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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

Mercedes Lefiti, et al.

Plaintiffs,

v.

Allied Universal Security Services, Inc., et al.,

Defendants.

This document relates to:

ALL CONSOLIDATED ACTIONS

Lead Case No.: CGC-17-559883

Consolidated with Case Nos.:
CGC-17-561236, CGC-17-561237,
CGC-17-561239, CGC-17-561240,
CGC-17-561241, CGC-17-561242,
CGC-17-561243, CGC-17-561245,
CGC-17-561-247, CGC-17-562500,
CGC-18-566717, and CGC-18-566722

Plaintiffs' Memorandum of Points & Authorities in Support of Plaintiffs' Joint Opposition to Defendant's Motion for Summary Judgment

CONDITIONALLY FILED UNDER SEAL

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I. INTRODUCTION

This case involves wrongful-death and personal-injury claims by victims of a shooting at a UPS facility in San Francisco. Plaintiffs bring this action against Allied Universal ("Allied"), the company UPS contracted to provide security at the facility where the shooting occurred.

To protect UPS employees from "workplace violence," Allied was required to screen every employee entering the facility for weapons under the terms of its contract with UPS. To that end, Allied guards were required to ensure that any employees entering the facility at the designated employee entrances had cleared metal detectors. In addition, Allied's guards were required to search any bags the employees attempted to bring with them into the facility.

But the Allied guard assigned to Post 1 failed to perform this procedure when, on June 14, 2017, Jimmy Lam entered Post 1 with a blue backpack on his back. Rather than screen Lam as procedures required, the guard sat idly in his chair as Lam walked straight through the metal detector with his blue backpack on, setting it off in the process.

Nine minutes later, Lam opening fire at a morning staff meeting with two 9mm pistols. After killing two UPS employees inside the facility and wounding others, Lam then followed a group of UPS employees that had fled outside to an adjacent street, where he then shot and killed a third UPS employee in front the other UPS employees outside.

Allied now files this motion for summary judgment, raising three arguments: First, Allied claims that it did not owe any UPS employees an actionable duty to protect them. Second, Allied claims that Plaintiffs cannot establish that any negligence by its guard was a "substantial factor" in the shooting. Third, Allied claims that, as a matter of law, it is not liable for the injuries and murder that occurred on the public street just outside UPS's facility.

Allied is wrong on all three counts.

First, at a minimum, Allied had a duty of care under a contract-based theory or a negligent-undertaking theory as set forth in the Restatement Second of Torts section 324A. Second, there is ample circumstantial evidence from which a jury could infer that Allied's negligence was a substantial factor in this shooting. Third, because the injuries that occurred on the street stemmed from Allied's failure to secure the UPS facility, Allied is liable for those injuries.

II. BACKGROUND

A. UPS relied on Allied to protect its employees from workplace violence.

UPS is one of the largest parcel carriers in the world, and its many "essential workers" are the backbone of its operation. As such, UPS put a high priority on its employees' safety. Of the threats to its employees' safety, UPS viewed "[w]orkplace violence [as] a growing concern," with a particular emphasis on "any shooting or workplace violence situation resulting in harm." (PCOE 115–116.)[1]

But because UPS is in the business of shipping packages not security, UPS decided to outsource security at its facilities to a security contractor. Universal Protection Service ("Universal") was one company UPS considered for security at its San Francisco facility (the facility at issue here).

Universal appeared to speak directly to UPS's security concerns: Universal's own documents discussed [redacted] and the importance of deterring so-called [redacted] situations in which [redacted] (PCOE 137.)

In August 2014, UPS contracted with Universal to provide security at its San Francisco facility. (PCOE 006.) Under the terms of that contract, Universal was [redacted] at the facility [redacted] (PCOE 019, italics added; PAMF #7.) The contract itself required Universal's guards to screen employees entering the facility at the four employee entrances. (PAMF #18–20.) The chief purpose of this "clean-in" screening procedure was to find weapons, particularly firearms. (PAMF #12, 24.) To that end, Universal's guards were expected to subject every employee entering the facility to an ID check, metal detector/wand check, and a bag check. (PAMF #21.) For Universal's guards, the importance of the "clean-in" screening procedure was underscored a month after Universal signed its contract with UPS when, in September 2014, a disgruntled former UPS employee shot and killed several UPS employees at a facility in Alabama. (PCOE 487–489; see also PAMF #22.)

[1] Citations directly to Plaintiffs' "Compendium of Evidence" appear as **(PCOE XXX)**. Citations to Plaintiffs' "Additional Material Facts" in their separate statement appear as **(PAMF #X)**. Citations to Allied's memorandum of points and authorities appear as **(Def. Memo. at X)**.

But although Universal's guards recognized the need to diligently screen employees for weapons upon entry, Universal's guards performed inconsistently, by not showing up to work on time, abandoning their posts without coverage, and failing to consistently perform the "clean-in" entry procedure. (PCOE 148.) When UPS raised these issues with Universal, Universal executives would reassure UPS that they would correct the issues. (*Ibid*.) But when the issues with Universal's guards persisted (PCOE 151), UPS began exploring other contractors to replace Universal. (PCOE 156.)

AlliedBarton ("Allied") was UPS's preferred candidate to replace Universal. (PCOE 156.) In a bid Allied provided to UPS in February 2016, it emphasized that its goal was [redacted] and promised its guards would be [redacted] (PCOE 174.) In particular, Allied stated that it understood that preventing [redacted] (PCOE 175.)

Ultimately, UPS's desire to abandon Universal for Allied appeared to resolve itself when, in December 2016, Allied and Universal merged (PAMF #1), forming [redacted] (PCOE 129.) Allied led UPS to believe that, with the merger, it would deliver on the promises it made to UPS in its February 2016 bid and would thus address the inconsistencies UPS experienced with Universal guards in the past. (PCOE 581.) In particular, it was UPS's expectation that Allied's guards would consistently perform the clean-in screening procedure for every UPS employee entering the facility. (PAMF #18–20.)

B. Allied's guard failed to screen Lam for weapons before Lam shot UPS employees.

Six months later, on June 14, 2017, Jimmy Lam—one of UPS's truck drivers—arrived at the employee entrance designated "Post 1." Whereas Lam typically carried a black duffle bag to work (PAMF #56), on this occasion Lam was wearing a blue backpack (PCOE 214).

At the time, Post 1 was manned by an Allied guard named Stiver Bushgjokaj ("Stiver"), Allied's "site supervisor." (PAMF #32.) Consistent with the entry procedures, when Lam walked into the facility with his blue backpack on, Stiver was required to stand up and take control of the entrance. (PAMF #33.) And when Lam and his backpack activated the metal detector, Stiver was required to direct Lam to walk back through the metal detector, empty his pockets, and place his bag on the table for inspection. (E.g., PAMF #14, 35.) UPS had confidence in Stiver's ability to carry out this

procedure: Indeed, UPS's security directors had witnessed Stiver do so on many occasions, and believed he understood both the need for, and how to conduct, the "clean-in" screening procedure. (PAMF #30.)

But Stiver did not fulfill that duty on the morning of June 14, 2017. Instead, Stiver remained seated in his chair with his legs crossed while Lam, wearing a blue backpack, walked through the post, setting off the metal detector. (PMAF #34, 40; PCOE 214 [surveillance photo]; PCOE 664 [video].)

Nine minutes later, Lam opened fire on UPS employees at a staff meeting with two 9mm semi-automatic pistols. (PAMF #43, 54; PCOE 222.) Benson Louie and Wayne Chan were the first two employees killed. (PCOE 214.) As the many UPS employees in the facility began to flee, Lam shot and wounded Alvin Chen and Edgar Perez. Lam then followed a group of employees out of the facility and onto an adjacent street where he shot and killed a third employee, Mike Lefiti, in front of other UPS employees, including some who had just arrived for work. (PCOE 214.)

After shooting Lefiti, Lam returned to the facility. (PCOE 214.) When police arrived, they found Lam dead from a self-inflicted gunshot wound. (*Ibid.*) Police also found Lam's blue backpack. (PCOE 222.) Inside, police found a box of 9mm ammunition. (PAMF #55; PCOE 224.)

Naturally, in reviewing the footage in the aftermath of the incident, Brian Woods—UPS's Director of Security for the Northern California region (PCOE 553)—was incensed and described Stiver's failure to screen Lam as nothing short of [redacted] (PCOE 579–580.) Shortly thereafter, UPS terminated its contract with Allied. (PCOE 545–546.)

The many victims of the shooting then filed this lawsuit, seeking to hold Allied liable for, among other things, its guard's negligent failure to discharge its duty to the "clean-in" entry screening procedures it was hired to perform for the safety of UPS employees.

III. STANDARD OF REVIEW

The party seeking summary judgment has the burden of persuasion and production, and must make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) It is not enough to simply point out "an absence of evidence to support" an element of the plaintiffs' cause of action. (*Id*. at 854, n.23.) The moving party must initially "present facts to establish a defense." (*Archdale v. American Intern. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 462.) Only if the defendant succeeds in doing so does the burden shift to "demonstrate the existence of a triable, material issue of fact" as to that defense. (*Ibid*.) A court reviewing a motion for summary judgment must strictly scrutinize the moving party's evidence. (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96–97.)

Summary judgment should be "used with caution" so it does not become a substitute for trial. (*Molko v. Holy Spirit Ass'n.* (1988) 46 Cal.3d 1092, 1107.) "In ruling on the motion the court must consider all of the evidence and all of the inferences reasonably drawn therefrom and must view such evidence in the light most favorable to the opposing party." (*Aguilar*, *supra*, 25 Cal.4th at 843, internal citations omitted.) This Court's role is to determine whether such issues of fact exist, "not to decide the merits of the issue themselves." (*Walsh v. Walsh* (1941) 18 Cal.2d 439, 441). All doubts as to whether there are any triable issues of fact are resolved in favor of the party opposing summary judgment. (*Zelda, Inc. v. Northland Ins. Co.* (1997) 56 Cal.App.4th 1252, 1259.)

Finally, a party seeking summary judgment may not rely on new facts or evidence in its reply papers. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.)

IV. POINTS & AUTHORITIES

A. Allied owed UPS employees a duty of care.

Allied first argues that Plaintiffs cannot show Allied owed them a duty of care. (Def. Memo. at 9.) But as discussed below, Allied owed UPS employees a duty of care under two alternative theories.

1. Allied had a duty to protect UPS employees under its contract to provide security.

Under California law, "[a] duty of care may arise … by contract." (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 803.)

Here, the [redacted] between Allied and UPS expressly states that Allied [redacted] (PCOE 006.) The contract further states that Allied [redacted] that [redacted] (PCOE 010.)

"Exhibit A" states that Allied [redacted] and the [redacted] (PCOE 019.) "Exhibit A" required Allied to [redacted] and charged Allied with the duty to ensure that all [redacted] complied [redacted] (PCOE 020.)

"Exhibit A" further states that Allied [redacted] (PCOE 019, *italics added*.) It also states that Allied [redacted] and Allied [redacted] (*Ibid.*, italics added.)

To that end, "Exhibit A" pointedly required Allied to [redacted] at [redacted] (PCOE 023), where, under the terms of the contract, Allied guards were required to [redacted] (PCOE 020.) In addition, the contract required Allied [redacted] (PCOE 008), including the site-specific security requirements known as "post orders." (PCOE 053.)

The post orders at the facility stated that [redacted] (PCOE 093, italics added.) The post orders further specified that [redacted] (PCOE 094, italics added.) To that end, the post orders specified that [redacted] (PCOE 095, italics added.)

Like the contract itself, the post orders also required Allied's guards to [redacted] (PCOE 094.) UPS policy at the facility dictated that [redacted] installed at Posts 1-4. (PCOE 107.) And UPS instructed Allied's guards to implement the [redacted] at those locations. (PCOE 109.) Specifically, Allied guards had to ensure employees [redacted] employees' bags. (PCOE 107, 109, 111.)

In short, the operative contract imposed a legal duty on Allied to protect UPS employees from workplace violence by diligently screening anyone entering the facility as Posts 1–4 for weapons through the use of metal detectors and bag searches. (PAMF #18–21.) Because "[a] duty of care may arise … *by contract*" (*J'Aire Corp.*, *supra*, 24 Cal.3d at p. 803), Allied's contractual obligations support a duty of care to Plaintiffs here.

Allied argues that this contract-based theory is foreclosed by language in the agreement which purports to exclude "third-party beneficiaries" from asserting rights under the contract. (Def. Memo at 21.) But as Allied concedes, even a third party "not in privity" with the defendant may nonetheless invoke a contract to establish a duty of care where "policy" dictates that result. (*Biakanja v. Irving* (1958) 49 Cal.2d 647, 650; Def. Memo. at 23.) Courts apply a six-factor test to make that determination:

> [1] The extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm.

(*Ibid.*) Here, all six factors apply.

The **first** factor ("the extent to which the transaction was intended to affect the plaintiff") applies here. As just discussed, the stated purpose of the contract was to deter [redacted]

[redacted] and [redacted] PCOE 019, italics added.) And the post orders Allied was obligated to follow state that Allied's [redacted] was [redacted] (PCOE 093, italics added.)

The **second** factor ("the foreseeability of harm to [Plaintiffs]") also applies. In assessing foreseeability, "the court's task ... is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed ...." (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772, internal quotation marks omitted, quoting *Ballard v. Uribe* (1986) 41 Cal.3d 564, 573, fn. 6.)

Allied openly acknowledged that [redacted] resulting from [redacted] were [redacted] (PAMF #22; PCOE 175.) Indeed, in a section titled [redacted] Allied's training manual specifically discussed the threat posed by [redacted] (PCOE 137.) Moreover, Allied's guards were aware of a similar incident in 2014 in which a disgruntled former employee shot and killed several employees at a UPS facility in Alabama. (PCOE 487–489.)

Nor does foreseeability in this context require a showing that it was "highly foreseeable" that criminal conduct will occur, which—according to Allied—requires "prior similar incidents 'on the premises.'" (Def. Memo. at 14.) Even assuming that standard has not been met here, it only applies when a plaintiff seeks to impose a *common-law duty* on a *landowner* to hire security guards. But where a plaintiff seeks to hold a *security company* liable for its failure to fulfill duties *under a contract*, the question is whether the security company could reasonably foresee that the breach of its contractual duties would expose the plaintiffs to an increased risk of harm.

Vasquez v. Lago Grande Homeowners Association (Fla.Ct.App. 2004) 900 So.2d 587, is instructive. There, a woman was murdered after security guards at a condominium complex allowed her ex-husband to enter the property despite instructions to the contrary. The trial court granted judgment on the belief that the security contractor was not liable absent "evidence of *prior such crimes*." (*Id.* at p. 592, italics original.) But the Florida Court of Appeal reversed. In doing so, the court

acknowledged that where the plaintiff alleges "a duty to prevent harm from criminal activity arises … as an aspect of the *common law* duty to exercise reasonable care to keep the premises safe, prior offenses, giving rise to foreseeability of future ones, may be deemed indispensable to recovery." (*Ibid.*) But the court noted that where "the duty to guard against crime is founded upon particular undertakings and hence obligations of the defendant to do so," then "prior-offense evidence is *not* necessary." (*Vasquez*, *supra*, 900 So.2d at p. 593.)

The Illinois Supreme Court reached that same conclusion in *Pippin v. Chicago Housing Authority* (Ill. 1979) 399 N.E.2d 596. There, a man was murdered while visiting a friend in a housing development. The victim's heirs sued the housing development ("Authority") and the security company ("Interstate Service Corporation") it hired to provide security guards at the property. *Pippen* found that the housing development "had no independent duty to protect against criminal acts on its premises," and therefore had no duty to provide security. (*Id.* at p. 599.) But *Pippen* emphasized that because the *security contractor* had "contracted with Authority … to provide 'protective services for the purpose of guarding (the Authority's) properties … and the protection of persons thereon,'" it could be held liable for its guards' negligence in securing the property even though the housing development did not have a duty to provide guards in the first place. (*Pippin*, *supra*, 399 N.E.2d at pp. 599–600.)

Finally, in *Marois v. Royal Investigation & Patrol, Inc.* (1984) 162 Cal.App.3d 193, the Court of Appeal—citing *Pippen*—emphasized the distinction between a landowner's failure to hire security guards, and a security contractor's failure to fulfill its contractual obligations:

> The question here is not whether the defendant failed to appreciate the risk of third-party criminal acts and take precautions against them, as would be the case if Jack-In-The-Box were sued for failing to provide security guards at a particular location. [Citations omitted.] Rather, the issue to be determined is whether the security guards, admittedly present and charged with protecting Jack-In-The-Box customers, acted reasonably with respect to the risk which obviously confronted Kevin Marois.

(*Id.* at p. 202.)

Vasquez, *Pippen*, and *Marois* teach that the question here is not whether it was "highly foreseeable" to Allied that a mass-shooting might occur at this facility in light of prior incidents. Rather, the question is whether Allied reasonably foresaw that breaching its contractual duty to diligently screen employees for weapons increased the risk of a workplace shooting. And Allied certainly did.

Balard v. Bassman Event Security (1989) 210 Cal.App.3d 243, is not to the contrary. Allied cites *Balard* for the premise that a security contractor "owes no greater duty" to protect a business's customers than the business itself. (Def. Memo. at 23.) But *Balard* was careful to note that this limitation was only true "*absent [a] contractual relationship*" extending it. (*Balard*, *supra*, 210 Cal.App.3d at p. 249, italics added.) *Balard* thus distinguished both *Marois* and *Pippen* as cases in which the "imposition of liability" was "a function of the contractual relationship" between the security contractor and the landowner. (*Id.* at p. 259, n. 4; see also *id*. at p. 259 ["What the court did in *Marois* was to examine the duty arising from the contractual relationship between the security services company and the business establishment."].) Accordingly, *Balard* actually makes Plaintiffs' case.

The **third** factor ("the degree of certainty that the plaintiff suffered injury") also applies. There is no dispute that the wrongful-death Plaintiffs in fact lost their loved ones that day, or that the survivors were seriously injured, whether physically, emotionally, or both.

The **fourth** factor ("the closeness of the connection between the defendant's conduct and the injury suffered") also applies. "An intervening third party's actions that are 'themselves derivative of defendants' allegedly negligent conduct ... do not diminish the closeness of the connection between defendant's conduct and plaintiff's injury for purposes of determining the existence of a duty of care.'" (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1148, quoting *Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 583.) Thus, "[i]f the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the defendant negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the defendant from being liable for harm caused thereby." (*Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 58–59.)

The **fifth** factor ("the moral blame attached to the defendant's conduct") also applies. Courts "may assign moral blame 'where the defendants exercised greater control over the risks at issue.'" (*Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1091, quoting *Kesner*, *supra*, 1 Cal.5th at p. 1151.) Here, there is no question Allied—which was [redacted] and which was contractually obligated to screen employees for weapons with metal detectors and bag searches—exercised "greater control over the risks at issue" than Plaintiffs.

Finally, the **sixth** factor ("the policy of preventing future harm") also weighs in favor of assigning a duty of care. To state the obvious, holding security contractors liable for injuries resulting from their failure to do what they were hired to do would serve to prevent future harm by giving security companies a powerful incentive to do their jobs. By contrast, it would only increase the potential for future harm if this Court were to grant absolute immunity to [redacted] (PCOE 129) for injuries resulting from its negligent failure to do the very thing it was hired to do.

2. Allied had a duty to protect UPS employees under a negligent-undertaking theory.

Plaintiffs can also establish a duty on a negligent-undertaking theory under Restatement Second of Torts section 324A. Under that section, "one who undertakes ... for consideration, to render services to another … for the protection of a third person …, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care" if "the harm is suffered because of reliance of the other or the third person upon the undertaking." (Rest.2d Torts, § 324A, subd. (c).)

Peredia v. HR Mobile Services, Inc. (2018) 25 Cal.App.5th 680, is instructive. There, a dairy worker was killed by a tractor at a dairy farm. The decedent's family brought negligence claims against a contractor ("HR Mobile") that the dairy hired to help enhance "workplace safety." (*Id.* at p. 685.) The trial court granted summary judgment on duty grounds, but the Court of Appeal reversed, holding that "[a] safety consultant is liable to an employee of the firm that hired the safety consultant when the employee establishes the elements of a negligent undertaking claim." (*Peredia*, *supra*, 25 Cal.App.5th at p. 687.) Under *Peredia*, Plaintiffs can establish duty by satisfying the following three elements:

- First, that "[Allied] undertook to render services to [UPS]."
- Second, that the services rendered were of a kind [Allied] should have recognized as necessary for the protection of employees of [UPS]."
- Third, "either (a) [Allied]'s carelessness increased the risk of such harm, or (b) the undertaking was to perform a duty owed by [UPS] to the employees, or (c) the harm was suffered because of the reliance of [UPS] or the employees on the undertaking."

(*Peredia*, *supra*, 25 Cal.App.5th at pp. 690–691, 695.) Plaintiffs can satisfy all three elements here.

Regarding the **first** element, as discussed above, Allied clearly undertook to protect UPS employees by screening everyone entering the facility for firearms by conducting [redacted] and [redacted] searching their bags. (PAMF #18–21.)

The **second** element also applies: Again, as discussed above, Allied readily understood the threat posed by [redacted] including [redacted] (PAMF #22, 23), and the important rule that clean-in entry procedures play in reducing that risk. (PAMF #24.)

The **third** element also applies: UPS personnel confirmed they expected [redacted] by doing the "clean-in" screening procedure for every employee. (PMAF #6, 8, 18–20.) This is sufficient to establish reliance for purposes of a negligent-undertaking theory. (*Pippin*, *supra*, 399 N.E.2d at p. 600 ["By contracting with Interstate for guard services, the Authority, as a matter of law, relied upon Interstate to perform its undertaking."].)

In attacking a negligent-undertaking theory, Allied focuses exclusively on Plaintiffs and whether *they* relied on Allied's undertaking. Specifically, Allied emphasizes that "there is no evidence that the *UPS employees* were lulled into a false sense of security and that, consequently, the employees failed to undertake additional precautionary measures on their own." (Def. Memo. at 18, italics added.)

But a negligent-undertaking claim only needs "reliance of [the employer] *or* the employees on the undertaking." (*Peredia*, *supra*, 25 Cal.App.5th at pp. 690–691, italics added.) Because these two scenarios "are joined by the disjunctive 'or,' plaintiffs need only establish one of the[m]." (*Id.* at p. 697.) Thus, Plaintiffs have a negligent-undertaking claim so long as UPS *as a company* relied on Allied to protect its employees, and Allied does not dispute that it did.

Even if Allied disputed that premise for the first time on reply, it would fail: As a question of fact, reliance generally cannot be resolved on summary judgment. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.) And although Allied's guards were often derelict in screening employees, Allied assured UPS it would address those issues. (PCOE 148; PCOE 581.) Moreover, the evidence shows that Allied's guards demonstrated "clean-in" procedures when UPS's security managers observed them firsthand (PCOE 277, 329–330, 454–455), leading them to believe the guards understood the clean-in procedures. (PAMF #30; PCOE 272–273.)

B. Allied's negligence was a substantial factor in the shooting.

Allied next argues that Plaintiffs cannot show that its negligence caused their injuries.

To establish that Stiver's failure to search and screen Lam on the day of the shooting was a legal cause of their injuries, Plaintiffs need only show it was a "substantial factor" in the shooting. (*Mukthar v. Latin American Security Service* (2006) 139 Cal.App.4th 284, 293.) To make *that* showing, "[t]he ultimate question … is whether there is evidence" that Stiver's failure to screen Lam "increased the risk of harm that befell [Plaintiffs]." (*Ibid*.) Naturally, that question is a highly fact-intensive issue that typically "cannot be resolved by summary judgment." (*Lawrence v. La Jolla Beach & Tennis Club, Inc.* (2014) 231 Cal.App.4th 11, 33.)

Here, the evidence supports an inference that Stiver's failure to perform the clean-in procedure on Lam that morning played a significant role—and was thus a substantial factor—in Lam's ability to carry out this shooting.

As already discussed, Allied recognized the potential of an active-shooter scenario by a disgruntled employee (PAMF #22), and thus recognized the need for a diligent "clean-in" entry procedure to screen employees for firearms. (PAMF #21, 24.)

To that end, when Lam walked into the facility with his blue backpack on, Stiver should have stood up and taken control of the entrance. (PAMF #33.) And when Lam and his backpack activated the metal detector, Stiver should have directed Lam to walk back through the metal detector, empty his pockets, and open his backpack for inspection. (PAMF #14.) Stiver was required to deny entry to Lam if he refused to comply, including by using reasonable force if needed. (PAMF #35, 38, 58.)

But Stiver did not do *any* of these things. Instead, he sat in his chair as Lam walked through the metal detector with a blue backpack, setting it off as he strolled by. (PAMF #34, 39.) Minutes later, Lam began shooting UPS employees (PAMF #43, 54; PCOE 222), murdering three and injuring many more. Of course, after the shooting stopped, police found Lam's blue backpack, and upon searching it, found a box of 9mm ammunition inside. (PAMF #55.) Viewed in a light most favorable to Plaintiffs, these facts are certainly sufficient to present a question of fact to the jury regarding whether Stiver's failure to screen Lam "increased the risk of harm that befell [Plaintiffs]." (*Mukthar*, *supra*, 139 Cal.App.4th at p. 293.) As discussed below, Allied's two counter-arguments both fail.

1. Speculation that Lam smuggled guns and ammunition into the facility days before the shooting cannot justify summary judgment.

In an attempt to defeat causation, Allied emphasizes that as a truck driver, Lam had an "opportunity to bring the guns and ammunition into the facility in his UPS truck in the days leading up to the incident." (Def. Memo at 26.) With that in mind, Allied speculates that Lam *might* have done so here, and *might* have stored the guns and ammunition in his truck or in his locker at the facility until the morning of the shooting. (*Ibid.*) But there are several problems with this effort.

First, this theory is wholly speculative, as there is absolutely no evidence to support it. Of course, a party is not entitled to judgment on a theory rooted in "mere speculation and conjecture." (*Merrill v. Navegar* (2001) 26 Cal.4th 465, 490.) Indeed, rather than *evidence* to support the theory that Lam brought his guns and ammunition in prior to the day of the shooting, all that Allied offers to support this theory is the mere fact that it might be *possible*. (Def. Memo. at p. 26 [noting only that Lam had "opportunities" that he "could have" exploited].) But a mere *possibility* an injury might not be attributable to the defendant's negligence is insufficient to negate causation under California law.

Sarti v. Salt Creek (2009) 167 Cal.App.4th 1187, is instructive. In *Sarti*, a woman suffered food poisoning after eating at the defendant's restaurant. On appeal, the Court of Appeal rejected the restaurant's claim that the plaintiff "was required, as a matter of law, to exclude all 'possibilities' other than the meal she had at the restaurant." (*Id.* at p. 1210.) As the court explained, a rule that foreclosed causation simply because an alternative theory was "conceivabl[e] or plausibl[e] … would swallow up the universe," and it would thus be "ludicrous … to suggest that such bare conceivability must, as a matter of law, defeat [causation]." (*Ibid.*) So too here, Allied cannot negate causation merely by pointing to other "possible" ways Lam could have committed this crime.

Second, Allied's theory that Lam stashed his guns and ammunition in either his truck or his locker in the days leading up to the shooting is at odds with the evidence.

Regarding the **truck**, it is notable that there were no locked compartments in the truck where drivers could store any personal belongings. (PCOE 297–298.) Instead, drivers were given an [redacted] to store any belongings in, which would then be placed on one of the shelves in [redacted] (PCOE 252.)

The fact that drivers could not store belongings in a locked compartment—and were instead relegated to an [redacted] that easily revealed [redacted]—makes it unlikely Lam stored his guns and ammunition in his truck given that *numerous* UPS employees interacted with the trucks on a daily basis.

Notable here is the testimony of Danielle Brown, a business manager at the facility. (PCOE 245.) Brown testified that after a driver's shift is over, another UPS employee—known as a [redacted] (PCOE 248–250; PCOE 372.) And Brown testified that, at a minimum, [redacted]—and a hypothetical tote full of guns and ammo—[redacted] (PCOE 250–251.)

In addition to [redacted] Brown testified that after the drivers are gone, [redacted] (PCOE 246–247; PCOE 372.)

In addition to [redacted] Brown testified that [redacted] (PCOE 253–254; PCOE 372.)

Finally, in addition to [redacted] Brown testified that [redacted] (PCOE 253, 255; PCOE 372.)

Viewing this evidence in a light most favorable to Plaintiffs, a reasonable jury could infer that the absence of any places to hide guns and ammunition in the trucks—and the volume and frequency with which other UPS employees entered the trucks—made it unlikely Lam stored his guns and ammunition in his truck in the days before the shooting.

Allied's speculative theory that Lam might have stashed his guns and ammunition in his **locker** before the shooting is also unlikely. Indeed, only nine minutes elapsed between when Lam entered the facility and started shooting. (PCOE 214, 216.) And those nine minutes coincided with the morning rush, during which UPS drivers were arriving to work and storing their belongings in their own lockers

before starting their shifts. (PCOE 631 [¶ 15].) As a result, the locker room at UPS—which is extremely cramped and indiscreet (PCOE 604–613)—would have been heavily trafficked during the time Lam would have been removing the guns and ammunition from his locker under Allied's theory. (PCOE 631 [¶ 15].)

Allied's speculation that Lam brought his guns and ammo in through his truck in the days before the shooting is also contradicted by the circumstantial evidence that Lam brought his guns and ammunition with him on the day of the shooting in his blue backpack:

- Police found a box of bullets in the blue backpack after the shooting. (PCOE 220; PCOE 224.)
- The police officer who recovered the blue backpack agreed that Lam's guns and the ammunition all "would have fit in the backpack." (PCOE 499.)
- The metal detector activated when Lam walked through it with the blue backpack. (PCOE 214.)
- In surveillance photos from Post 1, the backpack appears bulky and is hanging low on Lam's back as he is walking through the metal detector, suggesting it is full. (PCOE 214.)
- One of Lam's co-workers testified that Lam's typical work bag was a *black duffle bag*. (PCOE 247A.) Thus, the blue backpack Lam wore that day was apparently new, suggesting Lam brought it *specifically for this shooting*.

This last point leads to another: If it was not to bring guns and ammo into the facility, why did Lam bother with the blue backpack *at all*? Indeed, other than the uniform he was wearing and the blue backpack itself, the only items police associated with Lam were a sweatshirt, the guns, and the bullets. (PCOE 501.) But if Lam was on an inevitable one-way suicide mission with "no escape plan" as Allied speculates (Def. Memo. at 26), a jury might doubt that Lam brought a new, otherwise empty backpack into the facility simply to carry a *sweatshirt*. Not only would that be absurd, it would ignore the common-sense inference that Lam may have wrapped the guns in the sweatshirt before stuffing them in his backpack to prevent them from rattling around as he walked into the facility.

Finally, Allied actually makes the case that the guns and ammo were in the blue backpack when it repeatedly emphasizes that Lam contacted his union the day before the shooting to verify his life-insurance benefits. (E.g., Def. Memo. at 26.) Viewed in a light most favorable to Plaintiffs, that fact suggests Lam made the final decision to carry out the shooting only the day before, and was thus

unlikely to take a significant and dangerous step in that plan (i.e., smuggling guns and ammo into the facility) "in the days leading up to the incident." (*Ibid.*)

Third, indulging Allied's speculative theory that Lam smuggled his guns and ammo into the facility in the days before the shooting would violate California law by allowing Allied to use its own negligence as a shield to liability.

Haft v. Lone Palm Hotel (1970) 3 Cal.3d 370, is instructive here. In *Haft*, a father and son drowned in a motel pool. Although the motel had a "statutory" duty to provide a lifeguard, no lifeguard was at the pool that day. (*Id.* at p. 765.) Because "[n]o one witnessed the actual drownings of the two Hafts" (*id.* at p. 747), there was a no evidence regarding "the precise manner in which the drownings occurred." (*Id.* at p. 753.) Accordingly, "the problem of 'causation' … loomed large." (*Id.* at p. 753.)

As *Haft* recognized, "the paucity of evidence on causation is normally one of the burdens that must be shouldered by a plaintiff in proving his case." (*Id.* at p. 771.) But because "an attentive guard … serves the subsidiary function of witnessing those accidents that do occur," the Court also recognized that "the evidentiary void" regarding causation "result[ed] primarily from defendants' failure to provide a lifeguard to observe occurrences within the pool area." (*Ibid.*)

With that in mind, *Haft* held that "[u]nder these circumstances the burden of proof on the issues of causation should be shifted to defendants to absolve themselves if they can." (*Id.* at p. 772.) As the California Supreme Court reasoned, any contrary rule "would permit defendants to gain the advantage of the lack of proof inherent in the … situation which they [negligently] created." (*Ibid.*)

So too here, any "evidentiary void" regarding whether the guns and ammo were in the blue backpack exists only because Allied's guard failed to perform the screening procedure UPS hired him to do. (*Id*. at p. 771 ["[A]n attentive guard does serve the subsidiary function of witnessing those [incidents] that do occur."].) To then permit Allied to defeat causation based on that very uncertainty "would permit [Allied] to gain the advantage of the lack of proof inherent in the … situation which they [negligently] created." (*Ibid.*) Accordingly, "[u]nder these circumstances the burden of proof on the issues of causation should be shifted to [Allied] to absolve themselves if they can." (*Id.* at p. 772.)

2. The mere existence of other ways into the facility cannot justify summary judgment.

Allied next attempts to defeat causation by pointing out that there were other ways into the facility beyond the four guard posts. (Def. Memo. at 26.) Here, Allied refers to the fact that there were three unguarded ways into the facility: a stairwell from the corporate offices on the roof (PCOE 410), a stairwell from the mechanics' facility on the roof (PCOE 295), and a doorway in the back of the customer-service office on the ground floor (PCOE 296). But there are three flaws with this argument.

First, the existence of other ways into the facility is *irrelevant*. While that evidence might be relevant if it were unclear how Lam got into the facility, here we know *exactly* how Lam got in: Video surveillance confirms that Lam entered the facility at Post 1 by exploiting a negligent guard who failed to screen Lam (and his bag) for weapons as was required. (PCOE 214; PCOE 664.)

Second, the premise that Lam would have used those other entrances is *speculative*. Indeed, Allied offers no evidence Lam even *knew about* those entrances, or that he would have used those other entrances even assuming he knew they existed. Although not staffed with Allied guards, those areas were not uncontrolled: As the UPS security manager at the facility testified, [redacted] there were [redacted] (PCOE 296.) Again, a party is not entitled to judgment on a theory rooted in "mere speculation and conjecture." (*Merrill*, *supra*, 26 Cal.4th at p. 490.)

Third, to the extent other entrances offered Lam an alternative way to commit this crime, that would only lead back to Allied's negligence. Indeed, under its contract, Allied was responsible for [redacted] at the facility (PAMF #7), including [redacted] (PCOE 019.) And Allied promised UPS [redacted] (PCOE 585–586.) To that end, Allied promised UPS that it would [redacted] and [redacted] (PCOE 177.)

With that in mind, UPS [redacted] (PAMF #8), trusted that Allied would point out security vulnerabilities if they existed (PAMF #10), and would have been receptive to Allied's suggestions to correct them (PAMF #11). Indeed, after the shooting, UPS added additional security, including key-card locks to the two entrances the roof. (PAMF #61.)

But despite Allied's promises to recommend ways to improve access control at the facility—and UPS's receptiveness to suggestions—Allied did not provide any such advice. (PAMF #60.) Perhaps not coincidentally, Stiver—the very Allied guard who failed to screen Lam on the day of the shooting—was Allied's "site supervisor," and was thus the "management" person responsible for evaluating access control at the facility. (PAMF #59; PCOE 267–268.)

Accordingly, to the extent there were alternative ways into the facility that Lam might have exploited, that conclusion would simply underscore Allied's failure to fulfill its promise to UPS that it would [redacted] at the facility to [redacted] (PCOE 177, PCOE 585–586.) As such, Allied's speculative theory of the case would, at most, provide another reason to find Allied negligent. (See *Peredia*, *supra*, 25 Cal.App.5th at p. 683 ["[A] safety consultant retained by a California employer owes a duty of care to the employer's workers."].)

Notably, the mere fact Allied may not have had the unilateral authority to implement access-control measures in the facility would not absolve Allied for a negligent failure to recommend such measures. Indeed, *Peredia* relied on out-of-state cases in which courts held that "an independent consulting firm" hired "to perform safety inspections of its plant and make recommendations concerning safety improvements" could be liable for a "negligent inspection" even if it "did not have the authority to implement the safety improvements it recommended." (*Peredia*, *supra*, 25 Cal.App.5th at pp. 689–690 [citing cases].)

Ultimately, this Court cannot ignore *the undisputed fact* Lam exploited Allied's negligence at Post 1 based on *hypothetical speculation* Lam might have exploited Allied's negligence elsewhere in the facility had Allied's guard done his job.[2]

[2] Nor should this Court credit Allied's speculative assertion that this shooting was "inevitable." (Def. Memo. at 26–27.) Allied was being paid "a lot of money" to supply guards to diligently screen employees entering the facility for weapons in order to protect UPS employees from workplace violence. (PAMF #20.) But Allied's suggestion that there was nothing it could do to prevent a workplace shooting suggests that it was acting in bad faith when it solicited UPS's business and accepted its money based on promises it would provide security that, if its brief is to be believed, Allied regarded as superfluous and ineffective.

C. Allied is liable for injuries outside the UPS facility.

Allied argues that it is not liable for "injuries sustained outside the UPS facility." (Def. Memo. at 19.) Here, Allied refers to the fact that, after shooting several employees inside the facility, Lam went after the many UPS employees who fled to the public street outside the facility, where he then shot and killed Lefiti in front of other UPS employees. (PCOE 216.) Simply because that murder—and the survivors' emotional distress—occurred outside the facility, Allied claims it cannot be held liable for any resulting injuries *as a matter of law*.

As support for that argument, Allies cites cases which generally hold that landowners (and their security contractors) do not have a duty to protect persons from criminal activity outside their property. (Def. Memo. at 19–21.) But those decisions merely recognize that because the power to secure an area is dependent on one's ability to control it, landowners (and their agents) generally are not liable for failing to secure areas outside their property. (E.g., *Rosenbaum v. Security Pacific Corp.* (1996) 43 Cal.App.4th 1084, 1091.)

But the "outside Plaintiffs" do not accuse Allied of failing to secure the street adjacent to UPS's facility. Rather, the claims asserted by the "outside" Plaintiffs are rooted in Allied's failure to secure *the UPS facility it was hired to secure*. Indeed, none of the "outside" Plaintiffs—including the three UPS employees arriving to work when Lefiti was executed (Ed Canaya, Jeffery Mosley, Jimmy Tang)—would have been harmed had Allied stopped Lam at Post 1, as it was required to do.

Thus, because Allied's negligence consisted of its failure to secure the facility it was hired to secure, the chance fact that some of the injuries resulting from that negligence occurred immediately outside the property does not absolve Allied of liability. (*Rosales v. Stewart* (1980) 113 Cal.App.3d 130, 134 [landowner's "duty" to prevent shooting that originated on its property extended to victims "either on or off the property, so long as that person was within the zone of danger"]; *Swanberg v. O'Mectin* (1984) 157 Cal.App.3d 325 [landowner liable where tree on its property extended over adjacent street and obscured visibility there, resulting in collision].)

V. CONCLUSION

For the foregoing reasons, Plaintiffs ask this Court to **deny** Allied's motion for summary judgment and/or summary adjudication.

Dated: August 19, 2020

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