No. D075738

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

Angela Bolger,
Plaintiff/Appellant,

v.

Amazon.com, Inc.,
Defendant/Respondent.

On Appeal from the Superior Court of the State of California, County of San Diego, Case No. 37-2017-00003009-CU-CR-CTL
Honorable Randa Trapp

Appellant's Reply Brief

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Amazon asks this Court to affirm an erroneous ruling allowing Amazon to amass the spoils of being a global retail giant without shouldering any of the responsibilities. Our law does not condone this kind of predatory capitalism, and the ruling should be reversed.

This litigation is not, as Amazon suggests, an effort to hold Amazon liable because it is a successful business. Amazon is liable because it was the key link in the chain of distribution of the exploding battery. Ms. Bolger ordered the battery from Amazon using Amazon's marketplace. She put it in Amazon's "shopping cart" and paid Amazon using its online checkout system. Amazon then retrieved the defective battery from its warehouse in California, packed it, labeled it, and shipped it to Ms. Bolger.

Ms. Bolger never had any contact with Lenoge, the third-party Chinese company Amazon claims is the "seller." She did not visit Lenoge's website, did not pay Lenoge, and Lenoge did not ship her any products. Amazon handled all of that and more.

These facts render Amazon strictly liable for Ms. Bolger's horrible burns. Indeed, under California law, strict liability applies to far lesser roles in product distribution than Amazon's. (See, e.g., *Canifax v. Hercules Powder Co.* (1965) 237 Cal.App.2d 44, 52, [defendant held liable even though it only ordered a product that shipped directly from the manufacturer

to the buyer]; *Hernandezcueva v. E.F. Brady Co., Inc.* (2015) 243 Cal.App.4th 249, 263 [large drywall subcontractor that installed asbestos-containing drywall held to be in the chain of distribution].)

Tacitly acknowleding this, Amazon tries to manuever its way out by making the baseless claim it is merely a "service provider" and is not liable even if it was in the chain of distribution. But what service did Amazon provide to Ms. Bolger? It cannot identify a single one. This was a retail transaction. The only "services" Amazon talks about are Amazon's interactions with its suppliers. Any retailer, though, can claim to provide "services" for upstream distributors or manufacturers whose products it sells. That isn't the question. To the rest of the world, Amazon sells products.

Amazon's semantic arguments over the outer boundaries of who is a "seller" only cloud the issue. California product liability law focuses on participation in the chain of distribution, not the precise terminology used to identify the participants. What matters is Amazon was the main link in the chain for this sale.

Amazon expresses concern Ms. Bolger is asking this Court to fashion a "defendant-specific rule" (Respondent's Brief ("RB") 12) or seeking a "sweeping change in the law." (RB 34) Neither is true. Amazon is the one urging a "defendant-specific" ruling excluding it, and only it, from the liability every other retailer accepts. And there is no "sweeping change" being

requested. While this is an important issue given the rapid expansion of e-commerce, this appeal involves only applying California common law to the facts of this case.

As to Ms. Bolger's negligence-based causes of action, Amazon's claim that she abandoned them is inaccurate. Ms. Bolger abandoned only the negligent undertaking cause of action because the evidence did not support it. But Ms. Bolger did not abandon her other negligence allegations. Rather, Amazon's summary judgment motion made only general arguments applicable to both Ms. Bolger's negligence and strict liability claims. Her opposition to the motion thus necessarily encompassed both her strict liability and negligence claims.

Finally, Amazon's continued effort to invoke the Communications Decency Act should be rejected by this Court, like it has been by nearly every court to consider it. The Act simply does not apply to sales of defective products.

At bottom, this is a case about accepting responsibility. Amazon should not be rewarded for trying to exploit e-commerce technicalities to sidestep its rightful duties. That is contrary to California product liability law, and the trial court erred in holding otherwise.

Argument

1. Amazon is strictly liable for selling the defective battery that burned Ms. Bolger

In an effort to distract from the unavoidable fact that Amazon is the main link in the chain of distribution here,

Amazon contrives disputes over issues at the outer margins of this case. It falsely analogizes itself to an occasional seller of second-hand goods, a provider of professional services, or a package delivery service. It claims it lacked control over the exploding battery, though the record shows just the opposite. It argues pointlessly about holding title. It liberally cites out-of-state cases applying dissimilar laws to often dissimilar facts.

These largely manufactured squabbles flow from factual misstatements or an incorrect reading of the law. But most telling is Amazon's refusal to confront the main issue: Amazon directly sold and distributed the defective battery to Ms. Bolger. That is what the facts show, and that is why California law holds Amazon strictly liable.

A. Amazon is in the chain of distribution of the battery

There is no dispute Ms. Bolger bought a defective battery in a retail sale. And no legitimate dispute that Amazon was in the chain of distribution of that defective battery. Amazon was the direct link in the chain between Lenoge, the wholesaler or supplier, and Ms. Bolger.

Amazon hardly argues otherwise, even though participation in the chain of distribution is the main basis for imposing product liability in California. (See *Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 88.) Instead, Amazon reframes the issue as whether Amazon is a "seller" or

"service provider." Amazon's journey down the rabbit hole of taxonomy is misplaced.

Although Amazon clearly functioned as a seller here, ultimately whether Amazon is termed a seller, marketplace, retailer, or some other descriptor is unimportant. "[T]hese labels have little legal significance." (*State Farm Fire and Casualty Company v. Amazon.com, Inc.* (N.D. Miss., Oct. 31, 2019, No. 3:18CV166-M-P) 2019 WL 5616708, at *3 [referring to dispute over whether Amazon is a "marketplace" or "service provider"].)

What matters is whether Amazon was in the chain of distribution. "In a product liability action, **every** supplier in the stream of commerce or chain of distribution, from manufacturer to retailer, is potentially liable." (*Edwards v. A.L. Lease & Co.* (1996) 46 Cal.App.4th 1029, 1033, emphasis added.) The particular classification of the entity in the chain of distribution is inconsequential. "[T]he imposition of strict liability hinges on a party's 'participatory connection' to the stream of commerce regarding the defective product, rather than the party's 'precise legal relationship' to members of that stream." (*Hernandezcueva*, *supra*, 243 Cal.App.4th at p. 265.)

Our courts have imposed strict liability on nearly every possible link in the chain of distribution, including lessors (*McClaflin v. Bayshore Equipment Rental Co.* (1969) 274 Cal.App.2d 446 and *Price v. Shell Oil Co.* (1970) 2 Cal.3d 245); a developer (*Kriegler v. Eichler Homes, Inc.* (1969) 269

Cal.App.2d 224); a licensee (*Garcia v. Halsett* (1970) 3 Cal.App.3d 319 (a launderette owner who was said to have licensed the use of a washing machine to plaintiff)); and a wholesale-retail distributor (*Barth v. B. F. Goodrich Tire Co.* (1968) 265 Cal.App.2d 228).

Two decisions are particularly apt here, *Canifax*, *supra*, 237 Cal.App.2d 44, and *Barth*, *supra*, 265 Cal.App.2d 228. Although both predate e-commerce by decades, they show California product liability law has always focused on chain of distribution rather than the particulars of the defendant's upstream supplier arrangement.

Canifax involved a deadly dynamite explosion during an excavation project. The cause was defective fuses. The project manager had purchased the blasting supplies, including the fuses, from a "jobber" who had then placed the order with the defendant Hercules Powder Co. (*Id.* at p. 47-48.) Hercules did not manufacture fuses and instead passed the order on to the manufacturer. (*Ibid.*) Rather than send the fuses to Hercules, the manufacturer shipped them directly to the "jobber." (*Ibid.*) Hercules thus never had possession of the fuses. (*Ibid.*)

Like Amazon, Hercules argued it could not be held strictly liable because it did not manufacture the fuse or even possess it. The *Canifax* court was not persuaded. It held Hercules liable because strict liability applies to "any person engaged in the business of selling…" (*Id.* at p. 52), and Hercules was in the business of selling blasting materials. (*Ibid.* ["[i]t is common, if

not judicial, knowledge that Hercules is one of the large nationwide sellers of dynamite and blasting supplies"].) The court also explained Hercules' lack of possession was immaterial: "The fact that [Hercules] chooses to delegate the manufacture of fuse to another and that it causes the manufacturer to ship the product directly to the consumer cannot be an escape hatch to avoid liability." (*Ibid.*)

Here, of course, Amazon did have possession of the defective battery. But the reasoning in *Canifax* still applies. Amazon was in the chain of distribution of the defective battery and is in the business of selling products. (1 AA 306, 311.)

Barth is also instructive. One of the defendants in *Barth* was a dealer of Goodrich tires. It sold tires to the public and serviced Goodrich's national fleet accounts. (*Id.* at p. 234.) After a tire blowout caused a fatal crash, an employee of one of the national accounts sued the tire dealer, alleging it was strictly liable for installing a defective tire on his corporate car. (*Id.* at p. 233–234.)

The dealer claimed, like Amazon does, it could not be strictly liable because it did not sell the tire but instead was merely a "conduit for the sale." (*Id.* at p. 251.) The trial court was convinced and instructed the jury that a "sale" was defined as "a transfer or an agreement to transfer goods to a buyer for a price," but the court of appeal held that instruction was prejudicial error. (*Id.* at p. 250.)

The *Barth* court held the defendant's restrictive definition of a sale, which is nearly identical to Amazon's preferred definition, "is not in accord with the definition of a seller for the purpose of the doctrine of strict liability, adopted as the law of this state…" (*Id.* at p. 250–251.) Instead, "as to the business of selling, the doctrine of strict liability applies to any person engaged in the business of selling products for use or consumption therefore including any manufacturer, wholesaler or retail dealer or distributor…" (*Ibid.,* italics omitted.)

The holdings in *Barth* and *Canifax* are fatal to Amazon's efforts to avoid liability for selling Ms. Bolger the exploding battery. Amazon is engaged in the business of selling products. Its own witness said as much: "Part of Amazon's business is selling products." (1 AA 306) "[W]e sell products at retail. We provide the marketplace. We have Amazon web services … We make hardware. We do lots of different things." (1 AA 311)

True, selling products is not all Amazon does. Amazon has adhered itself to the global retail economy like a multi-tendrilled tumor, invading every corner, every nook. But as *Barth* explains, "[i]t is not necessary that the seller be engaged solely in the business of selling such products." (*Id.* at p. 251.) Rather, "[t]he only group of persons exempted from the rule is the occasional seller who is not engaged in that activity as part of his business, like a housewife who, on occasion, sells to her neighbor a jar of jam or a pound of sugar." (*Ibid.*) That is not Amazon. "Amazon is not someone in the neighborhood holding

a garage sale." (*Legal Aid of Nebraska, Inc. v. Chaina Wholesale, Inc.* (D. Neb., Jan. 3, 2020, 4:19-CV-3103) at p. 9, Appellant's Second Motion for Judicial Notice, Exh. B.) Rather it is the world's dominant online retail force. (1 AA 206-207)

Amazon's efforts to distinguish *Canifax* and *Barth* (see RB 50-51) are unavailing. It claims *Canifax* is distinguishable because "Amazon had no direct relationship with the manufacturer of the battery" and "did not set the purchase price for the battery." (RB 50) This is both factually inaccurate and legally irrelevant. Lenoge had been supplying batteries on Amazon for several years before Ms. Bolger bought one and, under Amazon's BSA, was required to register each battery with Amazon that was stored in Amazon's warehouses. (1 AA 110; 2 AA 411-412, 431) Amazon also paid Lenoge some portion of the sale price for every Lenoge battery Amazon sold. (1 AA 103; 2 AA 321, 323, 336-337) And Amazon eventually blocked Lenoge from its website because of safety concerns. (2 AA 408-410, 412) So, by any measure, it did have a relationship with Lenoge.

And, while Amazon may not have set the price of the battery per se, it certainly influenced it. Amazon's commissions and fees (1 AA 103) no doubt factor heavily into a manufacturer or supplier's price decision, and Amazon mandates all suppliers agree not to sell their products for a lower price anywhere else. (1 AA 103, 2 AA 341) And though this is a commission sales model instead of a traditional retail

arrangement, in the end, "everything turns out to be economically the same for the manufacturer, retailer, and consumer." (*Apple Inc. v. Pepper* (2019) 139 S.Ct. 1514, 1522 [noting regardless of whether a retailer buys a product from a manufacturer and then re-sells it takes or a commission so the manufacturer will list it with the retailer for at a price netting the same profit, the outcome is the same.].)

Further, Amazon cannot point to any part of the opinion in *Canifax* suggesting the defendant Hercules had a direct relationship with the fuse manufacturer or set the purchase price of the fuses either. Nothing in *Canifax* so much as hints those factors were considered by the court. And Amazon offers no reason why they should be relevant here.

Amazon's effort to avoid the ruling in *Barth*, which it dismisses as an "older case" (RB 24), also fails. Amazon claims *Barth* is not on point because, unlike the tire dealer in that case, Amazon did not own the battery and possesses no specialized knowledge about it. (RB 51) Again, however, Amazon cannot cite to any language in *Barth* suggesting the court did or would consider those facts important. On the contrary, given the *Barth* court held the tire dealer was strictly liable *even though there was no sale* and the dealer received only a service fee and inventory credit, there is no reason to believe who owned the tires while they were in the dealer's possession mattered.

B. Courts out of state have also held Amazon is in the chain of distribution

Initially, Amazon was very successful in convincing courts it was not strictly liable for the products it sold. Amazon accomplished this partly by removing cases to federal court, thus stunting the development of state common law, and partly by litigating in jurisdictions that had product liability statutes favorable to Amazon. These early victories created something of a snowball effect that Amazon could use to persuade other courts, like the trial court here, Amazon should not be liable.

Now, however, courts are wising up to Amazon. Two recent decisions illustrate this. The first is *Gartner v. Amazon.com, Inc.* (S.D. Tex., Jan. 7, 2020), No. 4:18-cv-2242, at p. 9, Appellant's Second Motion for Judicial Notice, Exh. A. Much like the present case, *Gartner* involved a defective consumer electronic product listed on Amazon by a Chinese company that declined to respond to service of process. (*Id.* at p. 3.) And, like this case, the product was "fulfilled" by Amazon, meaning Amazon had possession of it. (*Id.* at p. 2.)

In moving for summary judgment, Amazon argued, as it does here, it is a service provider, not a seller. The District Court, applying Texas law, rejected the argument[1]. Not only did the court hold Amazon was a seller—"Amazon was engaged in the business of placing the product in the stream of

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[1] Like California law, "Texas law does not require an entity to transfer title or sell a product to be considered a seller." (*Gartner v. Amazon.com, Inc.*, *supra*, at p. 14.)

commerce and, therefore, qualifies as a seller…" (*Id*. at p. 13)—it also rejected Amazon's position that "seller" and "service provider" are necessarily separate categories. The court explained: "The fact that Amazon is a service provider does not preclude [it] from also being a seller." (*Id*. at p. 11; see also *Barth*, *supra*, at p. 251 ["It is not necessary that the seller be engaged solely in the business of selling such products."].)

This undercuts a legally unsupportable theme that pervades Amazon's brief: the idea that if Lenoge is the "seller" and Amazon is a "service provider," Amazon cannot be strictly liable under California law. Not so. Amazon can be both a service provider and a seller. Even if it arguably provides some services to third-party product distributors and manufacturers, it is still a seller vis-à-vis the consumer. And regardless of whether Lenoge is denoted a seller, Amazon can be one as well.

The court in *State Farm Fire and Casualty Company*, *supra*, 2019 WL 5616708 reached a similar result. That case concerned Amazon's potential liability under Mississippi common law for damages caused by a hoverboard sold on Amazon that caught fire. Amazon again argued it was a "service provider." The district court rejected the debate over semantics, concluding the central point is, "Amazon in fact enjoys the benefits of a free market, with its attendant common law responsibilities, whether it is labeled a service provider or a marketplace." (*Ibid.*) As such, the court reasoned, "common law liability should apply because **such marketplaces are in**

the direct chain of commerce." (*Id.* at p. 4, emphasis added.)

Other courts are in accord as well, both in cases involving Amazon in particular (see, *State Farm Fire and Casualty Company v. Amazon.com, Inc.* (W.D. Wis. 2019) 390 F.Supp.3d 964, 972 ["Amazon is an integral part of the chain of distribution, an entity well-positioned to allocate the risks of defective products to the participants in the chain"])[2] and cases involving other companies that claim to provide "logistics services" to businesses (see, *Allphin v. Peter K Fitness, LLC* (N.D. Cal., July 18, 2014, No. 13-CV-01338-BLF) 2014 WL 3593108 [defendant logistics company that stored, packed, and shipped products was in the chain of distribution].).

The thoughtful analyses in these cases should guide the outcome here. Amazon benefits handsomely from selling products in the free market. It should bear the common law liabilities born by all other retailers as well. And while Amazon cites to several out-of-state cases holding it not responsible for defective products, as discussed in Section 1(F), *infra*, those cases do not dictate the outcome here because they largely involve statutes unique to the jurisdiction where the case arose or dissimilar facts.

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[2] Amazon contends, without genuine analysis, the decision in *State Farm* is "glaringly wrong under Wisconsin law." (RB 26) But to date, no court has disagreed with it or suggested the court's reasoning was misguided.

C. Under Amazon's definition of "sale," it sold the defective battery to Ms. Bolger

Amazon urges this Court to conclude Lenoge is the lone seller of the defective battery. But this is belied by Amazon's own hand-picked definition of "sale."

Amazon's Brief defines "sale" as: "to transfer (property) in return for money or something else of value" or "transferring a thing that one owns to another in exchange of something of value, usually money." (RB 23)

And while that definition is much more restrictive than the correct one under California product liability law (See *Barth*, *supra*, at p. 250–251), even Amazon's narrow definition encompasses its role here. Ms. Bolger gave Amazon "something of value"—her money—and in exchange Amazon "transferred property" to her. That was a sale.

And since Amazon took the money and transferred the product itself, it was a seller. (*Amazon Servs., LLC v. S.C. Dep't of Revenue* (Sept. 10, 2019) Docket No. 17-ALJ—17-0238-CC, p. 29, Appellant's First Motion for Judicial Notice, Exh. A [Amazon "is the party present at the consummation of the sale who accepts money from the consumer in exchange for the product."].) As a district court in Texas recently held, "Amazon is integrally involved in and exerts control over the sale of third-party products such that it qualifies as a seller…" (*Gartner v. Amazon.com, Inc.*, *supra*, at p. 11.)

Discounting its own controlling role in the sale, Amazon repeatedly proclaims Lenoge "sourced the battery, owned it, set the price, and developed the product offer…"[3] (RB 11, 20, 23) From this, Amazon summarily concludes Lenoge is the only "seller" of the battery, not Amazon.

This argument is nonsensical. Amazon cites no California case ascribing significance to who "sourced" a product or "developed the product offer." Indeed, Amazon's chosen definition of "sale" says nothing about those actions.

Amazon also did not submit any evidence to the trial court (and thus there is none in the record) showing Amazon's arrangement with Lenoge was meaningfully different than any other retail arrangement. Because it was Amazon's burden as the moving party to show this sale would not be subject to strict liability (see, *Ryan v. Real Estate of the Pacific, Inc.* (2019) 32 Cal.App.5th 637, 642 [moving party bears the initial burden to show no triable issue of fact]), it follows Amazon needed to show this transaction was significantly unlike other retail sales. This, it did not do. Why does it matter for strict liability who initially sources the product? Do other retailers source all their own products? Amazon provides no answers.

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[3] As before, this claim omits any reference to Amazon's absolute control over what third parties can list on the Amazon site (1 AA 98, 101, 103) and how they can list it (*Ibid.*), and Amazon's pervasive influence over price setting. (1 AA 103, 2 AA 341.)

As before, Amazon places importance on its lack of title to the battery. But just as Amazon cannot find California authority freeing a retailer from strict liability because someone else "sourced" the product, Amazon also cannot point to any California authority suggesting ownership of title is a prerequisite to product liability. Our law is just the opposite, holding title transfer, or any kind of sale, is unnecessary. (See *Barth*, *supra*, 265 Cal.App.2d at p. 246 [[U]nder the doctrine of strict liability, it is not necessary that the ultimate user or consumer have purchased the product at all… The liability is one in tort and does not require any contractual relation or privity of contract."].)

Further, even if Amazon did not hold title to the battery, there is no question it had the power to *transfer* that title after payment to Amazon by an Amazon customer. Amazon does not claim Ms. Bolger had to contact Lenoge separately to obtain title. Rather, Amazon transferred title when it shipped the product from its warehouse[4]. Otherwise, no buyer of a product Fulfilled by Amazon would obtain valid title to it, because "[a] purchaser of goods acquires all title which his transferor had or had power to transfer…" (Cal. U. Com. Code, § 2403.) Either Amazon can transfer title to any product stored in and shipped from its warehouses or it is making millions of illegal sales by

[4] In it's Brief, Amazon claims "E-Life" "transferred title directly to Bolger as the buyer." (RB 23) But Amazon's record citation says nothing about transfer of title.

representing it can transfer ownership of a purchased product when it cannot. And if it has the power to transfer title, then by its own definition, it is a seller. (See RB 23)

The trial court's contrary finding that Amazon was just Lenoge's "means of marketing" (2 AA 511) is unsupportable. Marketing companies do not sell, store, and ship new consumer products while preventing any direct payment to or communication with the manufacturer or supplier of the product. Those actions are the hallmark of a product seller.

Further, Lenoge's culpability here does not relieve Amazon of liability. "A strictly liable defendant cannot reduce or eliminate its responsibility to plaintiff for all injuries caused by a defective product by shifting blame to other parties in the product's chain of distribution who are ostensibly more at 'fault'…" (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 633.)

D. Amazon did not provide any services to Ms. Bolger, it just sold her a product

Throughout its brief, Amazon constantly refers to itself as a service provider, presumably in the belief that repeating it enough will make it true. As noted previously, Amazon's argument over linguistics is ultimately pointless. Nevertheless, because Amazon stresses the point so persistently, it is important to address why Amazon was not a service provider in this case.

To start with, although there are numerous California cases analyzing when a defendant claiming to be a service provider can avoid strict liability, Amazon flatly ignores them. And for good reason—their holdings do not help Amazon.

Drawing the line between a product seller and a service provider requires looking at the "primary objective" of the transaction in question. (*Pierson v. Sharp Memorial Hospital, Inc.* (1989) 216 Cal.App.3d 340, 344.) Where, as here, the "purchase of a product is the primary objective or essence of the transaction, strict liability applies even to those who are mere conduits in distributing the product to the consumer." (*Ibid.*) But, if the primary objective is to obtain services, and use of a product is just incidental, the service provider will not be strictly liable[5]. (*Ibid.*)

There is no question the primary purpose of Amazon's transaction with Ms. Bolger was to sell her a product. She did not visit Amazon's website seeking services, and Amazon did

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[5] Examples of this include *Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 258 (river rafting service not strictly liable for allegedly defective raft used by customers); *Ontiveros v. 24 Hour Fitness USA, Inc.* (2008) 169 Cal.App.4th 424 (gym not strictly liable for allegedly defective exercise equipment used by patron); *Murphy v. E. R. Squibb & Sons, Inc.* (1985) 40 Cal.3d 672 (pharmacist provides services not products); *Pena v. Sita World Travel, Inc.* (1978) 88 Cal.App.3d 642; and *Shepard v. Alexian Brothers Hosp.* (1973) 33 Cal.App.3d 606 (hospital furnishing blood to patients not strictly liable).

not provide her with any. She bought a product and was charged by Amazon for that sale. It is not surprising, then, that Amazon cannot identify a single service it claims Ms. Bolger requested or received from Amazon.

Instead of confronting the mass of cases undermining its position, Amazon improperly conflates cases involving auctioneers of used goods (*Tauber-Arons Auctioneers Co. v. Superior Court* (1980) 101 Cal.App.3d 268, and *Brejcha v. Wilson Machinery, Inc.* (1984) 160 Cal.App.3d 630), and a case involving a finance lessor (*Arriaga v. CitiCapital Commercial Corp.* (2008) 167 Cal.App.4th 1527) with cases concerning service providers.

Presumably this is an attempt to falsely imply those cases involve service providers, but they do not and the holdings do not even mention the seller/service provider distinction. Instead, the courts in those cases were concerned with liability for auctioning or financing **used** goods. (*Tauber-Arons*, at p. 274; *Brejcha* at p. 635-636[6]; *Arriaga*, at p. 1531.)

Re-sellers such as auctioneers are not generally strictly liable for the products they resell, but not because they are providing a service. Instead, they are not participants in

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[6] The opinion in *Brejcha* does not specifically state the machinery was used, but there is no suggestion the seller was also the manufacturer. Instead the auction was for "certain personal property owned by Wilson and located at 1775 South First Street, in buildings 9, 11, and 21, in the City of San Jose, California." (*Id.* at p. 635–636.) The fair inference from this is the goods were not new.

"initial distribution to the consuming public of the particular defective product of a given manufacturer." (*Tauber-Arons*, at p. 276.) Thus, public policy does not support holding dealers in used goods strictly liable. Doing so "would in effect render used goods dealers as insurers against defects which came into existence *after* the original chain of distribution and while the product was under the control of previous consumers." (*Wilkinson v. Hicks* (1981) 126 Cal.App.3d 515, 521, italics added.)

Indeed, the *Tauber-Arons* court suggested that if an auction house was in the business of selling **new** consumer products it would be strictly liable because that entity would be involved in "the enterprise by which *initial* distribution of the particular manufacturer's products to the consuming public is effected." (*Tauber-Arons* at p. 277, italics added.) As an example, the court said, "[i]f a manufacturer of modern 'antiques' chose to market them exclusively through an 'estate' auctioneer as its agent, such auctioneer patently would be a participant 'in the manufacturing-marketing system' " and thus strictly liable. (*Id.* at p. 276.)

The reseller/auctioneer cases do not support Amazon's argument. This was a sale of a new consumer product not a second-hand one, and Amazon does not contend otherwise. The policies driving the decisions in those cases do not apply here.

Not only does Amazon cite the wrong law on service provider liability, or at least cite cases for propositions they did

not consider, it also wrongly focuses on its upstream operations, arguing it provides "logistics services" to its suppliers. The proper inquiry is whether the *end consumer* is being sold a product or a service. (*Carmichael v. Reitz* (1971) 17 Cal.App.3d 958, 979 [the question is whether "the primary objective is the acquisition of ownership or use of a product" or "to obtain services"].) (*Pierson*, *supra*, 216 Cal.App.3d at p. 344.) Whether the seller provides services to manufacturers or wholesalers is immaterial. Allowing companies in the distribution chain to avoid liability because they provided services to other companies up the chain would eviscerate strict product liability. Every company in any distribution chain can claim to be offering some kind of service to the other links in the chain.

Erie Insurance Company v. Amazon.com, Inc. (4th Cir. 2019) 925 F.3d 135, relied on heavily by Amazon, does not compel a different result. There, the court, applying Maryland law, held Amazon was not strictly liable because it lacked title to the product and so was not a "seller." (*Id.* at p. 141.) The court explained, "a manufacturer, distributor, dealer, and retailer who own — *i.e.*, have title to — the products during the chain of distribution are sellers, whereas shippers, warehousemen, brokers, marketers, auctioneers, and other bailees or consignees, who do not take title to property during the course of a distribution" are not sellers. (*Ibid.*) The court also noted in passing that "[a]lthough Amazon's services were

extensive in facilitating the sale, they are no more meaningful to the analysis than are the services provided by UPS Ground, which delivered the headlamp…" (*Id.* at p. 142.)

The main holding of *Erie*—that transfer of title is necessary for strict liability—is irreconcilable with California law. (See *Barth*, *supra*, at p. 252 [California law requires neither "the transfer of title to the goods nor a sale" for product liability].) And the idea that Amazon's involvement in the sale is equivalent to that of a shipping company is, respectfully, simply incorrect. No shipping company has anything close to Amazon's involvement in product sales.

This dicta from *Erie*, though, seems to fuel Amazon's specious argument that holding it liable in this case would have a drastic impact on all types of unrelated service-oriented businesses such as delivery services, credit card companies, newspapers, shopping malls, and even search engines. (RB 31-32.) That is decidedly untrue.

Unlike Amazon, those enterprises are not "engaged in the business of selling products for use or consumption...." (*Hernandezcueva*, *supra*, 243 Cal.App.4th at p. 259, citing Restatement (Second) of Torts § 402A (1965), com. (f), p. 350.) And none of them, save perhaps delivery services, is even arguably in the chain of distribution.

Consumers cannot buy a laptop battery from a delivery service or a credit card company. Shopping malls and search engines don't process payments for products and keep a

commission. Newspapers are not involved in sales ultimately made through classified ads.

And while Amazon has managed to combine the functions of many of those businesses under its umbrella, the principal distinction is Amazon *sells products*. Amazon's main competitors are retailers, not credit card companies or search engines. And, companies that are not in the business of selling products would not be affected by a ruling holding Amazon liable here.

E. Amazon's claim it lacked control over the battery is both false and irrelevant

Citing *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, Amazon argues "control is the touchstone for product liability" in California and claims, without a shred of support, it had no control over the battery it packed and shipped from its *own warehouse* to Ms. Bolger. (RB 24) Amazon is wrong on several fronts.

First, *O'Neil* did not say anything about control being the "touchstone" for product liability. Rather, the court simply repeated a basic maxim of tort law that liability depends on a showing the plaintiff's injuries were caused by "an act of the defendant or an instrumentality under the defendant's control." (*O'Neil*, *supra*, 53 Cal.4th at p. 349.) A maxim that fully supports holding Amazon liable here. Ms. Bolger's injuries were caused by an act of Amazon—sending her the

battery after taking her money—and an instrumentality under Amazon's control—a battery sitting in Amazon's warehouse.

Second, *O'Neil*, although a product liability case, is not remotely apposite here. It concerned the scope of product manufacturers' liability for defective components added *after* the product left the manufacturer. (*O'Neil*, *supra*, 53 Cal.4th at p. 342.) The high court held a manufacturer was not liable in such cases unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products. (*Id.* at p. 342.) In other words, a manufacturer's responsibility does not extend to "preventing injuries caused by *other* products that might foreseeably be used in conjunction with a defendant's product." (*Ibid.* italics in original.)

There is no connection between this appeal and a manufacturer's potential liability for later-added products, and Amazon wisely does not attempt to draw one. *O'Neil* offers no guidance here.

Third, even if control is a relevant consideration, Amazon obviously did have control over the battery since it voluntarily accepted the battery into its fulfillment program, stored the battery in one of its warehouses, and retained the right to halt the sale of the battery and ban the supplier at any time. If this is not control, no seller has control over the products it sells.

F. The cases cited by Amazon holding it was not a seller are inapposite

As it did at the trial court, Amazon relies heavily on several out-of-state decisions finding it was not liable given the particular facts of the case and the applicable law. But the law has shifted since several of those cases were decided.

A recent case sums up the current legal landscape this way: "While many courts that initially considered the issue found in Amazon's favor, some more recent cases have reached different results, with appeals on a few of these cases still pending. Indeed, this is a developing area of law…" (*Philadelphia Indemnity Ins. Co. v. Amazon.com, Inc.* (E.D.N.Y., Dec. 4, 2019, No. 17CV03115DRHAKT) 2019 WL 6525624, at *3.) In other words, it is not a settled area of law.

In fact, there are several appeals pending, including two in California state courts, this appeal and *Loomis v. Forrinx Technology (USA), Inc.*, pending in Division Eight of the Second District, *Carpenter v. Amazon.com, Inc.*, No. 19-15695, pending in the Ninth Circuit, *Oberdorf v. Amazon.com, Inc.*, No. 18-1041, pending en banc review in the Third Circuit, and *Stiner v. Amazon.com, Inc.* (Ohio Ct. App. 2019) 120 N.E.3d 885, *review accepted at* 125 N.E.3d 911[7].

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[7] Amazon criticizes Ms. Bolger for citing to the holding in *Papataros v. Amazon.com, Inc.*, (D. N.J. Aug. 26, 2019) No. 17-9836 (KM) (MAH), 2019 WL 4011502, an opinion that was stayed shortly before Ms. Bolger's Opening Brief was filed pending the outcome in *Oberdorf*, yet relies heavily on the holding in *Stiner* (see RB 11, 25, 26, 39), which has been taken

There are some existing rulings favoring Amazon which were addressed in Ms. Bolger's Opening Brief. (See *id.* at p. 51-58.) And, although Amazon liberally sprinkles its own Brief with selective quotes from those cases, it makes no effort to confront the arguments raised by Ms. Bolger as to why Amazon's cases are distinguishable. Amazon may believe cases from different states involving different facts and different laws are fungible, but they are not. The details matter.

For example, Amazon quotes extensively from *Stiner*, *supra*, 120 N.E.3d 885, *review accepted at* 125 N.E.3d 911, including to claim other courts have shown a "disinclination" to hold Amazon strictly liable. (RB 11) But it neglects to mention *Stiner* is being reheard by the Ohio Supreme Court. *Stiner* also involved Ohio law and a product purchased by someone other than the injured party that was shipped directly from the supplier to the buyer, bypassing Amazon. (*Stiner*, at p. 887.) Yet, Amazon treats *Stiner* as if it was dispositive here.

Amazon also heavily cites *Erie*, but as explained previously, that case turned on a state law that required ownership of the product to be considered a seller. (*Id.* at p. 141.)

The remaining cases are a mixed bag, some finding for Amazon and some not. The best that can be gleaned from them is each case should be decided on its own facts in accordance

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up for review by the Ohio Supreme Court.

with the law of the appropriate jurisdiction. Which is exactly what Ms. Bolger is asking this Court to do.

2. Amazon's arguments about public policy miss the point

A. This Court is best suited to resolve the liability question, not the Legislature

Amazon attacks Ms. Bolger for supposedly advancing "nebulous policy goals" (RB 12) in favor of holding Amazon strictly liable here. It also claims given the "many years and cases it took for strict liability to reach sellers," this Court is not suited to address the issues raised in this appeal and should instead wait for legislative action (although Amazon has not suggested any is pending). (RB 34)

As a prefatory matter, Amazon is simply wrong that it took "many years and cases" for California to impose strict liability on retailers. It took one year and one case. Our Supreme Court had zero difficulty in extending strict liability to retailers at the first opportunity to do so. *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256 was decided right after *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57.

More broadly, Amazon ignores the fact that product liability law in California is judge-made common law. (*Acqua Vista Homeowners Assn. v. MWI, Inc.* (2017) 7 Cal.App.5th 1129, 1143 ["Strict liability is a common law doctrine."].) And, the creation and development of that common law was and is driven almost entirely by policy considerations. "The

application of strict liability in any particular factual setting is determined largely by the policies that underlie the doctrine." (*Taylor v. Elliott Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 564, 576. See also *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 733 [Strict product liability "was created judicially because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society"].)

Our Legislature has rarely seen it appropriate to wade into common law product liability issues. Instead, our common law is fashioned by courts like this one "adjudicating on a regular basis the rich variety of individual cases brought before them." (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394.)

As our Supreme Court observed many years ago, "[t]he inherent capacity of the common law for growth and change is its most significant feature." (*Rodriguez*, *supra*, at p. 394.) The development of the law "has been determined by the social needs of the community which it serves. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society, and adapting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the country." (*Ibid.*, citing 15 Am.Jur.2d, Common Law, §§ 1, 2, pp. 794-796.)

There is absolutely no reason this Court is incapable of weighing the policy considerations at play here. Strict product

liability was created by our courts and, in the absence of clear legislative action, should be fashioned by our courts. Waiting for the Legislature to address an issue of pure common law, which it may never do, would be the wrong approach.

Further, Ms. Bolger is not, as Amazon claims, requesting either a "sweeping change in the law" (RB 34) or asking this Court to "create special new defendant-specific rules" (RB 13). The question presented here is simply whether the facts of this case, established California law, and the policies underlying strict liability support imposing it in this case. Holding Amazon liable is not a "sweeping change"; it is consistent with California law that dates back more than fifty years. (See, *Barth*, *supra*, 265 Cal.App.2d 228; *Canifax*, *supra*, 237 Cal.App.2d 44.) It also would not have the earth-shattering effect Amazon claims. Indeed, "[t]he same dire predictions were made in response to the original development of strict products liability" (*Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 481), yet have not come true[8].

As for "defendant-specific rules," it is Amazon pushing that agenda. Amazon is the one arguing it should be allowed to game the system and profit from product sales while avoiding

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[8] Amazon cites a statute from another jurisdiction as supposed evidence some states have determined "the judicial expansion of liability to sellers went too far." (RB 36.) But this bald claim is unsupported by any citation to legislative history or statutory language lending credence to Amazon's blanket assertion of motive. And, in any event, had our Legislature felt that way, it certainly could have done something about it.

the duties and responsibilities born by all other retailers. There is no question had Ms. Bolger purchased the battery at any other retailer, say, Target or Walmart, those entities would be strictly liable for her injuries. But Amazon is seeking to upend decades of established law and carve-out a "defendant-specific" exception for itself through the kind of contractual legerdemain that propelled the development of strict product liability in the first place. And in so doing, Amazon is asking this Court to bless an unfair advantage Amazon has over its competitors, since every other retailer must factor in the cost of product liability claims.

B. Amazon's arguments about the application of the policies underlying strict liability here are specious

As noted in Ms. Bolger's Opening Brief, the main policy justifications for imposing strict liability are "enhancing product safety, maximizing protection to the injured plaintiff, and apportioning costs among the defendants." (*Arriaga*, *supra*, 167 Cal.App.4th at p. 1535.) Amazon's arguments that these policies do not support liability are wrong.

Enhancing product safety: Amazon had a four-year contractual relationship with Lenoge, including an agreement by Lenoge to indemnify Amazon for any losses relating to Lenoge products. Amazon had complete control over what products Lenoge could store in Amazon's warehouses. And, Amazon ultimately exercised its right to ban Lenoge from the

Amazon website over safety concerns. Yet, Amazon argues it cannot influence product safety.

Amazon's own employee testified influencing product safety was one of the main purposes behind limiting access to the Amazon website.

A. So when Amazon.com suspends a product listing from being available to customers, that affects the third party selling that product?

Q. Yes, that's the question.

A. Yes, the answer is yes.

Q. Okay. And does this encourage third-party sellers to fix the product if there's something wrong with it?

A. I can't think of any specific examples, really, but I'm sure that will be true from time to time if it's a problem with the product and Amazon chooses to prevent the product from being sold for whatever reason. I'm sure there are many examples where the third-party seller takes – takes some kind of action to restore that product for sale, fixing whatever the problem is, if they can. (2 AA 348-349)

Other courts have recognized this as well. (See, e.g., *Gartner*, *supra*, at p. 15 [noting that with the rights Amazon retains over Fulfilled by Amazon products "Amazon could halt the placement of defective products in the stream of commerce, deterring future injuries"]; *State Farm Fire and Casualty Company*, *supra*, 390 F.Supp.3d at p. 972 ["Amazon was in a position to halt the flow of any defective goods of which it became aware."])

Moreover, even if we assume Amazon could not effectively halt the sale of all dangerous products on its website, that is

only because Amazon has deliberately set up a marketplace model that is a free-for-all[9]. It is no defense to liability for Amazon to say it can no longer contain a problem *it created*. Holding a company that erected a business that floods the United States with defective goods could avoid liability for the ensuing devastation by claiming it is not possible to police its own retail operation defies any reasonable policy.

Peterson v. Superior Court (1995) 10 Cal.4th 1185 and *O'Neil v. Crane Co.*, *supra,* cited by Amazon, do nothing to change the policy analysis. As discussed above, *O'Neil* concerned involved an attempt to hold a product manufacturer liable for injuries caused by an entirely different product. The policies involved in that decision bear no resemblance to the issue of whether a company that dominates all aspects of a retail transaction, including directly sending the product to the buyer, can avoid liability.

Peterson is equally inapplicable. There, the court held a hotel owner was not strictly liable for alleged defects in one of its bathtubs because the injured consumer was not buying a product and "a hotel owner is not a part of the chain of distribution of a bathtub that is installed in a hotel room…" (*Id.* at p. 1199.) Instead, "the bathtub, toilets, and ceiling fans left the stream of commerce when they were purchased and

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[9] Amazon, of course, ensures protection for itself by insisting on indemnity from all its suppliers, but provides no similar protection for its customers.

installed in the premises of the various businesses." (*Ibid.*) Just because "customers of these businesses would use the products in question or be benefited by them does not transform the owners of the businesses into the equivalent of retailers of the products." (*Id.* at p. 1199–1200.)

Thus, again, the policy considerations being weighed by the court in *Peterson* are not present here. This was a sale and Amazon was in the chain of distribution of the battery to Ms. Bolger. Its position is not comparable to that of a hotel or restaurant owner.

Compensation: Amazon cannot realistically argue it is not in the best position to compensate Ms. Bolger for her injuries, so instead it manufactures disputes about whether loss spreading is the "exclusive criteria" for product liability and reiterates it should not be held liable just because it is hugely successful. (RB 41) Ms. Bolger has never argued otherwise.

The point is Amazon profits from every product it sells and it has set up a product distribution system that renders the third-party supplier often unidentifiable (through the use of fake names on Amazon's website) and unreachable. As such, it should be responsible for compensating victims injured by those products just like any other retailer. This is no different than the policies applied by the Supreme Court in *Vandermark*.

Risk Spreading: Amazon argues the policy of spreading the risk of injury across society does not support holding Amazon liable because it supposedly would result in Amazon charging its third-party suppliers higher fees, resulting in higher prices. Not so.

Amazon already has the risk-spreading mechanisms in place. It forces all its suppliers to provide it with indemnity and requires suppliers who move any significant volume to have $1 million in liability insurance. (1 AA 96, 99; 2 AA 434) So, the cost is already passed on to the supplier. That is the system working properly, since, as this Court has explained, a product liability defendant's recourse where it believes other parties in the chain are at fault, "lies in an indemnity action." (*Wimberly*, *supra*, 56 Cal.App.4th at p. 633.)

Thus, Amazon's argument amounts to nothing more than a baseless protest against doing what other retailers already do. How does Amazon suppose Home Depot spreads the cost of product injuries across society? All the tools available to every other retailer to engage in risk spreading are available to Amazon.

Indeed, Amazon's claim that it, unlike all its competitors, should not have to absorb or redistribute any risk is further evidence Amazon wants all the benefit with none of the responsibility. Amazon undercuts all its competitors on price by avoiding the usual costs of doing business. The result: Amazon gets rich and consumers get dangerous products with

no hope of recourse. And while Amazon may not want to give up this lucrative arrangement, it calls for the imposition of liability on Amazon, not against it.

Amazon again references *Peterson* for the idea cost spreading would hurt Amazon's suppliers and customers. That is disingenuous at best since Amazon has built an empire on exploiting its customers and suppliers at every opportunity. Where was this customer concern when Ms. Bolger's legs caught fire or when she spent weeks in the hospital? If Amazon is so worried about its suppliers, why did it spend its entire brief trying to pin liability on Lenoge?

In the passage of *Peterson* Amazon quotes, the Supreme Court cautioned that small hotel and inn operators could face ruinous liability if they were held strictly liable for every product found in their establishments. (RB 44) There is no analogue here. Amazon has consistently argued Lenoge is the "seller," (see, e.g., RB 23) so obviously it is fine with its third-party suppliers being held strictly liable. And Amazon, a trillion-dollar global retail behemoth, cannot honestly be trying to liken itself to the operator of a local inn. The policy analysis in *Peterson* is unhelpful here.

Amazon also complains Ms. Bolger has not adequately studied the specific industry costs and burdens of imposing strict liability in this case (RB 44), but that is not a burden that has ever been placed on a plaintiff in a product liability case. An injured consumer suing for product liability need only

prove the elements of the claim, i.e., the defendant is in the business of putting products into the stream of commerce and the consumer was injured by a defect in one of those products. (See, Judicial Council of California Civil Jury Instructions, "CACI" 1203, 1204.) There is no requirement the plaintiff also conduct a comprehensive economic analysis on the effects of liability.

And again, Amazon's concern that holding it liable in this case would affect other websites and delivery services like "Doordash, Postmates, and the United States Postal Service" is unfounded. No one is arguing delivery companies should be held strictly liable for items they deliver. Those companies, unlike Amazon, do not sell products.

Further, if there are other entities out there that mirror Amazon's business model, they should be strictly liable when they are in the chain of distribution. Exonerating Amazon from any responsibility for the products it sells would incentivize all retailers to adopt Amazon's e-commerce marketplace model to try to avoid liability. Judgment-proof suppliers would inundate the country with unsafe junk and injured consumers would be helpless to protect themselves. This is the exact *opposite* of the goal of strict product liability.

Product liability was created to further the "public policy of insuring the costs of injuries caused by defective products are borne by those putting them on the market, 'rather than by the injured persons who are powerless to protect themselves.' "

(*Wimberly*, *supra*, 56 Cal.App.4th at p. 632, quoting *Greenman*, *supra*, 59 Cal.2d at p. 63.) Responsibility is to be fixed "wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." (*Escola v. Coca Cola Bottling Co. of Fresno* (1944) 24 Cal.2d 453, 462.)

Here, those policies all point toward holding Amazon strictly liable. At a minimum, Ms. Bolger has put forth sufficient evidence to have the jury determine if Amazon should be viewed as a retailer in this case.

3. Ms. Bolger did not abandon all her negligence causes of action

Amazon (and the trial court) mistakenly equated Ms. Bolger's decision not to pursue her claim for negligent undertaking with a complete abandonment of any negligence-based theories. That is incorrect.

Amazon's motion for summary judgment advanced a specific argument targeting Ms. Bolger's negligent undertaking claim. (1 AA 79-81.) Amazon argued Ms. Bolger could not state a claim for negligent undertaking because there was no evidence Amazon increased the risk beyond what was already present and Ms. Bolger did not rely on Amazon's actions in warning her because Amazon did not take any until after the battery had already exploded. (*Ibid.*)

Ultimately, Ms. Bolger concluded Amazon was correct on that one point and did not oppose summary judgment as to

negligent undertaking. But that does not mean she abandoned all other theories of negligence. The operative complaint also had allegations of negligent product liability and general negligence. (1 AA 46-48, 52-53) And Amazon's motion for summary judgment did not address those allegations specifically. Rather, Amazon argued under all theories, it was not liable because it was a service provider and did not sell the battery. (1 AA 66-78)

As such, Ms. Bolger no more abandoned her negligence claims, aside from the negligent undertaking one, than she did her strict liability claims. Her Opposition addressed Amazon's arguments in the way they were made.

In keeping with that theme, Amazon's substantive arguments against Ms. Bolger's negligence claims largely mirror its arguments elsewhere, e.g., Amazon did not have a post-sale duty to warn about the battery's dangers because it was not the battery's seller and *O'Neil*, *supra*, holds a manufacturer does not have a duty to warn about a different manufacturer's product. (RB 54-55)

These arguments fail for the reasons discussed previously—Amazon did sell the battery here, or at least was in the chain of distribution, and *O'Neil* is an entirely different case whose holding offers no guidance in this matter.

4. Ms. Bolger's case is not barred by the Communications Decency Act

As noted in her Opening Brief, nearly every court, including the trial court here, has held the Communications Decency Act ("CDA") does not bar claims relating to the sale of defective products. (AOB 61-62) Indeed, even in *Erie Insurance Company*, *supra*, 925 F.3d 135, a case Amazon relies on heavily everywhere else in its brief, the court held the CDA did not bar claims based on sales of defective products[10]. (*Id*. at p. 139.)

Still, Amazon persists in arguing the CDA is a complete defense all Ms. Bolger's claims. Amazon has not advanced any points not already considered and rejected by the *Erie* court and others.

Amazon's entire argument rests on the false premise Amazon is just a passive publisher of website content written by third parties, i.e., was just the "publisher of E-Life's product offer" and not a "seller" of the battery. (RB 60.) That issue—and the fact that Amazon is a seller by its own definition—have already been addressed.

Ms. Bolger is not seeking to hold Amazon liable as "the publisher of E-Life's offer." (RB 60) Amazon is liable to Ms. Bolger because it sold her a defective product sitting in its warehouse. And it is simply untrue that the only way Amazon

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[10] The court in *Oberdorf v. Amazon.com, Inc.* (3d Cir. 2019) 930 F.3d 136, *rehearing en banc granted, opinion vacated* (3d. Cir. 2019) 936 F.3d 182 may address this question as well.

could protect users from harmful products is to "decline to publish certain third-party offers." (RB 61-62)

For starters, Amazon could make its suppliers identify the manufacturer of the product, use their actual name rather than a fake screen name, identify an agent for process in the United States, and provide some evidence of the liability insurance Amazon contractually requires. In addition, at least in this case, Amazon could refuse to stock unsafe products in its warehouses and not process payments for those products. None of these actions are directly related to hosting third-party generated content on a website.

Amazon cites to a few cases holding the CDA preempts claims over third-party content posted on websites (See, e.g., *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190; *Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561; and *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816), but their reasoning does not fit here. Neither *Cross* nor *Doe II* had anything to do with product sales, and although *Gentry* did, the CDA came into play only because the plaintiffs were trying to "hold eBay responsible for misinformation or misrepresentations originating with other defendants or third parties." (*Gentry*, *supra*, 99 Cal.App.4th at p. 820.) In addition, the plaintiffs did not allege eBay was the seller; instead their allegations showed "it is in fact the individual defendants who sold the forged items to [the plaintiffs]." (*Id.* at p. 827.)

Here, as noted, Amazon is liable because it was in the chain of distribution of a defective product, not because of any content of "E-Life's offer."

Conclusion

The facts of this case, California law, and the general policies underlying strict product liability all support holding Amazon strictly liable for Ms. Bolger's horrible injuries. Amazon was the key link in the chain of distribution of the exploding battery and by any measure was a seller of it. Amazon has the power to influence product safety by prohibiting products or sellers from its marketplace, is in the best position to compensate Ms. Bolger, and can spread the risk across society just as any retailer can. It was also negligent here because it failed to warn Ms. Bolger and other buyers of Lenoge batteries after banning Lenoge from its marketplace over safety concerns. Because the trial court committed error in ruling otherwise, that ruling must be reversed.

Dated: February 18, 2020

Casey, Gerry, Schenk, Francavilla, Blatt & Penfield, LLP

/s/ Jeremy Robinson
Jeremy Robinson

Certificate of Compliance

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 10,953 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By: /s/ Jeremy Robinson
Jeremy Robinson

Declaration of Service

I am employed in the County of San Diego, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 110 Laurel Street, San Diego, CA 92101.

On February 19, 2020, I caused to be served the following document(s): **Appellant's Reply Brief** on the interested parties in this action addressed as follows:

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[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 February 19, 2020, I also caused to be served the following document(s): **Appellant's Reply Brief** on the interested parties in this action addressed as follows:

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[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 February 19, 2020 at San Diego, California.

/S/ Jeremy Robinson
JEREMY ROBINSON