CASE NO. D075738

COURT OF APPEAL OF CALIFORNIA

FOURTH APPELLATE DISTRICT

ANGELA BOLGER,

Plaintiff and Appellant,

vs.

AMAZON.COM LLC, et al.,

Defendant and Respondent.

Appeal From the Superior Court of California for the
County of San Diego
Case No. 37-2017-00003009
Hon. Randa M. Trapp

RESPONDENT'S BRIEF

Julie L. Hussey, Bar No. 237711
JHussey@perkinscoie.com
Julian Feldbein-Vinderman, Bar No. 307838
JFeldbeinVinderman@perkinscoie.com
PERKINS COIE LLP
11452 El Camino Real, Suite 300
San Diego, CA 92130-2080
Telephone: (858) 720-5750
Facsimile: (858) 720-5850

W. Brendan Murphy, ***Pro Hac Vice Pending*
BMurphy@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-6179
Facsimile: (206) 359-7179

Attorneys for Respondent Amazon.com LLC

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION ONE	COURT OF APPEAL CASE NUMBER: D075738
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 237711 NAME: Julie L. Hussey FIRM NAME: Perkins Coie LLP STREET ADDRESS: 11452 El Camino Real, Suite 300 CITY: San Diego STATE: CA ZIP CODE: 92130-2080 TELEPHONE NO.: 858) 720-5700 FAX NO.: (858) 720-5799 E-MAIL ADDRESS: jhussey@perkinscoie.com ATTORNEY FOR (*name*): Respondent Amazon.com LLC	SUPERIOR COURT CASE NUMBER: 37-2017-00003009-CU-CR-CTL
APPELLANT/ PETITIONER: ANGELA BOLGER RESPONDENT/ REAL PARTY IN INTEREST: AMAZON.COM, LLC	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): AMAZON.COM, LLC

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
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Date: December 9, 2019

Julie L. Hussey
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(SIGNATURE OF APPELLANT OR ATTORNEY)

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I. OVERVIEW OF THE CASE

Bolger asserts that Amazon should be deemed the seller of a battery that was sold by a third-party seller, E-life, on Amazon's website. She put forward no evidence in the trial court that Amazon actually sold the battery, beyond the speculative opinion of a self-described "e-commerce expert" that the court correctly ruled inadmissible. As a result, "[m]any of the foundational facts are not disputed." Appellant's Opening Brief (AOB) at 32. E-life sourced the battery, owned it, set the price, and developed the product offer that was published on Amazon.com. Amazon, by contrast, provided the website, processed payment and remitted the price minus service fees to the seller, and provided logistics services to the seller.

According to Bolger, providing these services makes Amazon a seller. But "seller" is not a malleable concept that can be stretched to encompass a service provider that never owned or controlled the product. For that reason, nearly every court nationwide to have considered this issue has held that Amazon is not the seller of products sold by third parties on Amazon.com. *See, e.g.*, *Fox v. Amazon.com, Inc.*, 930 F.3d 415 (6th Cir. 2019); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135 (4th Cir. 2019). A "review of case law from other jurisdictions shows a disinclination to hold Amazon liable as a seller, distributor, or supplier of the products offered for sale on the Amazon Site by third-party sellers." *Stiner v. Amazon.com, Inc.*, 120 N.E.3d 885, 893 (Ohio Ct. App. 2019), *review accepted at* 125 N.E.3d 911 (Table).

California law supports following this "disinclination." The Supreme Court has rejected extending strict liability to entities that did not manufacture or sell the product. *O'Neil v. Crane Co.*, 53 Cal. 4th 335 (2012). Bolger cannot sidestep this rule by simply calling a service provider a seller. This issue is not new. Several cases from this court involving auctions and finance lessors hold that providers of services that others use to sell products are not sellers. *See Tauber-Arons Auctioneers Co. v. Super. Ct.*, 101 Cal. App. 3d 268, 270-71 (1980); *Arriaga v. CitiCapital Commercial Corp.*, 167 Cal. App. 4th 1527 (2008).

In the trial court, Bolger sought to expand strict liability outside the chain of distribution based on the "market enterprise doctrine," but she seems to have abandoned that argument here. She instead asserts, for the first time ever and on a very thin record, that nebulous policy goals warrant expanding strict liability so that the law "catch[es] up to Amazon." AOB at 14. She does not address how this rule would work and who it would apply to—other than Amazon. The barely concealed premise of her argument is that the "world's most valuable retail company" can afford to pay, and that the Court should improperly usurp the role of the Legislature to ensure that Amazon does pay. AOB at 11. She also makes irrelevant and unfounded claims, such as Amazon has an "unfair competitive advantage" (not true, nor is this an antitrust case) and "evade[s] laws and regulations normal retailers must follow" (not true, nor does she identify a single one that Amazon evaded). *Id.*

The trial court focused on the proper considerations and correctly applied established California product liability law. This Court should reject Bolger's invitation to create special new defendant-specific rules and affirm the grant of summary judgment.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Bolger's recitation of facts focuses on Amazon's control over its website and the services offered to third-party sellers, which the trial court correctly regarded as insufficient to confer seller status. The following provides a more complete picture, including of E-life's role and the control it had over the battery that it sold to Bolger.

A. E-life sells Bolger a battery on Amazon.com.

E-life is one of millions of third-party sellers who sell products on Amazon.com. 1 Appellant's Appendix (AA) 86. In August 2016, Bolger used Google to find a battery that was compatible with her laptop computer and then went to Amazon.com to buy one from E-life. 1 AA 86, 88; AOB at 23.

E-life was identified as the seller on the product detail page and throughout the entire checkout process. 1 AA 88. And the order confirmation that Bolger received stated that the battery was "Sold by: E-life." 1 AA 92. Although Bolger describes (AOB at 24, 47) "E-life" as a "fake name," the record citations she provides establish that it is the display name chosen by Lenoge Technology (HK) Limitd, a defendant in this lawsuit. 1 AA 86, 302.

When Bolger set up her Amazon.com account, and again when she bought the battery from E-life, she assented to the *Conditions of Use* that govern the use of Amazon's services. The *Conditions* tell users that "Parties other than Amazon operate stores, provide services, or sell product lines through the Amazon Services," and explain that Amazon is "not responsible for examining or evaluating, and we do not warrant the offerings of, any of these businesses or individuals or the content of their Web sites." 1 AA 121.

E-life assented to the *Amazon Services Business Solutions Agreement* (BSA) when it registered as a third-party seller on Amazon.com. 1 AA 87. As the BSA describes, E-life signed up for "a Service that allows [sellers] to list products for sale directly on the Amazon Site." 1 AA 101.

Bolger identifies (AOB at 17-19) many ways in which the BSA gives Amazon control over the *services* it provides, but she omits the provisions that place the third-party sellers in complete control of the *products* they sell. Under the BSA, third-party sellers source and, at all times, own their products, set the price, develop their own offers, and offer any warranty. 1 AA 87. As the BSA states, the third-party sellers must "source [,] offer and sell" their products (1 AA 102 at § S-2.1); provide "accurate and complete Required Product Information for each product that [they] make available to be listed for sale through the Amazon Site and promptly update such information as necessary to ensure it at all times remains accurate and complete," including price (1 AA 101 at § S-1.1);

and "identify [themselves] as the seller of [their] [P]roduct[s] on all packing slips or other information included with [their] Products and as the Person to which a customer may return the applicable product." (1 AA 102 at § S-2.1)

The sellers must also "ensure that [their] Materials, [their] Products (including packaging) and [their] offer and subsequent sale of any of the same [on the Amazon site] comply with all applicable Laws ...." (1 AA 101 at § S-1.1.) They are also "responsible for any non-conformity or defect in, or any public or private recall of, any of [their] Products." (1 AA 102 at § S-3.1.)

In addition to providing the website where E-life offered the battery for sale, Amazon processed payment for the transaction. When a buyer orders from a third-party seller, Amazon charges the payment instrument designated in the buyer's account and remits the purchase price to the seller minus the services fees agreed to in the BSA. 1 AA 89, 2 AA 321, 323, 332, 334-35.

E-life used the Fulfillment by Amazon (FBA) service. FBA is an optional logistics service in which third-party sellers pay fees to store their fully assembled and packaged products in Amazon fulfillment centers, while retaining ownership of their products and the right to remove their inventory at any time. 1 AA 88-89. When a buyer orders the product, the fulfillment center retrieves the product from the seller's inventory and delivers it to a shipping carrier such as UPS. 1 AA 89.

The FBA and payment processing services are both available for transactions that take place wholly outside Amazon.com. *Id.*

B. Amazon bars E-life from selling on Amazon.com.

In September 2016, about 8 weeks after Bolger bought the battery, Amazon suspended E-life's seller account due to reports of safety incidents involving various battery products that E-life sold. 2 AA 412-13. The next month, Amazon blocked E-life's account after it failed to provide requested safety documentation. 1 AA 86, 2 AA 412-13. Months after Bolger filed this lawsuit, in April 2017, Amazon sent Bolger an email indicating that it had learned of potential issues with the battery that E-life had sold to Bolger and others. 1 AA 89.

This lawsuit was the first safety report that Amazon received for the battery model that Bolger purchased. *Id*. Bolger concedes that the "evidence suggests Amazon did not learn of the battery's hazards until after" the battery was sold. AOB 59.

C. Bolger sues Amazon, E-life, and others.

Bolger sued Amazon, Herocell, Inc., EPC Global, Inc. and HP Inc. 1 AA 4-16. She later dismissed EPC and HP; obtained a default against Herocell; and substituted in Lenoge Technology HK Limited, Unisun, and Shenzhen Uni-Sun Electronics Co., Ltd. for various "Doe" defendants. 1 AA 39-42, 196. Lenoge, which is the formal entity name for E-life, did not answer and was defaulted. 1 AA 196, 2 AA 541.

Bolger initially asserted five causes of action against Amazon: (1) Negligent Product Liability; (2) Strict Product Liability – Design and Manufacturing Defect; (3) Strict Product Liability – Failure to Warn of Defective Condition; (4) Breach of Implied Warranty; and (5) Breach of Express Warranty. 1 AA 4-21. She later added a sixth cause of action for Negligence/Negligent Undertaking based on Amazon's alleged failure to timely notify customers after suspending E-life's account. 2 AA 412-13.

Amazon moved for summary judgment on four grounds. 1 AA 60-81. First, California law does not support liability for products sold by third-party sellers on Amazon.com. 1 AA 69-78. Second, the warranty claims fail because Amazon did not sell the battery and issued no warranties. 1 AA 78-79. Third, the negligence claim fails because there is no duty to warn with respect to products manufactured and sold by others, and Bolger could not establish the elements of a negligent undertaking claim. 1 AA 79-81. Fourth, the Communications Decency Act (CDA), which protects website providers from claims that are based on publication of third-party content, bars the claims. 1 AA 81-84.

Bolger, in her opposition, argued that Amazon is a seller subject to strict liability. 1 AA 160-67. She argued in the alternative that strict liability should apply under the three-element "stream of commerce" test, also known as the "market enterprise" doctrine, set forth in *Bay Summit Cmty. Ass'n v. Shell Oil Co.*, 51 Cal. App. 4th 762 (1996). 1 AA 167-68. Finally, she asserted that the CDA does not apply to online sales by third

parties. 1 AA 168-69. She did not address her negligence claims and abandoned her warranty claims. 1 AA 177, 2 AA 524.

D. The trial court grants Amazon summary judgment.

The trial court granted Amazon's motion. 2 AA 509-515. It first overruled Bolger's evidentiary objections and sustained all of Amazon's objections to the declaration of Bolger's battery expert, Jonathan Jordan, and most of Amazon's objections to the declaration of her "e-commerce expert," Peter Kent. 2 AA 509; 1 Respondent's Appendix (RA) 1-15. Bolger does not challenge these evidentiary rulings on appeal. The court then addressed each of Bolger's causes of action.

Strict Liability. The court held that Amazon is not a seller or distributor. 2 AA 511-12. Bolger inaccurately states (AOB at 12) that the trial court was "swayed by" case law "requiring transfer of title for imposition of strict liability." Not so. The trial court acknowledged that in "California, neither the transfer of title to the goods nor a sale is required to be a seller for purposes of products liability." 2 AA 511.

The court focused on Amazon's role as a service provider. "Rather than acting as a retailer, the evidence shows that Amazon performed a service for sellers to offer their products and for buyers to purchase them." *Id.* Bolger provided "no evidence that Amazon had a role in the selection of the goods E-life/Lenoge sought to sell on Amazon's website; instead it was the third party vendor's means of marketing." *Id.* Amazon was not a distributor because there "is no evidence that Amazon had a participatory

connection with E-life/Lenoge which created consumer demand for its batteries" and the Business Solutions Agreement "did not create any exclusive distributor relationship between Lenoge [E-life] and Amazon." *Id.* at 512.

E-life's use of the FBA service did not make Amazon a seller or distributor because FBA "was another service provided by Amazon to facilitate the sale between plaintiff and E-life." *Id.* at 511. In sum, "Amazon was not a distributor but a provider of services by maintaining an online marketplace, warehousing and shipping goods and processing payments." *Id.* at 512.

Market Enterprise Doctrine. The court ruled that Bolger did not establish any of the three elements of the *Bay Summit* test. 2 AA 512-13. The first element was not satisfied because there was "no evidence that Amazon profited from creating a marketplace of E-life's batteries." 2 AA 512. The second element was not satisfied because there was "no evidence that Amazon's role was integral to the business of bringing laptop batteries to the initial consumer market." *Id.* Rather, "Amazon provided a way for third-parties, including E-life, to sell products that were already on the market." *Id.* The third element was not satisfied because there was "no [] evidence that Amazon influenced or could influence how the batteries sold by E-life are manufactured or how E-life distributed them." *Id.* at 513. While Amazon blocked E-life from selling on its website, the court correctly found that there was "no evidence Amazon substantially

influenced or could substantially influence how the batteries sold by E-life were manufactured or sold through other channels." *Id.*

Negligence. The court observed that "Plaintiff has offered no argument for [her negligence] cause of action" but went on to hold that, in any event, Bolger did not establish the elements of negligent undertaking. 2 AA 514. Amazon did not increase the risk of harm and Bolger did not rely on any action by Amazon. *Id.*

Warranty. The trial court did not address the warranty claims because Bolger "states [she] is not challenging these causes of action." 2 AA 513.

The trial court did not need to address the CDA because its ruling on state-law grounds disposed of Bolger's claims. The court nevertheless ruled that the CDA does not apply because "it does not appear here that plaintiff is seeking to hold Amazon liable for information originating with E-life/Lenoge on Amazon's website…based on [Amazon's] is [sic] status of a publisher or speaker for representations made by E-life." 2 AA 514.

III. ISSUES ON APPEAL

1. E-life sourced, owned, and controlled the battery, set the price, and offered it for sale on Amazon.com. Amazon provided the website where it was sold. The first issue is whether Amazon can be held strictly liable for providing the website where a third-party seller sold a product.

2. Bolger framed her negligence claim in the trial court as negligent undertaking but did not address that claim in opposing summary judgment.

Now, on appeal, she seeks to create a post-sale duty to warn about products made and sold by others, contrary to the Supreme Court's admonition in *O'Neil* that no such duty exists. The second issue is whether Bolger preserved any negligence claim and, if so, whether any duty supports it.

3. Amazon's principal connection to the battery was publishing E-life's offer on Amazon.com. Though Amazon also provided logistics services, Bolger does not claim that they contributed to the defect (nor, logically, could they). The third issue is whether the Communications Decency Act, 47 U.S.C. § 230, bars holding a website provider liable for an online sale conducted by a third party.

IV. STANDARD OF REVIEW

This Court reviews the trial court's summary judgment ruling *de novo*. *Buss v. Super. Ct.*, 16 Cal. 4th 35, 60 (1997). It can affirm on any ground that the parties addressed below. *Kramer v. State Farm Fire & Cas. Co.*, 76 Cal. App. 4th 332, 335-36 (1999); *Carnes v. Super. Ct.*, 126 Cal. App. 4th 688, 694 (2005).

The trial court overruled Bolger's objections to Amazon's evidence and sustained some of Amazon's objections, but Bolger does not challenge these rulings on appeal. 2 AA 509; 1 RA 1-15. Had she challenged evidentiary rulings, this Court would review them for abuse of discretion and would disregard evidence that the trial court properly excluded. *State*

Dept. of Health Serv. v. Super. Ct., 31 Cal. 4th 1026, 1035 (2003); *Duarte v. Pac. Specialty Ins. Co.*, 13 Cal. App. 5th 45, 52 (2017).

V. ARGUMENT

A. Website providers are not strictly liable for products sold by others on their websites.

Under California law, "retailers engaged in the business of distributing goods to the public" can be held liable for "personal injuries caused by defects in those goods." *Arriaga*, 167 Cal. App. 4th at 1534. This rule applies to entities "involved in the vertical distribution of consumer goods," including "wholesale and retail distributors." *Id.* at 1535.

E-life was the seller and would appropriately be subject to strict liability. California does not, however, impose strict liability on websites or other service providers outside the vertical chain of distribution. The market enterprise doctrine and the policies that Bolger cited here and in the trial court do not support departing from this well-established rule.

1. Amazon did not sell or distribute the battery.

The trial court correctly determined that Amazon is not a seller or distributor because, rather "than acting as a retailer, the evidence shows that Amazon performed a service for sellers to offer their products and for buyers to purchase them." 2 AA 511. As the trial court found, there "is no evidence that Amazon had a role in the selection of the goods E-life/Lenoge sought to sell on Amazon's website; instead it was the third party vendor's

means of marketing." *Id.* Bolger offered no evidence that Amazon, as opposed to E-life, sourced the battery, owned it, set the price, or developed the product offer.

Amazon was not a seller or distributor under any legal or commonsense meaning of these terms. The ordinary meaning of the word "sell," from which "seller" is derived, involves transferring a thing that one owns to another in exchange for something of value, usually money. *See* The Merriam-Webster Dictionary 653 (2016) ("to transfer (property) in return for money or something else of value"). The legal definition is the same. *See* Cal. Comm. Code § 2106 (defining "sale" as "the passing of title from the seller to the buyer for a price"); Black's Law Dictionary 1567 (10th ed. 2014) (defining "sell" as "[t]o transfer (property) by sale"). Similarly, "distributor" describes a seller who is higher in the chain of distribution than the retailer—that is, a "wholesaler, jobber, or other manufacturer or supplier that sells chiefly to retailers and commercial users." Black's Law Dictionary 1884 (10th ed. 2014).

Under these definitions, E-life was the battery's "seller." It was responsible for sourcing the battery, held title, set the price, and transferred title directly to Bolger as the buyer. 1 AA 87-88. By contrast, Amazon is not the "seller" or "distributor" of products sold by third parties on Amazon.com because it does not own or control those products.

As the Fourth Circuit recognized, when Amazon "provides a website for use by other sellers of products and facilitates those sales under its

fulfillment program, it is not a seller, and it does not have the liability of a seller." *Erie*, 925 F.3d at 144. Because the third-party seller "transfers ownership of property for a price," the third party is the seller. *Id.*; *see also Milo & Gabby LLC v. Amazon.com, Inc.*, 693 Fed. App'x 879, 890 (Fed. Cir. 2017) (holding that Amazon is not a seller of third-party products because "the third-party sellers retain title to the [products] at all times"); *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018) (holding that Amazon is not a seller given its "failure to take title to a product"); *Phila. Indem. Ins. Co. v. Amazon.com, Inc. et al.*, 17-CV-03115 (DRH)(AKT), 2019 WL 6525624, at *4 (E.D.N.Y. December 4, 2019) (same).

An older case suggests that title transfer is not essential for seller status. *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 251-52 (1968). Title nonetheless bears on control over a product, and control is the touchstone for product liability. "It is fundamental that the imposition of liability requires a showing that the plaintiff's injuries were caused by an act of the defendant or an instrumentality under the defendant's control." *O'Neil*, 53 Cal. 4th at 349.

Amazon does not control products sold by third-party sellers, as several courts have recognized in rejecting seller status. In *Fox*, for example, the Sixth Circuit held that Amazon did not have "sufficient control over [a] hoverboard [sold by a third-party seller] to be deemed a 'seller' of the hoverboard" because Amazon "did not choose to offer the

hoverboard for sale, did not set the price of the hoverboard, and did not make any representations about the safety or specifications of the hoverboard on its marketplace." 930 F.3d at 425; *see also Garber v. Amazon.com, Inc.*, 380 F. Supp. 3d 766, 778 (N.D. Ill. 2019) (concluding that Amazon's "level of participation" did not establish that it was a "seller" because Amazon merely "provid[ed] a venue and marketplace for third-party sellers … to connect with buyers"); *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-2738 (FLW) (LHG), 2018 WL 3546197, *8 (D.N.J. July 24, 2018) (Amazon "never exercised control over the product sufficient to make it a 'product seller'").

Bolger offered no evidence below, and cites none in her brief, showing that Amazon owned or controlled the battery. She instead focuses on Amazon's control over various aspects of its website. That is not the relevant analysis for strict liability.

With respect to products listed for sale on the Amazon site by third parties, "Amazon is better characterized as a provider of services" rather than a seller. *Eberhart*, 325 F. Supp. 3d at 399. As the Ohio Court of Appeals explained in *Stiner*, "Amazon merely provided a service and platform for [the third-party seller] to offer and sell its product." 120 N.E. 3d at 895.

As a service provider, Amazon is not itself a "seller"—and indeed falls outside the chain of distribution altogether—even though its services help others sell products. In *Stiner*, for example, the plaintiff claimed that

Amazon was liable for caffeine powder sold by a third-party seller that caused his son's tragic overdose death. The issue was whether Amazon was a "supplier," which Ohio defined broadly to include anybody who "participates in the placing of a product in the stream of commerce." 120 N.E.3d at 891. The Court of Appeals upheld the trial court's conclusion that the third-party seller, by choosing and sourcing products and offering them for sale, was the only supplier. *Id.* at 894. Those actions by the third-party seller "contrast with the role of the platform through which that entity chose to offer the product for sale." *Id.*; *see also Allstate*, 2018 WL 3546197, at *7 (distinguishing between facilitators, who may be "intermediaries in the distribution process," and sellers).

Bolger cites two cases involving Amazon that she contends support her position: *Papataros v. Amazon.com, Inc.*, No. 17-9836 (KM) (MAH), 2019 WL 4011502 (D.N.J. Aug. 26, 2019), and *State Farm Fire & Cas. Co.* v. *Amazon.com*, 390 F. Supp. 3d 964 (W.D. Wis. 2019). AOB at 13. She fails to mention that the district court in *Papataros* stayed its opinion because it relied on the vacated Third Circuit panel decision in *Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136 (3d Cir. 2019). *See Papataros v. Amazon.com, Inc.*, No. 2:17-cv-9836 (KM) (MAH), 2019 WL 4740669, *1 (D.N.J. Sept. 3, 2019). The court ordered that, "during the pendency of this stay, the Court's August 26, 2019 Opinion and Order shall not be relied on in any respect." *Id.*

State Farm is an outlier, and its holding is based on a misinterpretation of two Wisconsin statutes that have no analogue in California. The court concluded that the structure of two statutes—both of which *restrict* liability—"suggests that, in the absence of the manufacturer, the entity responsible for getting the defective product into Wisconsin is liable." 390 F. Supp. 3d at 969-70 (relying on Wisconsin Statute §§ 895.046 & 895.047). One statute (§ 895.047) restricts the circumstances in which sellers can be liable; the other (§ 895.046) restricts the application of the "risk contribution theory" and includes a statement of legislative purpose to "assure[] that businesses may conduct activities in this state without fear of being sued for indefinite claims of harm from products which businesses may never have manufactured, distributed, sold, or promoted, or which were made and sold decades ago." Wis. Stat. § 895.046(1g). The court also relied on a case that extended strict liability to lessors. 390 F. Supp. 3d at 971-72. Like sellers, lessors source, own, and control the product—all things that Amazon does *not* do with respect to third-party sales. In short, the *State Farm* ruling was glaringly wrong under Wisconsin law and certainly has no application outside Wisconsin.

Bolger also contends that Amazon should be considered a "seller" in light of a recent decision by the South Carolina Administrative Law Court which determined that Amazon was required to collect and remit sales and use tax for third-party sales on Amazon.com. AOB at 41. That opinion is irrelevant here. The Administrative Law Court held that, for purposes of

South Carolina's Sales and Use Tax Act, Amazon is "engaged in the business of selling tangible personal property at retail," where 'business' [wa]s broadly defined to mean 'all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect." *Amazon Servs., LLC v. S.C. Dep't of Revenue*, Docket No. 17-ALJ—17-0238-CC at 20 (quoting S.C. Code Ann. § 12-36-20 (2014)). The court relied on the fact that Amazon's "referral fee," which is based on a percentage of the underlying sale price of a product, conferred either a "profit" or "benefit" to Amazon and thus satisfied the definition of "business" in the Sales and Use Tax Act. *Id.* at 32-33.

The broad definition of "business" in South Carolina's Sales and Use Tax Act is inapplicable to and inconsistent with California's product liability law. If the Administrative Law Court's reasoning were applied here, any service provider that collects a service fee based on a percentage of the underlying sales transaction (*e.g.*, Visa and Mastercard) could be deemed a "seller" and thus strictly liable for product defects. That is not the law and the underlying policy considerations are substantially different. *See*, *e.g.*, *Pierson v. Sharp Mem'l Hosp. Inc.*, 216 Cal. App. 3d 340, 344 (1989) (the doctrine of strict liability is ordinarily inapplicable to transactions "whose primary objective is obtaining services," and to transactions in which the "service aspect predominates and any product sale is merely incidental to the provision of the service").

2. Service providers are not strictly liable for defects in products sold using their services.

Providers of services that others use to sell products are not sellers for product liability purposes, as this Court's rulings involving auctions and finance lessors demonstrate. *See Tauber-Arons Auctioneers Co. v. Super. Ct.*, 101 Cal. App. 3d 268 (1980); *Brejcha v. Wilson Mach. Inc.*, 160 Cal. App. 3d 630 (1984); *Arriaga v. CitiCapital Commercial Corp.*, 167 Cal. App. 4th 1527 (2008).

In *Tauber-Arons*, the Court held that strict liability did not apply to an auction provider because its connection to the product was its "random and accidental role in transferring the planer from one consumer to another." *Id.* at 277 (internal quotation marks and citation omitted). Strict liability requires much more than just participating in a transaction. The "marketing enterprise, participation in which would justify imposition of strict liability for a defect created by the manufacturer, is the enterprise by which *initial distribution of the particular manufacturer's products to the consuming public is effected*." *Id.* at 277 (italics added). The defendant must "have a participatory connection with the enterprise which created consumer demand for and reliance upon the particular injury-producing product, not just products of the same classification." *Id.* at 276 (internal quotation marks and citations omitted).

Providing the means that others use to sell products does not make one a seller. The Court found that it "was not appropriate for the trial court to declare that petitioner, [*a*]*s a marketer*, was strictly liable on account of

any defect in the Forsberg planer." *Id.* at 284 (emphasis added). The auction provider "had no special position vis-à-vis the original manufacturer" and "played no more than a random and accidental role in the distribution" of the product. *Id.* The Court reinforced these points in *Brejcha*, where it rejected strict liability and negligence claims against an auctioneer. 160 Cal. App. 3d at 639 (quoting *Tauber-Arons*' reasoning that the auction provider could not be liable as a marketer); *id.* at 641 (rejecting plaintiff's negligence claim because the auction provider had no duty with respect to the product).

The trial court followed the principles established in these cases in finding that Amazon was E-life's "means of marketing." 2 AA 511. Bolger offered no evidence whatsoever that Amazon itself marketed the battery, much less owned or controlled it. Amazon published E-life's product offer on Amazon.com, followed by providing some logistics services after Bolger accepted E-life's offer.

Bolger misses the point in stating (AOB at 48) that Amazon is not an auctioneer. The point is that Amazon provides the place—a website rather than a physical auction house—where others sell products. The auction cases hold that providing such a place does not make one strictly liable for products sold by others. That rule applies whether the provider is an auction, a website where third parties sell products, or a mall where merchants sell products in a brick-and-mortar space.

The courts have applied the same principle to entities who provide other services associated with a product sale. In *Arriaga*, this Court held that a finance lessor is not a seller. The plaintiff asserted that the finance lessor was "instrumental in placing the product into the stream of commerce." 167 Cal. App. 4th at 1532. But, as "the entity that merely provided the financing, CitiCapital was outside the direct chain of distribution." *Id.*

Courts will not apply strict liability "even if the defendant is technically a 'link in the chain' in getting the product to the consumer market if the judicially perceived policy considerations are not satisfied." *Id.* at 1537. As *Arriaga* demonstrates, these policies are not advanced by extending liability to a service provider. Like the finance lessor in *Arriaga*, Amazon did not "select the specific machine or manufacturer"; had no "ongoing relationship with a particular manufacturer"; did "not play an integral role in the producing and marketing enterprise" for the product; never held title to the product; and had "neither the opportunity nor the expertise to inspect [it] in order to discover defects." *Id*. at 1538, 1541 (internal citation omitted).

Treating service providers as sellers would ensnare many entities who have no meaningful control over the product or relationship with its manufacturer. For example, the owner of a mall leases space to merchants, who could not sell without a place to display their wares. Visa, MasterCard, and PayPal extend credit and process payments, without which

many transactions would not occur. Logistics providers deliver products to purchasers and are essential to online purchases. Newspapers run advertisements that connect sellers with buyers. Indeed, in this case, an online search engine was a "link in the chain" between E-life and Bolger because it directed her to the product she chose to purchase; there is no principled reason that Bolger's arguments, if given credit, would not sweep in even a search engine. These entities provide services essential to the distribution of products but are not liable for defects in products sold using their services.

Bolger suggests (AOB at 52-53) that the FBA logistics services may transform Amazon into a seller. Many courts have rejected this contention, and accepting it here would imply that logistics providers like the United States Postal Service, UPS, and FedEx all somehow become the sellers of products they deliver.

In *Erie*, the Fourth Circuit observed that "Amazon's services were extensive in facilitating the sale," but held that those services "are no more meaningful to the analysis than are the services provided by UPS Ground, which delivered the headlamp to [the buyer]. Neither Amazon nor UPS Ground was a seller incurring liability for the defective product." 925 F.3d at 142; *see also id.* at 141 ("shippers, warehousemen, brokers, marketers, auctioneers, and other bailees or consignees, who do not take title to property during the course of a distribution but rather render services to facilitate that distribution or sale, are not sellers"); *Milo & Gabby*, 693 Fed.

App'x at 890 (providing "an online marketplace followed by logistical and shipping services after the third-party seller has completed its transaction with a buyer" does not make Amazon a seller); *Eberhart*, 325 F. Supp. 3d at 399 (Amazon's role in "warehousing and shipping goods" under the FBA program does not subject it to strict liability); *Allstate*, 2018 WL 3546197, *10 (Noting that the third-party seller "controlled the content for the product listing, dictated the price, and, ultimately, transferred title to the buyer. Throughout this process, Amazon, although in possession of the product, lacked the necessary control over the product.").

The rule that service providers are not sellers is so broadly accepted that the American Law Institute included it in the Third Restatement. Restatement (Third) of Torts § 20 cmt. G (AM. LAW INST. 1998); *see also New Tex. Auto Auction Servs., L.P. v. Gomez de Hernandez*, 249 S.W.3d 400, 403 (Tex. 2008) (companies like "a trucking business that makes deliveries all might be 'engaged' in product sales, but they do not themselves sell the products"); *Mech. Rubber and Supply Co. v. Caterpillar Tractor Co.*, 399 N.E.2d 722, 723-24 (Ill. Ct. App. 1980) (noting that a "transportation company or an independent warehouse" might "have some relation to a product and, although perhaps related to the general economic system, they are outside the manufacturing distributing system contemplated by products liability theories").

3. The Court should reject Bolger's invitation to expand strict liability.

Bolger has taken two different tacks in the trial court and this Court to expand strict liability beyond the actual seller, E-life. She asked the trial court to apply the three-element test established in *Bay Summit*, which requires an extraordinary participation in the market enterprise that led to a product's placement in the stream of commerce. 1 AA 167-68. She seems to have abandoned that argument on appeal and instead asks this Court to create a new category of strict liability for policy reasons. AOB at 42-47. This Court should reject both grounds.

a. Bolger's policy rationales do not support expanding liability.

Bolger assumes that the courts are best positioned to adopt a broad new rule governing internet commerce. That is wrong. Common law rulemaking is an incremental process, as shown by the many years and cases it took for strict liability to reach sellers. The courts adjudicate individual cases with oftentimes thin records (like this one), and are not well-equipped to evaluate the many policy issues involved in making the kind of sweeping change in the law that Bolger advocates. Those countervailing policies include consumer interest in a broad selection of products and the fairness of imposing a tax on e-commerce, including millions of upstanding sellers and small businesses, to insure against isolated personal injuries.

The Legislature is the best forum to address the policies implicated by creating new liability rules for internet commerce. The tax code revisions that Bolger cites demonstrate precisely this point. AOB at 13-14 (citing Cal. Assembly Bill No. 147 codified as Rev. & Tax Code § 6042). That legislation requires "marketplace facilitators" to collect and remit sales tax on third-party transactions. It implicitly recognizes that "marketplace facilitators" are not retailers; otherwise there would be no need to have a law specifying differently. It also shows that the legislature can and does respond to perceived gaps in the law created by internet commerce.

Outside of the tax arena, both California and Oregon have recently enacted legislation which provides specific carveouts to electronic stores and marketplaces for privacy and data security liability arising from third-party devices and applications. *See* S.B. 327 § 1, to be codified as Cal. Civ. Code § 1798.91.05; 2019 Or. Laws Ch. 193 (H.B. 2395) (to be codified in ORS 646.607). In sharp contrast to Bolger's advocacy for a sweeping expansion of product liability, these statutes represent the legislature's careful judgment and efficacy in making policy determinations that implicate internet commerce. *See also*, *e.g.*, *Mason v. Gen. Motors Corp.*, 490 N.E.2d 437, 442 (Mass. 1986) (deferring to the legislature because the questions whether "liability for products that are defective without fault should be imposed in this Commonwealth, and if so, what types of transactions should give rise to liability, are matters of social policy to which the Legislature has given its attention"); *Tincher v. Omega Flex,*

Inc., 104 A.3d 328, 354 (Pa. 2014) ("the Court is not in a position to upend risks and expectations premised upon broad-based arguments calling for a judgment about socially acceptable economic incentives; the legislative setting is a preferable forum for such an endeavor").

Several states have recognized that the judicial expansion of strict liability to sellers went too far and, in response, enacted seller-protective statutes. *See, e.g.*, RCW § 7.72.040. Although California has not enacted such a law, their prevalence across the country indicates that the law is moving counter to the direction Bolger advocates.

Even if courts were the appropriate body to expand strict liability, the California Supreme Court's unanimous decision in *O'Neil* shows little appetite for it. The Court rejected claims based on foreseeability of injury from other manufacturers' products because allowing them "would represent an unprecedented expansion of strict products liability." 53 Cal. 4th at 342; *see also Taylor v. Elliott Turbomachinery Co.*, 171 Cal. App. 4th 564, 571 (2009) (no duty to warn about products manufactured and sold by others).

The Court began with the "bedrock principle in strict liability law" that the "plaintiff's injury must have been caused by a defect in the defendant's product." 53 Cal. 4th at 347 (internal quotation marks and brackets omitted). It held that "defendants had no duty to warn of risks arising from *other manufacturers'* products." *Id.* at 348. The Court explained that "strict products liability should be imposed only on those

entities responsible for placing a defective product into the stream of commerce." *Id.* at 349. It reasoned that "those outside the marketing enterprise generally have no continuing business relationship with the manufacturer of the defective product" and "cannot exert pressure upon the manufacturer to make the product safe and cannot share with the manufacturer the costs of ensuring the safety of the product's user." *Id.* (internal quotation marks omitted).

The Court went on to hold that "mere foreseeability of injury to users of a defective product [is] not sufficient justification for imposing strict liability outside the stream of commerce." *Id.* "That the defendant manufactured, sold, or supplied the injury-causing product is a separate and threshold requirement that must be independently established." *Id.* at 362. Creating an "obligation to compensate on those whose products caused the plaintiffs no harm" would "exceed the boundaries established over decades of product liability law." *Id.* at 365. The Court rejected the sort of policy-based expansion, and judicial legislating, that Bolger seeks here: "Nor would public policy be served by requiring manufacturers to warn about the dangerous propensities of products they do not design, make, or sell." *Id.* at 343.

* * *

The policies behind product liability are enhancing product safety, maximizing protection to the injured plaintiff, and apportioning costs among the defendants. *Arriaga*, 167 Cal. App. 4th at 1537. This list omits

many additional policies that the Legislature would likely examine, which is reason enough to reject Bolger's invitation to create a new rule to advance her narrow interests. Even so, expanding strict liability to websites for products sold by others would not serve, and may even frustrate, these policies.

Safety. The Supreme Court recognized that the incentivize-safety aspect of strict liability only makes sense where the defendant has a continuing relationship with the manufacturer. In *Peterson*, the Court walked back a previous expansion of strict liability to landlords, in part because landlords have no relationship with the manufacturer of products used on their premises. "A landlord or hotel owner, unlike a retailer, often cannot exert pressure upon the manufacturer to make the product safe and cannot share with the manufacturer the costs of insuring the safety of the tenant, because a landlord or hotel owner generally has no 'continuing business relationship' with the manufacturer." 10 Cal. 4th at 1199.

Imposing strict liability where no continuing relationship with the manufacturer exists is also unfair and burdensome, as the Court recognized in *O'Neil*. Absent such a relationship, a "manufacturer cannot be expected to exert pressure on other manufacturers to make their products safe and will not be able to share the costs of ensuring product safety with these other manufacturers." *Id.* at 363. Imposing liability would "require manufacturers to investigate the potential risks of all other products and replacement parts that might foreseeably be used with their own product

and warn about all of these risks," but it "does not comport with principles of strict liability to impose on manufacturers the responsibility and costs of becoming experts in other manufacturers' products." *Id.* Creating such "a duty would impose an excessive and unrealistic burden on manufacturers." *Id.*

Amazon does not have a relationship with manufacturers for third-party products or set the price for such products, so it cannot directly pressure the manufacturer on safety or spread the cost of defects across units sold. *See Stiner*, 120 N.E. 3d at 895 (Amazon "was not in a reasonable position to safeguard against allowing this caffeine powder, as a potentially dangerous product, to enter the stream of commerce"); *Allstate* 2018 WL 3546197, at *11 (Amazon, which does not control the price and has no relationship with the manufacturer, "lacks control over the product at issue, making it, ultimately, unable to manage the risks posed by the allegedly defective product"); *Arriaga*, 167 Cal. App. 4th at 1538 (finance lessor does not select the product and therefore "does not have control over, or a substantial ability to influence, the manufacturing or distribution process"); *see also Phila. Indem. Ins. Co.*, 2019 WL 6525624, at *5 ("Given that Amazon does not know who the manufacturer is, it is not in a position to influence it"). The most Amazon could do would be to distribute the costs of defective products across all *sellers*, many of whom are small businesses and the vast majority of whom are innocent actors selling safe products.

Bolger asserts (AOB at 43) that Amazon controls access to its services. But withholding access to a service, or setting standards for access to it, does not support strict liability. Thus, courts have declined to hold Amazon liable as a seller even where it has demanded safety-related information from third-party sellers or removed those sellers or their products from Amazon.com for safety reasons. *See Fox*, 930 F.3d at 424 (holding that Amazon was not a seller even though Amazon's ability control sellers' access to Amazon.com may theoretically "spur the manufacturing and sale of safer products in the future" because Amazon lacked control over the product); *Garber*, 380 F. Supp. 3d at 779 (although "Amazon had the right to require third-party sellers to meet certain safety requirements in order to list their products on the marketplace" and "Amazon stopped allowing third-party sellers to list hoverboards on the marketplace," these facts "do not establish that Amazon 'was in a position to eliminate the unsafe character' of the product" because "Amazon cannot be expected to judge the quality of every product for sale by third parties"); *State Farm*, 2019 WL 4744818, at *3 (plaintiff failed to demonstrate that "Amazon has the time and technical know-how needed to inspect, detect, and ultimately remove dangerous defects from the products it is in the business of selling before placing them in the stream of commerce that the typical manufacturer or seller does"). And of course it makes no sense to penalize Amazon for taking such safety-related actions or to disincentivize Amazon from doing so.

Compensation. Bolger contends (AOB at 44) that Amazon "is the only viable defendant." She ignores the Supreme Court's "point that the function of loss spreading should not be the exclusive criterion upon which to premise strict liability." *Peterson*, 10 Cal. 4th at 1208. And, contrary to Bolger's position (AOB at 44), California does not recognize a party's default or unavailability as grounds for declaring another entity subject to strict liability.

The Supreme Court has also rejected Bolger's assertion that size and resources support liability. "Another problem with relying exclusively upon the doctrine of loss spreading to justify the imposition of liability without fault is that the same reasoning could be used to impose strict liability in any situation in which the defendant is in a superior position economically to bear or distribute the loss suffered by the plaintiff." 10 Cal. 4th at 1208. The Court favorably quoted a commentator's point that "[s]preading the cost of injury throughout society amounts to no more than a judicially imposed insurance system. To use this rationale for imposing strict liability in isolation of other rationales is to write a judicial ticket to impose strict liability in any area of law where there are injured plaintiffs who may not be compensated." *Id.*; *see also Cafazzo v. Cent. Med. Health Servs., Inc.*, 668 A.2d 521, 535 (Pa. 1995) ("To assign liability for no reason other than the ability to pay damages is inconsistent with our jurisprudence. Where the liability is sought to be imposed on a party which

is not a seller under 402A, such liability would indeed be assigned for no reason at all.") (internal citation omitted).

Cost-allocation. Bolger believes that Amazon should spread the costs of strict liability across *all* third-party sellers by "altering its fee structure." AOB at 47. She asserts, quoting the *Papataros* ruling that court itself suspended, that Amazon can "increase the fees it charges third-party vendors to account for the risk of defective products and make the price—particularly the portion of the price retained by Amazon—reflect that risk." AOB at 47.

Requiring Amazon to insure third-party sellers' products sold on Amazon.com, even though Amazon does not own, control, select, or sell those products, would impose a form of absolute liability that California has rejected. *See O'Neil*, 53 Cal. 4th at 363 ("Although an important goal of strict liability is to spread the risks and costs of injury to those most able to bear them, it was never the intention of the drafters of the doctrine to make the manufacturer or distributor the insurer of the safety of their products. It was never their intention to impose absolute liability."); *see also Coyle v. Richardson-Merrell, Inc.*, 584 A.2d 1383, 1387 (Pa. 1991) ("Reliance on cost-shifting as the only factor to be considered in whether a given party should be exposed to liability, however, would result in absolute liability rather than strict liability").

Bolger's proposal is essentially a tax that would "pass on" the costs of strict liability to millions of faultless third-party sellers who have never

sold a defective or dangerous product. This in turn would likely result in a universal rise in the prices of products sold on Amazon.com. The decision to impose such social cost-spreading—essentially, a tax on online commerce—would require a hotly contested policy determination that the interests of individual plaintiff-consumers outweigh the interests of the overwhelming majority of consumers and online businesses—large and small. That is not a policy decision that can or should be made by judicial fiat.

A liability rule that spreads costs to consumers and innocent sellers is not what strict liability seeks to achieve. As the Supreme Court recognized in *Peterson*, the cost-spreading rationale does not make sense where its implementation would impose costs on the consumers it is intended to protect. The Court quoted favorably a commentator's point that the risk-distribution objective "will probably fail" where the "cost of insuring risk will not be distributed along the chain of commerce but will probably be absorbed by tenants who will pay increased rents." 10 Cal. 4th at 1199.

* * *

Adopting Bolger's position also would not serve the institutional interest in neutral decision-making. She unabashedly seeks to create a liability rule specific to Amazon—in her words, "time for the law to catch up to Amazon" (AOB at 14)—and principally justified by Amazon's alleged status as "the world's most valuable retail company." AOB at 11.

It is plainly improper to create a rule for one company alone based on its resources. Any liability rule should be one of general applicability and based on neutral considerations, not size and resources. *See Martinez v. State of Calif. Dep't of Transp.*, 238 Cal. App. 4th 559, 566 (2015); *Allstate*, 2018 WL 3546197, at *11 n.8 (Liability "is not to be predicated on profit.").

Bolger nowhere explains what this rule is, whom it might affect (if anybody other than Amazon), and how it might work. Nothing in the record establishes the cost or burden of expanding strict liability, which is reason enough to reject it. As the Supreme Court pointed out in *Peterson*, understanding the "economic consequences" of expanding liability is important. 10 Cal. 4th at 1207. The earlier expansion of strict liability that the Court rolled back "could be particularly onerous for the operators of small establishments," who "through no fault of their own, could be rendered financially insolvent if a grievous injury to a guest caused by an unknown defect in the premises resulted in a judgment that exceeded available insurance coverage." *Id.*

Many popular websites, large and small, have third-party sellers. AOB at 16-17 (listing several). Many other entities bring products to customers, such as Doordash, Postmates, and the United States Postal Service. Imposing liability based on "passing the product down the line to the consumer" (AOB at 35) is an unworkable rule with unpredictable and far-reaching consequences. Strict liability has appropriately been confined

to entities that control the product, and Bolger offers no persuasive reason to depart from that principle here.

b. The market enterprise doctrine does not apply.

Bolger does not challenge the trial court's rejection of her market enterprise claim beyond mentioning a few cases that apply the doctrine. AOB 34, 39; 2 AA 512-13. She has therefore abandoned it. *Wall St. Network, Ltd. v. N. Y. Times Co.*, 164 Cal. App. 4th 1171, 1177 (2008) (failure to address summary adjudication of a claim on appeal constitutes abandonment of that claim). In any event, the trial court's ruling on that issue was correct.

Under the market enterprise doctrine, strict liability "extends to nonmanufacturing parties outside the vertical chain of distribution of a product, which play an integral role in the producing and marketing enterprise of a defective product and who profit from placing the product into the stream of commerce." *Bay Summit*, 51 Cal. App. 4th at 773.

Bolger incorrectly characterizes liability as being contingent on "passing the product down the line to the consumer." AOB at 35. The "imposition of strict liability based on th[is] theory is not limitless." *Bay Summit*, 51 Cal. App. 4th at 774. The "fact an entity was a link in the chain of getting goods to the market or that it participated in marketing a defective product is not enough to establish the defendant should be held strictly liable." *Id.* at 778 (internal quotation marks and brackets omitted). Further, the "mere fact an entity 'promotes' or 'endorses' or 'advertises' a

product does not automatically render that entity strictly liable for a defect in the product." *Id.* at 775-76.

Three elements are necessary to extend strict liability outside the vertical chain of distribution: "(1) the defendant received a direct financial benefit from its activities and from the sale of the product; (2) the defendant's role was integral to the business enterprise such that the defendant's conduct was a necessary factor in bringing the product to the initial consumer market; and (3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process." *Id.* at 776. Bolger does not address any of these elements, so Amazon will keep its discussion brief. A more detailed discussion is in the record at 1 AA 76-78 and 2 AA 457-60. (It is not clear that the market enterprise doctrine survives *O'Neil's* holding that strict liability only applies to entities in the chain of distribution. But this Court need not decide that issue because Bolger cannot meet the elements of that doctrine.)

The first element focuses on a "direct financial benefit from [defendant's] activities," *Bay Summit*, 51 Cal. App. 4th at 776, which connotes activities to generate the consumer market for the product. Bolger presented "no evidence that Amazon profited from creating a marketplace of E-life's batteries." 2 AA 512. Receiving an indirect benefit through service fees does not suffice. *See Arriaga*, 167 Cal. App. 4th at 1538 ("any direct financial benefit received by the finance lessor is derived from having placed its money, not the product, into the stream of commerce").

As for the second element, Bolger presented "no evidence that Amazon's role was integral to the business of bringing laptop batteries to the initial consumer market." 2 AA 512. Lenoge-brand batteries were sold on websites such as eBay.com and Walmart.com. 2 AA 459. Bolger selected that particular battery because she found it on Google. Amazon had nothing to do with the battery apart from providing a service that E-life used to sell it. *See Tauber-Arons*, 101 Cal. App. 3d at 277 (marketing activities necessary to support liability must be directed to "initial distribution of the particular manufacturer's products to the consuming public"); *Carpenter v. Amazon.com, Inc.*, No. 17-cv-03221-JST, 2019 WL 1259158, at *5 (N.D. Cal. Mar. 19, 2019) (granting Amazon summary judgment because there was no evidence that Amazon "played a dominant role in creating the market for hoverboards, took steps to assist hoverboard manufacturers in marketing hoverboards, or engaged in any other activities that led to the creation of the initial hoverboard market").

Finally, on the third element, Bolger offered no evidence that Amazon controlled or had the ability to influence the manufacturing or distribution process for the battery. Amazon does not select or source products sold by third-party sellers and has no relationship with the manufacturers or upstream distributors of those sellers' products. 1 AA 88.

4. Bolger's other arguments do not support treating Amazon as a seller.

Bolger offers several other random arguments for deeming Amazon a seller, but none supports doing so.

1. Bolger relies on the definition of "sale" in the Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1790 *et seq.*, to argue that Amazon is a "consignment seller" and thus falls within the vertical chain of distribution. AOB at 41. The Song-Beverly Act pertains to warranties, not product liability, and Bolger abandoned her warranty claims. The Act is irrelevant.

Even so, there was no consignment sale here. A consignment sale is "one in which the merchant takes possession of goods and holds them *for sale* with the obligation to pay the owner for the goods from the proceeds of *a sale* by the merchant. If the merchant does not sell the goods the merchant may return the goods to the owner without obligation." *Bank of Cal. v. Thornton-Blue Pac., Inc.*, 53 Cal. App. 4th 841, 847 (1997) (emphasis added) (citation omitted). A consignment sale requires a "sale" by the merchant or consignee, but Amazon did not sell the battery to Bolger.

The BSA, which governs the relationship between Amazon and E-life, reinforces that Amazon and E-life are independent contractors and that E-life is the seller. 1 AA 102. It nowhere mentions a consignment relationship. *See N. Counties Bank v. Earl Himovitz & Sons Livestock Co.*, 216 Cal. App. 2d 849, 859 (1963) (In determining whether a consignment

of goods has occurred, "the intent of the parties is controlling."); *see also Brejcha*, 160 Cal. App. 3d at 641 (holding that auctioneer had no duty to inspect or service allegedly defective rolling machine which it had taken on consignment from its owner).

2. Bolger cites several California cases, including *Hernandezcueva v. E.F. Brady Co., Inc.*, 243 Cal. App. 4th 249 (2015), *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228 (1968), and *Canifax v. Hercules Powder Co.*, 237 Cal. App. 2d 44 (1965), to argue that Amazon should be strictly liable. AOB at 34, 36, 44. Each of these cases is factually distinguishable and involved entities which had longstanding relationships with the manufacturers of the allegedly defective products and either sold and/or installed those products. That is not the case here.

In *Hernandezcueva*, the court found a drywall installer strictly liable for asbestos-related health complications where the installer purchased the drywall materials directly from the manufacturer and sold them in the course of installing them into its customers' buildings. 243 Cal. App. 4th at 262-63. The evidence showed that the drywall installer always included the drywall products with its bids as this was essential for it to secure its subcontracting work. *Id.* at 263. "E.F. Brady's substantial purchases of the defective products, coupled with its ongoing relationships with their manufacturers, thus support the imposition of strict liability." *Id.* at 264.

Here, Amazon never purchased the battery from the manufacturer with the intention to supply it to a consumer. Despite Bolger's repeated

attempts to conflate E-life (the third-party seller) with Lenoge (the manufacturer or brand name), there is no admissible evidence in the record that Amazon had any relationship with the manufacturer, or that the sale of batteries was essential to Amazon's business. Unlike the drywall installer, Amazon neither set the price for Lenoge-brand batteries nor directly charged customers fees for the sale of those products—Amazon's service fees are deducted from the sale proceeds that are remitted to the seller. 1 AA 89.

In *Barth*, a tire dealer installed tires for a corporate customer of a tire manufacturer from its own inventory and charged the tire manufacturer for the tires and installation. 265 Cal. App. 2d at 248-49. The court recognized that the defendant was a "wholesale and retail Goodrich distributor" that "sold tires to individuals and serviced Goodrich's national fleet accounts." *Id.* at 249. In determining that the tire dealer was strictly liable for its installation of a defective replacement tire, the court recognized that the dealer benefited from servicing the manufacturer's national accounts (in addition to its wholesale and retail business), that it obtained the tire from its own inventory, that it had received a credit for the tire in addition to the installation fee, and that it had placed its name on the tire's warranty form. *Id.* at 252. The court further relied on the fact that the tire dealer "was the only other party who had any knowledge or expertise as to the proper weight to be carried by the tires," and had access to manuals,

service publications and service briefings provided by the tire manufacturer which it never communicated to the public unless specifically asked. *Id.*

Unlike the tire dealer in *Barth*, Amazon does not have its own "stock" or inventory of a third-party seller's or manufacturer's products. Third-party sellers own the products they sell, even when they use the FBA service. 1 AA 89. Amazon lacks any unique or specialized knowledge regarding products sold by third-parties. *See State Farm*, 2019 WL 4744818, at *3. Finally, Amazon did not offer a warranty in connection with the battery. AA 87-88, 90.

In *Canifax*, a wholesaler had a direct and ongoing relationship with the manufacturer of a dynamite fuse and caused this fuse to be shipped directly to the consumer. 237 Cal. App. 2d at 44, 52. The wholesaler never had possession of the fuse but billed the customer and paid the manufacturer's invoice. *Id.* at 48. Unlike the wholesaler in *Canifax*, Amazon had no direct relationship with the manufacturer of the battery. Amazon also did not set the purchase price for the battery. It charged the payment instrument designated in Bolger's account and remitted the sale price, minus any applicable fees, to E-life. 1 AA 89.

3. Bolger misconstrues the holding of *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019), to argue that "a marketplace operator is tantamount to a retailer." AOB at 13, 37-39. *Apple*, which was decided in the antitrust context, did not address this issue. Rather, the limited question before the U.S. Supreme Court was whether the plaintiffs had standing to sue Apple

under the Clayton Antitrust Act for "overcharg[ing] consumers" for mobile applications sold through Apple's App Store. 139 S. Ct. at 1519. The Supreme Court observed that, "[b]y contract and through technological limitations, the App Store is the only place where iPhone owners may lawfully buy apps," "independent app developers … contract with Apple to make the apps available to iPhone owners in the App Store," and "Apple keeps 30 percent of the sales price" for each application sold on the App Store. 139 S. Ct. at 1519. The Court concluded that the plaintiffs had standing because they "purchase apps directly from the retailer Apple, who is the alleged antitrust violator" and "pay the alleged overcharge directly to Apple." *Id.* at 1521.

Bolger is not alleging antitrust claims under the Clayton Antitrust Act related to the price of the battery, and thus *Apple*'s discussion of standing to sue is irrelevant here. Moreover, even if she had pursued antitrust rather than product-liability claims, *Apple* is easily distinguishable. Unlike in *Apple*, third-party sellers do not manufacture or develop products for Amazon or its devices, which Amazon then sells directly to consumers; the third parties are responsible for selling and transferring title themselves. And while the "App Store [was] the *only* place where iPhone owners [could] lawfully buy apps," Amazon.com is only one of many sales channels through which third-party sellers can sell their wares. Amazon is therefore unlike *Apple* even for the limited antitrust issue addressed by the Supreme Court.

4. Bolger suggests that she believed Amazon was the battery's "seller," and more broadly that Amazon is a seller from "the buyer's perspective." AOB at 24, 37. But a purchaser's subjective belief is irrelevant in determining whether an entity was, in fact, the "seller" of a product. *See Allstate*, 2018 WL 3546197, at *11 (plaintiff's subjective belief is "immaterial to whether Amazon acted as a product seller"). Bolger cites no California authority that would support the expansion of liability based on a purchaser's subjective belief regarding the identity of the seller. *See State Farm*, 2019 WL 4744818, at *5 (observing that the plaintiff failed to identify "a single case where an Arizona court found an injured party's subjective belief to be a relevant factor in exposing an entity to strict liability").

B. Bolger abandoned her negligence claim and no duty supports it.

The trial court correctly observed that Bolger "has offered no argument" for her negligence claim. 2 AA 514. She waived the claim and cannot resuscitate it here. *A Local & Regional Monitor v. City of L. A.*, 12 Cal. App. 4th 1773, 1804 (1993) ("It is well established that a party may not raise new issues on appeal not presented to the trial court"). Even if this Court considers the claim, the trial court properly dismissed it.

Bolger asserted a negligent undertaking claim based on Amazon's alleged failure to "timely send any kind of notice or warning to purchasers of Lenoge replacement laptop batteries even after having suspended, and then permanently block[ing], Lenoge's account due to safety concerns over

those batteries." 1 AA 52. A "defendant's undertaking will support the finding of a duty to another only if (a) the defendant's action increased the risk of harm to another, or (b) the other person reasonably relied upon the undertaking to his or her detriment." *Delgado v. Trax Bar & Grill*, 36 Cal. 4th 224, 250 (2005). The trial court found that Bolger could not meet either element because "sending the warning letter did not increase the harm to plaintiff as she had already been harmed," and Bolger "did not rely on the warning to her detriment." 2 AA 514.

Bolger does not challenge this ruling. Instead, she asks this Court to create a post-sale duty to warn based on arguments she never presented to the trial court. The Court should reject this request for several reasons in addition to the impropriety of Bolger asserting a new claim for the first time on appeal.

First, California has never recognized a post-sale duty to warn for non-manufacturers, as Bolger acknowledges. AOB at 60. It is undisputed that Amazon did not manufacture the battery. 1 AA 174.

Second, even if a post-sale duty to warn extended to sellers, Amazon did not sell the battery. The cases Bolger relies upon (AOB at 58-59) do not suggest otherwise. In *Fox*, the Sixth Circuit held that Amazon was not the seller of a hoverboard sold by a third-party seller because Amazon did not control the product. 930 F.3d at 425. It remanded a negligent undertaking claim because of a fact issue surrounding reliance on a post-sale email. *Id.* at 427-28. Here, Bolger offered no proof or argument on

the reliance element. *Fox* supports Amazon's position because it held that Amazon was not a seller and limited any post-sale duty to a negligent undertaking claim.

The *Love* and *Great Northern* decisions involved pleading-specific questions on motions to dismiss, not the merits of the claims. Even so, the cases are facially unhelpful to Bolger. The issue in *Love* was whether the plaintiff pleaded sufficient facts to state a claim for negligent failure to warn *at the time of sale*. *Love v. Weecoo (TM)*, 774 Fed. App'x 519, 522 (11th Cir. 2019). Here, Bolger concedes there is no evidence that Amazon knew of any hazard when the battery was sold. AOB at 59. And *Great Northern* supports Amazon's position because the district court recognized there was no post-sale duty to warn and dismissed a negligent failure-to-warn claim. *Great N. Ins. Co. v. Amazon.com, Inc.*, No. 19 C 684, 2019 WL 3935038, *2 (N.D. Ill. Aug. 20, 2019).

Third, California law is clear that there is no duty to warn about hazards in products manufactured and sold by others. As a unanimous California Supreme Court explained in *O'Neil*, "we have never held that a manufacturer's duty to warn extends to hazards arising exclusively from other manufacturers' products." 53 Cal. 4th at 351. The line of cases addressing this subject "holds instead that the duty to warn is limited to risks arising from the manufacturer's own product." *Id.* One of those cases is this Court's decision in *Taylor*, 171 Cal. App. 4th at 571, which held that "the trial court was correct in concluding that California law imposed no

duty on respondents to warn of the hazards inherent in defective products manufactured or supplied by third parties."

Bolger offers no justification for disregarding *O'Neil* and radically expanding the duty to warn.

C. The Communications Decency Act bars Bolger's claims.

Expanding liability to a website provider for a third party's sale on that website is also barred by federal law.

The Communications Decency Act states that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Congress intended, among other things, to "promote the development of e-commerce." *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003), *superseded by statute on other grounds as explained in Breazeale v. Victim Servs., Inc.*, 878 F.3d 759, 766-67 (9th Cir. 2017). This Court and many others have interpreted the CDA to bar attempts to hold website providers liable for products and services sold by third parties on their sites. *See, e.g.*, *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (2002) (CDA bars claims against eBay for third party's sale of sports memorabilia).

Amazon raised and fully briefed the CDA below but the trial court, without analyzing the bases of Bolger's claims as required by this Court's precedent, held it does not apply to claims of "selling." 1 AA 81-84; 2 AA 514. This Court need not reach the CDA because the trial court properly

rejected Bolger's claims on state-law grounds. But the CDA is an additional basis to reject Bolger's request to expand liability and to affirm the judgment.

1. The CDA protects websites for publishing third-party content.

The CDA preempts state law and "immunizes providers of interactive computer services against liability arising from content created by third parties." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 406 (6th Cir. 2014). CDA "immunity is to be construed broadly, to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles." *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 206 (2017) (quotation and citation omitted). Congress "intended to extend immunity to *all civil claims*," not just defamation. *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 568 (2009) (emphasis added).

Providers "of interactive computer services are liable only for speech that is properly attributable to them. State-law plaintiffs may hold liable the person who creates or develops unlawful content, but not the interactive computer service provider who merely enables that content to be posted online." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (internal citation omitted). The CDA "precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as

deciding whether to publish, withdraw, postpone or alter content—are barred." *Gentry*, 99 Cal. App. 4th at 828-29 (citation omitted).

The CDA bars claims where three elements are met: (1) the defendant is an interactive computer services provider, (2) the information at issue was provided by another information content provider, and (3) the claims seek to hold the defendant liable for "information originating with a third party user of its service." *Doe II*, 175 Cal. App. 4th at 568; *see also Gentry*, 99 Cal. App. 4th at 830.[1]

Bolger disputed each of these elements below but did not address the first two in her opposition brief. 1 AA 168-69, 179. She focused on the third element, arguing that her claim was based on the sale of a product rather than any content on the website. 1 AA 169. The trial court focused its attention there as well. 2 AA 514.

2. Amazon is an interactive service provider and E-life provided the product offer.

Amazon put forward evidence that its website provides computer access by multiple users to a computer server that allows them to interact with content on Amazon.com and qualifies as an "interactive computer

[1] An "interactive computer service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2). An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).

service." 1 AA 87. Bolger disputed this, claiming that "Amazon is a retailer," but offered no contrary evidence. 1 AA 179. The trial court did not address this element, nor was there any need to because "[w]ebsites are the most common interactive computer services." *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019). Courts have readily found that Amazon is an interactive computer service provider. *See, e.g., Kabbaj v. Google Inc.*, 592 F. App'x 74, 74 (3d Cir. 2015) (CDA bars "claims against Google, Amazon, and Yahoo").

Amazon also put forward evidence that E-life is an information content provider because it provided the product offer that Bolger accepted. 1 AA 87-88. Bolger identified no evidence to the contrary. 1 AA 179. She disputed this element because Amazon has the discretion, under the BSA, to determine what it publishes on its website and because her e-commerce expert's declaration (relevant portions of which the trial court properly ruled inadmissible) said an Amazon user might perceive that the product was sold by Amazon. 1 AA 179; 1 RA 13. The latter point is irrelevant for the reasons addressed in section V.A.4 above. The former is immaterial because deciding what to publish is a core editorial function protected by the CDA. *See Gentry*, 99 Cal. App. 4th at 828-29.

3. Bolger seeks to hold Amazon liable for E-life's content.

The trial court incorrectly viewed Bolger's claims as arising from selling rather than third-party content published on Amazon.com. 2 AA 514. Neither Bolger nor the trial court probed the basis of Bolger's claims,

as required by this Court's precedent. The required analysis shows that her claims derive from Amazon's status as publisher of E-life's content and are barred.

The court "must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, section 230 (c)(1) precludes liability." *Cross*, 14 Cal. App. 5th at 207 (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009)). Importantly, *the label of the claim is immaterial*; what "matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Cross*, 14 Cal. App. 5th at 207 (quoting *Barnes*, 570 F.3d at 1101-02).

When analyzed as required by *Cross*, Bolger's "selling" claims derive from Amazon's status as publisher of E-life's offer on Amazon.com. Bolger seeks to put Amazon in the shoes of E-life as the seller. Amazon's role in the sale was publishing E-life's product offer; Amazon did not source the product, hold title to the product, market the product, provide any warnings or instructions, or set the price. E-life's offer is a necessary fact underlying all of Bolger's claims; without it, there would be no sale and no link between Amazon, the product, and Bolger. Although Amazon also provided fulfillment services and payment processing, Bolger does not claim that the product defect arose from those services, such as mishandling in storage.

This Court addressed analogous "selling" claims in *Gentry*. The plaintiffs claimed that eBay, which "promotes itself as the world's largest online marketplace for the sale of goods and services among its registered users," failed to furnish a certificate of authenticity when they purchased fraudulently autographed sports collectibles from third-party sellers through eBay's site. 99 Cal. App. 4th at 820. But third parties "sold the items to plaintiffs, using eBay as a venue." *Id.* at 827. This Court recognized that the plaintiffs sought to hold "eBay responsible for conduct falling within the reach of section 230, namely, eBay's dissemination of representations made by the individual defendants, or the posting of compilations of information generated by those defendants and other third parties." *Id.* at 831.

The plaintiffs in *Gentry* characterized their negligence claims broadly as eBay misrepresenting the safety of products sold on its website and failing to act when it knew or should have known about unlawful sales practices. *Id.* at 833. The Court held that these claims seek to "hold eBay responsible for having notice of illegal activities conducted by others on its web site, and for electing not to take action against those third parties"—claims that "have been uniformly rejected by the courts" because they implicate "a publisher's traditional editorial functions." *Id.* at 835.

Bolger would like this Court to impose a broad duty on website providers to protect users from harmful products or services sold by third parties. The only way websites could do that is to decline to publish certain

third-party offers. As *Doe* shows, such a duty squarely implicates the CDA.

The plaintiffs in *Doe II* sought to hold MySpace liable for "failure to adopt reasonable safety measures" to protect children from sexual predators. 175 Cal. App. 4th at 573. Similar to Bolger, the plaintiffs asserted that their claims were not "content based" but instead rested on the website's "failure to institute reasonable measures" to protect users. *Id.* at 565-66. The court recognized that, at "its core," the plaintiffs wanted "MySpace to regulate what appears on its Web site." *Id.* at 573. But that "type of activity—to restrict or make available certain material—is expressly covered by" the CDA. *Id.*; *see also Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003) (claims that a defendant "was negligent in promulgating harmful content and in failing to address certain harmful content on its network" are attempts to hold the website operator "liable for decisions relating to the monitoring, screening, and deletion of content from its network," which are "actions quintessentially related to a publisher's role").

The trial court and Bolger seem to assume that the CDA does not apply because Bolger's injury was not directly caused by the content, as would be the case with a claim like defamation. But the CDA applies even though the harm occurred offline. The sexual assaults in *Doe II* "occurred offline," and in *Gentry* the "harm occurred when the plaintiffs purchased the sports memorabilia." 175 Cal. App. 4th at 573-74. Regardless of

where and how the harm occurred, the only link in those cases between the plaintiffs, the injury, and the defendant was publication of third-party content. That is the only link here too.

Several other courts have held that the CDA bars claims relating to sales of products and services by third parties on websites such as Amazon, eBay, and Craigslist. *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 20, 22 (1st Cir. 2016) (CDA bars claims against Backpage.com relating to third-party postings for sex-related services); *Chi. Lawyers Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668, 671–72 (7th Cir. 2008) (CDA bars claims that "electronic meeting place for those who want to buy, sell, or rent housing (and many other goods and services)" engaged in discriminatory advertising); *Eberhart*, 325 F. Supp. 3d at 400 n.5 (to the extent plaintiff sought "to assert a claim that Amazon is liable, either directly or vicariously, for the content it permitted [the seller] to post on amazon.com, such a claim is preempted by § 230 of the Communications Decency Act"); *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 725 (Wis. 2019) (CDA bars claims against website for third party's sale of gun).

Applying the CDA would not, as Bolger worries, "create a perverse incentive for brick-and-mortar retailers to immediately move all product sales online to avoid strict product liability *en masse*." AOB at 63. An online retail sale involves the seller posting its own content. The CDA does not apply to first-party content.

Bolger also points to the Fourth Circuit's holding in *Erie* that the CDA did not bar product liability claims to the extent they were based on alleged selling. AOB 61-62. That court made the same error as the trial court in that it did not properly analyze the source of the duty underlying the claims. Unlike the *Erie* court, this Court does not accept a claim of "selling" at face value. Applying the analysis required by *Cross*, the "selling" claims here reduce to the contention that Amazon is legally responsible for a third party's actions because it posted that party's content on Amazon.com. These claims lie at the core of the CDA.

VI. CONCLUSION

The trial court's grant of summary judgment to Amazon should be affirmed.

DATED: December 9, 2019

Respectfully submitted,

PERKINS COIE LLP

By: */s/ Julie L. Hussey*
Julie L. Hussey
W. Brendan Murphy
Julian Feldbein-Vinderman

Attorneys for Defendant and
Respondent Amazon.com LLC

CERTIFICATION OF COMPLIANCE

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned certifies that Respondent's brief is proportionately spaced, has type face of 13 points or more, and contains 13,367 words as calculated using the word count of the computer program used to prepare the brief, not including the cover, title page, table of contents, table of authorities, certificate of interested entities or persons, any signature blocks or this certificate of compliance.

DATED: December 9, 2019

Respectfully submitted,

PERKINS COIE LLP

By: */s/ Julie L. Hussey*
Julie L. Hussey
W. Brendan Murphy
Julian Feldbein-Vinderman

Attorneys for Defendant-Respondent
Amazon.com LLC

DECLARATION OF SERVICE

I am a citizen of the United States and employed in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 11452 El Camino Real, Suite 300, San Diego, California 92130-2080.

On December 9, 2019, I caused to be served the following documents: Respondent's Brief, Certificate of Interested Parties and Respondent's Appendix on the interested parties in this action as follows:

Jeremy Robinson, Esq.
Casey Gerry Schenk Francavilla Blatt & Penfield LLP
110 Laurel Street
San Diego, CA 92101
Telephone: (619) 238-1811
Email: jrobinson@cglaw.com

[X] (BY ELECTRONIC SERVICE THROUGH TRUFILING) These documents are being e-filed through the Court of Appeal's Trufiling service. Under California Rules of Court rule 8.71 and Rule 5(i) of the Local Rules of the Fourth Appellate District, Division One, the electronic copy of all documents that will be provided by the Trufiling service constitutes proper and complete service.

On December 9, 2019, I also caused to be served the following document(s): Respondent's Brief, Certificate of Interested Parties and Respondent's Appendix on the interested parties in this action addressed as follows:

Superior Court of California, County of San Diego
Honorable Randa Trapp
Central Hall of Justice
330 West Broadway, Department 70
San Diego, CA 92101
Telephone: (619) 450-7070

[X] (BY REGULAR MAIL) I have placed a true copy of said document in a sealed envelope and caused such envelope to be deposited in the United States mail at San Diego, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United

States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 9, 2019, at San Diego, California.

Ann E. Ridyard