsel received a certified mail return receipt showing that Mr. Klemme, and CBCS, received Plaintiff's February 21, 2024 letter on February 27, 2024, fifteen days before Defendants' Answers were due. Plaintiff's counsel emailed Mr. Klemme on February 20, 2024, the day before Defendants were served, asking Mr. Klemme to please call him regarding the claim. *See* Plaintiff's Counsel's February 20, 2024 email to Doug Klemme attached as Exhibit F.

This Court issued a Notice of Hearing on April 17, 2024, setting forth a telephone conference to be held April 26, 2024. On April 19, 2024, thirty-six days after the due date, Defendants filed Answers.

During the April 26, 2024 telephone conference, the Court directed

Defendants to file their Motion to Set Aside Default Judgment within ten days of the date of the conference. The Court's direction and deadline was restated in the Minute Sheet for proceedings held In Chambers on 04/26/2024. *See* Doc 15. The April 26 Minute Sheet stated, in relevant part, "After hearing from the parties, the Court DIRECTED Defendants to file within 10 days their motion so set aside default." *Id*. The Court directed deadline expired at midnight May 6, 2024.

Defendant Bulldog filed a Motion to Set Aside Default Judgment on May 7, 2024, *after* the deadline expired. *See* Civil Docket for Case #: 1:24-cv-00455-SEG attached as Exhibit G.

I. LEGAL STANDARD AND AUTHORITY

A district court's denial of a motion to set aside entry of default is reviewed by Court of Appeals under an abuse of discretion standard. *Savoia-McHugh v. Glass*, 95 F.4th 1337, 1342 (11th Cir. 2024). The Eleventh Circuit Court of Appeals described the abuse of discretion standard as allowing, "a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." *Savoia-McHugh*, F.4th at 1342 *quoting In re Rasbury,* 24 F.3d 159, 168 (11th Cir. 1994).

A court may set aside an entry of default for good cause under Fed R. Civ. P. 55(c) using the following guidelines: (1) whether the default was culpable or willful, (2) whether the defaulting party presents a meritorious defense, and (3)

whether setting [the default] aside would prejudice the adversary; however, If a court determines that, "a party willfully defaults by displaying either an intentional or reckless disregard for the judicial proceedings, **the court need make no other findings in denying relief**." *Savoia-McHugh*, 95 F.4th at 1342 (*quoting Compania Interamericana Exp.-Imp., S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948 (11th Cir. 1996) (internal quotations omitted).

A. <u>The Eleventh Circuit Court of Appeals will affirm a district court's denial to set aside a motion for default judgment if the district court did not abuse its discretion where a defendant displayed an intentional or reckless disregard for judicial proceedings or where a defendant is given ample opportunity to comply with court orders and fails to do so.</u>

The Eleventh Circuit Court of Appeals will affirm a district court's denial to set aside a motion for default judgment if the district court did not abuse its discretion where a defendant displayed an intentional or reckless disregard for judicial proceedings. In *Savoia-McHugh*, the Eleventh Circuit Court of Appeals determined the district court did not abuse its discretion in denying Defendant Glass' motion to set aside default stating, "Glass willfully default[ed] by displaying either an intentional or reckless disregard for the judicial proceedings." 95 F.4th at 1345 (*citing Compania Interamericana*, 88 F.3d at 951-52). The

Plaintiffs in *Savoia-McHugh* sued Defendant Glass alleging misconduct in real estate transactions, and Defendant Glass failed to "respond to the complaint or defend the action in any way" despite proper service of process that included a summons informing Defendant Glass that Plaintiffs sued him and he was required to respond to the lawsuit. 95 F.4th at 1339. A clerk's default was entered against Defendant Glass who subsequently moved to set aside said default. *Savoia-McHugh*, 95 F.4th at 1341. The Court reasoned that Defendant Glass willfully defaulted and intentionally or recklessly disregarded judicial proceedings because he ignored several legal documents sent to him via mail, Federal Express, and personal service. *Savoia-McHugh*, 95 F.4th at 1343. *See also Insituform Techs., Inc. v. AMerik Supplies, Inc.*, 588 F. Supp. 2d 1349 (N.D. Ga. 2008) (denying defendant's motion for relief from default because the record indicated that defendant knew of the legal proceedings against a company where defendant held the positions of president and CEO and intentionally or recklessly disregarded those proceedings). The Eleventh Circuit determined it need not address Defendant Glass' arguments regarding meritorious defense or prejudice because Defendant Glass willingly defaulted; however, in footnote twelve of its opinion, the Court concluded that the Defendant Glass' arguments regarding meritorious defenses and prejudice would not change its decision. *Savoia-McHugh*, 95 F.4th at 1345, fn. 12. The Court explained that the defendant "failed to offer anything remotely

resembling a meritorious defense. He only presented four conclusory and superficial statements." *Id.* As to prejudice, the Court stated, "Prejudice may exist where a party faces additional expense caused by the delay." *Id.* (*Citing* 10A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 2700 (4th ed. 2023). The Eleventh Circuit concluded that, "the district court did not abuse its discretion in finding that Glass willfully defaulted, **negating a finding of good cause to set aside the default**." *Id.* (emphasis added).

The Eleventh Circuit Court of Appeals will affirm a district court's denial to set aside a motion for default judgment where a defendant is given ample opportunity to comply with court orders and fails to do so. In *Compania Interamericana*, the Eleventh Circuit Court of Appeals affirmed the district court's denial of the motion to set aside entry of default because the Defendant, Compania Dominicana de Aviacion, was given ample opportunity to comply with court orders, but failed to affect compliance. 88 F.3d at 952. In *Compania*, Plaintiff sued Defendant, a national airline owned by the Dominican Republic, for breach of contract and injunctive relief. 88 F.3d at 949. The Defendant moved the district court to set aside entry of default judgment reasoning that political unrest and the struggling economy in the Dominican Republic resulted in its inability to comply with court orders. 88 F.3d at 952. In affirming the district court's denial of the Defendant's motion to set aside entry of default, the Eleventh Circuit stated,

"While we do not doubt the administrative difficulties faced by Dominicana during this litigation, we cannot say that the district court abused its discretion in denying Dominicana relief from default." *Id.* The Eleventh Circuit further reasoned that, "most failures to follow court orders are not "willful" in the sense of flaunting an intentional disrespect for the judicial process. However, when a litigant has been given ample opportunity to comply with court orders but fails to effect [sic] any compliance, the result may be deemed willful." *Id.*

B. The Eleventh Circuit will vacate a district court's denial of default judgment if the district court does not use the plausibility standard to determine whether to enter default judgment on a plaintiff's claims and will uphold a denial of entry of default judgment when a district court eventually dismisses a plaintiff's lawsuit for failing to state a claim despite the defendant being in default.

Default judgment may be obtained by application to the Court after the Clerk has entered a party's default and where entry of default judgment is warranted by "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Fed. R. Civ. P. 55(a) – (b); *Surtain v. Hamlin Terrace Foundation*, 789 F.3d 1239, 1245. *See also Terrell v. Prosperity Financial Solutions, Inc.*, 2013 WL 3149374 at *1 (N.D.Ga., Atlanta Division, June 18, 2013).

The Eleventh Circuit will vacate a district court's denial of default judgment

if the district court does not use the plausibility standard to determine whether to enter default judgment on a plaintiff's claims. In *Surtain*, the Eleventh Circuit Court of Appeals vacated the district court's denial of default judgment and remanded for reconsideration simply because the district court applied the incorrect pleading standard when ruling on the motion for default judgment. 789 F.3d at 1244-46 (11th Cir. 2015). The Eleventh Circuit reasoned that, "The District Court did not use the *Iqbal/Twombly* plausibility standard to determine whether to enter default judgment on Surtain's race discrimination claims. Instead, the District Court held that Surtain 'fail[ed] to plead a valid claim for relief,' because she had not made out a prima facie case of racial discrimination under *McDonnell Douglas*." *Surtain*, 789 F.3d at 1246.

The Eleventh Circuit will uphold a denial of entry of default judgment when a district court eventually dismisses a plaintiff's lawsuit for failing to state a claim despite the defendant being in default. *In Graveling v. Castle Mortg. Co.,* The Eleventh Circuit determined the district court did not abuse its discretion in refusing the plaintiffs' request for default judgment because the district court dismissed the plaintiff's claims as to some defendants and granted summary judgment as to the remainder. 631 F. App'x 690, 692 (11th Cir. 2015). The Eleventh Circuit reasoned that the record showed that plaintiff's complaint contained "bare legal conclusions unsupported by factual allegations." 631 F.

App'x at 694. The Eleventh Circuit noted that defendants were in default for failure to file an Answer in a timely manner; however, wrote that, "A default is only warranted if there is sufficient basis in the pleadings to support the judgment." 631 F. App'x at 698.

C. <u>Employers are liable for the negligence and tortious conduct of their employees when said conduct is committed in furtherance of and within the scope of the employer's business.</u>

In *Carter v. Riggins*, the Court of Appeals of Georgia outlined the principal of respondeat superior as follows, "Pursuant to the principle of respondeat superior, an employer is liable for negligent or intentional torts committed by an employee in furtherance of and within the scope of the employer's business." 748 S.E.2d 117, 120 (2013). *See also Battle v. Thomas*, 623 F. Supp. 3d 1312, 1316 (N.D. Ga. 2022) (where the Defendant tractor-trailer operator's employer, Defendant Thomas Contracting LLC, admitted vicarious liability under a theory of respondeat superior due to its employee colliding with Plaintiff's tractor-trailer on a highway while driving for the Defendant employer and allegedly causing Plaintiff's injuries). The Plaintiff in *Carter* was attacked by a Defendant-Employee while an invitee at a restaurant. 748 S.E.2d at 118. The Court of Appeals ruled that the Defendant-Employer was *not* liable under the principles of respondeat superior, because the Plaintiff was attacked "for purely personal reasons entirely disconnected form the

restaurant's business." *Id.* at 120.

D. Plaintiffs in Georgia who have a cause of action arising in tort are permitted to join the motor carrier and its insurance carrier to said action.

At the time Plaintiff filed this lawsuit, Georgia law permitted Plaintiff to join the motor carrier and the motor carrier's insurance carrier to his lawsuit arising from Defendant Shetos Inc.'s employee's tortious conduct. O.C.G.A § 40-1-112(c) established, "It shall be permissible under this part for any person having a cause of action arising under this part to join in the same action the motor carrier and the insurance carrier, whether arising in tort or contract." Similarly, O.C.G.A § 40-2-140(d)(4) reads, "Any person having a cause of action, whether arising in tort or contract, under this Code section may join in the same cause of action the motor carrier and its insurance carrier."

II. ARGUMENT AND ANALYSIS REGARDING DEFENDANTS' MOTIONS TO SET ASIDE DEFAULT

This Court will not abuse its discretion by denying Defendants' Motions to Set Aside Default because Defendants have willfully defaulted and have not otherwise shown good cause to open default.[3]

[3] Plaintiff notes that, Defendants each filed separate Motions to Set Aside Default Judgments, but all three motions are exactly the same except that the Defendant is replaced, and the verb tenses and pronouns are altered to fit the Defendant that filed the motion. For efficiency, Plaintiff's response will address all three of Defendants' motions,

A. Defendants willfully defaulted and displayed intentional and reckless disregard for these judicial proceedings which negates the need for the Court to make a finding of good cause to set aside default.

In *Savoia-McHugh*, the plaintiffs sued the defendant who failed to respond or defend the action in any way despite being properly served with the lawsuit with clear instructions in the summons as to his duty to file a response. 95 F.4th at 1339. The district court denied a motion to set aside default judgment which was affirmed by the Eleventh Circuit reasoning that the defendant willfully defaulted by intentionally or recklessly disregarding legal proceedings and legal documents that were sent to him via mail and personal service. *Savoia-McHugh*, 95 F.4th. 1337. Similarly, the Defendants in this lawsuit intentionally disregarded several legal documents that were delivered to them through process servers and United States Postal Service Certified Mail. Defendant Bulldog received Plaintiff's letters of representation November 7, 2023, and was served Plaintiff's Complaint and a Summons February 21, 2021. *See* Exhibit B and Doc 7. The Complaint detailed Plaintiff's allegations of fact and law, and the Summons clearly described Defendant Bulldog's duty to respond to Plaintiff's lawsuit within 21 days in accordance with the Federal Rules of Civil Procedure. Plaintiff also mailed Defendant Bulldog a letter

and Plaintiff notes the unlikelihood that all three Defendants in this lawsuit had exactly the same good faith beliefs and reasons for failing to respond to Plaintiff's Complaint.

pursuant to O.C.G.A § 33-7-15(c) placing Defendant Bulldog's third-party claims handler on notice of the Plaintiff's January 31, 2024, lawsuit and providing the claims handler, Mr. Klemme, with the Summons to each Defendant and the Complaint. *See* Exhibit E. Defendant Elsayed[4] and Defendant Shetos, Inc. were both personally served, via hand delivery by a Pennsylvania process server, Plaintiff's Complaint, and a summons addressed to each of them on February 21, 2024. *See* Docs 5 and 6; *See also Insituform*, 588 F. Supp. 2d 1349 (denying defendant's motion for relief from default because the record indicated that defendant knew of the legal proceedings against a company where defendant held the positions of president and CEO and intentionally or recklessly disregarded those proceedings). These summonses clearly set out Defendant Elsayed's and Defendant Shetos Inc.'s duty to respond within 21 days of service. Defendants have had numerous legal documents delivered to each of them which clearly put them on notice of Plaintiff's lawsuit, and as the court held in *Savoia-McHugh,* Defendants' willful default negates a finding of good cause to set aside the default. 95 F.4th at 1343.

Defendants cite to a Third Circuit case, *Hritz v. Woma Corporation*, to demonstrate that willingness requires more than mere negligence. 732 F.2d 1178, 1183 (3d Cir. 1984). The *Hritz* case is purely persuasive authority and not binding precedent on this Court. Defendants do not cite to a single line of analysis in that

[4] The likely owner of Defendant Shetos Inc.

case to support their argument that their default was not willful, *and* the Third Circuit Court of Appeals did *not* find that the district court in *Hritz* abused its authority by entering a default judgment against the defendant where that defendant "callously disregarded repeated notices of a judicial proceeding" which is strikingly similar to the Defendants actions in this lawsuit. 732 F.2d 1178 at 1184. Similarly, Defendants cite to a Second Circuit case, *Commerical Bank of Kuwait v. Rafidain Bank*, where the Second Circuit Court of Appeals *affirmed* the district court's denial to set aside defendant's default in part because, "While the record does not strongly support a finding of prejudice, we need not scrutinize this factor further because **the Iraqi Banks' [sic] willful default and the absence of meritorious defenses were sufficient to support the district court's disposition of the case**." 15 F.3d 238, 244 (2d Cir. 1994) (emphasis added).

It is difficult to believe that Defendant Bulldog, a large, multi-million-dollar company could not appreciate the gravity of being named in a lawsuit filed in a Federal United States District Court. Defendant Bulldog states that its failure to respond was "neither culpable nor willful, but rather resulted from its good faith belief that this was a case of mistaken identity, that its Insured was not involved, and that Plaintiff would amend the Complaint to include the correct parties." Defendant Bulldog, as a risk retention group, has no doubt been party to hundreds if not thousands of lawsuits. For Defendant Bulldog to argue that "it thought a response

was not necessary" despite clear instruction in the Summons issued by the Court is dubious at best. Furthermore, the Federal Rules of Civil Procedure set out very clear instructions for presenting defenses Under Fed. R. Civ. P. 12(b). If Defendants hired counsel in a timely manner, it could have presented their defenses in accordance with federal law rather than relying on the Plaintiff to "amend the Complaint to include the correct parties." Defendants' motions state, "There are no facts to support a conclusion of willfulness by [Defendant] here.";[5] however, Defendants were served with process February 21, 2024, and Defendant Bulldog received an additional letter from Plaintiff's counsel on February 27, 2024. *See* Doc 7 and Exhibit B. *And*, Plaintiff's counsel emailed Mr. Klemme, the claims handler for Defendant Bulldog after all three Defendants were served. *See* Exhibit F. **Defendants' own citations to legal authority refute their Motions asking the Court to set aside default on this issue**.

The Court has given Defendants ample opportunity to comply with the Court's direction. As stated by The Eleventh Circuit Court of Appeals in *Compania*, "most failures to follow court orders are not "willful" in the sense of flaunting an intentional disrespect for the judicial process. However, when a litigant has been given ample opportunity to comply with court orders but fails to effect [sic] any

[5] This same sentence, along with every sentence in Defendants' Motions, is used in all of Defendants' Motions to Set Aside Default.

compliance, the result may be deemed willful." 88 F.3d at 952. During the April 26, 2024, telephone conference, the Court directed Defendant Bulldog to file a motion to set aside entry of default within 10 days of the conference. That time period expired at the end of the day on May 6, 2024. Defendant Bulldog filed its motion to set aside default judgment on May 7, 2024. *See* Exhibit G. Even after the Court graciously granted Defendants ten days to write motions to support setting aside the entries of default against them, Defendants missed their deadline and filed three copy and pasted motions that effectively blame Plaintiff for not "amend[ing] the Complaint to include the correct parties."

B. Plaintiff would be prejudiced if the Court granted Defendants' Motions to Set Aside Entry of Default.

Although the Court need not address the prejudice aspect due to Defendants willfully defaulting, Plaintiff addresses Defendants arguments here. As explained by the Eleventh Circuit in *Savoia-McHugh*, "prejudice may exist where a party faces additional expense caused by delay." 95 F.4th at 1345, fn. 12. In fact, the Eleventh Circuit goes on to say in *Savoia-McHugh* that, the most common type of prejudice *is* the additional expense caused by the delay, the hearing on the Rulle 55(c) motion, and the introduction of new issues." *Id.* (emphasis added). Each of the three most common forms of prejudice listed by the Eleventh Circuit are present in this case. The Plaintiff was severely physically injured in this wreck and his vehicle was

destroyed which consequently caused exceedingly difficult financial hardship. Defendants do not even address the additional expense or time caused by the delay from their willing defaults; this is an aspect of Plaintiff's life that he shoulders daily.

Defendants cite a case from the U.S. District Court for the Eastern District of Pennsylvania, *Choice Hotels Intern., Inc. v. Pennave Associates., Inc.*, to support the proposition that a plaintiff is not prejudiced by having to litigate an action on the merits. 192 F.R.D. 171 (E.D. Pa. 2000).[6] Again, this purely persuasive authority sets out a slightly similar, yet distinctly different four-factor test used by the Eastern District Court of Pennsylvania to determine the propriety of a district court's entry of default judgment, *and*, after his analysis, the judge conditionally *denied* defendant's motion to set aside default. Defendants cite to *Connecticut State Dental Ass'n v. Anthem Health Plans, Inc.*, 591 F.3d 1337 (11th Cir. 2009) for the proposition that, "There is no prejudice to the plaintiff where the setting aside of the default has done no harm to plaintiff except to require it to prove its case." However, the *Anthem Health Plan* case is hardly analogous to the facts of this case, and does not indicate, as Defendants suggest in their Motions, that "the Eleventh Circuit subscribes to this same sentiment" especially considering the Eleventh Circuit's excellent analysis of prejudice in *Savoia-McHugh* referenced above. 95 F.4th at

[6] Defendants' Motions indicate that this is a case from the Third Circuit, but Plaintiff's counsel was unable to locate the case in the Third Circuit Court of Appeals.

1345, fn. 12.

C. <u>Defendants' meritorious defenses are conclusory and superficial blanket statements</u>.

Although the Court need not address the meritorious defense aspect due to Defendants willfully defaulting, Plaintiff nonetheless addresses Defendants' arguments given that they too fail. Defendants' meritorious defenses literally mirror each other word for word in each of their Motions to Set Aside Default Judgment. Defendants state that (1) they breached no legal duty to Plaintiff, (2) the Defendants were not involved in the wreck described in Plaintiff's Complaint, and (3) the Defendants were not in the state of Georgia on the date of the wreck. All of that is untrue.

Like the defendant in *Savoia-McHugh*, these Defendants "fail to offer anything remotely resembling a meritorious defense." 95 F.4th at 1345, fn. 12. The three statements listed in the previous paragraph are comparable to the four "conclusory and superficial statements" that the defendant in *Savoia-McHugh* offered, and as the Eleventh Circuit clearly stated in that opinion, these statements should not sway the Court in granting Defendants' Motions to Set Aside Default Judgment. *Id.*

Defendants cite one pre-September 30, 1981, case from the Fifth Circuit Court of Appeals for the proposition that a "hint of a suggestion" of a meritorious defense

is enough to grant a Motion to Set Aside Default Judgment. However, in the first case cited by Defendants, *Moldwood Corp. v. Stutts*, The Fifth Circuit Court of Appeals *affirmed* the district court's denial to set aside default judgment and stated in relevant part that, "It is universally recognized as an essential to the obtaining of relief from a default judgment entered with jurisdiction that there should appear in the motion **a clear and specific statement showing**, **not by conclusion**, **but by definite recitation of facts**, that an injustice has been probably done by the judgment, in that the debt or demand was not owing; **that there was a valid defense to it**, and that on another trial there will in reasonable probability be a different result. 410 F.2d 351, 352 (5th Cir. 1969) (emphasis added). The second, and final Fifth Circuit case cited by Defendants, *United States v. One Parcel of Real Property*, addressed an action by the United States seeking forfeiture of property in which the U.S. failed to follow proper procedure, and therefore the "obtuse" meritorious defense was enough to reverse the district court's entry of default judgment. 763 F.2d 181 (5th Cir. 1985). That being said, this case is not binding in the Eleventh Circuit as it falls after September 30, 1981, and is wholly distinct from this matter.

D. Defendants have utterly failed to show that good reason exists for Defendants' failure to respond to Plaintiff's Complaint and have not acted in good faith.

Defendants' again proffer the argument that, due to their belief that this was a

case of "mistaken identity" they expected Plaintiff to "amend his Complaint to include the proper parties." That is not a good reason for failing to file a timely Answer in accordance with Federal law, especially considering the language in the summonses explaining exactly what Defendants' duties were, the deadline by which they had to carry out their duty, and the consequences of failing to uphold that duty.

Despite all the methods that Plaintiff used to tell Defendants they needed to respond, Defendants *still* willfully defaulted by intentionally and recklessly disregarding these judicial proceedings, and now Defendants are asking the Court to save them from their own intentional and reckless disregard for these judicial proceedings. The Defendants' own deliberate inaction has resulted in consequences that the Court should enforce.

III. ARGUMENT AND ANALYSIS IN SUPPORT OF PLAINTIFF'S SECOND MOTION FOR ENTRY OF DEFAULT JUDGMENT

Default judgment may be obtained by application to the Court after the Clerk has entered a party's default and where entry of default judgment is warranted by "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Fed. R. Civ. P. 55; *Surtain v. Hamlin Terrace Foundation*, 789 F.3d 1239, 1245. *See also Terrell v. Prosperity Financial Solutions, Inc.*, 2013 WL 3149374 at *1 (N.D.Ga., Atlanta Division, June 18, 2013).

A. Plaintiff's Complaint contains sufficient facts that, accepted as true,

state a claim to relief that is plausible on its face.

As stated by the Eleventh Circuit in *Surtain v. Hamlin*, the correct standard to determine whether there is sufficient basis for entry of default is plausibility. 789 F.3d at 1244-46 (*citing Ashcroft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Plaintiff's Complaint alleged that Plaintiff's car was struck by Defendant John Doe who was operating Defendant Shetos, Inc.'s tractor-trailer on October 12, 2023. *See* Doc 1 ¶¶ 19-22. Plaintiff's Complaint further alleged that John Doe left the scene of the collision and that the collision caused serious personal injuries to Plaintiff. *See* Doc 1 ¶¶ 23 and 24. Plaintiff's Complaint "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Surtain*, F.3d at 1245 (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. at 1965).

Defendants cite to *Estate of Faull by Jacobus v. McAfee* for the proposition that sufficient basis for entry of default is "akin to that necessary to survive a motion to dismiss for failure to state a claim." 727 F. App'x 548 (11th Cir. 2018). While the Eleventh Circuit does make this comparison in *Surtain*, the Court's holding is that the correct standard is plausibility as defined in *Iqbal*/*Twombly*. Defendants also included a parenthetical citation to *Insituform Technologies, Inc. v. AMerik Supplies, Inc.*, stating that the holding by the district court was that "any doubts regarding

whether to set aside an entry of default should be resolved in favor of the party seeking relief." 588 F. Supp. 2d 1349, 1352 (N.D. Ga. 2008). Judge Batten's holding in *Insituform Technologies* was *not* what Defendants quoted in their parenthetical, rather, Judge Batten held that the defendants in *Insituform Technologies* failed to show "good cause" to set aside entry of default. 588 F. Supp. 2d at 1359-60.

B. Defendant Shetos Inc. is vicariously liable for the negligence of Defendant John Doe pursuant to the principles of respondeat superior because Defendant John Doe was operating Defendant Shetos' tractor-trailer in furtherance of and within the scope of Defendant Shetos' business when Defendant John Doe collided with Plaintiff's car.

Defendant John Doe was hauling a trailer at the time of the collision. It is clear that Defendant John Doe was driving in furtherance of and within the scope of his employment as he was operating a tractor clearly marked with Defendant Shetos Inc.'s name, Department of Transportation number, and the principal place of business on the driver's side door. Exhibit A. In contrast to the "purely personal reasons" of the tortious conduct outlined in *Carter*, Defendant Shetos, Inc. collided with Plaintiff's car while driving a commercial vehicle similar to the facts in *Battle v. Thomas*, a case this Honorable Court decided on August 18, 2022, where the Defendant employer admitted it was vicariously liable. 748 S.E.2d at 120; 623 F.

Supp. 3d at 1316.

C. Defendant Elsayed is vicariously liable to Plaintiff because, upon information and belief, Defendant Elsayed is the owner of Defendant Shetos, Inc.

Defendant Elsayed's personal address matches Defendant Shetos, Inc.'s principal place of business address. Plus, Shetos Inc. is a "one driver one vehicle company" otherwise known as an owner-operator company. *See* Exhibit D. Whether Defendant Elsayed was driving the tractor-trailer in the hit and run or not, Defendant Elsayed is, at a minimum, vicariously liable to Plaintiff pursuant to the principles of respondeat superior as the owner of Defendant Shetos, Inc.

Plaintiff is entitled to recover against Defendant Shetos, Inc. and Defendant Khaled Elsayed because the operator of the Shetos, Inc. tractor-trailer was on dispatch for Shetos, Inc. in furtherance of and within the scope of Defendant Shetos' business when Defendant John Doe (likely Defendant Elsayed himself) collided with Plaintiff's car.

Plaintiff is entitled to recover against Defendant Bulldog because Defendant Bulldog issued at least one policy of commercial automobile liability insurance on the Shetos Inc. tractor-trailer that is the subject of this lawsuit. Under Georgia's direct-action statute, Defendant Bulldog is responsible for any judgment rendered against Defendant Shetos, Inc., Defendant Khaled Elsayed, and Defendant John

Doe. *See* O.C.G.A §§ 40-1-112(c) and 40-2-140(d)(4).

CONCLUSION

Plaintiff respectfully requests that the Court DENY Defendants' Motions to Set Aside Default. Plaintiff further respectfully requests that the Court ENTER default judgment against Defendant Shetos, Inc., Defendant Bulldog National Risk Retention Group Inc., and Defendant Khaled Elsayed and place this matter on the Court's next available calendar for a hearing on damages as to the aforementioned defendants.

Respectfully submitted this 8th day of May, 2024.

TOBIN INJURY LAW

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF COMPLIANCE WITH N.D. GA LOCAL RULE 7.1(D)

Plaintiff hereby certifies that the aforementioned submission complies with Local Rule 5.1(C) and is submitted in 14-point Times New Roman font.

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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

O'RHONDE CHAPMAN, *Plaintiff*, v. SHETOS INC., BULLDOG NATIONAL RISK RETENTION GROUP, INC., and KHALED ELSAYED *Defendants.*	Civil Action No.: 1:24-cv-00455-SEG

CERTIFICATE OF SERVICE

I hereby certify that the foregoing, *Response to Defendants' Motions to Set Aside Default and Brief in Support of Plaintiff's Revised Motion for Entry of Default* has been filed with the Clerk of Court.

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Respectfully submitted this 8th day of May, 2024.

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