Case No. B297995

STATE OF CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION EIGHT

KISHA LOOMIS,
Plaintiff and Appellant,

vs.

AMAZON.COM LLC,
Defendant and Respondent.

Appeal from the Superior Court of the County of Los Angeles
Hon. Ralph C. Hofer
Los Angeles Superior Court Case No. BC632830

Appellant's Reply to Amicus Curiae Brief Filed by the Civil Justice Association of California in Support of Respondent Amazon.Com, LLC

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Introduction and Summary of Argument

In August of last year Amazon responded to proposed legislation aimed at holding online marketplaces to the same standard of liability as physical retailers by boldy throwing its support behind the bill. Amazon proclaimed:

> Injured consumers should be able to seek compensation regardless of how a particular online marketplace makes money.[1]

Amazon is right, and this appeal seeks to hold it to that proclamation. Amazon should be held liable for the defective hoverboard sold on its website that seriously injured Ms. Loomis.

The Civil Justice Association of California ("CJAC") has filed an amicus curiae brief arguing otherwise. But rather than help guide the analysis, CJAC's brief only parrots meritless arguments already made by Amazon, misleadingly minimizes Amazon's role in this transaction, and expresses unfounded and unsupported fears that have been dismissed by our courts since the creation of strict liability.

Stripped of its rhetoric, CJAC's brief sets out four main claims: (1) this Court should defer to possible legislative action that may or may not ever materialize; (2) Amazon is a mere service provider for other sellers and exempt from strict liability;

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[1] Huseman, Brian, *Amazon Stands Ready to Support AB 3262 if all Stores are Held to the Same Standard*, THE AMAZON BLOG (August 21, 2020), https://blog.aboutAmazon.com/policy/Amazon-stands-ready-to-support-ab-3262-if-all-stores-are-held-to-the-same-standards (last visited February 3, 2021).

(3) imposing liability on Amazon—the world's largest online retailer and a company that saw a *$100 billion increase* in net sales for 2020[2]—would amount to a "regime of absolute liability"; and (4) *Bolger v. Amazon.com, LLC* (2020) 53 Cal.App.5th 431 was wrongly decided.[3] Not one of these claims has merit.

First, California product liability law is a common law doctrine and always has been. And while the Legislature certainly can weigh in on it, that possibility does not relieve this Court of its duty to build the common law and resolve the disputes before it. Even assuming the Legislature eventually enacts laws that might encompass this case, they will come too late for Ms. Loomis. So, what CJAC really means when it says this Court should "defer" to the Legislature is this Court should arbitrarily deny a remedy to a deserving litigant because there is a possibility the law may one day change. That is not the role of the courts.

Second, CJAC's suggestion that Amazon is a "service provider"—a faulty argument also made by Amazon—has no basis in fact. What service did Amazon provide to Ms. Loomis?

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[2] Kohan, Shelley, "Amazon's Net Profit Soars 84% With Sales Hitting $386 Billion," *Forbes* (Feb. 2. 2021, 6:12 pm EST), https://www.forbes.com/sites/shelleykohan/2021/02/02/amazons-net-profit-soars-84-with-sales-hitting-386-billion/?sh=2eb0fdf11334 (last visited Feb. 4, 2021).

[3] CJAC's brief also briefly discusses the so-called "marketing enterprise doctrine." However, CJAC adds nothing to the discussion of that doctrine and Ms. Loomis already addressed it in full in her briefs. (AOB 56-60; ARB 58-64.)

CJAC cannot identify a single one. This was a retail transaction. The only "service" CJAC contemplates is Amazon's creating and operating an online store where consumers can buy products. Any retailer can claim to provide that "service." Just because Amazon uses a consignment retail model rather than a buy-and-resell model does not render it a service provider.

Third, CJAC's professed fear over the creation of "absolute liability" is groundless. CJAC persistently repeats the phrase but fails to explain how applying established law to an online retail giant so powerful Congress is considering rewriting the antitrust rules to account for it[4] could usher in absolute liability. Instead, it is clear CJAC does not like product liability law as it exists in California and is asking this Court to supplant it with CJAC's preferred legal architecture. Which, of course, this Court cannot do even if so inclined. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

Fourth, and finally, CJAC's attack on the recent decision in *Bolger*, *supra*, 53 Cal.App.5th 431, is off base. CJAC misconstrues both the holding of *Bolger* and the thoughtful analysis the court used to reach that holding. Ultimately, CJAC's criticism of *Bolger* boils down to little more than CJAC's displeasure with the outcome.

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[4] See, *Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary* (October 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf

The fact remains that the trial court here erred in granting summary judgment to Amazon. That court did not have the benefit of the *Bolger* decision or all the other developments since its summary judgment ruling, but this Court does. California law, both new and old, compels reversal of the trial court's ruling.

Argument

A. CJAC's "Factual Summary" misleadingly downplays the tremendous control Amazon exercised over this product sale

Although unnecessary to an amicus brief, CJAC nevertheless inserts its own "synthesis" of the facts to "inform and understand the legal issues presented." (CJAC Brief, p. 12, fn. 3.) Far from an accurate synthesis, though, CJAC's summary glosses over most of the key facts while spuriously trying to minimize Amazon's role here.[5] Littering its brief with words like "slight" and "tenuous," CJAC misleadingly portrays Amazon as a bystander to a sale between a third-party supplier and Ms. Loomis. Not so. "Amazon is no mere bystander to the vast digital and physical apparatus it designed and controls." (*Bolger*, *supra*, at p. 457.)

Just as in *Bolger*, Amazon was not a bystander here, either. Rather, Amazon was a "direct link in the chain of distribution" acting as a "powerful intermediary" between the third-party supplier and Ms. Loomis. (*Bolger*, *supra*, at p. 439.) Throughout

[5] Unsurprisingly, CJAC's factual summary does not contain any citations to the record, the parties' briefs, or other case law.

the entire process, Ms. Loomis had no contact with TurnUpUp[6] or anyone other than Amazon. She ordered the hoverboard on Amazon's website. She placed it in Amazon's virtual "shopping cart." She used Amazon's virtual checkout process. She paid Amazon. And she got confirmation of the order from Amazon. Just as if she had gone to a physical store and the physical store agreed to drop ship[7] the product after payment.

As one New York court recently observed while reversing summary judgment for Amazon: "E-commerce has displaced brick and mortar storefronts. The consumer goes to Amazon's website to look for a product in the same manner one would walk into a Lowes, Home Depot, or a neighborhood True Value, or order from one of those entities' website." (*State Farm Fire and Casualty Company v. Amazon.com Services, Inc.* (N.Y. Sup. Ct., Dec. 8, 2020, No. 008550/2019) 2020 WL 7234265.)

Thus, CJAC's suggestion that Amazon is just an interenet service provider with a tangential link to product sales is false.

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[6] In fact, "TurnUpUp" does not exist. Rather, it is the fake name Amazon permitted another entity to use on Amazon's website. (1CT/84; 4CT945,1031.) But Amazon did not provide Ms. Loomis any way to uncover this since Amazon prohibits direct communications between its suppliers and customers. (4CT/800-801, 901, 910-912, 1015, 1034.)

[7] Drop shipping is the now common practice of shipping goods from a manufacturer or wholesaler directly to a customer rather than to the retailer that took payment. (See, Ferreira, Corey, "What is Dropshipping?" *Shopify*, (Jan. 1. 2021), https://www.shopify.com/blog/what-is-dropshipping (last visited Feb. 4, 2021.)

On the contrary, "Amazon is a global e-commerce behemoth—'the world's largest retailer.' " (*McMillan v. Amazon.com, Incorporated* (5th Cir. 2020) 983 F.3d 194, 196.) Its massive website, Amazon.com, "makes up at least 46 percent of the online retail marketplace, selling more than its next twelve online competitors combined." (*Ibid.*) This has real-world consequences. "The migration of consumer spending online, further compounded by the COVID-19 pandemic, has enabled the once modest online bookstore (initially dubbed 'Cadabra,' as in 'abracadabra') to make many traditional retailers disappear." (*Ibid.*)

Ms. Loomis's Opening Brief and Reply Brief exhaustively details the facts in the record showing Amazon's control over the hoverboard sale here, and its retail website in general (AOB 15-22; ARB 16-18) and they need not be repeated here. But it is important to correct CJAC's continued insinuation that Amazon is merely a bit player in product sales since that misapprehension contaminates all of CJAC's arguments.

This blight is readily apparent from CJAC's statement of the "principal issue" in this appeal, which CJAC frames as whether it is appropriate to impose strict liability on a "website serving as an online marketplace" when a buyer purchases a defective product "directly from a third-party seller." (CJAC Brief, p. 9.) That is not the issue. Amazon isn't just a "website" and Ms. Loomis did not buy the hoverboard "directly from a third-party seller." Instead, she bought it from Amazon. These facts are key to the analysis.

B. The issue of Amazon's liability in this case is not a question for the Legislature

CJAC's argument that this Court should await possible legislative action is baseless. California product liability is judge-made law. (*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").) Being judge-made, its evolution is fashioned by the courts, not the Legislature. Indeed, 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 v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394.) And in the product liability context, the application of strict liability in a given situation is determined by the courts' weighing of the policies underlying the doctrine. (*Taylor v. Elliott Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 564, 576.)

Unsurprisingly, then, none of the cases cited by CJAC so much as hint that the Legislature is the proper body to decide this case. *California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177 involved a constitutional challenge to a worker retention ordiance passed by the City of Los Angeles. And the excerpt quoted by CJAC (see CJAC Brief, p. 19) does not even appear in that case, or at least not on the page cited. Likewise, *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312 says nothing about novel "gig economy" business models, as CJAC misleadingly suggests. Rather it involved whether Target was required to have

an automatic external defibriliator ("AED") on its premises. (*Id.* at p. 317.) In deciding against such a duty, the high court noted, among other reasons, that the Legislature had already enacted comprehensive legislation concerning AEDs. (*Id.* at p. 342.) And finally, in *Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, an eminent domain action, the court rejected Metropolitan Transport Authority's argument that certain eminent domain statutes contravened public policy. (*Id.* at p. 1112.)

Not only are the above cases inapposite, they also all involved existing legislation. There is no parallel here, a fact that also distinguihses this case from the out-of-state cases declining to hold strictly Amazon liable on the basis of a state's particular product liability statute.

CJAC references last year's Assembly Bill 3262 to show our Legislature has at least considered the issue of online product liability, but CJAC's discussion of it is confusing at best. First, CJAC's discussion of AB 3262 also carefully omits a key fact: Amazon conditionally supported the bill provided it would apply to all online marketplaces. The pertinent section of Amazon's position on AB 3262 reads:

> We share the California legislature's goal of keeping consumers safe. To further that goal, this legislation aimed at protecting consumers should apply equally to **all** stores, including all online marketplaces. Injured consumers should be able to seek compensation regardless of how a particular online marketplace makes money. For example, some online marketplaces charge third-party sellers up-front fees to post a product, while others charge sellers by

> taking a percentage of their sales, while others charge advertisers in order to be compensated for operating their marketplaces. The common thread is that all online marketplaces—like all marketplaces everywhere—bring buyers and sellers together. For AB 3262 to be a successful, lasting, and meaningful law, it cannot leave open loopholes for some marketplaces to escape accountability. This will merely incentivize companies to restructure how they operate to avoid being held to this strict liability[8].

Second, by all appearances CJAC was *opposed* to AB 3262, and its amicus brief quotes an opinion piece that falsely claims the bill would have killed online commerce for small businesses. (CJAC Brief, p. 18, fn. 5.) In other words, CJAC tries to bolster its legislative deference argument with a bill that Amazon supported, CJAC opposed, and that would impose strict liability on online marketplaces—the result both Amazon and CJAC are arguing againt in this appeal.

Third, and finally, AB 3262 was unsuccessful because time expired to vote on the bill, which also speaks to the wisdom of waiting for legislative solutions.

C. Amazon is not a "service provider" under California law

CJAC also argues, as Amazon itself has, that Amazon is merely a service provider and thus categorically exempt from

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[8] Huseman, Brian, *Amazon stands ready to support AB 3262 if all stores are held to the same standards*, (Aug. 21, 2020), https://blog.aboutamazon.com/policy/amazon-stands-ready-to-support-ab-3262-if-all-stores-are-held-to-the-same-standards (emphasis in original).

product liability. Hardly. CJAC's argument rests on its perversion of Amazon's role in this sale. The reality is Amazon did not provide a service to Ms. Loomis, it sold her a product. There is no other way to look at it.

California courts draw a distinction "between a transaction where the primary objective is the acquisition of ownership or use of a product and one where the dominant purpose is to obtain services…" (*Murphy v. E. R. Squibb & Sons, Inc.* (1985) 40 Cal.3d 672, 677.) In the latter case, strict product liability does not apply. (*Ibid.*) But, 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." (*Pierson v. Sharp Memorial Hospital, Inc.* (1989) 216 Cal.App.3d 340, 344*;* see also *Sharufa v. Festival Fun Parks, LLC* (2020) 49 Cal.App.5th 493, 502-503 (summary judgment denied for injuries from waterpark slide because there was a triable issue of fact whether water park provided a product or a service).)

In this case, there is no question the primary purpose of Amazon's transaction with Ms. Loomis was to sell her a product, and CJAC cannot realistically contend otherwise. Ms. Loomis did not visit Amazon's website seeking services, and Amazon did not provide her any. She bought a product off Amazon.com and paid Amazon for it.

The supposed "services" to which CJAC refers are just Amazon's agreements with third party suppliers to make products available for purchase on Amazon.com. In other words,

Amazon's "service" is doing what every other retailer does. But a retailer like Amazon cannot unilaterally transform itself into a service provider by claiming that listing products for sale is a service. If that were the test, this characterization could be employed by any distributor or retailer seeking to dodge responsibility.

True, Amazon employs a consignment retail model, i.e., third parties list the products to be sold within the parameters dictated by Amazon, but it is still a retail model. (See *Soto v. Tristar Products, Inc.* (C.D. Cal., Nov. 9, 2017, No. CV176406MWFMRWX) 2017 WL 5197399, at *3 ("Costco Membership is a prerequisite to gaining access to Costco Wholesale ***stores***, which contain ***products*** that members are able to ***purchase***." (emphasis in original).) In the end, regardless of the model, "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).)

Amazon cannot engineer its way out of liability by manipulating the contractual details of how it sells products. In fact, our Supreme Court created strict product liability precisely to overcome this kind of economic gerrymandering. (See, *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 63 (*Greenman*).) As the *Bolger* court observed, "[t]he doctrine of

strict liability in California was intended to cut through such technicalities and compensate plaintiffs for injuries caused by defective products." (*Bolger*, *supra*, 53 Cal.App.5th at p. 431.)

The rue proposed by CJAC where a retailer like Amazon could absolve itself from responsibility by refusing to take title or possession of a product and claim to only be providing a service would eradicate nearly six decades of progress in product liability law and replace it with an easily manipulated and archaic rule of contractual privity—the very type of rule our Supreme Court eliminated in *Greenman*.

Nor would liability here ensnare delivery services such as UPS and FedEx. The *Bolger* court easily dispensed with that contention, observing "the obvious differences between Amazon and those entities do not need to be elucidated here." (*Bolger*, *supra*, at p. 459, fn. 8.) Unlike Amazon, delivery services are not "engaged in the business of selling products for use or consumption...." (*Hernandezcueva v. E.F. Brady Co., Inc.* (2015) 243 Cal.App.4th 249, 259, citing Restatement (Second) of Torts § 402A (1965), com. (f), p. 350.)

At its core, CJAC's argument seems to flow from an incorrect belief that Ms. Loomis is asking for a sweeping expansion of the law (which CJAC also posits the *Bolger* decision already brought about). Not so. Ms. Loomis only asks this Court to do what the *Bolger* court has already done: apply established legal principles to a new but now ubiquitous form of selling products.

The sweeping change would come only if courts *refused* to hold a company like Amazon liable because it is not an exact fit

with the classic definition of a retailer or distributor. That would upend product liability as we know it and would give e-commerce marketplaces an unfair competitive advantage over their physical counterparts who properly shoulder the responsibilities that come with making products available to the buying public. It would also endanger the safety of American families and consumers by allowing companies like Amazon to flood the market with defective goods manufactured or distributed by judgment-proof entities and suffer no consequences.

D. CJAC has no basis to argue imposing liability on Amazon here would create "absolute liability"

Woven throughout CJAC's brief is the erroneous notion that finding liability here would lead to catastrophic results and erect a "regime of absolute liability." That is wrong for a number of reasons. First, it rests on a purposeful mischaracterization of Amazon's role in the hoverboard sale here. CJAC thus argues that if Amazon can be held liable for its de minims involvement in the sale, other tangentially associated companies will soon fall victim as well. But, as discussed above, Amazon was *not* tangentially involved in this sale; it controlled or engaged in almost all parts of it.

Second, nothing in the record or in common experience suggests the dire consequences CJAC forecasts. Instead, we are invited to speculate that a necessary evolution of the law to encompass contemporary retail would produce disastrous consequences without the benefit of knowing how or why.

Indeed, one would expect if there was actual evidence of negative repercussions from holding online retailers responsible for injuries caused by their products, CJAC would cite to it. After all, the *Bolger* decision is, as of the date of this brief, more than six months old. And that is not the only court to have held Amazon potentially liable. (See, e.g., *State Farm Fire and Casualty Company v. Amazon.com, Inc.* (W.D. Wis. 2019) 390 F.Supp.3d 964, 973 (Under Wisconsin law, Amazon was a seller of a defective faucet adapter listed on its website by a third party); *McMillan v. Amazon.com, Inc.* (S.D. Tex. 2020) 433 F.Supp.3d 1034, 1044 (Amazon deemed a seller of a defective remote control under Texas law)[9]; *State Farm Fire and Casualty Company*, *supra*, 2020 WL 7234265) (triable issue of fact as to whether Amazon was a seller of defective thermostat).

But CJAC has nothing. On the contrary, Amazon just announced net sales of $386.1 billion for 2020, up more than *$100 billion* from its 2019 total of 280.5 billion.[10] Clearly, the possibility it may be held strictly liable in some cases has not dampened its runaway success in the least. And the flood of

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[9] This decision is currently on appeal in the Fifth Circuit and the Court of Appeals there has certified the question to the Texas Supreme Court, which has agreed to hear it. (*McMillan*, *supra*, 983 F.3d 194).

[10] Kohan, Shelley, "Amazon's Net Profit Soars 84% With Sales Hitting $386 Billion," *Forbes* (Feb. 2. 2021, 6:12 pm EST), https://www.forbes.com/sites/shelleykohan/2021/02/02/amazons-net-profit-soars-84-with-sales-hitting-386-billion/?sh=2eb0fdf11334 (last visited Feb. 4, 2021).

product liability litigation against delivery companies or other true service providers predicted by CJAC has not materialized.

Even more absurd is CJAC's suggestion that holding Amazon liable here "threatens to kill the e-commerce goose that lays the golden eggs." (CJAC Brief, p. 18) E-commerce is a field renown for making company owners overnight billionaires and the four main companies are so large and powerful that the House of Representatives' *Investigation of Competition in Digital Markets* remarked: "companies that were once scrappy, underdog startups that challenged the status quo have become the kind of monopolies we last saw in the era of oil barons and railroad tycoons." (*Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary* (October 2020), p. 6 https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.)

Of Amazon in particular, the Investigation notes that Amazon's "control over, and reach across, its many business lines enables it to self-preference and disadvantage competitors in ways that undermine free and fair competition." (*Id*. at p. 16.) One of those ways likely being its efforts to avoid the liabilities and responsibilities imposed on and accepted by other retailers. Indeed, the Investigation noted that "courts and enforcers have found the dominant [e-commerce] platforms" to have "arbitrary and unaccountable power" which they use to "repeatedly violat[e] laws and court orders" in a way that "raises questions about

whether these firms view themselves as above the law, or whether they simply treat lawbreaking as a cost of business." (*Id.* at p. 19.)

CJAC expresses concern that holding Amazon liable here would stray from the "categorical terms" such as "manufacturer," "seller," or "retailer" defining "who is and who is not liable when it comes to injuries sustained from defective products." (CJAC Brief, p. 10-11.) But that has never been the law in California. To the contrary, our courts have repeatedly held that strict product liability extends to *any* entity in the chain of distribution. (See, e.g., *Sharufa*, *supra*, 49 Cal.App.5th at p. 502 ("[l]iability extends to the entire distribution chain because the purpose of products liability is to hold responsible all who place a defective product into the stream of commerce"); *Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 88 ("[t]he doctrine of strict products liability imposes strict liability on all the participants in the chain of distribution of a defective product"); *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 628 (a consumer injured by a defective product "may now sue 'any business entity in the chain of production and marketing,' "); *Kaminski v. Western MacArthur Co.* (1985) 175 Cal.App.3d 445, 455 (same).)

Ultimately, CJAC's hollow concerns are nothing more than a repeat of the hand-wringing that has accompanied strict product liability since its creation. As our Supreme Court has noted, "[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 to pass.

E. The Bolger case was correctly decided and should be guiding precedent for this Court

Finally, recognizing the holding in *Bolger* lays the groundwork for the outcome here, CJAC resorts to claiming the *Bolger* court is wrong. But to reach this conclusion, CJAC has to mangle the holding, contorting it into something entirely different than what it really is. This is most easily shown by CJAC's claim that under *Bolger*, "everyone with some minor connection to a product, including transportation services who deliver a product, would be subject to strict liability." (CJAC Brief, p. 26.)

That is not at all what the court in *Bolger* held. The *Bolger* court's comprehensive analysis of California product liability law and ultimate conclusion that Amazon could be held strictly liable for the injuries caused by the exploding battery in that case did not turn on Amazon's "minor connection" to the product. Rather, as the court in *Bolger* explained, Amazon was a "direct link in the chain of distribution, acting as a powerful intermediary between the third-party seller and the consumer." (*Bolger*, *supra*, 53 Cal.App.5th at p. 438.) Amazon's liability flowed from its being "the only member of the enterprise reasonably available to an injured consumer[,]" its playing "a substantial part in ensuring the products listed on its website are safe," its power to "exert pressure on upstream distributors … to enhance safety," and its "ability to adjust the cost of liability between itself and its third-party sellers." (*Id.* at p. 438–439.) Based on those facts, the court thus concluded, "[u]nder established principles of strict liability,

Amazon should be held liable if a product sold through its website turns out to be defective." (*Id.* at p. 439, citing *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262.)

This is a far cry from "absolute liability" where any company with a "slight connection" to product sales or distribution can be held strictly liable. On the contrary, it is entirely consistent with established California product liability law.

CJAC nevertheless contends the *Bolger* court misconstrued two cases, *Canifax v. Hercules Powder Co.* (1965) 237 Cal.App.2d 44 ("*Canifax*") and *Barth v. B.F. Goodrich Tire Co.* (1968) 265 Cal.App.2d 228 ("*Barth*"). But it is CJAC that misreads *Canifax*, and its criticism of *Bolger*'s take on *Barth* is unintelligible.

CJAC maintains that the holding in *Canifax*, in which the court held a wholesaler strictly liable for injuries and death caused by defective dynamite fuses, was predicated on the court's finding that the fuses were "unavoidably unsafe products." (CJAC Brief, p. 27.) How CJAC divines this conclusion is a mystery. *Canifax* mentions "unavoidably unsafe products" only once in passing, during a discussion of the then newly-enacted section 402A of the Restatement (see, *id.* at p. 53) and certainly says nothing about that being material to its decision to hold the wholesaler liable. On the contrary, the pertinent holding comes much earlier in the case and is based on Section 402A's definition of "seller," not its analysis of what constitutes a defective product. (*Id.* at p. 52 ("The fact that [the wholesaler] chooses to delegate the manufacturer 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"). "Unavoidably unsafe products" does not factor into the court's decision at all.

CJAC also says the *Bolger* court erred in its reading of *Barth*, a case notable for its holding that under California law "neither the transfer of title to the goods nor a sale is required" for strict liability to apply. (*Id.* at p. 251–252.) But CJAC's claim is not backed up by any analysis or argument. (See CJAC Brief, p. 28.) Rather, CJAC simply notes the facts in *Barth* are different than they are here. But the *Bolger* court never suggested *Barth* was a mirror image of Amazon's business model; unsurprising considering *Barth* was decided decades before the internet was invented.

Ultimately, CJAC's audacious claim that a sister appellate court, in the course of a thorough analysis of California product liability law, failed to grasp the meaning of key precedent falls flat. *Bolger* reads *Canifax* and *Barth* correctly. CJAC does not.

Equally suspect is CJAC's contention that *Bolger* created a new category of strictly liable defendants deemed "facilitators" of product sales. That is a true example of misreading precedent. What the *Bolger* court actually said was: "Whatever term we use to describe Amazon's role, be it 'retailer,' 'distributor,' or merely 'facilitator,' it was pivotal in bringing the product here to the consumer." (*Id.* at p. 438.) The court's point being, the analysis should focus on Amazon's actual role in the sale, not the terminology used to describe what Amazon does.

The *Bolger* court did not err in reversing summary judgment for Amazon and holding Amazon strictly liable. This Court should

follow *Bolger*'s lead and allow Ms. Loomis the opportunity to seek the compensation Amazon once claimed she was entitled to "regardless of how a particular online marketplace makes money."

Conclusion

It is time to end the fiction created by Amazon and perpetuated by CJAC that Amazon is not a retailer but is just a website service provider. Imagine that it was possible to corral everything Amazon did here into four walls. Instead of going to Amazon's website to browse for products, Ms. Loomis went to Amazon's store. Instead of putting the hoverboard in Amazon's virtual shopping cart, she put the purchase slip in the showroom in in Amazon's physical shopping cart. Instead of checking out and paying Amazon with Amazon's virtual checkout system, she used Amazon's physical checkout system. And instead of Amazon processing the order and virtually directing TurnUpUp to ship her the hoverboard, Amazon processed the order and physically directed TurnUpUp to ship her the product.

That would be a retail sale subject to product liability. And so it is here, too. CJAC's arguments about expanding liability and crippling businesses are just smoke, dissipating at the first breeze. As shown above, they are singularly without merit and should not impact this Court's analysis in the slightest.

Dated: February 3, 2021. THE DOLAN LAW FIRM

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CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 5,959 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

PROOF OF SERVICE

CCP §§ 1011, 1013, 1013a

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is The Dolan Law Firm, 1438 Market Street, San Francisco, CA 94102.

On February 5, 2021, I served the foregoing document described as **Appellant's Reply to Amicus Curiae Brief Filed by the CJAC of CA in Support of Respondent Amazon.Com, LLC** to the interested parties in this action as follows:

☒ By placing true copies enclosed in a sealed envelope addressed to each addressee as follows:

Perkins Coie LLP
Max Loren Rothman SBN 313025
1888 Century Park East, Suite 1700
Los Angeles, CA 90067-1721
Telephone: 310) 788-9900
Facsimile: (310) 788-3399
Attorneys for Defendant and Respondent, Amazon.com LLC

LOS ANGELES SUPERIOR COURT
The Honorable Ralph C. Hofer
111 North Hill Street, Department NCD
Los Angeles, CA 90012
Trial Court

☒ BY EXPRESS MAIL/OVERNIGHT DELIVERY:

I placed each envelope into a package designated by the express service carrier, with delivery fees provided for and addressed to each addressee as stated on the attached list, and deposited the package in a facility regularly maintained by the express service carrier at Alameda, California, for collection and overnight delivery.

Executed on February 5, 2021, at San Francisco, California.

☐ STATE I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

* Megan Irish _____ /s/ Megan Irish _____