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 Opening Brief

Thomas D. Luneau (Bar No. 145804)
*Jeremy Robinson (Bar No. 188325)
Jillian F. Hayes (Bar No. 297536)
CASEY, GERRY, SCHENK, FRANCAVILLA, BLATT & PENFIELD, LLP
110 Laurel Street
San Diego, California 92101
Tel: (619) 238-1811
Fax: (619) 544-9232

Attorneys for Appellant ***Angela Bolger***

Table of Contents

Page

Table of Authorities

Page(s)

Cases

Statutes

Other Authorities

Issue Presented

Angela Bolger suffered severe burns when a defective laptop battery she bought from Amazon.com exploded in her lap. Is Amazon liable under California's strict product liability or negligence law for Ms. Bolger's injuries?

Overview of the Case

Amazon.com, Inc. ("Amazon")[1] is the world's most valuable retail company. It earns nearly 50% of all online retail dollars in the United States. (1 AA 206-207)[2]

But, there is a price: Amazon's success owes partly to its dubious ability to evade laws and regulations normal retailers must follow, giving Amazon an unfair competitive advantage. Amazon's primary vehicle for this is its online "marketplace," a commission-based sales platform where product manufacturers and suppliers list their products with Amazon on the Amazon.com website. Amazon assiduously avoids taking title to those products (even though it warehouses and ships many of them) and profits from fees and commissions rather than retail markups.

Depsite Amazon often assuming all the essential roles of both a retailer and distributor, its e-commerce marketplace

---

[1] To avoid confusion, throughout this Brief, "Amazon" will be used to refer to the entity, Amazon.com, Inc., and "Amazon.com" will be used to refer to the website operated by Amazon.

[2] "AA" refers to Appellant's Appendix.

model has provided Amazon a means to gerrymander its way out of liability for defective products by claiming it is just a service provider. According to Amazon, the actual "seller" is the often-anonymous and frequently judgment-proof supplier.

Amazon's legerdemain presuaded the trial court here. When Angela Bolger, a loyal Amazon Prime member, suffered life-altering burn injuries from a defective laptop battery sold through the Amazon.com website, Amazon disavowed any responsibility. Amazon instead claimed the "seller" was a defaulted Hong Kong-based supplier or manufacturer that did not respond to service. In granting Amazon summary judgment, the trial court agreed with Amazon.

That was error. Our Supreme Court created strict product liability precisely to overcome this kind of economic sleight of hand. (See, *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 63 (*Greenman*).) Indeed, a rule under which a retailer like Amazon could absolve itself from responsibility by forcing its suppliers to accept the mantle of "seller" 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*.

It appears, though, that the trial court was swayed by the lack of specific California precedent and several decisions from states requiring transfer of title for imposition of strict liability. (2 AA 510-511) That should not have determined the

outcome here. Regardless of the law elsewhere, California law requires neither "the transfer of title to the goods nor a sale" for product liability. (*Barth v. B. F. Goodrich Tire Co.* (1968) 265 Cal.App.2d 228, 252 (*Barth*).)

In any event, the legal landscape has changed since the trial court's ruling. Legislatures and courts alike are closing the door on efforts by online "marketplace facilitators" like Amazon to profit by evading the obligations borne by other retailers. First, at least two courts have found Amazon can be liable for defective products sold by third-parties through its website[3]. And as of the date of this brief, two other such cases, one finding Amazon liable and one not, are being reconsidered, by the Third Circuit sitting en banc and the Ohio Supreme Court, respectively[4].

Second, the United States Supreme Court recently held in the antitrust context a marketplace operator is tantamount to a retailer. (See, *Apple Inc. v. Pepper* (2019) 139 S.Ct. 1514 (*Apple*).) And third, California has now enacted the "Marketplace Facilitator Act," (Assembly Bill No. 147), which,

---

[3] See *State Farm Fire and Casualty Company v. Amazon.com, Inc.* (W.D. Wis. 2019) 390 F.Supp.3d 964 and *Papataros v. Amazon.com, Inc.* (D.N.J., Aug. 26, 2019, No. CV179836KMMAH) 2019 WL 4011502, Exhibits D and E to Ms. Bolger's Motion for Judicial Notice.

[4] See *Oberdorf v. Amazon.com Inc.* (3d Cir. 2019) 930 F.3d 136, *reh'g en banc granted, opinion vacated* (3d Cir. 2019) 936 F.3d 182 and *Stiner v. Amazon.com, Inc.* (2019) 156 Ohio St.3d 1487, Exhibits B, C, and F to Ms. Bolger's Motion for Judicial Notice.

among other things, deems companies like Amazon "the seller and retailer for each sale facilitated through its marketplace" for tax registration purposes. (Rev. & Tax. Code, § 6042.) A South Carolina court likewise just ruled Amazon is a product seller for tax purposes[5].

It is time for the law to catch up to Amazon. "The Internet's prevalence and power have changed the dynamics of the national economy." (*South Dakota v. Wayfair, Inc.* (2018) 138 S.Ct. 2080, 2097 [201 L.Ed.2d 403].) For years, Amazon has reaped the benefits of being a retail behemoth, ruthlessly undercutting brick and mortar stores who must factor the cost of defective products into their price structure, while leaving injured consumers like Ms. Bolger here with nothing. The broad policies underlying California's product liability laws cannot allow such a practice to continue.

Statement of Appealability

A judgment following summary judgment is appealable. (Code Civ. Proc., § 437c, subdivision (m)(1); see also *Saben, Earlix & Associates v. Fillet* (2005) 134 Cal.App.4th 1024, 1030.) Here, the trial court granted Amazon summary judgment and judgment was entered on March 6, 2019. (2 AA 529) Notice of Entry of Judgment was served on March 12,

---

[5] See *Amazon Servs., LLC v. S.C. Dep't of Revenue* (Sept. 10, 2019) Docket No. 17-ALJ—17-0238-CC, Exhibit A to Ms. Bolger's Motion for Judicial Notice.

2019 (2 AA 526), and Ms. Bolger filed her Notice of Appeal on April 23, 2019. (2 AA 533)

Standard of Review

This Court reviews de novo an order granting summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) In doing so, the Court considers "all of the admissible evidence and reasonable inferences therefrom in a light most favorable to" Ms. Bolger, as the opposing party. (*Rojas v. HSBC Card Services Inc.* (2018) 20 Cal.App.5th 427, 431.) Recent authority holds this de novo review also extends to evidentiary rulings made by the trial court in deciding the motion. (*Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1451.)

Statement of Facts

1. Amazon is a retailer and distributor of consumer products on its marketplace

To understand Amazon's liability here, it is first necessary to understand the runaway success of Amazon's "marketplace" business model and its interplay with traditional "brick and mortar" retail.

Like most traditional retailers, "[p]art of Amazon's business is selling products." (1 AA 306) Amazon's "goal is to make sure that customers have a broad selection at good prices and it's convenient and that they're able to make good, informed purchase decisions." (*Ibid.*)

Unlike most traditional retailers, though, Amazon also acts as the marketplace, the distributor, and in some cases the manufacturer: "[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) Or, as succinctly put by one court, "Amazon … serves all the traditional functions of both retail seller and wholesale distributor." (*State Farm Fire and Casualty Company*, *supra*, 390 F.Supp.3d at p. 973.)

Amazon's e-commerce marketplace model has been wildly successful for Amazon. According to Forbes, "Amazon has surpassed Walmart as the biggest retailer on the planet."[6] It now accounts for nearly 38 percent of online retail in the United States, up from 32 percent in 2016, as reported by eMarketer.[7] Indeed, the "marketplace" is now Amazon's dominant business model (1 AA 212), and several other major retailers, including Walmart, Sears, Wayfair, Newegg, and

---

[6] Lauren Debter, *Amazon Surpasses Walmart As The World's Largest Retailer*, Forbes (May 15, 2019, 5:50 p.m.) https://www.forbes.com/sites/laurendebter/2019/05/15/worlds-largest-retailers-2019-amazon-walmart-alibaba/#65f43bfd4171.)

[7] Jason Del Ray, *Inside the Conflict at Walmart That's Threatening its High-Stakes Race With Amazon*, Vox (Jul. 3, 2019, 6:30 a.m.) https://www.vox.com/recode/2019/7/3/18716431/walmart-jet-marc-lore-modcloth-amazon-ecommerce-losses-online-sales. Ms. Bolger submitted similar evidence with her opposition to the Motion for Summary Judgment (1 AA 206), but the numbers are slightly different now.

others, have followed Amazon's lead and opened their own e-commerce marketplaces. (1 AA 216)

A. Amazon's Business Solutions Agreement gives Amazon control over sales on its Marketplace

A product manufacturer or supplier wanting to list products on Amazon's marketplace must agree to Amazon's Business Solutions Agreement ("BSA"), (1 AA 84, 94-115, 2 AA 334), an adhesion contract that gives Amazon total control over transactions on its marketplace. As one legal commentator observes, "the [BSA] exists primarily to serve Amazon's interest in shielding itself from a much liability stemming from its third-party vendors as possible." (Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon* (2019) 20 N.C.J.L. & Tech. On. 181, 216.)

Under the BSA, any supplier using the Amazon.com website must agree to a litany of terms prescribed by Amazon such as:

- **Format and content:** Any product listing must be in the format and contain the content Amazon requires. (1 AA 101).
- **Product listings:** Amazon retains total control over product listings and can alter or remove them at its discretion. (1 AA101, 103) Also, suppliers cannot list any product prohibited by Amazon or create posts that contain "sexually explicit," "defamatory," or "obscene" materials. (1 AA 101)
- **Communications:** Suppliers cannot communicate with Amazon customers except through Amazon, and confirmation of orders is sent by Amazon, not the suppliers. (1 AA 102)

- **License to Amazon:** The supplier gives Amazon a worldwide, perpetual, irrevocable license to exploit in any manner, any of the supplier's materials. (1 AA 95)

- **Advertising:** Amazon will conduct advertising and promotion of the supplier's products at its discretion. (1 AA 101)

- **Payment:** Amazon will process all sales transaction and has the exclusive right to receive all sales proceeds. (1 AA 101)

- **Commissions:** Amazon collects a commission from each transaction (a percentage of the sales proceeds based on the kind of product is sold) as well as various added fees (1 AA 103)

- **Refunds:** Amazon determines when refunds will be given and how they will be given. (1 AA 102) All refunds are routed through Amazon, and for each of them Amazon charges a "Refund Administrative Fee." (1 AA 103)

- **Indemnity:** The supplier must indemnify Amazon against "any claim, loss, damage, settlement, cost, expense, or other liability …" relating to the sale of the supplier's products. (1 AA 95)

- **Liability Insurance:** Any supplier who has gross sales of more than $10,000 for any three consecutive months must obtain $1 million in liability insurance and name Amazon as an additional insured. (1 AA 96, 99, 2 AA 434)

- **Transaction limits:** Amazon can impose individual and cumulative transaction limits on any supplier. (1 AA 94)

- **Amazon can stop transactions:** Amazon has the exclusive right to "in its sole discretion, withhold for investigation, refuse to process, restrict shipping destinations for, stop, and/or cancel any of the company's transactions." (1 AA 98, 101)

- **Pricing parity:** The manufacturer/supplier can sell its products through any other channels it wants outside of Amazon but must give Amazon "parity" for all sales,

> meaning the supplier cannot sell the product for less elsewhere or provide different customer service or product information. (1 AA 103, 2 AA 341)

The BSA has some regrettable omissions as well. For example, Amazon does not require foreign suppliers to designate a U.S. agent for service of process (2 AA 430), and although Amazon ostensibly requires the suppliers to have liability insurance, Amazon does not have a practice of confirming its existence. (1 AA 304-305) Amazon also does not require suppliers to identify the manufacturer of products sold through Amazon. (2 AA 431) Unfortunately, the result in this case was the third-party supplier did not have an agent for service in the U.S., did not answer the complaint after being served in Hong Kong, and no insurance carrier has appeared on its behalf. (1 AA 196.)

Amazon limits what buyers can know about suppliers and vice versa. It allows suppliers to mask their identity to buyers[8] by using a pseudonym (1 AA 86, 302) and prevents suppliers from getting customer information such as the customer's home address and credit card details, which Amazon deems "super confidential." (2 AA 407.) Thus, Amazon tightly controls the flow in both directions of money (purchases and refunds) and information.

---

[8] Unsurprisingly, Amazon requires suppliers to provide *Amazon* with complete and accurate information. (1 AA 94)

B. Fulfillment by Amazon gives Amazon possession of the product and control over shipping and returns

For an additional charge, Amazon will fulfill orders from its own warehouses, as was done here. Under the Fulfillment by Amazon program, Amazon receives the product directly from the supplier/manufacturer, stores it, selects it, and then ships it from one of its many warehouses receiving an order. (1 AA 110-115) Fulfilled products are also returned to Amazon and Amazon processes the return. (1 AA 111-112)

Under the terms of Fulfillment by Amazon, as spelled out in the BSA, Amazon takes charge of: **Inventory** (Amazon tracks the inventory of all products stored in its fulfillment warehouses) (1 AA 111); **Storage** (Amazon chooses which of its facilities will be used to store the products and can move them or comingle them) (1 AA 111); **Shipping** (Amazon determines the amount charged for shipping, which Amazon then bills to the supplier, and can combine shipments from different suppliers (1 AA 111, 113); **Title and risk** (Amazon can take title to any product if Amazon decides the product is a risk or if the supplier fails to provide direction on returned items within 90 days (1 AA 111, 112); and **Product Damage** (Amazon will pay the supplier the replacement value of the product if it is damaged while being stored by Amazon). (1 AA 112, 2 AA 342)

A supplier wanting to use Fulfillment must register each product with Amazon, and Amazon may refuse registration of any product. (1 AA 110) When an Amazon customer places an

order for a product that is Fulfilled by Amazon, Amazon picks the product from the shelf, packs it in an Amazon box, and ships it with, when eligible, Prime Shipping. (2 AA 323-324) Amazon can package Fulfilled products together, regardless of whether they come from different suppliers, so they all arrive together. (1 AA 111) Amazon also provides buyers of Fulfilled products customer service for the shipment, although questions about the product itself are usually directed back to the supplier. (2 AA 325)

A Fulfilled product is returned by printing out an Amazon shipping label from the customer's Amazon account and sending the product back to Amazon, where it is inspected by an Amazon employee. (2 AA 328-330) Amazon then refunds the customer the purchase price and decides whether to return the item to the supplier's inventory. (2 AA 330-331)

Amazon touts the fulfillment service as helping "manufactures reach customers globally." (2 AA 345) Meaning a manufacturer that has no other avenue into the United States can sell through Amazon and Amazon will fulfill the orders from its U.S. warehouses. Unfortunately, it also potentially enables suppliers to circumvent U.S. safety regulations or guidelines, such as Underwriter Laboratories certification. (1 AA 310 (noting Amazon recently began requiring UL certification from its suppliers but did not at the time Ms. Bolger purchased her battery).) In fact, shortly before

this Brief was filed, a Wall Street Journal expose found numerous banned and unsafe products for sale on Amazon[9].

C. Amazon makes a profit from every sale on its marketplace through commissions and fees

Buyers on Amazon.com can purchase multiple products from different suppliers (including Amazon) at the same time. Amazon's customers cannot make payments directly to suppliers; instead, the customer must pay Amazon. Amazon then periodically remits sales proceeds to the supplier, minus the fees charged by Amazon. (2 AA 336-337)

For any product sold the Amazon Marketplace, Amazon automatically takes a "referral" fee—a fee every supplier pays to Amazon based on a percentage of the sales proceeds. (2 AA 321, 323) In the case of laptop batteries, the referral fee is 15% of the total sale. (2 AA 321) For orders using Fulfillment, Amazon also charges an order handling fee, a pick and pack fee, a weight handling fee, and a monthly storage fee for inventory. (2 AA 332, 334-335)

D. Amazon guarantees products on its marketplace and can and will suspend suppliers over safety concerns

Amazon provides the "A to Z Guarantee," for all products sold to customers on Amazon.com. (1 AA 304) The A-to-Z

---

[9] Alyse Stanley, *Just How Bad is Amazon's Banned Products Problem?* Gizmodo (Aug. 31, 2019, 3:44 pm), https://gizmodo.com/just-how-bad-is-amazons-banned-products-problem-1837778839

Guarantee broadly provides that if something goes wrong with a transaction, Amazon will, with certain limitations, make the customer whole by either refunding the customer or providing a replacement product. (2 AA 343-344)

Amazon also "has a robust and active process to monitor for any customer complaints that come in." (1 AA 298) Depending on the "severity of the scope, the frequency, variety of factors, [Amazon] will decide whether or not we're going to continue to sell a particular product or not." (*Ibid*.)

Amazon can suspend or ban products or suppliers from its website at any time for any reason. (1 AA 98, 110; 2 AA 348-349, 414) Being suspended from a marketplace as ubiquitous as Amazon.com obviously has a negative effect on the supplier. (1 AA 224, 2 AA 348) Amazon takes such action partly to encourage suppliers to rectify product defects and fix the problem if possible. (2 AA 348-349)

2. Amazon was the seller of the defective battery Angela Bolger purchased from Amazon.com

In 2016, Ms. Bolger went to Google to look for compatible replacement batteries for her laptop. Immediately, she saw Amazon listings, including ones for batteries made by a company called Lenoge Technology HK Ltd. (2 AA 446-447)

Being an Amazon Prime member and regular Amazon customer, she went to the Amazon site to take advantage of the free shipping. (1 AA 198-199, 307, 2 AA 326-327, 439) She

scanned customer reviews of a compatible Lenoge replacement battery and then bought it. (1 AA 199, 2 AA 438, 440)

Ms. Bolger assumed she was buying the lithium-ion battery from Amazon. (2 AA 441, 448-449) She shopped on Amazon.com, put the battery in the Amazon.com virtual "shopping cart," and purchased the battery from Amazon through Amazon's "checkout" procedure. (1 AA 199) Everything about the transaction was designed to provide an Amazon-centric buying experience and emulate shopping at a traditional retail store. Ms. Bolger had no contact with anyone else other than Amazon during the entire transaction. (1 AA 199)

Amazon was already storing the battery in its facility near Oakland and shipped it within 24 hours of being ordered to Ms. Bolger in San Diego. (1 AA 300, 2 AA 406, 415-417) The battery arrived in a brown Amazon box with Amazon's trademark blue and white tape. (1 AA 199-200, 2 AA 442) Because lithium ion batteries are a regulated product for shipping, Amazon provided special labeling and documentation. (1 AA 301)

The order form for the purchase, which Amazon sent via email to Ms. Bolger, stated in small print that the battery was "Sold by: E-Life" and "Fulfilled by: Amazon." (1 AA 86, 92) After being sued, Amazon revealed that "E-Life" was a fake name used on the Amazon.com site and that Lenoge was the third-party supplier. (1 AA 86, 302)

The battery cost $12.30. (1 AA 92) Of that, Amazon kept $4.87, or just shy of a 40% commission for itself. (1 AA 182; 2 AA 333)

3. Amazon blocked Lenoge's account after reports of battery fires but did not warn its customers of the risks; Ms. Bolger was severely burned

A few months after Ms. Bolger bought the battery, Amazon suspended Lenoge's selling privileges because of several safety reports showing problems with their batteries, including fires, and because Lenoge would not respond to requests for documentation. (2 AA 408-410, 412-413) A month later, Amazon permanently blocked Lenoge's account. (2 AA 412)

Roughly a month after Amazon banned Lenoge, the battery Ms. Bolger bought from Amazon erupted while her laptop was on her lap. (1 AA 200) The fire caused third degree burns on her arms, legs, thighs, and feet, as well as burning her bed, clothes, and floor. (*Ibid*.)

Five months after the explosion, Ms. Bolger received a "safety alert" email from Amazon recommending she stop using the battery and saying Amazon would refund her the $12.30. (1 AA 200-203, 2 AA 443-445, 450)

Procedural Background

Angela Bolger filed her original complaint on January 24, 2017, naming as defendants Herocell, Inc., EPC Global, Inc.

HP Inc., and Amazon.com, LLC. (1 AA 4-16) At the time, she incorrectly believed HP and EPC were involved in the manufacturing or distribution of the battery. EPC and HP were later dismissed. A default was entered against Herocell. (1 AA 196)

Ms. Bolger's Complaint alleged causes of action for: (1) Negligent Product Liability; (2) Strict Product Liability – Design and Manufacturing Defect; (3) Strict Product Liability – Failure to Warn of Defective Condition; (4) Breach of Implied Warranty; and (5) Breach of Express Warranty. (1 AA 4-21) Amazon answered on March 6, 2017 and filed a cross-complaint against the other named defendants shortly after. (1 AA 22-38)

Ms. Bolger then substituted Lenoge Technology HK Limited for fictitiously named "Doe No. 1," Unisun for "Doe No. 2," and Shenzen Uni-Sun Electronics Co., Ltd. for "Doe No. 3." (1 AA 39-42) Ms. Bolger served Lenoge, but Lenoge did not answer, and a default was entered. (1 AA 196, 2 AA 541) Ms. Bolger attempted to serve Unisun but has been told service will take up to three years. (1 AA 196)

After Amazon filed a motion for summary judgment, Ms. Bolger requested leave to file a First Amended Complaint, which the court granted. That complaint added a sixth cause of action for Negligence/Negligent Undertaking based on Amazon's failure to send its customers any alert after having suspended (and then banned) Lenoge from the Amazon.com

site due to safety concerns about Lenoge's batteries and Lenoge's failure to respond to Amazon's inquiries. (1 AA 43-55)

Amazon then refiled its summary judgment motion, arguing it could not be held strictly liable for Ms. Bolger's injuries because it was a service provider rather than a seller or distributor of the product. Amazon also argued Ms. Bolger could not show a negligent undertaking and all her claims were barred by the Communications Decency Act, 47 U.S.C. § 230. Amazon supported its motion with a declaration from a product safety manager, Deborah Harvey, and certain documents like the BSA.

Amazon's motion set forth several facts Amazon contended were undisputed.[10] Among them:

- The battery that exploded was supplied by Lenoge Technology HK Limited, which operated on the Amazon.com site under the fictitious name "E-Life." (1 AA 86, 134, 302)
- Within the parameters permitted by Amazon, suppliers such as "E-Life" choose the products they want to put on the Amazon site, pick the selling price, and choose the display content. (1 AA 86, 87, 134-136)
- "E-Life" signed up as a supplier on Amazon's site in 2012 and thus consented to Amazon's Business Solutions

[10] Ms. Bolger objected to some of Amazon's evidence, arguing it was not competent to establish the facts Amazon claimed it did. (1 AA 185-189) The trial court overruled those objections. (2 AA 519)

Agreement. (1 AA 87, 134)

- "E-Life" retained title to the battery that injured Ms. Bolger "at all times." (1 AA 88)
- Amazon "never held title to the battery that Plaintiff purchased." (1 AA 135)
- "E-Life" was identified as the "seller" in a few places during the transaction where Ms. Bolger bought the battery. (1 AA 88, 136)
- "E-Life" participated in the Fulfilment by Amazon program. (1 AA 88, 89, 136)
- Amazon provides payment processing, meaning it charges the buyer and then remits the proceeds to the supplier minus Amazon's fees. (1 AA 89, 136)
- Amazon permanently blocked Lenoge's account on the Amazon website on October 20, 2016. (1 AA 139)
- Six months later, on April 10, 2017, Amazon sent Ms. Bolger a letter saying it had uncovered problems with the battery that "E-Life" sold to Ms. Bolger and other customers. (1 AA 139)

Ms. Bolger opposed the motion. First, she objected to parts of Ms. Harvey's declaration and argued Amazon had not met its burden on summary judgment because it presented insufficient competent evidence. (1 AA 185-189) Ms. Bolger objected that Ms. Harvey had no personal knowledge of the transaction between Amazon and Ms. Bolger and was unfairly extrapolating generalities to the specifics of the case. (1 AA

187-189) For example, Harvey stated "E-Life retained title to the battery at all times," yet her only basis for making that claim is the BSA states generally that suppliers are supposed to hold title to the products they list on Amazon. (1 AA 188) She had no way of knowing whether that held true here. (*Ibid.*) Ms. Bolger likewise objected to similar factual claims based solely on the BSA. (1 AA 187-189)

Ms. Bolger also argued Amazon had not met its burden on summary judgment because even assuming Amazon's claimed facts were true, that was not enough to take it outside of California product liability law. (1 AA 159) Ms. Bolger adduced substantial evidence showing Amazon was in the direct chain of distribution of the battery and therefore liable under California law. Among other facts, she demonstrated that: (1) she had no interaction with "E-Life"/Lenoge at any time during the transaction (1 AA 171, 183, 199); (2) she bought the battery from Amazon because she was an Amazon Prime member and wanted the free shipping (1 AA 183, 199); (3) Amazon shipped the battery from an Amazon Fulfilment center in Oakland, California (1 AA 171, 300; 2 AA 406, 415-417); (4) the battery arrived in an Amazon box with Amazon tape on it (1 AA 183, 199-200; 2 AA 442); (5) because the product was a lithium ion battery, Amazon provided the appropriate special labeling and documentation (1 AA 171, 301); (6) of the total sale price of $12.30, Amazon kept $4.87, or just shy of 40% of the gross sales proceeds. (1 AA 182; 2 AA

333)

Ms. Bolger also established that Amazon is one of the world's largest and most successful companies (1 AA 180, 206-207); is in the business of selling products, among other things (1 AA 180, 306); has over 100 million Amazon Prime members (1 AA 218); and currently has 163 Fulfilment warehouses in North America (1 AA 182, 208). Ms. Bolger also set out many of the other details about Amazon's business model articulated in pp. 9-17, *infra*. (1 AA 182-183, 224-225; 2 AA 348-349)

In support of her arguments, she filed declarations from Peter Kent, an e-commerce expert (1 AA 204-233), and Jonathan Jordan, a battery expert. (1 AA 234-237) Ms. Bolger also offered deposition testimony from Amazon employees Damon Jones, Christopher Poad, and Deborah Harvey as well as Amazon's Responses to Requests for Admission. (2 AA 420-434)

Finally, Ms. Bolger argued the Communications Decency Act is inapplicable because she is seeking to hold Amazon liable for selling a defective product, not for the contents of its website. (1 AA 168-169)

In reply, Amazon reiterated its positions on strict liability and the Communications Decency Act and objected to the Kent and Jordan declarations. (2 AA 453-463)

The trial court issued a tentative ruling granting the motion and held oral argument the following day. The court overruled Ms. Bolger's evidentiary objections and sustained

some, but not all, of Amazon's. (2 AA 509) The court then issued a final ruling a few weeks later confirming the tentative ruling. (2 AA 509-515)

Relying on the lack of California precedent and a few out-of-state decisions for guidance, the court concluded Amazon was not liable under California law.[11] (2 AA 510-512, RT 11) The court held Amazon was not a seller, but rather a service provider. (2 AA 511) The court also ruled Amazon was not a distributor and not liable under the "marketing enterprise doctrine" because Amazon "did not have a participatory connection with the enterprise which created consumer demand for the product." (2 AA 512-513) The court closed by noting "there are no California cases and no cited cases finding Amazon liable for products/strict liability as a seller or distributor or under a market enterprise theory." (2 AA 513)

Ms. Bolger filed a timely Notice of Appeal after entry of judgment.

Argument

1. Summary judgment was improperly granted here because Amazon is strictly liable for injuries caused by defective products it sells

A defendant such as Amazon is entitled to a summary judgment "only where the court is able to determine from the evidence presented that there is no triable issue as to any

[11] The trial court rejected Amazon's argument on the Communications Decency Act. (2 AA 514)

material fact and that the moving party is entitled to a judgment as a matter of law." (*Rojas v. HSBC Card Services Inc.*, *supra*, 20 Cal.App.5th at p. 429, citations and internal quotation marks omitted.) In product liability cases, "whether a defendant falls within the scope of the strict liability doctrine generally is a question of law." (*Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 774, fn. 10 (*Bay Summit*).) But, "the issue becomes a factual one where the facts regarding the extent of the defendant's participation in the enterprise are disputed." (*Ibid.*)

Here, the issue is a mixed question of law and fact. Many of the foundational facts are not disputed, but the parties vigorously disagree about "the extent of [Amazon's] participation in the enterprise" and the legal ramifications of that participation. Regardless, under an examination of either the facts or the law here, Amazon was not entitled to summary judgment and the trial court erred in finding otherwise.

A. Strict product liability is a broad, flexible doctrine created to remove impediments to liability like those erected by Amazon

More than a half century ago, our Supreme Court declared that protection of consumers hurt by defective products is of paramount importance and held that manufacturers who put defective products on the market are strictly liable for injuries they cause. (*Greenman*, *supra*, 59 Cal.2d at p. 63.) Strict product liability was thus born.

The following year, the Supreme Court extended that doctrine to retailers such as Amazon. (*Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262–263 (*Vandermark*).) The court explained that "holding retailers strictly liable would (1) enhance product safety since retailers are in a position to exert pressure on manufacturers; (2) increase the opportunity for an injured consumer to recover since the retailer may be the only entity 'reasonably available' to the consumer; and (3) ensure fair apportionment of risk since retailers may 'adjust the costs of such protection between them in the course of their continuing business relationship.' " (*Bay Summit*, *supra*, 51 Cal.App.4th at pp. 772–773, citing *Vandermark*, *supra*, 61 Cal.2d at p. 262–263.)

Today, "[t]he doctrine of strict products liability imposes strict liability on all the participants in the chain of distribution of a defective product." (*Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 88 (*Bostick*), citations omitted.) A consumer injured by a defective product "may now sue 'any business entity in the chain of production and marketing, from the original manufacturer down through the distributor and wholesaler to the retailer; liability of all such defendants is joint and several.' " (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 628, quoting *Kaminski v. Western MacArthur Co.* (1985) 175 Cal.App.3d 445, 455–456.) The purpose for this "stream of

commerce" approach "is to extend liability to all those engaged in the overall producing and marketing enterprise who should bear the social cost of the marketing of defective products." (*Kaminski*, *supra*, 175 Cal.App.3d at p. 456, citation omitted.) This ensures "the policy of compensating the injured plaintiff is preserved, and retailers and distributors remain free to seek indemnity against the manufacturer of the defective product." (*Ibid*.)

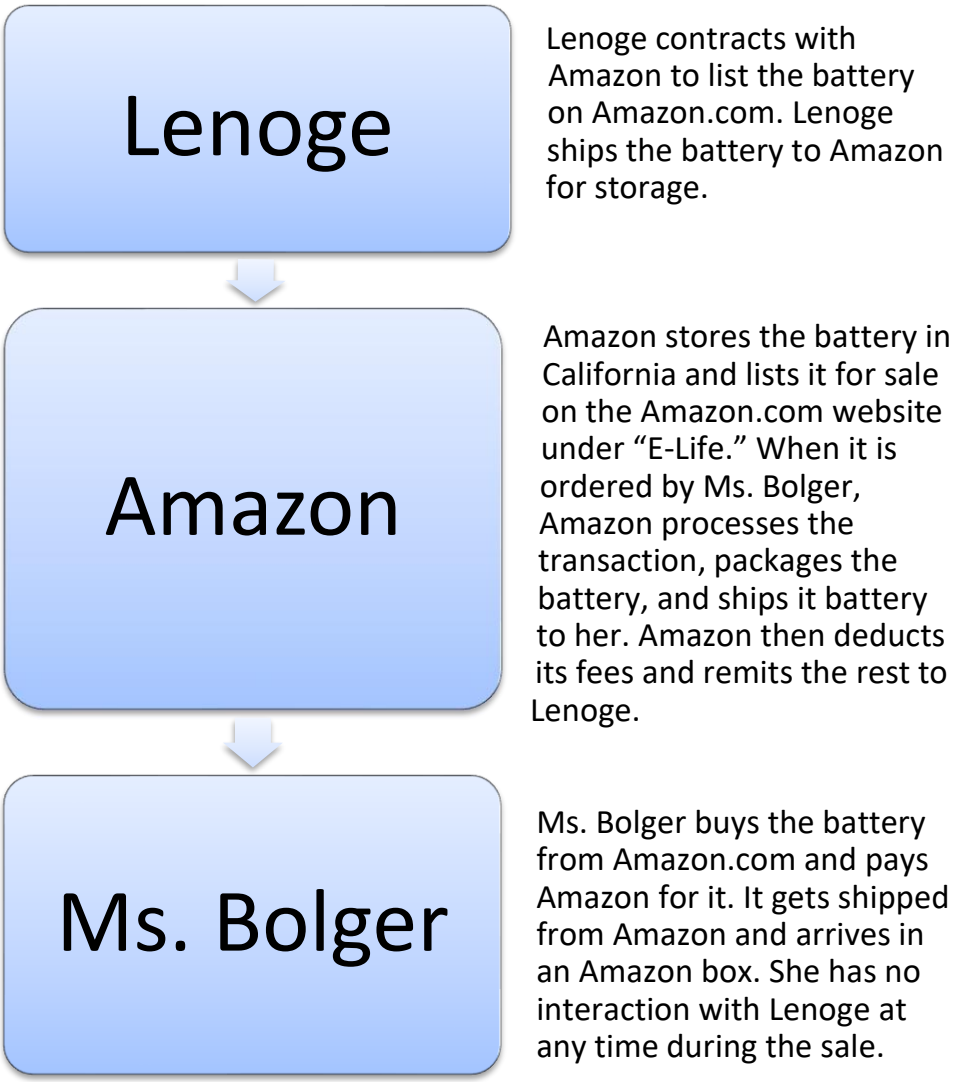
The stream of commerce approach even sweeps in lessors (*McClaflin v. Bayshore Equipment Rental Co.* (1969) 274 Cal.App.2d 446, 452, licensors (*Garcia v. Halsett* (1970) 3 Cal.App.3d 319, 325–326 (laundromat strictly liable for defective washing machine), and wholesalers (*Canifax v. Hercules Powder Co.* (1965) 237 Cal.App.2d 44, 52 (summary judgment reversed against blasting fuse wholesaler even though wholesaler did not manufacture fuse or have possession of it)).

California's strict liability is broad enough that "neither the transfer of title to the goods nor a sale" is necessary. (*Barth*, *supra*, 265 Cal.App.2d at p. 252.) "[S]trict liability may attach even if the defendant did not have actual possession of the defective product …" (*Bay Summit*, *supra*, 51 Cal.App.4th at p. 774.) Indeed, "strict liability applies even to those who are mere conduits in distributing the product to the consumer." (*Hernandezcueva v. E.F. Brady Co., Inc.* (2015) 243 Cal.App.4th 249, 258.)

B. Amazon is strictly liable for the injuries caused by the defective battery because it was in the chain of distribution

1. *Amazon sold and distributed the defective battery to Ms. Bolger*

As the chart below shows, there is little doubt Amazon was in the chain of distribution here, since it was "responsible for passing the product down the line to the consumer." (*Bay Summit*, at p. 773.)



This transaction is nothing more than a slight variation of the standard retail model. Lenoge sent the battery to Amazon who then sold it to Ms. Bolger while assuring itself a profit from the sale as it does with every sale. Amazon's role here is both as a retailer and a distributor. Or, stated differently, Amazon "is the party present at the consummation of the sale who accepts money from the consumer in exchange for the product." (*Amazon Servs., LLC v. S.C. Dep't of Revenue* (Sept. 10, 2019) Docket No. 17-ALJ—17-0238-CC, p. 29, Appellant's Motion for Judicial Notice, Exh. A.)

As such, "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." (*State Farm Fire and Casualty Company*, *supra*, 390 F.Supp.3d at p. 972.) Amazon received the battery from the supplier, advertised it, stored it, shipped it, labeled it, and sold it to Ms. Bolger. In fact, Amazon was far more connected to the chain of distribution than the defendants in several California cases where the courts had no problem fastening strict liability. (See, e.g., *Canifax*, *supra*, 237 Cal.App.2d at p. 52 (wholesaler never had possession of defective product; *Barth*, *supra*, 265 Cal.App.2d at p. 252 (tire dealer strictly liable for defective tire in its stock even though customer order tires from a different distributor).)

2. *Amazon's refusal to take title to the defective battery does not matter in this case*

Amazon is quick to point out that instead of buying the battery from Lenoge, Amazon forced Lenoge to retain legal ownership of the battery (although not possession of it) and Amazon profited from commissions and fees. But how Amazon structures its business with upstream suppliers is of little consequence. On the contrary, such a distinction is the exact type of legal artifice our Supreme Court commands us to avoid in product liability analysis. "The concept of strict liability itself … arose from dissatisfaction with the wooden formalisms of traditional tort and contract principles in order to protect the consumer of manufactured goods." (*Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 735.)

From the buyer's perspective, Amazon is the retailer. As explained in *Apple Inc. v. Pepper*, 139 S.Ct. 1514, a decision issued after this appeal was filed, its upstream arrangements with its wholesalers is immaterial to the transaction.

In *Apple*, the United States Supreme Court emphatically rejected the argument that a commission-based retail model like Amazon's insulates the "marketplace provider" from suits by injured consumers. Apple urged the court to dismiss an antitrust suit over iPhone "apps" sold through its App Store,

arguing, as Amazon did here, the third-party developer is the seller.[12] (*Id.* at p. 1519–1520.)

The high court was not convinced. "Apple's proposed rule is not persuasive economically or legally[,]" and "would draw an arbitrary and unprincipled line among retailers based on retailers' financial arrangements with their manufacturers or suppliers." (*Id.* at p. 1522.) The court pointed out that "agreements between manufacturer or supplier and retailer may take myriad forms, including for example a markup pricing model or a commission pricing model." (*Ibid.*) And regardless of whether a hypothetical retailer buys a product for $6 from a manufacturer and then sells it for $10 or takes a 40% commission so the manufacturer will list it with the retailer for $10 to net $6, "everything turns out to be economically the same for the manufacturer, retailer, and consumer." (*Ibid.*)

The Supreme Court declined to adopt a rule that "would allow a consumer to sue the … retailer in the former situation but not the latter." (*Ibid.*) "[W]e fail to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a … retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer …" (*Id.* at p. 1523.) In other

---

[12] Apple's App Store is an online "marketplace" much like Amazon.com. Third-party developers create the apps and then sell them through the App Store. (*Id.* at p. 1519.) Like Amazon, Apple profits from the sale by taking a percentage of the sales price as a fee or commission. (*Ibid.*)

words, "it does not matter how the retailer structured its relationship with an upstream manufacturer or supplier—whether, for example, the retailer employed a markup or kept a commission." (*Apple Inc.*, *supra*, 139 S.Ct. at p. 1523.)

The court also noted giving credence to such economic finesse would elevate form (the precise arrangement between manufacturers or suppliers and retailers) over substance (whether the consumer is injured) and expressed concern it would "provide a roadmap" for retailers to evade responsibility by rigging the supply system. (*Ibid*.) The court could not condone market manipulation of that sort: "We refuse to rubber-stamp such a blatant evasion of statutory text and judicial precedent." (*Id.* at p. 1523–1524.)

The *Apple* analysis applies even more forcefully in the product liability context. Like federal antitrust law, California product liability law does not recognize a distinction based on the configuration of the supplier and retailer. "In light of the policy to be [served], it should make no difference that the party distributing the article has retained title to it." (*Price v. Shell Oil Co.* (1970) 2 Cal.3d 245, 251." As this Court has observed, "[i]n applying this stream of commerce theory, courts have eschewed legal labels and have taken a very practical approach, focusing on the actual connection between the defendant's activities and the defective product." (*Bay Summit*, *supra*, 51 Cal.App.4th at p. 774.) Regardless of a defendant's position in the commercial chain "the basis for his liability

remains that he has marketed or distributed a defective product." ((*Daly*, *supra*, 20 Cal.3d at p. 739.)

3. *Recent decisions and legislation have rejected title as being a dispositive factor in identifying retailers*

Amazon's refusal to take title to the battery and effort to shoehorn Lenoge into the role of "seller" should not protect it here. In rejecting the identical argument by Amazon, a district court in Wisconsin held Amazon was in the chain of distribution regardless of its failure to take title. "Amazon took on all the roles of a traditional—and very powerful—reseller/distributor. The only thing Amazon did not do was take ownership of [the supplier's] goods." (*State Farm Fire and Casualty Company*, *supra*, 390 F.Supp.3d at p. 973.)

A New Jersey district court reached the same conclusion, noting that "[w]hile Amazon never took title to the property, it adopted a proprietary stance with respect to the sale." (*Papataros v. Amazon.com, Inc.* (D.N.J., Aug. 26, 2019, No. CV179836KMMAH) 2019 WL 4011502, at p. 14.) The court held title was not dispositive, rather what mattered was that Amazon "exerted control by taking physical possession of the product[,]" "shipped the product to the customer in its own box[,]" "physically delivered the product[,]" "confirmed the sale with a 'thank you for shopping with us' message[,] and "allowed communication between the third-party vendor and the buyer only through Amazon's own website…" (*Ibid.*) The

court concluded: "Amazon's control of the product, its relationship with the third-party sellers, and the structure of the Amazon marketplace all weigh in favor of finding that Amazon was a seller, not a mere broker or facilitator…" (*Papataros*, *supra*, 2019 WL at p. 17.)

Lastly, in the sales tax arena—another field where Amazon endeavors to duck responsibility by arguing its third-party suppliers are the "sellers" for legal purposes—the Chief Administrative Law Judge for the Administrative Law Court in South Carolina held in an exhaustively researched opinion that Amazon was a retail seller. (See *Amazon Servs., LLC v. S.C. Dep't of Revenue* (Sept. 10, 2019) Docket No. 17-ALJ—17-0238-CC.) In rejecting Amazon's claim that its suppliers/merchants are the retailers, the court aptly observed Amazon's "activities and collection of the Fee show it is engaged in the 'business' of selling…" (*Id*. at p. 33.)

Our legislature has also codified laws outside the product liability realm that place Amazon in the chain of distribution. For example, California Civil Code section 1791 defines a "sale" as either passing title to the buyer for a price or a consignment sale (Civ. Code, § 1791, subd. (n)), the latter being analogous to what Amazon does here. Thus, under this definition, Amazon sold the defective battery to Ms. Bolger.

And, as noted earlier, California has now legislatively deemed companies like Amazon to be "the seller and retailer for each sale facilitated through its marketplace" for tax

registration purposes. (Rev. & Tax. Code, § 6042.) This legislative action is pertinent here because "[m]uch of the debate now about whether Amazon must collect those taxes centers around whether Amazon is a retailer — or whether it purely acts as a platform facilitating a transaction"[13] The State's declaration that Amazon is the retailer for tax purposes reflects its sentiment that Amazon should not be able to dodge the responsibilities of normal retail through creative distribution arrangements.

All of this shows unmistakably that Amazon was in the stream of distribution of the defective battery that exploded on Ms. Bolger. Amazon is therefore strictly liable under California unless public policy requires a different result. (*Bay Summit*, *supra*, 51 Cal.App.4th at p. 774 ("strict liability doctrine derives from judicially perceived public policy considerations and therefore should not be expanded beyond the purview of these policies").) And here it does not.

C. The policies underlying product liability would be furthered by holding Amazon strictly liable here

Our Supreme Court has said "whether to apply strict liability in a new setting is largely determined by the policies underlying the doctrine." (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 362.) Those policies are: "enhancing product safety,

---

[13] Krystal Hu, *The new treasurer of America's most populous state is taking on Amazon*, Yahoo! Finance, (Dec. 1, 2018) https://finance.yahoo.com/news/new-treasurer-americas-populous-state-taking-amazon-114917764.html

maximizing protection to the injured plaintiff, and apportioning costs among the defendants." (*Arriaga v. CitiCapital Commercial Corp.* (2008) 167 Cal.App.4th 1527, 1535 (*Arriaga*).) All of them favor imposing liability here.

1. *Amazon is positioned to enhance product safety*

The first policy consideration is whether the defendant is in a position "to either directly or indirectly exert pressure on the manufacturer to enhance the safety of the product." (*Arriaga*, *supra*, at p. 1538.) The evidence here shows Amazon has that power.

Amazon exerts substantial control over its own website and over its third-party suppliers. As part of using Fulfillment by Amazon, Amazon required Lenoge to register each product, and Amazon reserved the right to refuse to sell any of them. (1 AA 110) "So Amazon was in a position to halt the flow of any defective goods of which it became aware." (*State Farm Fire and Casualty Company*, *supra*, 390 F.Supp.3d at p. 972.)

Amazon also "has a robust and active process to monitor for any customer complaints that come in." (1 AA 298) Meaning, it already has the necessary infrastructure in place. And if it finds safety issues, it can suspend or ban from its website any suppliers that provide unsafe products, as it did here with Lenoge. (1 AA 298, 2 AA 408-410, 412-414) Given Amazon's market dominance, getting suspend or blocked by Amazon can severely impact a supplier. (1 AA 224-225, 2 AA

348) That fact is not missed by Amazon: the point of such action is partly to exert pressure on suppliers to rectify product defects and fix the problem if possible. (2 AA 348-349)

It is also worth noting that Lenoge became a supplier for Amazon in 2012 and Ms. Bolger bought the defective battery in 2016. (2 AA 411-412, 431) Meaning, Amazon and Lenoge had a *four-year* "ongoing relationship" by the time this battery was sold. (*Hernandezcueva*, *supra*, 243 Cal.App.4th at p. 264.) This is not a case of a remote supplier popping up on Amazon for a fleeting moment and then disappearing again.

2. *Holding Amazon strictly liable will maximize protection to injured consumers*

At present, Amazon is the only viable defendant in the chain of distribution of the defective battery that burned Ms. Bolger. Since Amazon does not require foreign suppliers to designate a U.S. agent for service of process (2 AA 430), Ms. Bolger served Lenoge in Hong Kong. (1 AA 196, 2 AA 541 Lenoge did not respond and Ms. Bolger had a default entered. (*Ibid.*) Ms. Bolger will pursue obtaining a default judgment against Lenoge, but the likelihood of collecting on that judgment is near zero. Especially since even although Amazon requires suppliers like Lenoge to have liability insurance, Amazon does confirm that. (1 AA 298-299)

Amazon also does not require suppliers to identify the manufacturer of products sold through Amazon. (2 AA 431) And, under the BSA third-party vendors can communicate

with the customer only through Amazon. (1 AA 102, 2 AA 407) This enables third-party vendors to conceal themselves from the customer, leaving customers injured by defective products with no direct recourse to the third-party vendor. Indeed, there are numerous cases in which neither Amazon nor the party injured by a defective product were able to locate the product's third-party vendor or manufacturer. (See, e.g., *Allstate New Jersey Insurance Company v. Amazon.com, Inc.* (D.N.J., July 24, 2018, No. CV172738FLWLHG) 2018 WL 3546197, at *2 ("Neither Plaintiff nor [Amazon] is aware who manufactured the laptop battery ...."); *Oberdorf v. Amazon.com Inc.* (3d Cir. 2019) 930 F.3d 136, 145 and fn. 20, *reh'g en banc granted, opinion vacated* (3d Cir. 2019) 936 F.3d 182 ("After Oberdorf was injured by the defective collar, neither she nor Amazon was able to locate [the supplier].")

Here, the information available to Ms. Bolger suggests the battery was manufactured partly by a Chinese company called Shenzen Uni-Sun Electronics Co., Ltd. (1 AA 39-42) and partly by Lenoge. (1 AA 199, 235-236) Ms. Bolger has defaulted Lenoge and attempted to serve Uni-sun, so far without success. (1 AA 196)

This business model—where unreachable foreign entities dump their products into the United States without any accountability—supports holding Amazon liable. Amazon chooses to operate in a way that reduces or eliminates protections "that might keep foreign (or otherwise judgment-

proof) manufacturers from putting dangerous products on the market." (*Erie Insurance Company v. Amazon.com, Inc.* (4th Cir. 2019) 925 F.3d 135, 144. (conc. opn. of Motz, J.).) And, as recent litigation against Amazon shows, many dangerous products have found their way into the United States through Amazon's "marketplace."[14]

Because Amazon adheres to a business model that fails to prioritize consumer safety, it should be made to bear the consequences. Indeed, blessing Amazon's evasion of product liability would give an incentive to companies to design business models, like Amazon's, that do nothing to protect consumers from defective products. It would further no public policy and instead serve "merely as a shield against potential liability." (*Ault v. International Harvester Co.* (1974) 13 Cal.3d 113, 120.)

---

[14] See, e.g., *Fox v. Amazon.com, Inc.* (6th Cir. 2019) 930 F.3d 415, 421 (battery in hoverboard bought on Amazon.com erupted, burning down family home and causing various injuries); *Garber v. Amazon.com, Inc.* (N.D. Ill. 2019) 380 F.Supp.3d 766, 770 (same); *Stiner v. Amazon.com, Inc.* (Ohio Ct. App. 2019) 120 N.E.3d 885, 887 (teenager died from dosage of caffeine powder bought from Amazon.com); *Erie Insurance Company*, *supra*, 925 F.3d at p. 137 (defective headlamp batteries burned down house); *State Farm Fire and Casualty Company*, *supra*, 390 F.Supp.3d 964 (defective bathtub faucet adapter purchased from Amazon flooded house).

Further, it would be entirely unfair to consumers to relegate them to the herculean task of identifying and pursuing suppliers. Even just the first step is a challenge. Not only does Amazon allow fake supplier names like "E-Life," it also sells its own products through wholly-owned private brands that often make no mention of being Amazon-owned. Thus, even the most sophisticated consumer has little hope of deciphering the true identity of a supplier/seller, and even less chance of understanding the legal distinction Amazon wants to draw between "seller" and "marketplace facilitator."

3. *Amazon already has the power to spread the risk of product defects through the chain of distribution*

Amazon can easily spread the risk of defective products by altering its fee structure. "If Amazon wished to adjust its business model to spread the costs of defective products among consumers, it could do so." (*Papataros*, *supra*, at p. 16; see also *State Farm Fire and Casualty Company*, *supra*, 390 F.Supp.3d at p. 972 (Amazon could spread the risk by adjusting "the substantial fees that it would retain for itself…").) Amazon can "increase the fees it charges third-party vendors to account for the risk of defective products and make the price—particularly the portion of the price retained by Amazon—reflect that risk." (*Papataros*, *supra*, at p. 16.) This may cause a slight increase in the list price of the products, but that "represents the system working as intended." (*Ibid.*)

And Amazon already has mechanisms in place to assign the ultimate responsibility for defective products to the party that bears the fault. The BSA requires any supplier, including Lenoge, to indemnify Amazon for any claims made relating to the supplier's products. (1 AA 95) Thus, Amazon can at any time seek indemnity from Lenoge and if Ms. Bolger obtains a judgment against Amazon, Amazon can pursue contribution against Lenoge.

The problem, of course, is that Lenoge is unresponsive and apparently beyond the jurisdictional reach of U.S. Courts. But, between Ms. Bolger and Amazon, that risk should fall to Amazon. Ms. Bolger had no relationship with Lenoge; Amazon did. Just because Amazon insisted on contractual protection from Lenoge but failed to include any means to enforce it does not mean Ms. Bolger should suffer the consequences. That would be "contrary to the public policy of encouraging the distributor of mass-produced goods to market safer products." (*Ault*, *supra*, 13 Cal.3d at p. 120.) Amazon certainly has the market might to demand any terms it wants from suppliers, including designating an agent for service of process in the United States or providing proof of insurance.

D. Amazon is not an auctioneer or seller of used products, nor is it a service provider

Contrary to what the trial court found, Amazon's business model does not place it outside—or even particularly near—the limits of strict liability in our state.

California law draws the outer boundaries for strict liability at cases where the defendant is only tangentially involved in the sale and where imposing liability would not be supported by public policy. (*Arriaga*, *supra*, 167 Cal.App.4th at p. 1535.) Thus, commercial dealers in used goods are not subject to strict liability because 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; see also *Tauber-Arons Auctioneers Co. v. Superior Court* (1980) 101 Cal.App.3d 268, 283 (same); *Larosa v. Superior Court* (1981) 122 Cal.App.3d 741, 753–761 (same).)

Likewise, a finance lessor will not be held strictly liable for a defective product because it is not able to exert pressure on the manufacturer to enhance safety and does not play an "integral role in the 'producing and marketing enterprise' of the product…" (*Arriaga*, *supra*, 167 Cal.App.4th at p. 1539–1539.)

Also, strict liability is inappropriate when the defendant is principally providing a service to the consumer and is not in the business of selling products. (See *Pierson v. Sharp Memorial Hospital, Inc.* (1989) 216 Cal.App.3d 340, 346 (hospital not strictly liable for claimed defect in carpet because hospital is in the business of providing services, not selling products); *Ontiveros v. 24 Hour Fitness USA, Inc.*

(2008) 169 Cal.App.4th 424, 434 (no strict liability for commercial fitness facility for injury caused by exercise equipment because the gym "was in the business of providing fitness services" not selling products); *Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 259 (whitewater rafting company not strictly liable for alleged defects in raft provided to plaintiff because the raft was merely incident to the service).)

Here, Amazon was not selling used goods or acting as simply a processor of financial transactions. Instead, "Amazon … serve[d] all the traditional functions of both retail seller and wholesale distributor." (*State Farm*, *supra*, 390 F.Supp.3d at p. 973.)

Nor was Amazon primarily providing a service, as argued below. Amazon's website sells products for people to buy, not services. (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).)

Amazon's self-characterization as a service provider could be employed by any brick and mortar retail store or consignment shop to avoid responsibility as a seller. Notably, Amazon does not charge "service fees" to its customers, it just charges them for the products they buy.

(See *Amazon Services, LLC* at p. 28 ("Amazon Services is engaged in the business of selling … products to ***customers*** even if it is providing a service to Merchants." (emphasis in original).)

Indeed, even though the trial court erroneously held Amazon was a service provider not a seller, the "service" identified by the trial court was "for sellers to offer their products and for buyers to purchase them." (2 AA 511) In other words, being a retailer.

E. The cases holding Amazon was not a seller or distributor are distinguishable

Doubtless, Amazon will tout the several cases decided both before and after the trial court granted summary judgment that held Amazon was not, under the facts and theories presented, strictly liable for product defects. (See, e.g., *Erie Insurance Company*, *supra*, 925 F.3d 135, *Fox*, *supra*, 930 F.3d 415, *Stiner*, *supra*, 120 N.E.3d 885, *Garber*, *supra*, 380 F.Supp.3d 766, *Eberhart v. Amazon.com, Inc.* (S.D.N.Y. 2018) 325 F.Supp.3d 393, *Allstate New Jersey Insurance Company*, *supra*, 2018 WL 3546197, and *Carpenter v. Amazon.com, Inc.* (N.D. Cal., Mar. 19, 2019, No. 17-CV-03221-JST) 2019 WL 1259158.)

Most of these cases are easily distinguishable on the facts. Several did not involve the product being fulfilled by Amazon. This is a critical distinction because when Amazon does not fulfill the order, it never takes possession of the product. (See,

Stiner, *supra*, 120 N.E.3d at p. 895 (Amazon had no role in "storing, packaging, or distributing the product"); *Garber*, *supra*, 380 F.Supp.3d at p. 773 (Amazon did not pack, store, or ship the product); *Carpenter*, *supra*, 2019 WL 1259158 at p. 1 (same).)

Whether Amazon is strictly liable for a defective product shipped directly from the supplier to the buyer raises difficult questions not presented here. When Amazon never touches the product, the question of control becomes more critical[15]. And, indeed, the courts in *Stiner*, *Fox*, *Carpenter*, and *Garber* found that to be a dispositive concern. (*Fox*, *supra*, 930 F.3d at p. 425 ("we are not convinced, on the record before us, that [Amazon] exercised sufficient control over [the plaintiff's] hoverboard to be deemed a "seller" of the hoverboard under [Tennessee law]"; *Garber*, *supra*, 380 F.Supp.3d at p. 780 ("the Court predicts that the Illinois Supreme Court would find that Amazon was not part of the hoverboard's distributive chain"); (*Stiner*, *supra*, 120 N.E.3d at p. 894 (Amazon not strictly liable because the supplier "chose the product to offer for sale and then sourced, physically controlled, and fulfilled orders for that product…")

In this case, though, Amazon did take possession of the battery. Not only that, Amazon stored the battery in

---

[15] But see *Canifax v. Hercules Powder Co.*, *supra*, 237 Cal.App.2d at p. 52 ("The fact that [the defendant] 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.")

California, packaged it in an Amazon box, put special labeling on it, and shipped it to another California address. Amazon also remained responsible for any product returns. So, the concerns driving the courts in *Stiner*, *Fox*, *Carpenter*, and *Garber* to decline liability are absent here.

Three other cases did involve Fulfillment by Amazon: *Erie*, *Eberhart*, and *Allstate New Jersey*. Of those, *Erie* is the only appellate-level decision and the only published opinion. And *Erie* is inapposite here because the court was construing Maryland law, which, unlike California law, requires transfer of title for a sale: "insofar as liability in Maryland for defective products falls on 'sellers' and manufacturers … it is imposed on owners of personal property *who transfer title to purchasers of that property for a price.*" (*Erie Insurance Company*, *supra*, 925 F.3d at p. 141, emphasis added.) Thus, under Maryland law, those parties "who own — i.e., have title to — the products during the chain of distribution are sellers, whereas [those] who do not take title to property during the course of a distribution but rather render services to facilitate that distribution or sale, are not sellers." (*Ibid.*)

Like *Erie*, *Eberhart* also construed state law dissimilar to that of California's. *Eberhart* read New York law to require transfer of title in order to fall within the chain of distribution. "[R]egardless of what attributes are necessary to place an entity within the chain of distribution, the failure to take title to a product places that entity on the outside." (*Id.* at p. 398.)

California law has no such requirement. To the contrary, as explained in *Barth v. B.F. Goodrich Tire Co.*, *supra*, "neither the transfer of title to the goods nor a sale" is a prerequisite for product liability. (*Id.* at p. 252.) So, while "[i]n states in which the formal transfer of ownership is a prerequisite to strict liability, Amazon would prevail[,]" (*State Farm Fire and Casualty Company*, *supra*, 390 F.Supp.3d 964), California, like Wicsonsin, is not one of those states. (See *id.* at p. 973 ("Amazon bears responsibility for putting the defective product into the stream of commerce in Wisconsin, and Amazon is well positioned to allocate among itself and its third-party sellers the risks that products sold on Amazon.com would be defective. Wisconsin law is clear that it would not leave [the plaintiff] to bear that risk alone").)

Erie also showcases a concurring opinion that nicely anticipates the evolution of product liability law in response to the economic realities of Amazon's marketplace model. Judge Motz notes that "[a]lthough at the moment, Maryland law supports the result we reach," and federal courts sitting in diversity cannot change state law, "much of the State's product liability law was adopted at a time when the American economy operated much differently than it does now." (*Erie Insurance Company*, *supra*, 925 F.3d at p. 144 (conc. opn. of Motz, J.).)

Judge Motz observes: "By design, Amazon's business model cuts out the middlemen between manufacturers and

consumers, reducing the friction that might keep foreign (or otherwise judgment-proof) manufacturers from putting dangerous products on the market." (*Id.* at p. 144.) But, Amazon's business model "shields it from traditional products liability whenever state law strictly requires the exchange of title for seller liability to attach, in many cases forcing consumers to bear the cost of injuries caused by defective products (particularly where the formal 'seller' of a product fails even to provide a domestic address for service of process)." (*Ibid.*)

Amazon's purposeful avoidance of of title transfer was enough to give Amazon victory in *Erie* "under Maryland law as it stands today," but, Judge Motz notes, "that may not always be so." (*Ibid.*) "[N]othing in today's holding prevents Maryland's own courts or legislators from taking up and resolving these difficult, fast-changing, and cutting-edge issues differently." (*Id.* at p. 145.)

The third case involving Fulfillment by Amazon is *Allstate New Jersey*. That case is the most factually analogous to this one because it not only involved Fulfillment, it involved the same product—a defective battery supplied by Lenoge. But the holding in *Allstate New Jersey* predates most of the important decisions in this area, conflicts with *Papataros*, a more recently-decided case from the same district, and, in any event, is irreconcilable with California law.

Allstate New Jersey also involved a fire caused by a Lenoge battery, although there were no injuries. (*Id.* at p. 2.) The subrogee sued Amazon and the district court was tasked with deciding whether Amazon was a seller or distributor under New Jersey's Product Liability Act, which the court characterized as "evincing a legislative policy to limit the expansion of products-liability law." (*Id.* at p. 6, citations and internal quotation marks omitted; see also id at p. 12 ("The legislature enacted the statute as remedial legislation aimed at 'limit[ing] the expansion of products-liability law' ").)

The district court read New Jersey product liability law as focusing on whether the defendant had "control" of the product. "Under state law, control over the product is the touchstone that New Jersey courts have considered to determine whether a party has the requisite involvement to be a product seller." (*Id.* at p. 7.) After analyzing New Jersey case law, the court concluded "Amazon, although in possession of the product, lacked the necessary control over the product." (*Id.* at p. 10.) The court also observed based on the facts before it that "it is not clear that, without Amazon as a Defendant, Plaintiff would lack an appropriate party to sue." (*Id.* at p. 12.) This was because "neither party has identified the manufacturer of the battery, and it is unclear whether Lenoge, a Hong Kong company, is subject to service of process in the United States." (*Ibid.*)

The New Jersey district court's holding in *Allstate New Jersey* should not influence the outcome here. First, California product liability law is expansive and not subject to legislative enactments intended to limit its scope. Rather, "the concept of strict products liability was created and shaped judicially[,] (*Daly*, *supra*, 20 Cal.3d at p. 733) and is given a "broad application." (*Price*, *supra*, 2 Cal.3d at p. 250.)

Second, our courts do not focus on product "control" in the way that New Jersey law does. Instead, as this Court has said, "[S]trict liability may attach even if the defendant did not have actual possession of the defective product …" (*Bay Summit*, *supra*, 51 Cal.App.4th at p. 774.) Even just "evidence that a defendant received royalties and financial benefits [and] allowed the actual manufacturer to use its trademark or advertising network … [has] sufficed collectively to impose liability under the 'stream of commerce' standard." (*Taylor v. Elliott Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 564, 576.)

Finally, just as with the trial court in this case, *Allstate New Jersey* was decided in a time when there were no appellate-level opinions on the issue and when every lower court had decided in Amazon's favor. As discussed earlier, a more recent decision from the same district, *Papataros*, reaches the opposite conclusion as *Allstate New Jersey* and suggests the outcome in that case might have been different if the court had

the benefit of the intervening authorities undercutting Amazon's positions.

2. Amazon is also liable in negligence for failing to provide Ms. Bolger with a warning about the battery's dangers after uncovering that information

As noted at pp. 18-19, a few months after Ms. Bolger bought the battery, but before the battery exploded, Amazon suspended Lenoge's selling privileges because of several safety reports showing problems with its batteries. (2 AA 409-410, 413-414) A month later, but still before the explosion, Amazon permanently blocked Lenoge's account. (2 AA 408) Six months later, well after Ms. Bolger's horrible incident, Amazon finally notified its customers about the fire hazard. (1 AA 200-203, 2 AA 443-445, 450)

Because Amazon knew or should have known about the dangers posed by the battery well before Ms. Bolger was burned but failed to provide any kind of warning or notice to her, it is liable in negligence. "A supplier of a product, whether as manufacturer or seller, may have liability based on negligence where he knows or has reason to know the product is dangerous for the use supplied and fails to exercise reasonable care to give warning of its dangerous condition." (*Rawlings v. D. M. Oliver, Inc.* (1979) 97 Cal.App.3d 890, 896.) This is consistent with holdings elsewhere finding Amazon potentially liable in negligence for failure to warn of product defects. (See *Fox*, *supra*, 930 F.3d at p. 427–428 (Amazon

potentially liable for failing to provide adequate warning about defective hoverboard); *Love v. Weecoo (TM)* (11th Cir. 2019) 774 Fed.Appx. 519 (same); *Great Northern Insurance Company v. Amazon.com, Inc.* (N.D. Ill., Aug. 20, 2019, No. 19 C 684) 2019 WL 3935038, at p. 3 (Plaintiff stated viable claims for negligent misrepresentation and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act in relation to sale of hoverboard that caused a fire).)

The wrinkle here is the evidence suggests Amazon did not learn of the battery's hazards until after it sold the product to Ms. Bolger. So, the issue becomes whether Amazon had a post-sale duty to warn.

California law supports that duty here. Several California decisions have stated a manufacturer's duty of care may continue after sale and distribution. (See *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 721 ("[N]egligence of a manufacturer may be established by a failure to act after the product has been distributed to its end user[.]"); *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 16 ("[A] duty to warn may also arise if it is later discovered that the product has dangerous propensities, and breach of that duty is a form of negligence."); *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1827–28 (finding a "failure to conduct an adequate retrofit campaign may constitute negligence"); see also *Rosa v. Taser Intern., Inc.* (9th Cir. 2012) 684 F.3d 941, 949 ("[T]hough California law measures the

strict liability duty to warn from the time a product was distributed, a manufacturer may be liable under negligence for failure to warn of a risk that was subsequently discovered.").

To date, no California case has extended the post-sale duty to warn to a seller such as Amazon. But other courts have. For example, in *Cover v. Cohen* (1984) 61 N.Y.2d 261, the court held "[a] manufacturer *or retailer* may, however, incur liability for failing to warn concerning dangers in the use of a product which come to his attention after manufacture or sale … through being made aware of later accidents involving dangers in the product of which warning should be given to users." (*Id.* at p. 274–275.)

Such a rule makes even more sense now, since Amazon sells products of unknown origin and is the only interface with the consumer, rendering it the appropriate party to provide product warnings after learning about safety hazards posed by its products. "As consumers are more connected to sellers in the internet age, the duty to warn may be enlarged." (*Trask v. Olin Corporation* (W.D. Pa., Mar. 31, 2016, No. CV 12-340) 2016 WL 1255302, at *10; see Bryant Walker Smith, *Proximity-Driven Liability*, 120 GEO. L.J. 1777, 1779, 1802-03 (2014) (discussing how rationales for limiting post-sale duties to warn may be reduced as commercial sellers have greater knowledge about the consumers who purchase their products and as consumer products are increasingly connected to larger digital networks). Lenoge clearly was not going to provide a

warning and could not even if it wanted to because only Amazon knows it customers' identities.

3. The Communications Decency Act does not shield Amazon because its liability is based on selling and distributing a defective product and is not predicated on the content of its website

The trial court here correctly held that Ms. Bolger's case against Amazon was not barred by the Communications Decency Act ("CDA") (2 AA 514) This is consistent with the great weight of decisions on that issue.

The Communications Decency Act provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." (47 U.S.C. § 230(c)(1).) The Act defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server," 47 U.S.C. § 230(f)(2), and "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." (47 U.S.C. § 230(f)(3).)

Courts that have considered this issue have uniformly found the CDA does not immunize Amazon for claims of selling defective products. (See, e.g., *Erie Insurance Company*, *supra*, 925 F.3d at p. 139–40 (CDA immunity

denied because "[t]he products liability claims asserted by Erie in this case are not based on the publication of another's speech"); *State Farm Fire and Casualty Company*, *supra*, 390 F.Supp.3d at p. 973–74 ("Amazon's active participation in the sale, through payment processing, storage, shipping, and customer service, is what makes it strictly liable. This is not activity immunized by the CDA."); *McDonald v. LG Electronics USA, Inc.* (D. Md. 2016) 219 F.Supp.3d 533, 537 ("to the extent that a plaintiff may prove that an interactive computer service played a *direct* role in tortious conduct—through its involvement in the sale or distribution of the defective product—Section 230 does not immunize defendants from all products liability claims").

As explained by the Fourth Circuit in *Erie*, the CDA is inapplicable because "[t]he underpinning of Erie's claims is its contention that Amazon was the *seller* of the headlamp and therefore was liable as the seller of a defective product." (*Erie Insurance Company*, *supra*, 925 F.3d at p. 139, emphasis in original.) Thus, the court noted, "[t]here is no claim made based on the *content of speech published* by Amazon—such as a claim that Amazon had liability as the publisher of a misrepresentation of the product or of defamatory content." (*Ibid.*, emphasis in original.)

Motion for Judicial Notice Combined.pdf

These holdings are consistent with public policy and common sense. Amazon's expansive and unjustified reading

of the CDA would render its unlawful conduct "magically ... lawful when [conducted] online," thus giving Amazon "an unfair advantage over [its] real-world counterparts." (*HomeAway.com, Inc. v. City of Santa Monica* (9th Cir. 2019) 918 F.3d 676, 683, quoting *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1164 and fn. 15 (9th Cir. 2008) (*en banc*).) This would create a perverse incentive for brick-and-mortar retailers to immediately move all product sales online to avoid strict product liability *en masse*. If Target could be held strictly liable for products sold in stores but not online, why would it keep any of its stores open? The Communications Decency Act was not meant to "create a lawless no-man's-land on the Internet." (*HomeAway.com, Inc.*, *supra*, 918 F.3d at p. 683.)

There is no reason to depart from those holdings here. Giving Amazon a free pass for selling dangerous goods online just because the product manufacturer creates the product descriptions would allow Amazon to "do[] online what it may not lawfully do offline[,]" *Fair Housing Council of San Fernando Valley*, *supra*, 521 F.3d at p. 1162, and create a blueprint for mass evasion of the law.

Conclusion

Whether a "marketplace facilitator" is strictly liable for products sold through its website is one of the most important

product liability issues since the creation of the doctrine nearly 60 years ago. And while that determination can sometimes involve difficult questions of fact and law, in this case it does not. Amazon did everything here, including advertising the battery, acting as the sole interface with Ms. Bolger, storing the battery in California, shipping it to a California address, processing payment (keeping 40% of the proceeds for itself), suspending and then banning the supplier over product safety concerns, and warning Ms. Bolger (far too late, unfortunately) not to use the battery. Amazon also protected itself with an indemnity clause but failed to protect Ms. Bolger by allowing Lenoge to list its products under a fake name and without an agent for process in the United States. Under established California product liability law and the social policies supporting it, that is enough to hold Amazon liable, and the trial court erred in concluding otherwise.

There are also triable issues of fact as to whether Amazon is liable in negligence for failing to provide a timely post-sale warning. The evidence shows Amazon knew about the dangers posed by Lenoge batteries but did not take any action until it was far too late.

Dated: September 27, 2019 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 13,208 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 September 27, 2019, I caused to be served the following document(s): Appellant's Opening Brief, Certificate of Interested Entities, and Appellant's Appendix on the interested parties in this action addressed as follows:

Julie L. Hussey, Esq.
Julian Feldbein-Vinderman, Esq.
Perkins Coie LLP
11452 El Camino Real, Suite 300
San Diego, CA 92130-2594

[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 September 27, 2019, I also caused to be served the following document(s): Appellant's Opening Brief on the interested parties in this action addressed as follows:

Superior Court, County of San Diego
Honorable Randa Trapp
330 West Broadway
San Diego, CA 92101

[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 September 27, 2019, at San Diego, California.

/S/ Jeremy Robinson
JEREMY ROBINSON