IN THE SUPREME COURT OF OHIO

Case No. 2019-0488

On Appeal from the Ninth District
Court of Appeals, Lorain County
Case No. 17-CA-011215

DENNIS STINER
Administrator of the Estate of Logan James Stiner
Plaintiff-Appellant

v.

AMAZON.COM, INC., *et al.*
Defendants-Appellees

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INTRODUCTION

What appellant Dennis Stiner, Administrator of the Estate of Logan James Stiner, ("Stiner") seeks from this Court is the modern application of existing product liability law to the practical realities of Amazon's dominant role in the consumer marketplace and the egregious facts of this case. The question before the Court is whether Amazon can be held liable under Ohio's product liability laws as a "supplier" of a deadly pure caffeine powder where Amazon recommended that product to an unsuspecting teenage consumer and played a controlling and indispensable role in its sale.[1] Legislatures, through the passage of laws, and courts, through the application of those laws, seek to safeguard consumers from dangerous products placed in the stream of commerce. Product liability laws are intended to compensate victims of defective products, incentivize safety, prevent the circulation of dangerous products, and shift the risks of defective products away from injured consumers to entities that can spread the costs of such injuries. In determining supplier status, courts must look to those factors and, in this case, the lower courts erred in failing to so.

This case arises from the tragic death of a promising 18-year old high school senior, Logan Stiner, who died after ingesting a deadly pure caffeine powder that a teenage friend, "K.K.," purchased from Amazon.com. K.K. visited Amazon.com to find a workout supplement and searched for a "preworkout" product. Amazon's recommendation algorithm (A-9) directed her to the deadly Hard Rhino pure caffeine, which she purchased and shared with Logan, with fatal consequences.

All of the purposes underlying Ohio's product liability laws would be served by holding Amazon liable as a supplier of the deadly caffeine powder. The idea that Amazon cannot be a

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[1] "Amazon" refers collectively to defendants-appellees Amazon.com, Amazon Fulfillment Services, Inc., Amazon Web Services, Inc., and Amazon Web Services, LLC.

"supplier" because it did not physically touch or take title to the product at issue ignores both the manner in which e-commerce is conducted today and Amazon's crucial role in recommending the deadly powder. Stiner asks this Court to acknowledge the changed dynamics of the consumer marketplace and apply exiting law accordingly. Holding Amazon to be a supplier would serve the purposes of Ohio's product liability laws and is appropriate given Amazon's indispensable role in placing the deadly powder into the stream of commerce.

Amazon's business model has changed the dynamics of the marketplace and the country's most valuable retailer should not be permitted to shield itself from liability where it recommends a deadly product and completely controls the conditions of its sale. Ohio product liability law, developed when brick and mortar stores dominated, must be applied in the modern e-commerce context, which Amazon dominates. Here, Amazon controlled all aspects of the sale in question and recommended a deadly product to a teen who simply sought a pre-workout. Ignoring overwhelming evidence to the contrary and applying outmoded analysis, the lower courts erroneously deemed Amazon a neutral platform with no capacity to protect the consumer. If the policy factors underlying Ohio products liability law are applied to determine supplier status – as they must be - Amazon plainly should be held to be a supplier of the deadly powder. The lower courts erred in failing to do so and their decisions should be reversed.

STATEMENT OF FACTS

At the time of his death on May 27, 2014, Logan Stiner, a straight A student and wrestler, was a senior at Keystone High School in LaGrange. (R 355 at 30.) "K.K." was Logan's friend and classmate. (R 189 at 6-12.)

On February 27, 2014, K.K. went to Amazon.com to look for a "pre-workout." (Id. at 11-12.) K.K. was an Amazon customer who trusted Amazon and believed that products she purchased on Amazon.com would be safe to use and share. (Id. at 7-8.) She typed in "pre-

workout" into Amazon's search engine and Amazon recommended "Hard Rhino Pure Caffeine." (Id. at 11-12.) "I'm pretty sure I clicked on a pre-workout, and underneath it will say "products you may like at the bottom, and that was one of them." (Id.) K.K. had never heard of Hard Rhino or pure caffeine. (Id.) Using an Amazon gift card and her mother's Visa, K.K. purchased the Hard Rhino powder Amazon had suggested. (Id.) The entire transaction took place on Amazon.com. K.K. had no contact with Hard Rhino and Amazon did not direct her to a Hard Rhino website. (Id.)

K.K. went to Amazon.com because she trusted that Amazon would direct her to and sell her safe products. (Id.) She relied on Amazon in purchasing a product Amazon recommended. (Id.) She believed she was purchasing the powder from Amazon. (Id.) [redacted]

A. The Deadly Pure Caffeine Powder and Logan's Death

The pure caffeine powder K.K. purchased originated from CSPC Pharmaceutical ("CSPC"), a company based in China.[2] ("CSPC"). After production, the powder was imported by Green Wave Ingredients, Inc. and provided to an Arizona-based company, Tenkoris, LLC ("Tenkoris"). (R 160 at 32-33.) Tenkoris packaged the powder and posted it on Amazon.com under the name "The Bulk Source." (R 282 at 19, 40, 46, 88.)

The powder was extremely dangerous; just a small amount can result in caffeine toxicity. Caffeine toxicity may result in seizure, heart arrythmias, and death. (R 349 at 2.) One teaspoon can cause serious injury or death. (Id.; *see also*, R 351, Exhibit 9 at 17-18.) The powder is an adulterated dietary supplement because it presents a significant or unreasonable risk of illness or

[2] Despite extensive efforts, Stiner has been unable to perfect service on CSPC.

injuries under the conditions of recommended or suggested use. (R 351, Exhibit 9 at 18-19.) Here, the 500 grams of pure caffeine powder that K.K. purchased were not mixed with filler or encapsulated into dosages. (Id. at 48, 111, 115-116.) No measuring device was provided. (Id.; Id. at Exhibits 12, 13.)

On May 27, 2014, K.K. poured some of the powder into a bag and gave it to Logan. (R 189 at 36-37.) Later that day, Logan's brother returned home and found Logan unresponsive. He was pronounced dead at the scene. (R 353, Exhibit J at 2.) The Coroner concluded, "The cause of death ... is cardiac arrythmia and seizure due to acute caffeine toxicity due to excessive caffeine ingestion." (Id.)

Following Logan's death, the Food and Drug Administration (FDA) warned consumers to avoid pure caffeine powder because "very small amounts may cause accidental overdose" ... "it is nearly impossible to accurately measure ... with common ... tools and you can easily consume a lethal amount." (R 361, Exhibit 2.) [redacted]

B. Amazon Controls the Sales Process and Plays an Indispensable Role in Sale of the Powder

Amazon's business strategy is to attract the highest number of customers. (R 369, Exhibit 4.) [redacted] Amazon strictly limits third-party vendors' interactions with Amazon's on-line customers. When an order is shipped, Amazon, not the third-party vendor, notifies the customer. (R 282 at 32-33.) In no uncertain terms, Amazon told Tenkoris' Ken Olcher not to contact Amazon customers:

> Oh, we got in big trouble one time for trying to track – or contact Amazon customers with tracking information directly from our accounts. We were told: Do not under any circumstances contact Amazon customers directly, even with tracking information.

(Id.)

Through its Business Solutions Agreement ("Agreement") with third-party vendors, Amazon exerts complete control over the vendors, products, and website. It is undisputed that the Agreement expressly provides that Amazon has the right in its sole discretion to determine the content, appearance, design, functionality and all other aspects of the Amazon Site and the Selling on Amazon Services (including the right to re-design, modify, remove and alter the content...and prevent or restrict access...) (R 120, Exhibit 1 at ¶S-7.) Amazon has the right "to delay or suspend listing of, or refuse to list, or to de-list, or to require you not to list, any and all products in our sole discretion." (Id.) [redacted]

In the Agreement, Amazon places restrictions on the selling prices and every other term of offer or sale. The price of a product sold on Amazon must be the same price or better than the vendor's price for the same product on any other sales channels it may utilize. (R 120, Exhibit 1, at ¶S-4.) In other words, Amazon is involved in pricing of products. Under the Agreement, it can require a vendor such as Tenkoris to lower its listed price for a given product to provide "most favored nation" status to Amazon customers. Amazon may also suggest lower prices to vendors.

Through the Agreement, Amazon imposed strict conditions and controls on Tenkoris. If it determined that Tenkoris' actions could lead to customer complaints or claims, Amazon reserved the right, in its sole discretion, to "delay initiating any remittances and withhold any payments to

be made or that are otherwise due..." (R 120, Exhibit 1 at ¶7.) Tenkoris testified that Amazon has withheld roughly $30,000 from Tenkoris. (R 282 at 96.) Amazon reserved the right to impose transaction limits on vendors, including Tenkoris, relating to the value of any transaction, the cumulative value of all transactions, and the number of transactions per day or other period of time. (R 120, Exhibit 1 at ¶7.) Amazon further required Tenkoris to provide to Amazon information about shipping and order status and tracking and directed Tenkoris to "not send customers emails confirming orders or shipments" of its products. (Id. at ¶S-2.1.) Amazon required Tenkoris to indemnify it for any personal injury, death, or property damage related to products sold. (Id. at ¶6.) Amazon reserved the right to terminate or suspend the Agreement immediately "for any reason at any time." (Id. at ¶3.) Amazon further reserved the right to amend the Agreement at any time and at its sole discretion, with the vendor's continued use of Amazon's services being considered acceptance of the amendments. (Id. at ¶16.) Amazon had sole discretion, in their contract with Tenkoris, to determine what could be sold on its website. (Id. at ¶S-7.)

In this case, through the Agreement, Amazon agreed that, for a fee, it would list, merchandise, and promote the caffeine powder. [redacted] R 282, Exhibit 15 at ¶S-1.2.) [redacted] K.K. did not know about Hard Rhino or pure caffeine powder until Amazon directed her to it as a "product you may like." (R 189 at 11-12.) [redacted]

[redacted]

Further, to build customer trust in Amazon, Amazon provides its customers with an "A to Z" guarantee covering transactions with third-party vendors:

> The A to Z guarantee is one of the benefits to a customer shopping on Amazon. If they're purchasing from a third party that they may not know or may never have purchased from before, it allows them to have confidence that if they don't get the product that they ordered or if there's some problem with the transaction, Amazon is going to stand behind it.

(Id. at 165-166.)

Stiner's expert Robert D. Hamilton, III, a business professor who has taught the Amazon model in his MBA classes for years, concluded that Amazon "clearly participated" in placing the powder in the stream of commerce:

> Amazon handled the entire sales transaction including: promoting, merchandising and offering the HRPC; providing the "check out" process; accepting and processing payment; Amazon was the merchant of record for the credit card transaction; directed the HRPC delivery to [K.K.'s] house in Elyria, Ohio. In short, Amazon clearly participated in placing the HRPC into the stream of commerce. [K.K.] testified that Amazon was the seller and based on Amazon's actions and its business model it is my opinion that Amazon was the seller. [K.K.] had no contact with and never heard of The Bulk Source or Tenkoris. This online retail transaction is the same transaction if [K.K.] had walked into a local retail store such as GNC. [K.K.] went into the store and asked for a pre-workout and the sales associate recommended a couple of products. After looking over the recommendations [K.K.] makes a decision to purchase and places the product in her shopping cart then proceeds to the cashier and pays for the product... Amazon's business model does much more than "just provide a platform" for the sale of HRPC ... [C]learly Amazon participated in and sold the HRPC on February 27, 2014 to [K.K.]. Amazon actions placed the product (HRPC) into the stream of commerce.

(R 317, Exhibit C, at 13.)

The Business Solutions Agreement demonstrates that Amazon reserves to itself and exercises sole discretion over the content and the manner in which a product is described, listed,

and advertised for sale. Amazon controls the terms under which the sale occurs, collects the purchase price and shipping costs, and, after deducting its fee, distributes the net proceeds to the third-party vendor.

C. Amazon Identifies But Does Not Investigate or Remove Unsafe, Dangerous Third-Party Products from Its Website

Rachel Greer served as Product Safety Manager at Amazon and was the "subject matter expert in all things compliance." (R 223 at 101-108.) [redacted]

[redacted]

D. Amazon's Business Model Prioritizes Profits Over Public Safety

[redacted] [redacted]

> [redacted]

[redacted]

> [redacted]

[redacted]

[redacted]

> [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

E. Customers Warn About the Deadly Pure Caffeine Powder, But Amazon Does Nothing

Prior to K.K. purchasing the caffeine powder from Amazon.com, multiple Amazon customers issued clear and disturbing warnings in customer reviews about the powder that killed Logan. [redacted] These are the exact reasons the FDA cited for its determination that this product violates the Dietary Supplement Health and Education Act (DSHEA) and the exact reasons that the FDA required Amazon (via email) to stop marketing and selling this unsafe and dangerous product.

While these comments should have triggered an investigation and a halt to sales of the caffeine powder, Amazon did nothing. [redacted]

F. The Trial Court Grants Amazon Summary Judgment and the Court of Appeals Affirms

Plaintiff-Appellant Stiner brought this wrongful death action against Amazon and other parties. Stiner alleged that Amazon marketed, promoted, and supplied the powder in violation of the Ohio Product Liability Act, O.R.C. §2307.71, *et seq.* ("OPLA") and Ohio's Pure Food and Drug Safety Law, O.R.C. §3715, et seq. ("OPFDL").

On March 1, 2017, Stiner and Amazon filed motions for summary judgment. (R 287, 289.) On September 20, 2017, the trial court granted Amazon's motion and denied Stiner's. (R 413, Appendix at 32-51.) The trial court described "Amazon's services" as "allowing the product to be uploaded to its marketplace" and stated that "Plaintiff has failed to demonstrate that the action of Amazon in this particular transaction, amounted to anything more than providing an online forum for the seller, Tenkoris, to peddle its caffeine powder." (R 413 at 9, Appendix at 40, emphasis in original.) Among other things, the trial court held, as a matter of law, that Amazon "was not a supplier and did not otherwise participate in placing the powder in the stream of commerce" and therefore was not liable under the OPLA. (R 413 at 10, Appendix at 41.) On October 17, 2017, Stiner appealed to the Court of Appeals for Lorain County, Ninth Appellate District. (Appendix at 1-4.)

On February 19, 2019, the Court of Appeals affirmed the decision of the trial court. (Appendix at 5-30.) Among other things, the Court of Appeals found that "Amazon was not in a reasonable position to safeguard against allowing this caffeine powder, as a potentially dangerous product, to enter the stream of commerce." (Id. at 21.) It further stated that, "Amazon merely provided a service and a platform for Tenkoris to offer and sell its product ... and ... displayed Tenkoris' listing for caffeine powder to customers searching for relevant products." (Id. at 21-22.) On April 4, 2019, Stiner appealed to the Ohio Supreme Court, which accepted the appeal. (Id. at 1-4.)

ARGUMENT

The courts below erred in concluding that Amazon was not a supplier of the caffeine powder under Ohio's Product Liability Act. As developed below, the courts failed to acknowledge Amazon's deep and indispensable role in recommending the deadly powder, controlling the terms of its sale, and placing it into the stream of commerce. The courts further erred in failing to apply the public policy factors underlying Ohio product liability law in determining Amazon's supplier status. Proper application of those factors demonstrates unequivocally that Amazon was a supplier of the deadly powder and that the decisions below should be reversed.

Proposition of Law No. 1:

> **Where an internet provider such as Amazon acts as more than a neutral platform for third-party sales and actively promotes the sale of a deadly product, courts must apply public policy considerations underlying Ohio's consumer protection laws, including incentivizing safety and shifting risk away from consumers, in determining supplier status.**

The question before this Court is whether Amazon can be held liable as a "supplier" under Ohio's product liability laws where it acts as more than a neutral platform, actively promotes a deadly product, introduces that product to a trusting teen consumer, and both controls

and plays an indispensable role in the product's sale. Courts in Ohio and other states have correctly looked to the public policy considerations underlying product liability laws to determine "supplier" or "seller" status. In this case, however, the courts below: (1) ignored overwhelming evidence of Amazon's controlling and indispensable role in the sale of the deadly caffeine powder; and (2) failed to apply public policy considerations that demonstrate unequivocally that Amazon should be deemed a supplier of that product.

Prior to K.K.'s purchase, Amazon received multiple warnings that the pure caffeine powder was deadly and could easily kill a user. [redacted] Yet, pursuant to its Agreement with the third-party vendor, Amazon recklessly listed and promoted the deadly powder and, using its A-9 algorithms, recommended it to a teen customer looking for a pre-workout.

Under the Ohio Product Liability Act, O.R.C. §2307.71, *et seq.* ("OPLA"), a company can be held liable, under certain circumstances, if it is a "supplier" of a defective product. The OPLA defines a "supplier" as:

> A person that, in the course of a business conducted for the purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce.

O.R.C. §2307.71(A)(15)

The critical phrase "otherwise participates in the placing of a product in the stream of commerce" is undefined. Without guidance from this Court, lower courts struggle in determining "supplier" status, particularly in the modern context of internet sales which Amazon dominates. Product liability laws were adopted at a time when the American economy, and retail sales, operated very differently than they do today. In considering Amazon's role in this sale, the lower

courts applied archaic rules of "title" and "possession" of a product. Yet, Amazon's business model has cut out the middleman and the need to take possession of a product and place it on the shelves of brick and mortar stores. Moreover, Amazon's business model is designed to allow it to exert maximum control over the sale of each product while simultaneously avoiding liability if those products are dangerous, defective, illegal, or deadly. Amazon has changed the traditional distribution chain and, with great care, developed a business model that avoids taking title to more than half the products sold on its Marketplace while profiting from commissions rather than traditional retail mark-ups.

In holding that Amazon was not a "supplier," the Court of Appeals relied on two cases completely unrelated to e-commerce and today's consumer marketplace - one involving a financial lender taking a security interest in a leased machine and the other involving a Junior Achievement chapter that re-sold go carts for an annual race. However, as discussed below, one Ohio court presciently applied the public policy considerations underlying product liability laws in determining "supplier" status and courts are increasingly taking that approach, recognizing the realities of internet commerce, and applying existing law to today's consumer marketplace. This Court should reverse the courts below, which failed to take that approach, and hold that the public policy considerations underlying Ohio's product liability laws must be applied in determining supplier status in the current retail market.

A. Amazon was not "neutral platform" in the sale of the deadly powder; it promoted the powder, introduced it to the teen customer, and played an indispensable role in its sale.

Throughout this litigation, Amazon has erroneously presented itself as a mere "neutral platform" for a third party's sale of the deadly caffeine powder. Ignoring overwhelming evidence to the contrary, the trial court stated, "...Plaintiff has failed to demonstrate that the actions of

Amazon ... amounted to anything more than providing an online forum for the seller..." (R 413 at 9.) Similarly, the Court of Appeals stated, "Amazon merely provided a service and platform for Tenkoris to offer and sell its product and, as part of that service, Amazon displayed Tenkoris' listing for caffeine powder to customers searching for relevant products." (Appendix at 21-22.) In determining whether Amazon was a "supplier" of the powder, the Court of Appeals failed to acknowledge Amazon's indispensable role, including its recommendation of the deadly powder, or to apply the public policy considerations underlying product liability law.[3] It is clear that Amazon was the integral piece of the transaction at issue; it recommended the powder, caused it to be distributed to K.K., and placed it into the stream of commerce.

Remember, K.K. was a teenager who simply went on Amazon.com to find a pre-workout. She had never heard of pure caffeine powder or Hard Rhino. K.K. only learned of the powder because Amazon, which owns and uses sophisticated algorithms, recommended it to her as a "product you may like." Through its Business Solutions Agreement, Amazon agreed to list, promote and merchandise the product; the more product that was sold, the more Amazon's profits increased. [redacted] In short, Amazon was not "neutral" – it played an indispensable role in linking K.K. to the deadly powder.

[3] In minimizing Amazon's role, the Court of Appeals suggests that Amazon was merely directing customers to "relevant products." But Amazon was not neutrally listing the powder; pursuant to its Agreement, it was actively promoting the deadly powder as "a product you may like." Moreover, a deadly pure caffeine powder is not a "relevant product" for a teen seeking a workout supplement. Had it done its due diligence, Amazon would have known that.

While Amazon's tight control over the sales process is discussed further below, certain aspects of that control particularly demonstrate its non-neutrality. Amazon considered visitors to Amazon.com to be Amazon customers, even if they were purchasing products third-party products. K.K.'s entire purchase transaction was completed on Amazon.com. Amazon walled off contact between Tenkoris and K.K. and prohibited Tenkoris from contacting K.K. directly. Amazon processed the payment, accepted an Amazon gift card as part of that payment, [redacted] and directed the delivery of the powder to K.K.'s house.

One impact of that tight control was to magnify the "Amazon brand" and Amazon's ability to influence K.K.'s purchasing decision. She believed she was dealing with Amazon and Amazon encouraged her in that belief. K.K. had never heard of the Bulk Source or Tenkoris. But she had heard of Amazon and she trusted Amazon to sell her products that were safe to use and share. In other words, by controlling the sales process, restricting contact between its customers and third-party vendors, and using its influence to promote the powder, Amazon played an indispensable role in selling the powder to K.K. and placing it in the stream of commerce.

As stated by Stiner's expert Robert Hamilton, "This online transaction is the same transaction if [K.K.] had walked into a local retail store such as GNC. [K.K.] went into the store and asked for a pre-workout and the sales associate recommended a couple of products." (R 317, Exhibit C at 17.) Hamilton's conclusion is that "Amazon's actions placed the product (HRPC) in the stream of commerce." (Id.)

B. The lower courts should have applied the public policy considerations underlying product liability laws in determining Amazon's "supplier" status.

Again, the OPLA defines a "supplier" as:

> A person that, in the course of a business conducted for the purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce.

O.R.C. §2307.71(A)(15)

By its plain language, the OPLA extends liability as a "supplier" beyond those who formally transfer title to a product; entities that "prepare, blend, package, or label" a product do not necessarily transfer title to it. Moreover, the broad catch-all phrase "or otherwise participates in the placing of a product in the stream of commerce" suggests an expansive definition. This is especially relevant given the changing dynamics of e-commerce and the modern retail marketplace. Courts interpreting terms such as "supplier' and "seller" in the product liability context have extended their application beyond those who formally transfer title. *See, e.g., Fox v. Amazon, Inc.*, 930 F.3d 415, 422-425 (6th Cir. 2019) (Term "seller," as used in Tennessee product liability law, is not limited to individuals or entities that transfer title to a product); *Welch Sand & Gravel v. O&K Trojan* ("*Welch*"), 107 Ohio App.3d 218, 227-228, 668 N.E.2d 529 (1st Dist. 1995) (Term "supplier," under Ohio product liability statute, extends beyond an exchange of title to include bailors, lessors, consignors, and consignees.)

More importantly, in defining the scope of terms such as "supplier" and "seller" in this context, courts have looked to the public policy considerations underlying product liability laws. In *Welch, supra*, in applying identical "stream of commerce" language, the Court of Appeals for Hamilton County stated that "the clear public policy behind the products liability statute is to shift the risk of product-related injury away from the product consumer." *Welch,* 107 Ohio App.3d at 228, 668 N.E.2d 529. In *Welch*, plaintiff brought products liability claims against Brandeis Machinery, which offered a used loader for sale at an auction under a consignment agreement. Reasoning from the public policy underlying the product liability law, the Court

found that, even in its limited capacity as consignee, Brandeis "otherwise participated" in placing the product in the stream of commerce:

> In each of the situations cited by the *Anderson* court, the "seller" derived a benefit from the "sale," and ... was in a better financial and technical position than the user to ensure against risk from defects. ... Brandeis clearly derived a benefit from the sale of the loader under the consignment agreement. While we can agree that a bailor, lessor, or consignor is in a better financial and technical position than the user to ensure against risk, the rationale is less clear when applied to consignees. Therefore, the policy rationale behind the decision in *Anderson* is not as strong when applied to these facts ... nevertheless, under the statute we merely inquire whether Brandeis facilitated the placing of the product in the stream of commerce to determine whether Brandeis was a supplier.
>
> In its very limited capacity as consignee, Brandeis facilitated the sale of the loader to Welch. While it is a long reach to include a consignees of the used goods in the definition of "supplier," the clear public policy behind the products liability statute is to shift the risk of product-related injury away from the product consumer ...By making the loader available at auction, Brandeis participated in placing the loader in the stream of commerce. Therefore, Brandeis is a supplier under the broad definition in R.C. 2307.71(O)(1).

(Id. at 228 (citing *Anderson v. Olmsted Util. Equip., Inc.*, 60 Ohio St.3d 124, 573 N.E.2d 626 (1991))

In *Welch,* the Court of Appeals for Hamilton County indicated that, pursuant to public policy, seller or supplier status is appropriately imposed on those, like Amazon, who derive a benefit from the sale and are in a better position to ensure against risks.[4] (Id.)

In *Anderson v. Olmsted Util. Equip., Inc.*, 60 Ohio St.3d 124, 573 N.E.2d 626 (1991), addressing the pre-statute context, the Ohio Supreme Court focused on the policy reasons underlying strict liability in rejecting the argument of a company that rebuilt an aerial device that failed that strict liability did not apply because it did not actually sell the device. This Court stated that, "Not only does Olmsted's proposition ignore the realities of modern day business

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[4] Despite finding Brandeis a "supplier," the court in Welch ultimately granted the company summary judgment because plaintiffs could not establish their liability claims. (Id. at 229-230.)

transactions, but it is also contrary to the underlying policy reasons for which strict liability was adopted." (Id. at 127-128.) The Court further noted that "Comment c" to Section 402A of the Restatement of Torts, which states that "public policy demands that the burden of accidental injuries caused by products ... be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained," "supports the extension of strict liability to situations other than sales." (Id. at 128.) The Court noted with approval an Indiana appellate court's statement that, "To limit the rule [of strict liability] to only those situations in which there has been an actual sale would be to circumscribe the rule to such an extent that its purpose might be defeated." (Id.)

The only case the trial court cited in support of its decision - *Inman v. Technicolor USA, Inc.,* U.S. Dist. Case No. 11-666, 2011 WL 5829024, 2011 U.S. Dist. LEXIS 133220, *18-19 (W.D. Pa. 2011) – actually supports Stiner's position that the public policy considerations underlying product liability laws must be applied in determining "supplier" status. In *Inman,* plaintiff alleged that, under Pennsylvania law, eBay was the "seller" of defective vacuum tubes purchased on line. In dismissing *without prejudice* plaintiff's bare-bones complaint, the court, in *Inman,* stated that plaintiff had not alleged "any other facts to suggest that holding eBay responsible would incentivize safety ... or that eBay is in a better position than Inman to prevent the circulation of such defective vacuum tubes." *Id.* at *19. Incentivizing safety and preventing the circulation of defective products are two of the policy factors underlying product liability laws! In other words, the court indicated that, by providing more details, the *Inman* plaintiff could cure his pleading and that policy factors Stiner says must be considered – incentivizing safety and preventing the circulation of defective products – should be applied in determining

"seller" status. And, as demonstrated below, if those and other relevant factors are applied in this case, Amazon is plainly a "supplier" of the deadly powder.

See also, Samuel Friedland Family Ent. v. Amoroso, 630 So.2d 1067, 1068 (S.Ct. Fla. 1994) (Applying strict liability to a commercial lessor and a hotel from which a sailboat was leased, the Supreme Court of Florida notes that the "underlying basis for the doctrine of strict liability" is that those entities within a product's distributive chain, rather than an innocent injured person, should bear the financial burden because they can better ensure the safety of the products they market.")

Welch, Inman, and Friedland all indicate that the public policy considerations underling product liability laws must be applied in determining "supplier" status. In *Musser v. Vilsmeier Auction Co., Inc.*, 562 A.2d 279 (S.Ct. Pa. 1989), in determining whether an auction house was a "seller" under Section 402A of the Restatement (Second) of Torts, the Supreme Court of Pennsylvania made clear that courts later tasked with determining whether an actor is a "seller" should consider whether the following four factors apply:

1. Whether the actor is the only member of the marketing chain available for redress;
2. Whether imposition of strict liability upon the actor serves as an incentive to safety;
3. Whether the actor is in a better position than the consumer to prevent the circulation of defective products; and
4. Whether the actor can distribute the cost of compensating for injuries resulting from defects by charging for it in his business.

See, Musser, 562 A.2d at 282.

While, in *Musser*, the Court determined that the underlying purposes would not be served by holding the auction house liable, the Court first applied the public policy considerations underlying product liability laws and then considered whether those purposes would be served by holding the party liable. The point is that the public policy considerations must be applied.

And, as discussed below, application of those considerations demonstrates unequivocally that the policies underlying Ohio's product liability laws would be served by holding Amazon liable as a supplier in this case.

Further, the analytic framework established by *Welch* and *Musser* has been applied by courts specifically considering Amazon's liability in this context. In *State Farm Fire and Casualty Company v. Amazon.com, Inc.*, 390 F.Supp.3d 964 (D. Wisc. 2019), a subrogated insurer brought a products liability action against Amazon after an insured's home flooded due to a defect in a faucet adapter manufactured in China and sold on Amazon.com. In determining whether Amazon would be considered a "seller" of the adapter under Wisconsin law, the federal court immediately looked to the purposes underlying strict product liability laws.

> The strict product liability doctrine is based on a policy determination that, even without a showing of fault, it is appropriate to allocate the cost of defective products to the manufacturer rather than the injured party. The essential principles underlying the doctrine are that the manufacturer can adjust the price of the product to reflect the risks posed by the product and that such cost-shifting will provide the manufacturer an incentive to improve safety.

Id. at 968 (citation omitted.)

The court noted that "Wisconsin product liability law is broadly remedial, and not limited to a narrow, specifically defined class of defendants." Id. at 970. It further cited *Kemp v. Miller*, 453 N.W.2d 872 (S.Ct. Wisc.1990), where the Wisconsin Supreme Court found that the lessor of an automobile could be held strictly liable because "a lessor, like a seller, bears responsibility for putting a defective product into the stream of commerce" – the very phrase at issue in the present case.

> Kemp contended that the concept of "seller" should be construed more broadly to effectuate the purposes of the strict liability doctrine. The Supreme Court agreed with Kemp, reasoning that a lessor, like a seller, bears responsibility for putting a defective product in the stream of commerce. The *Kemp* court explained that lessors and sellers are similar in material ways: (1) both sellers and lessors

> "introduce potentially dangerous instrumentalities into the stream of commerce;" (2) like sellers, lessors are in a better position than the end user to allocate the cost of product dangerousness by purchasing insurance or adjusting the price of the lease; and (3) both sellers and lessors implicitly represent that their products are safe by advertising them and providing them to market." ... *Kemp* lays to rest Amazon's argument that under Wisconsin law a formal transfer of ownership is required to hold an entity strictly liable for a defective product.

(Id. at 971-972 (citations omitted.))

Acknowledging that Wisconsin would not hold an entity that played "only a peripheral role" strictly liable, the court in *State Farm* held that, under the facts of that case, Amazon "was so deeply involved in the transaction" that it would be held strictly liable and that, "Like the lessor in *Kemp,* Amazon bears responsibility for putting the defective product into the stream of commerce ... and Amazon is well positioned to allocate among itself and third-party sellers the risks that products sold on Amazon.com would be defective." (*Id.* at 966 and 973.) The court determined that Amazon was deeply involved in the transaction. Among other things, Amazon reserved the right to refuse to sell any product; Amazon was in a position to halt the flow of defective products of which it became aware; Amazon took steps to protect itself by requiring the third-party vendor to indemnify Amazon. (Id. at 972.) Amazon also implicitly represented that the product was safe by listing it for sale among its own products and expressly guaranteeing timely delivery in good condition. (Id.) And, under Amazon's A-Z guarantee, Amazon agreed to process returns and refunds if the third-party vendor did not respond. (Id.) In the present case, as discussed below, Amazon was so deeply involved in the transaction that, as in *State Farm*, it should be found to be a supplier of the powder and strictly liable.

In *Fox v. Amazon.com, Inc.*, 930 F.3d 415 (6th Cir. 2019), the Sixth Circuit also focused on the underlying purposes of product liability laws in considering whether, under the Tennessee's Product Liability Act ("TPLA"), Amazon was the "seller" of a hoverboard that

caused a house fire. The Act defined a "seller" as "any individual or entity engaged in the business of selling a product," including a distributor, lessor, or bailor. Declining to limit "sellers" to those who transfer title, the Sixth Circuit looked to the degree of control over a product exercised by a party in connection with the product's sale, noting that liability is contingent upon whether the product was defective or unreasonably dangerous when it left the party's control and that a breach of implied warranty can be maintained regardless of a transfer of title because "one party is in a better position to know and *control* the condition of the chattel." (Id. at 424 (citation omitted, emphasis in original.))

The Court noted that the foregoing construction "is consistent with the remedial purpose" of the TPLA." (Id.) "A primary purpose of [the TPLA] is 'to ensure that an injured consumer may maintain a strict liability action against whomever is most likely to compensate him for his injuries.'" (Id. (citation omitted).)

> In this case, Defendant [Amazon] is clearly the entity "most likely to compensate" Plaintiffs for their injuries. ... The third-party seller and manufacturer of Plaintiff Megan Fox's hoverboard, to whom Plaintiffs might otherwise look for compensation, appear to be judgment proof and unknown respectively. And Defendant certainly has the capacity to compensate Plaintiffs, as it accounts for 49.1% of all online retail spending in the United States, nearly more than all other online retailers combined, and generated $141.92 billion in product sales in 2018, including $13.38 billion in fees paid by third-party sellers in the fourth quarter alone. The combination of these two facts – Defendant's ability to facilitate the sale of goods by sellers who are functionally outside the reach of U.S. courts, and its online retail dominance – often drastically hinders the ability of consumers injured by defective or unreasonably dangerous products to receive compensation for their injuries.

(Id.)

The Court further noted that Amazon "also has the capacity to spur the manufacturing and sale of safer products in the future, which is a primary purpose behind the behind the doctrine of products liability in general." (Id.)

> That capability can indeed be seen in several of the facts of this case. Defendant required W2M to sign its BSA, which imposed various restrictions on W2M's ability to sell products on Defendant's marketplace. Defendant attempted to demand safety compliance documentation from third-party hoverboard sellers following initial reports of hoverboard fires and explosions. And Defendant eventually ceased all hoverboard sales on its marketplace worldwide.

(Id. at 424-425.)

In *Fox,* the Sixth Circuit concluded that plaintiffs, in that case, had not demonstrated that Amazon met the "sufficient control" test because they only showed that Amazon had obtained the initial payment for the hoverboard and handled all communications regarding the hoverboard.[5] In the present case, as demonstrated below, Amazon's level of control and role in the sale of the deadly powder dramatically exceeded that shown in *Fox* and should result in a finding that Amazon was a supplier of the deadly powder.[6]

The foregoing cases indicate that, in determining "supplier" status under Ohio's product liability laws, courts must apply the public policy considerations underlying those laws. The Court of Appeals failed to undertake that analysis, dismissing the *Welch* framework as inapplicable and ignoring compelling evidence that holding Amazon liable would incentivize safety. As set forth below, application of the policy considerations underlying Ohio's product

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[5] In *Fox*, the Sixth Circuit nevertheless reversed the summary judgment granted to Amazon on plaintiff's tort claims, noting that, under Tennessee law and the Restatement(Second) of Torts §§323 and 324A, a party who undertakes to render services necessary for the protection of a third person can be held liable for negligence in providing those services. The Court held that a question of fact existed as to whether Amazon, having issued a warning to the hoverboard purchaser, was negligent in doing so. *Fox*, 930 F.3d at 426-428. Here, an issue of fact exists as to whether Amazon, having undertaken to screen customer reviews, was negligent in doing so.

[6] While awaiting this Court's decision on its appeal, Stiner submitted as additional relevant authority the case of *Oberdorf v. Amazon.com Inc.,* 930 F.3d 136 (3d Cir. July 3, 2019), where the Third Circuit, applying the foregoing analysis and the public policy factors underlying product liability law, determined that Amazon was the "seller" of a defective dog collar under Pennsylvania product liability law. On August 23, 2019, in *Oberdorf v. Amazon.com Inc.,* 936 F.3d 182 (2019), the Third Circuit agreed to re-hear the preceding case *en banc* and therefore vacated the opinion and judgment that had been submitted to this Court.

liability laws shows clearly that Amazon should be deemed a "supplier" of the deadly caffeine powder. Such application would facilitate compensation, incentivize safety, protect the consumer, and spread the risk of injury away from the injured consumer – all essential purposes of product liability laws.

C. If the public policy considerations underlying existing product liability laws are applied to the modern consumer marketplace, Amazon is plainly a "supplier" of the deadly caffeine powder.

1. Amazon is the party most likely to compensate plaintiff; holding Amazon liable would incentivize safety; Amazon was in a better position to prevent the circulation of the deadly powder; and Amazon can readily distribute the costs of compensation.

Application of the public policy considerations underlying product liability laws, as directed by the cases above, demonstrates that Amazon should be held to be a supplier of the deadly caffeine powder. First, Amazon is the party most likely to compensate plaintiff, particularly to the full extent of the injury. In *Fox*, the Sixth Circuit found Amazon to be "the entity "most likely to compensate" Plaintiffs for their injuries," noting that Amazon accounts for 49.1% of all online retail spending in the United States and generated $141.92 billion in product sales in 2018. *Fox*, 930 F.3d at 424. The court further stressed that Amazon's retail dominance, combined with its ability to facilitate the sale of goods by sellers who are functionally outside the reach of U.S. courts, "often drastically hinders the ability of consumers injured by defective or unreasonably dangerous products to receive compensation for their injuries." (Id.)

One of the world's wealthiest companies, Amazon, in this case, facilitated and promoted the sale of a product originating in China and listed by a company of limited resources. Defendant CSPC, the original source of the caffeine powder, is based in China and, despite Stiner's extensive efforts at service, has proven beyond the reach of U.S. courts. Amazon is the defendant most likely to provide full compensation for the injuries to and death of Logan Stiner.

It would be inequitable and contrary to the purposes of the product liability laws to allow Amazon, which played an indispensable role in the sale of the powder product and which has nearly unlimited resources, to disclaim responsibility and leave appellant Stiner to seek compensation from those beyond the reach of the courts or with more limited resources. This factor favors finding Amazon a supplier of the powder.

Second, the imposition of liability on Amazon unquestionably would serve as an incentive to safety. [redacted] Imposition of legal liability plainly would provide Amazon with incentive to protect the consumers and the public from dangerous and defective products. In the words of *Inman*, it would "incentivize safety."

[redacted]

Without the threat of legal liability, Amazon has no incentive to change and no reason to invest in safety measures that would protect consumers from unsafe and dangerous products. Without that exposure, Amazon need not devote resources to removing dangerous products; it need not develop more effective review policies; and it need not monitor and heed customer warnings about the dangers of products being sold on Amazon.com. The threat of liability – particularly where Amazon recommends a deadly product like pure caffeine powder – is a powerful and obvious incentive to implement safety measures and undertake due diligence.

In *Fox*, moreover, the Sixth Circuit found that Amazon "also has the capacity to spur the manufacturing and sale of safer products in the future, which is a primary purpose behind the doctrine of products liability in general." *Fox,* 930 F.3d at 425. The court noted the powerful restrictions Amazon places on third-party sellers through its Business Solutions Agreement and Amazon's ability, which it has exercised repeatedly, to remove dangerous products from Amazon.com. This factor overwhelmingly favors holding Amazon liable as a "supplier."

Third, Amazon is plainly in a better position than the consumer to prevent the circulation of dangerous products. Amazon decides what products can be sold on its marketplace. [redacted]

[redacted]

Amazon is also uniquely positioned to receive and monitor customer reports of defective products, which in turn can lead to such products being removed from circulation. Through its Business Solutions Agreement, Amazon tightly restricts contact between its customers and third-party vendors and thereby limits the capacity of those vendors to receive and act upon negative customer feedback. [redacted] Consequently, Amazon failed to act on multiple customer warnings about the lethality of the caffeine powder at issue in this case.

The present case powerfully demonstrates that Amazon is in a far better position than the consumer to prevent the circulation of the deadly caffeine powder. K.K. was a teenager seeking a workout supplement product; she had never even heard of pure caffeine powder until Amazon's search engine recommended it to her. By contrast, Amazon, with its vast resources, had the capacity to do due diligence before recommending the powder. Moreover, through customer reviews, Amazon had received multiple graphic warnings that the powder was dangerous and could kill. One customer stated, "[I]f you overdose (only takes a gram or two) you can die...;" another: "REALLY COULD KILL YOU;" another: "The lethal does is 8 grams. This is 500 grams. Enough to kill 62.5 of me." Based on its resources and the Business Solutions

Agreement, Amazon is in the best position to act on such warnings and halt the flow of defective goods.

Ohio consumers have little or no capacity to prevent the circulation of dangerous products; many, like K.K., trust Amazon to only list and sell safe products. Third-party vendors are affirmatively restricted by Amazon in interactions with customers; they may never hear of customer complaints and may have little capacity or incentive to look for or act upon them. (For example, Tenkoris, based in Arizona, apparently was a small LLC with few resources.) By contrast, Amazon receives the customer complaints; it has the resources to screen them; and it has the capacity to prevent the circulation of products it learns, through those reviews or otherwise, are dangerous. The impotence of consumers is demonstrated by the fact that, in this case, their dire warnings were ignored. This factor strongly favors holding Amazon liable as a supplier.

Finally, Amazon can readily distribute the costs of compensating for injuries caused by dangerous products sold on its website. Few companies have a greater capacity to do that than Amazon, one of the wealthiest companies on the planet. Its retail dominance, the sheer volume of its transactions, and its capacity to impose conditions on third-party vendors all offer avenues for Amazon to distribute the costs of compensating for injuries caused by dangerous and defective products. *See, State Farm Fire and Casualty Company v. Amazon.com, Inc.*, 390 F.Supp.3d at 971-972. In fact, Amazon is perfectly positioned to allocate among itself and third-party vendors the risks of defective products. This is the cost distribution envisioned when product liability laws were developed, with the intent of shifting the risk away from the injured consumer and on to entities, like Amazon, with the ready capacity to distribute that risk. This factor also weighs heavily in favor of holding Amazon liable as the supplier of the powder.

In this case, the lower courts failed to undertake the foregoing analysis. The Court of Appeals dismissed *Welch*, saying that Amazon's role here was more akin to the auctioneer there, even though the auctioneer's role was not even described in *Welch*. Moreover, unlike Amazon, an auctioneer typically does not have an ongoing relationship with a seller, does not control the seller and sale through an elaborate Business Solutions Agreement, and is not in a position to receive and act upon customer reviews of a repeatedly sold product. The courts ignored, and failed to adapt to, the practical realities of the e-commerce marketplace that now dominates retail transactions.

Here, the Court of Appeals simply asserted that Amazon played a passive role. (Appendix at 21-22.) Yet, as demonstrated, Amazon played an active and indispensable role in the sale of the deadly powder. Similarly, against overwhelming evidence, the Court summarily dismissed any possibility that holding Amazon liable would incentivize safety. "...Stiner has not pointed to evidence to demonstrate that holding Amazon liable would incentivize safety. ...The facts demonstrate that Amazon was not in a reasonable position to safeguard against allowing this caffeine powder, as a potentially dangerous product, to enter the stream of commerce. ...Amazon merely provided a service and a platform ..." (Appendix at 21-22.)

All of the public policy factors underlying product liability laws, especially as applied in the modern e-commerce context, weigh in favor of deeming Amazon a "supplier" of the caffeine powder product. And, to the extent this Court conditions that liability on the extent of Amazon's involvement in or control of that transaction, that test is also met as Amazon controlled the process and played an indispensable role in that sale.

2. Amazon controlled and played an indispensable role in the sale of the caffeine powder.

In *Musser*, the Supreme Court of Pennsylvania held that the broadened concept of a "supplier" would not be applied where the purposes of the policy "will not be served" due to the entity's tangential role, as, for example, in the case of a financial lender.

> We note however that the broadened concept of "supplier," for purposes of predicating strict liability, is not without practical limits. The limits obtain in the purposes of the policy. **When those purposes will not be served,** persons whose implication in supplying products is tangential to that undertaking will not be subjected to strict liability for the harms caused by defects in the products. For example, though in *Francioni* we held that a lessor under the terms of a conventional or "true lease" is a supplier within the meaning of Section 402A, we distinguished the lessor under the terms of a lease intended as security or one designed solely for financing purposes.

Musser, 562 A.2d at 281 (citation omitted; emphasis added.)

Here, as demonstrated above, the purposes underlying Ohio's product liability laws unquestionably will be served by holding Amazon to be a supplier. Amazon is best positioned to compensate plaintiff; holding Amazon liable will incentive safety; Amazon was in a better position than the consumer to prevent circulation of the product; and Amazon can readily spread the costs of compensating those injured. That alone is sufficient to hold Amazon to be a "supplier" of the product and end the inquiry. In *Musser*, the Supreme Court of Pennsylvania only limited the broadened concept of a supplier where the purposes predicating strict liability would not be served by holding the entity liable. Here, those purposes plainly would be served by holding Amazon liable and this Court need look no further.

In *Fox*, the Sixth Circuit held that the Tennessee law's definition of "seller" "means any individual regularly engaged in exercising sufficient control over a product in connection with its sale, lease, or bailment, for livelihood or gain." *Fox*, 930 F.3d at 425. Amazon no doubt will note that, in *Fox*, the court ultimately was not convinced "on the record before us" that Amazon

exercised sufficient control over the hoverboard to be deemed its "seller" under Tennessee law. Yet, the *only* factors plaintiff was able to advance in that record were that Amazon had initially obtained payment for the hoverboard and had handled all communications with the purchaser. Id. In the present case, in addition to obtaining payment and handling communications, Amazon exercised many other indicia of control. Again, Amazon should be held to be a supplier under the *Musser* test alone because holding it liable will serve the purposes of Ohio's product liability laws. But, to the extent this Court applies the "sufficient control" test of *Fox*, Amazon should still be found to be a supplier because it exercised that control and was an indispensable party to the sale of the product.

In this case, Amazon obtained the initial payment, handled all communications, AND: agreed to merchandize and promote the caffeine powder; introduced and recommended that powder to K.K. as "a product you may like;" prohibited Tenkoris from contacting K.K. directly; controlled all aspects of the listing; completed the entire transaction on Amazon.com; [redacted] Amazon also provided an "A to Z guarantee" to customers purchasing third-party products. By treating all Amazon.com purchasers as Amazon customers and tightly controlling the entire sales process, Amazon built trust and encouraged the belief that customers were purchasing from Amazon. K.K. thought she was purchasing the product from Amazon and trusted Amazon to sell her a product safe to use and share.

In addition, through its Business Solutions Agreement, Amazon imposed strict conditions and controls on Tenkoris. If it determined that Tenkoris' actions could lead to customer complaints or claims, Amazon reserved the right, in its sole discretion, to "delay initiating any remittances and withhold any payments to be made or that are otherwise due..." (R 120, Exhibit

1 at ¶7.) Amazon reserved the right to impose transaction limits on sellers, including Tenkoris, relating to the value of any transaction, the cumulative value of all transactions, and the number of transactions per day or other period of time. Id. Amazon controlled the price of the product, requiring that it be the same or better than the price offered by Tenkoris on other sales channels. (Id. at ¶S-4.) Amazon required Tenkoris to indemnify it for any personal injury, death, or property damage related to products sold. (Id. at ¶6.) Amazon further reserved the right to terminate or suspend the Agreement immediately "for any reason at any time." (Id. at ¶3.) Amazon clearly exercised "sufficient control" over the transaction.

In *Fox*, moreover, the Sixth Circuit specifically noted that a breach of implied warranty can be maintained regardless of a transfer of title because "one party is in a better position to know and *control* the condition of the chattel." (Id. at 424, emphasis in original.) Here, Amazon received numerous customer warnings that the caffeine powder product was lethal and Amazon had the ability to prevent that deadly product from ever entering the stream of commerce. [redacted] Through the expansive control it gave itself in the Business Solutions Agreement, Amazon further had the capacity to unilaterally remove an unsafe product. Amazon plainly was in the best position to know and control the condition of the deadly powder. To the extent this Court looks to it, Amazon plainly meets the "sufficient control" test discussed in *Fox*.

In *Musser*, the Supreme Court of Pennsylvania indicated that an entity may be deemed a seller or supplier when, as here, to do so would serve the purposes underlying product liability laws. The Court stated that such status should not be extended where, as in the case of a financial

lender, those purposes would not be served. Rejecting the appropriate *Welch* products liability analysis and ignoring Amazon's role, the Court of Appeals below relied on two cases – *Long v. Tokai Bank*, 114 Ohio App.3d 116, 682 N.E.2d 1052 (2d Dist. 1996) (involving a financial lessor taking a security interest in a machine) and *Morris v. Junior Achievement of Northwest Ohio, Inc.*, 6th Dist. Lucas No. L-08-1420, 2009-Ohio-6340 (involving a charitable organization re-selling go-carts for an annual race) – where the purposes underlying product liability laws would not be served. By contrast, under the *Musser* test, holding Amazon liable in the present case would unquestionably serve the purposes of Ohio's product liability laws and therefore Amazon should be deemed a supplier. Should the Court consider the Fox "sufficient control" test, Amazon should also be deemed a supplier because it plainly exercised sufficient control and was an indispensable party to the sale of the powder.

D. The foregoing analysis is consistent with courts' recent treatment of Amazon and Apple in comparable contexts.

As set forth above, Amazon should be held to have been a supplier of the deadly caffeine powder because it recommended the powder and played a controlling and indispensable role in its sale and because the purposes of Ohio's product liability law will be served through that designation. Amazon no doubt will argue that, despite its recommendation, control, and indispensable role, the "true supplier" was the third-party vendor. Yet, adapting to the realities of modern e-commerce, courts have rejected Amazon's form over substance argument in comparable contexts.

In *Apple Inc. v. Pepper*, 139 S.Ct. 1514 (2019), for example, the United States Supreme Court rejected the argument that a commission-based retail model such as Amazon's insulates the "marketplace provider" from consumer lawsuits. In that case, Apple urged the court to dismiss an antitrust suit over iPhone "apps" sold through its App Store, arguing, as does

Amazon, that the third-party app developer that set the price of the app, not Apple, is the seller. (Id. at 1519-1520.) The Supreme Court rejected Apple's "who sets the price" rule as it "would draw an arbitrary and unprincipled line among retailers based on the retailers' financial arrangements with their manufacturers or suppliers." (Id. at 1522.)

The Court noted that "agreements between manufacturer or supplier and retailer may take myriad forms, including for example a markup pricing model or a commission pricing model." (Id.) Whether a hypothetical retailer "might pay $6 to the manufacturer and then sell the product for $10, keeping $4 for itself" or, in the alternative, list the product for the manufacturer and take a $4 commission on the sale, "everything turns out the same for the manufacturer, retailer, and consumer." (Id.) The Court declined to adopt a rule that "would allow a consumer to sue the monopolistic retailer in the former situation but not the latter." (Id.)

The Court further stated that, "Apple's line-drawing does not make a lot of sense, other than as a way to gerrymander Apple out of this and similar lawsuits." (Id. at 1522-1523.) Noting that the distinction between a markup and a commission is immaterial, the Court cited a leading antitrust treatise: "Denying standing because 'title' never passes to a broker is an overly lawyered approach that ignores the reality that a distribution system that relies on brokerage is economically indistinguishable from one that relies on purchaser-resellers." (Id. at 1523, citing 2A Areeda & Hovenkamp ¶345, at 183.) The Court concluded, "[I]t 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." (Id.) In short, the Supreme Court rejected a form over substance attempt to evade liability and that is consistent with the analysis Stiner urges this Court to adopt with respect to Amazon's indispensable role in the sale of the caffeine powder.

Similarly, in *Amazon Services, LLC v. South Carolina Department of Revenue*, Docket No. 17-ALJ-17-0238-CC (September 10, 2019) (Appendix at 52-105), the Chief Administrative Law Judge for the Administrative Law Court in South Carolina held that Amazon was a "seller" for purposes of South Carolina tax laws. In an exhaustive and helpful analysis that echoes the background set forth above, the Court reviews Amazon's controlling role vis-à-vis third-party vendors, noting, for example, how Amazon limits communications between vendors and customers, how the transactions are completed without leaving the page, how Amazon or an affiliate is listed on the customer's credit card statement, and how Amazon provides an A-Z Guarantee. (Id. at 55-64.)

The Court notes that although it "characterizes itself as a conduit for funds *after* a customer places and order," Amazon: restricts the types of communications merchants can have with Amazon.com customers; controls all information about Amazon.com customers; requires the use of an Amazon affiliate for payment processing; controls the flow of funds for all transactions and refunds; and provides the order confirmations and receipts for all purchases. (Id. at 80.) The Court flatly states: "In fact, contrary to Amazon Services contention, it is not just facilitating sales, it is consummating them." (Id. at 79.) The Court concludes:

> Indeed, during the entire transaction, the customer only interacts with Amazon Services. Amazon Services is the party present at the communication of the sale who accepts money from the customer in exchange for the product. Amazon Services' actions are not the actions of a simple payment processor but are the actions of someone who is in the business of selling.
>
> Based upon these conclusions and the fact that Amazon Services is the only party present at the consummation of the sale, I find Amazon Services is not merely a conduit or intermediary. Amazon Services' actions demonstrate that it is in the business of selling ...

(Id. at 80.)

These common sense decisions recognize Amazon's true role in transactions such as that involving the caffeine powder in this case. Moreover, the analysis Stiner urges this Court to adopt is consistent with the analysis of these cases, which further confirm that Amazon should be held to be a supplier of the caffeine powder.

Proposition of Law No. 2:

> **An internet provider such as Amazon "otherwise participates in placing a product in the stream of commerce" and is a "supplier" under O.R.C. 2307.51(A)(15) when it agrees to promote a deadly consumable product, introduces and recommends that product to a consumer, and otherwise uses its influence to lead that consumer to believe the product is safe.**

An internet provider such as Amazon should not be able to evade liability and "supplier" status where it abandons the role of "neutral platform" and instead actively promotes a product and uses its influence to lead consumers to believe the product is safe. This is particularly true where, as here: the product is a deadly consumable item; multiple customers warned in reviews that the product was lethal; [redacted] Amazon failed to do due diligence before promoting the product. Under these egregious circumstances, as a matter of law, Amazon should be deemed to be a "supplier" under O.R.C. 2307.51(A) and Ohio's product liability laws.

Amazon's business model is designed to maximize the number of customers. Amazon treats all visitors to Amazon.com as Amazon customers. By tightly controlling the transaction process, handling communications with the customer, and walling off direct interactions between the consumer and third-party vendors, Amazon builds loyalty to its brand and consumer confidence in what is being purchased on Amazon.com. In this case, K.K. completed her entire

purchase transaction on Amazon.com, believed she was buying the powder from Amazon, and trusted Amazon to sell her a product that was safe to use and share.

Amazon's strategy of engendering trust and inducing users to believe they are dealing with a trusted brand dramatically magnifies the power of Amazon's recommendations. In this case, Amazon was not a neutral platform for a third-party sale. To the contrary, Amazon entered into an agreement with Tenkoris whereby it agreed to promote and merchandise the caffeine powder. In doing so, Amazon abandoned neutrality and should be held responsible for what ensued.

Despite its vast resources, Amazon did not screen customer reviews or do the necessary due diligence to determine if the powder it was recommending was safe. It ignored consumer safety and, in the pursuit of sales and profits, promoted an unsafe and very dangerous consumable product. As a result, Amazon recommended, to a teenager seeking a pre-workout product, a deadly powder that Amazon presented as a "product you may like." That was egregious and unconscionable.

Where, as here, an internet provider, such as Amazon, abandons neutrality and affirmatively promotes a consumable product the safety of which it has failed to take reasonable steps to verify, that provider should be deemed, as a matter of law, to have "otherwise participated in placing the product in the stream of commerce" and to be a "supplier" of the product within the meaning of Ohio's product liability laws. The purposes of product liability laws are to incentivize safety, prevent the distribution of dangerous products, and spread the risk of injury away from the injured consumer and on to those, like Amazon, better able to spread that risk. *See, Welch Sand & Gravel v. O&K Trojan* ("*Welch*"), 107 Ohio App.3d 218, 227-228, 668 N.E.2d 529 (1st Dist. 1995); *Musser v. Vilsmeier Auction Co., Inc.*, 562 A.2d 279, 282 (S.Ct.

Pa. 1989); *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 424-425 (6th Cir. 2019); *Samuel Friedland Family Ent. v. Amoroso*, 630 So.2d 1067, 1068 (S.Ct. Fla. 1994). These purposes all will be served by holding Amazon liable as a supplier in this instance.

CONCLUSION

This is a case of first impression in Ohio. Much, if not all, of our state's product liability law was adopted when the economy operated very differently than it does today. This is the first opportunity for this Court to apply Ohio's product liability laws in the modern context of e-commerce. It is not a case involving a finance lender or a charity incidentally selling go carts or a brick and mortar store. It is a case involving a company, Amazon, that has transformed how the economies of Ohio and the country work and the way retail transactions are conducted.

Having transformed the retail marketplace, Amazon, the company that dominates that market, asks to be shielded from liability. Ohio should not shield from strict liability a company that dominates and controls retail sales and that, if held liable, could protect the consumer, prevent dangerous and deadly products from entering the stream of commerce, and readily spread the risk of injury away from the innocent consumer. This is particularly true in this case, where Amazon recommended a deadly caffeine powder to a teen consumer who was merely seeking a pre-workout. This Court should apply the policy considerations underlying Ohio's product liability laws and hold that Amazon was a "supplier" in this case.

For the foregoing reasons, Plaintiff-Appellant Dennis Stiner, Administrator of the Estate of Logan James Stiner, respectfully moves this Court to reverse the decisions of the Court of Appeals and trial court and either deem Amazon to be a "supplier" of the caffeine powder subject to liability under Ohio law or remand the case to the trial court for further proceedings as appropriate.

Respectfully submitted,

s/ Brian K. Balser

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CERTIFICATE OF SERVICE

A copy of been served upon all Attorneys of Record via email or regular U.S. Mail on November 1, 2019.

s/ Brian K. Balser
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IN THE SUPREME COURT OF OHIO

DENNIS STINER, Administrator of the Estate of Logan James Stiner, Appellant, v. AMAZON.COM, INC., et al., Appellees.	On Appeal from the Lorain County Court of Appeals, Ninth Appellate District Court of Appeals Case No. 17 CA 011215

NOTICE OF APPEAL OF APPELLANT DENNIS STINER, ADMINISTRATOR OF THE ESTATE OF LOGAN JAMES STINER

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IN THE SUPREME COURT OF OHIO

DENNIS STINER, Administrator of the Estate of Logan James Stiner, Appellant, v. AMAZON.COM, INC., et al., Appellees.	On Appeal from the Lorain County Court of Appeals, Ninth Appellate District Court of Appeals Case No. 17 CA 011215

Notice of Appeal of Appellant Dennis Stiner, Administrator of the Estate of Logan James Stiner

Appellant Dennis Stiner, Administrator of the Estate of Logan James Stiner, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lorain County Court of Appeals, Ninth Appellate District, entered in Court of Appeals case No. 17CA011215 on February 19, 2019.

This case is one of public or great general interest.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of this Notice of Appeal was sent by ordinary U.S. Mail and electronic mail to counsel for Appellees on April 4, 2019:

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DENNIS STINER VS. AMAZON.COM INC.

CASE NO. **.17CA011215**

Hon. Court of Appeals , Court of Appeals

* * * * * * * **NOTICE** * * * * * * *

Pursuant to ***Appellate Rule 30***, Notice is hereby given that judgment was rendered in the above captioned case and was entered upon the journal of the Court on 2/19/19. A certified copy has been sent to the trial court.

Distribution: All parties or attorneys of record.

17CA011215

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

DENNIS STINER

Appellant

v.

AMAZON.COM, INC.

Appellee

C.A. No. 17CA011215

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 15CV18837

DECISION AND JOURNAL ENTRY

Dated: February 19, 2019

SCHAFER, Presiding Judge.

{¶1} Plaintiff-Appellant, Dennis Stiner, Administrator of the Estate of Logan James Stiner ("Stiner"), appeals the trial court's entry of summary judgment in favor of Defendants-Appellees, Amazon.com Inc.; Amazon Fulfillment Services, Inc.; Amazon Web Services, Inc.; Amazon Services, LLC ("Amazon"), as to all claims asserted against Amazon in Stiner's second amended complaint. For the reasons that follow, we affirm.

I.

{¶2} This matter arises from the circumstances surrounding the tragic death of an eighteen year old high school student, Logan Stiner, on May 27, 2014. His father, Dennis Stiner, brought this action as administrator of Logan's estate. In addition to Amazon, Stiner also named Tenkoris LLC, d/b/a Guardian Wholesale, The Bulk Source, Hard Rhino, Guardian BioSciences (collectively "Tenkoris"); Green Wave Ingredients, Inc. ("Green Wave"); CSPC Pharmaceutical Co., Ltd. ("CSPC"); as well as one individual, "K.K.", as defendants in this action. The claims

as to all defendants other than Amazon were resolved or otherwise disposed of prior to this appeal.

{¶3} In February of 2014, K.K., a friend of Logan, searched for a "pre-workout" supplement and ultimately purchased Hard Rhino Pure Caffeine, a pure caffeine powder. She purchased the caffeine powder through Amazon's website (the "Amazon Site") from a seller identified as The Bulk Source. The Bulk Source fulfilled and shipped the order to K.K. K.K. then shared a portion of the caffeine powder with Logan. Logan ingested a fatal dose of caffeine powder, causing acute caffeine toxicity, which resulted in his death by cardiac arrhythmia and seizure.

{¶4} After Logan's death, Stiner commenced this action against Amazon and the other named defendants and eventually proceeded on the second amended complaint, which asserted ten claims against Amazon. Amazon and Stiner each filed a motion for summary judgment. The trial court granted Amazon's motion and entered judgment in favor of Amazon as to all claims in the second amended complaint.

{¶5} Stiner filed a timely appeal of the trial court's judgment, and raises five assignments of error for our review. For ease of analysis, we consolidate the first four assignments of error and consider separately the fifth assignment of error.

II.

Assignment of Error I

The trial court erred in failing to "view the facts in the light most favorable to the non-moving party and resolve any doubt in favor of the non-moving party" and nevertheless granting summary judgment.

Assignment of Error II

The trial court erred in holding, as a matter of law, that Amazon could not be held liable as a supplier of the lethal caffeine powder under Ohio's Product Liability Act.

Assignment of Error III

The trial court erred in holding, as a matter of law, that Amazon could not be held liable for offering for sale an adulterated product under Ohio's Pure Food and Drug Law.

Assignment of Error IV

The trial court erred in holding that Amazon's status as a supplier or offeror of the lethal caffeine powder did not raise genuine issues of material fact that preclude summary judgment.

{¶6} In the first assignment of error, Stiner advances several arguments regarding the trial court's decision to grant summary judgment in favor of Amazon. Stiner contends that the trial court failed to view the facts in a light most favorable to Stiner as the nonmoving party. Further, Stiner contends that the trial court erred by determining, as a matter of law, that Amazon was not a "supplier" or "offeror" of the caffeine powder. Stiner also argues that the trial court failed to recognize factual disputes that precluded the grant of summary judgment. Although Stiner presents these arguments throughout four assignments of error, the contentions raised in the separate assignments are somewhat interdependent. To provide a thorough analysis, we consider Stiner's arguments collectively and in the context of the claims implicated by Stiner's contentions.

A. Summary Judgment Decision

{¶7} The trial court issued its ruling on the parties' cross-motions for summary judgment, granting Amazon's motion. The court entered judgment in favor of Amazon as to all of the claims asserted in Stiner's second amended complaint.

{¶8} The first three counts of Stiner's complaint asserted claims pursuant to Ohio's pure food and drug law, R.C. 3715.01 et seq., alleging the following violations: count one, R.C. 3715.52(A)(1)-(3), prohibiting the certain acts relative to adulterated and misbranded drugs; count two, R.C. 3715.64 regarding a misbranded drug; and count three, R.C. 3715.83, regarding adulterated supplements. The trial court granted summary judgment on these three claims in the absence of evidence that Amazon sold or offered for sale the caffeine powder at issue.

{¶9} In counts four through seven, Stiner pleaded claims under the Ohio products liability act at R.C. 2307.71 to R.C. 2307.80. Counts four through six asserted the following claims for manufacturer liability: count four, R.C. 2307.75, for a product defective in design or formulation; count five, R.C. 2307.76, for a product defective due to inadequate warning or instruction; and count six, R.C. 2307.77, for a product failing to conform to a representation. Count seven alleged supplier negligence pursuant to R.C. 2307.78. The trial court granted summary judgment on counts four through seven finding as a matter of law that Amazon was not a "supplier" under the facts of this case and did not otherwise participate in placing the caffeine powder into the stream of commerce.

{¶10} In count eight, Stiner asserted a claim for breach of an implied warranty of merchantability pursuant to R.C. 1302.27. Count twelve asserted a claim for fraud. Stiner presented a demand for punitive damages in count eleven. The trial court also granted summary judgment as to these three counts. However, because Stiner has not challenged on appeal the trial court's decision as to counts eight, eleven, and twelve, we confine our analysis in these assignments of error to the trial court's entry of judgment on Stiner's claims in counts one through seven. We consider the products liability claims separate from the pure food and drug claims.

B. Standard of Review

{¶11} Before summary judgment may be granted under Civ.R 56(C), the trial court must determine each of the following:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). We review a trial court's ruling on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶12} Summary judgment proceedings create a burden-shifting paradigm. To prevail on a motion for summary judgment, the movant has the initial burden to identify the portions of the record demonstrating the lack of a genuine issue of material fact and the movant's entitlement to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). In satisfying the initial burden, the movant need not offer affirmative evidence, but it must identify those portions of the record that support its argument. *Id.* Once the movant overcomes the initial burden, the non-moving party is precluded from merely resting upon the allegations contained in the pleadings to establish a genuine issue of material fact. Civ.R. 56(E). Instead, it has the reciprocal burden of responding and setting forth specific facts that demonstrate the existence of a "genuine triable issue." *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996). "[E]xpressions of speculation or assumptions in deposition testimony and affidavits are insufficient to sustain the non-movant's burden." *Messer v. Summa Health Sys.*, 9th Dist. Summit No. 28470, 2018-Ohio-372, ¶ 31.

C. Factual Background

1. K.K. 's Purchase and Logan's Death

{¶13} On February 27, 2014, Logan's friend, K.K., searched online through the Amazon Site for a new "pre-workout" supplement. The search results returned a number of pre-workout products. K.K. clicked on one pre-workout product, which prompted the display of related products, or "products that you may like," including a product called Hard Rhino Pure Caffeine. K.K. clicked on the link for Hard Rhino Pure Caffeine, a pure caffeine powder, which was offered on the Amazon Site by a seller identified as The Bulk Source.

{¶14} K.K. decided to purchase the Hard Rhino product, 1.1 lbs. of caffeine powder. She placed the order through the Amazon website using an Amazon gift card to cover a portion and her mother's credit card to cover the balance. The seller, The Bulk Source, fulfilled the order and shipped the caffeine powder directly to K.K. K.K. received the product sometime in the first week of March 2014. She began using the caffeine powder by mixing it in her drink in a dosage she determined by reading the reviews of the product.

{¶15} During a text message exchange on May 26, 2014, K.K. told Logan she would "give [him] some of [her] caffeine powder if [he] want[ed.]" Logan accepted K.K.'s offer, and she brought a bag containing approximately one cup of the caffeine powder to him the following day. K.K. did not show Logan the product package or label, but they exchanged text messages discussing reasonable dosage and the dangers of ingesting too much caffeine. K.K. informed Logan that an eighth of a teaspoon is 100mg of caffeine and comparable to "16 oz. of coke" while a quarter teaspoon contains more caffeine than an energy drink. She indicated that she

typically used an eighth of a teaspoon of the caffeine powder in the morning, and another after school. She cautioned that taking too much could cause Logan to die.

{¶16} Logan died on May 27, 2014. The Lorain County Coroner's report indicated that he died as a result of acute caffeine toxicity which caused cardiac arrhythmia and seizure. Although the toxicology report did not specify the exact amount of caffeine in Logan's system, for the limited purpose of our present review we will assume that the caffeine powder K.K. gave to Logan caused his death.

2. The Product, the Businesses, and the Transaction

{¶17} The Bulk Source is the tradename under which Tenkoris, a supplement wholesaler, sold the caffeine powder under the brand name "Hard Rhino." Tenkoris sourced the caffeine powder and purchased it in bulk from Green Wave, a distributor of dietary supplements. Green Wave imported the caffeine powder from a manufacturer in China, CSPC, and delivered it to Tenkoris.

{¶18} At the relevant point in time, products available through Amazon were sourced and sold in multiple ways. In some instances, Amazon acts as a seller, retailing products offered through the Amazon Site. The majority of sales, however, are through third-party sellers who either, (1) source and sell their products which are stored, shipped and handled through Amazon facilities—Amazon-Fulfilled Products—or (2) the third-party seller sources, sells, fulfills, ships, and delivers its products—Seller-Fulfilled Products. Amazon's Business Solutions Agreement ("BSA") states that "Amazon Services Business Solutions" is "a suite of optional merchant services including the following services: Selling on Amazon, Amazon Webstore, and Fulfillment by Amazon."

{¶19} To offer its Seller-Fulfilled Products through the Amazon Site, Tenkoris entered into a BSA with Amazon. This enabled Tenkoris, using the trade name The Bulk Source, to create a product listing for Hard Rhino Pure Caffeine and offer it for sale on the Amazon Site. Tenkoris was required to input all product details, information, and images for the listing and set the sale price for the product. Amazon then assigned an identification number and activated the listing.

{¶20} When K.K. placed the order for the Hard Rhino—500 grams of the caffeine powder for $14.99 plus $5.49 for shipping—Tenkoris received notification of the sale from Amazon. Tenkoris then fulfilled the ordered by reviewing the customer information for the transaction, assembling and packaging the product, and then shipping it directly to K.K. Amazon never had possession of the caffeine powder Tenkoris shipped and supplied to K.K. Amazon captured and processed the payments for the sale, and remitted the proceeds to Tenkoris, less the fees and costs retained by Amazon for its services.

{¶21} At the time K.K. purchased the caffeine powder, there were no federal or state regulations prohibiting or restricting the sale of caffeine powder. However, following Logan's death, the Food and Drug Administration did issue a safety alert warning consumers of the dangers of caffeine powder. Amazon removed listings for pure caffeine powder and prohibited the sale of such products though Amazon.

D. Claims under Ohio Products Liability Act

{¶22} Stiner claimed that Amazon was liable as a supplier of the caffeine powder based on supplier negligence as stated in R.C. 2307.78(A)(1). Additionally, Stiner stated three claims for products liability pursuant to R.C. 2307.75 (design defect), R.C. 2307.76 (inadequate warnings or instructions), and R.C. 2307.77 (non-conformance to representation). These three

claims impose liability on "manufacturers" which are defined as "a person engaged in a business to design, formulate, produce, create, make, construct, assemble, or rebuild a product or a component of a product." R.C. 2307.71(A)(9).

{¶23} Stiner has not challenged the trial court's conclusion that Amazon was not a manufacturer. Rather, it is Stiner's position that Amazon is liable as if it were a manufacturer pursuant to R.C. 2037.78(B). "A supplier of a product" may be liable for compensatory damages based on products liability claims brought pursuant to R.C. 2307.75 through 2307.77 "as if it were the manufacturer of that product" if one of eight stated factors apply. R.C. 2307.78(B). Stiner claims that one or more of these factors applies to Amazon in its alleged role as a supplier.

{¶24} There is a threshold consideration applicable to all four of Stiner's products liability claims; to be liable for any of these claims Amazon must fit the definition of a "supplier" as stated in R.C. 2307.71(A)(15). A supplier is defined as either of the following:

> (i) A person that, in the course of a business conducted for the purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce;
>
> (ii) A person that, in the course of a business conducted for the purpose, installs, repairs, or maintains any aspect of a product that allegedly causes harm.

R.C. 2307.71(A)(15)(a).

{¶25} The trial court concluded that Amazon did not install, repair, or maintain any aspect of a product and, therefore, did not fit the definition of a supplier under R.C. 2307.71(A)(15)(a)(ii). Further, the trial court examined the evidence in light of R.C. 2307.71(A)(15)(a)(i) and determined that Tenkoris, not Amazon, was the "seller" and that Amazon did not distribute, lease, prepare, blend, package, or label the caffeine powder. The essential question before the trial court was "whether or not Amazon qualifies as a 'supplier' for 'otherwise participat[ing] in the placing of a product in the stream of commerce'" as stated in

R.C. 2307.71(A)(15)(a)(i). The trial court concluded that "Amazon, under the facts of this case, was not a supplier and did not otherwise participate in the placing of the caffeine powder in the stream of commerce." Stiner contends that the trial court erred in its resolution of that issue.

1. Application of the Law to the Facts of the Case

{¶26} To give context to the concept of "otherwise participat[ing]" as stated in R.C. 2307.71(A)(15)(a)(i), the trial court looked to a federal district court opinion applying Pennsylvania products liability law in the context of an eBay transaction. The trial court cited the federal district court ruling on a motion to dismiss, which stated:

> [Plaintiff] has not pled facts alleging that eBay is so connected to the overall chain of distribution as to suggest a relationship with the manufacturer or product "beyond their immediate sale." * * * Specifically, [Plaintiff] has not alleged that eBay, at any time, had anything more than a fleeting connection to the allegedly defective products. [Plaintiff] has not alleged that eBay ever had physical possession of the products, that they were moved or stored in a facility owned by eBay, or any other facts to suggest that holding eBay responsible would incentivize safety, that eBay is the only member of the marketing chain available, or that eBay is in a better position than [Plaintiff] to prevent the circulation of such defective vacuum tubes.

(Internal citations omitted.) *Inman v. Technicolor USA, Inc.*, W.D.Pa. No. CV 11-666, 2011 WL 5829024, *5 (Nov. 18, 2011).

{¶27} Considering the analysis in *Inman*, the trial court below analogized that Amazon, like eBay, provided an online forum for Tenkoris to "peddle its caffeine powder." The trial court stated that Tenkoris, not Amazon, provided the product information for listing on Amazon's Site, held the product, and arranged for shipping. The trial court noted that any issues with the product were not related to the services that Amazon provided. Regarding Stiner's claim that K.K. was under the impression that Amazon sold the caffeine powder, the trial court indicated that all evidence throughout the transaction identified The Bulk Source as the seller.

{¶28} Additionally, the trial court indicated several facts relevant to the policy consideration of Amazon's ability to safeguard against defects in the product. For instance, the court noted that Amazon never had physical possession of the caffeine powder, and never moved or stored the product. The trial court also indicated that Amazon "never fulfilled the sale by labeling, packaging, or shipping the product[,]" and noted the lack of evidence that Amazon's connection to the chain of distribution suggested a relationship with Tenkoris beyond the immediate sale.

{¶29} Stiner challenges the trial court's application of the law and argues that the trial court applied an "overly restrictive definition of 'supplier'" and ignored facts that Amazon considered relevant. Citing to a First District opinion, *Welch Sand & Gravel v. O&K Trojan*, Stiner contends that the trial court was required to "look to pre-statutory precedent and to the public policy underlying the products liability statute" to determine whether a defendant "'otherwise participated' in placing [a product] in the stream of commerce." *Welch Sand & Gravel v. O&K Trojan*, 107 Ohio App.3d 218, 227 (1st Dist.1995). In *Welch*, the court concluded that the defendant—a consignee—qualified as a "supplier" under R.C. 2307.71 where it facilitated the sale of a machine to the plaintiff. The court noted that while "it is a long reach to include a consignee of used goods in the definition of 'supplier,'" the public policy underlying the products liability statute required that the "risk of product-related injury" be shifted away from the consumer. *Id.* at 228. The Court reasoned the consignee's action in making the loader available at auction constituted placing the loader into the stream of commerce and brought the consignee within the definition of a supplier. *Id.* Ultimately, however, that court held that the plaintiff had not established a sufficient claim of liability against the consignee.

{¶30} Stiner contends that the public policy considerations in *Welch* should have been applied to determine Amazon's status as a supplier and liability for the caffeine powder. We find the facts of *Welch* distinguishable from the facts of this case, and its analysis inapplicable. In *Welch* the Court looked to the consignee that, by definition, did not own the product, but made it available for sale through an auction and considered whether those actions warranted the application of supplier status. Under the facts of the case at bar, Tenkoris offered the caffeine powder for sale though the Amazon Site. By comparison, Tenkoris is more akin to the consignee-supplier, whereas Amazon's role is more akin to that of the auctioneer in *Welch.* The court in *Welch* was not faced with the question of whether the auctioneer was liable as a "supplier" for the sale of a product. Accordingly, the public policy basis for applying seller status to the consignee does not translate to Amazon because the evidence shows that Tenkoris, like the consignee, may bear the risk for actually placing the product into the stream of commerce. *Welch* does not support Stiner's contention that Amazon's peripheral role in relation to the distributive chain of the caffeine powder placed Amazon in a position to ensure against risks or to incentivize safety.

{¶31} Other courts of Ohio have considered the meaning of "supplier" as it relates to entities that provide services or are otherwise involved with the sale or distribution of a defective product. In *Long v. Tokai Bank,* 114 Ohio App.3d 116, (2d Dist.1996), the court considered whether, regarding a products liability claim, the defendant was the "supplier" of a machine it leased, where it included in the lease a provision requiring that the lessee maintain the equipment pursuant to the manufacturer's instructions. The Second District reasoned that, although the defendant retained title to the machine and required the lessee to follow the manufacturers' maintenance schedule to preserve the machine, the defendant (1) "did not participate in the

selection of the product or in negotiations about the product" and (2) as lessor, the defendant's "role was one of offering the use of money, not of supplying the [machine]." *Id.* at 125. The court expressed concern over "'catastrophic impact[s] on commerce'" that might result from placing the responsibility for detecting defects on entities that "'are not equipped to pass upon the quality of the myriad of products they are called upon to finance'" and which do not have a direct impact in the manufacturing process or relationship with the manufacturer. *Id.* at 125, quoting *Nath v. Natl. Equip. Leasing Corp.*, 497 Pa. 126, 132, 439 A.2d 633 (1981). In *Tokai*, the court stated that such "tangential participation does not justify the imposition of strict liability" and held that the lessor was not a "supplier" for purposes of the products liability claims. *Id.* at 126, quoting *Nath* at 132.

{¶32} The Sixth District considered a products liability claim asserted against a non-profit entity that, for purposes of its annual go-kart race fundraiser, had purchased go-karts and then sold them to companies and organizations who wished to participate in the race by sponsoring a car. *Morris v. Junior Achievement of Northwest Ohio, Inc.*, 6th Dist. Lucas No. L-08-1420, 2009-Ohio-6340, ¶ 8-9. In determining whether the defendant met the definition of a "supplier" as defined by R.C. 2307.71, the Sixth District held that

> no evidence was presented in the proceeding below that [the defendant] conducted its business for the purpose of selling, distributing, leasing, preparing, blending, packaging, labeling or otherwise placing go-karts into the stream of commerce, or conducted its business for the purpose of installing, repairing or maintaining any aspect of go-karts. Rather, [the defendant] passed along the go-karts, and the cost of those vehicles, to the participants in the [go-kart race.] Accordingly, [the defendant] was not a supplier of go-karts as that term is used in Ohio's Product Liability Act.

Id. at ¶ 24.

{¶33} Although such cases are neither controlling nor directly on point, a review of case law from other jurisdictions shows a disinclination to hold Amazon liable as a seller, distributor,

or supplier of the products offered for sale on the Amazon Site by third-party sellers. *See Fox v. Amazon.com, Inc.*, M.D.Tenn. No. 3:16-CV-03013, 2018 WL 2431628, *8 (May 30, 2018) (concluding that Amazon was not a seller under the Tennessee Products Liability Act); *Erie Ins. Co. v. Amazon.com Inc.*, D.Md. No. CV 16-02679-RWT, 2018 WL 3046243, *3 (Jan. 22, 2018) (holding that Amazon was not a seller under Maryland's UCC); *Oberdorf v. Amazon.com, Inc.*, 295 F.Supp.3d 496, 499 (M.D.Pa. 2017) (declining to impose liability as a "seller" on Amazon under Pennsylvania Strict Products Liability Law); *Milo & Gabby LLC v. Amazon.com, Inc.*, 693 Fed.Appx. 879 (Fed.Cir.2017) (holding that Amazon was not the seller of a third-party product under federal copyright law); *McDonald v. LG Elecs. USA, Inc.*, 219 F.Supp.3d 533, 542 (D.Md. 2016) (holding that "Amazon's role as the 'platform' for the third-party sales does not qualify it as a merchant or a seller under Maryland's UCC."); *Allstate New Jersey Ins. Co. v. Amazon.com, Inc.*, D.N.J. No. CV 17-2738 (FLW) (LHG), 2018 WL 3546197, *10 (July 24, 2018) (holding that where "Amazon facilitates rather than drives the sale" it does not act as a product seller under New Jersey products liability law).

{¶34} Stiner has not demonstrated that the trial court erred by looking to *Inman* to give meaning to the phrase "otherwise participated" in the context of a supplier under R.C. 2307.71(A)15(a)(i). *Inman*, W.D.Pa. No. CV 11-666, 2011 WL 5829024. We observe no error in the trial court's consideration of the actions of the entity that chose the product to offer for sale and then sourced, physically controlled, and fulfilled orders for that product, in contrast with the role of the platform through which that entity chose to offer the product for sale. Based on this Court's review of the relevant case law, we conclude that the trial court did not err in its interpretation and application of the law in this case.

2. Absence of a dispute of fact

{¶35} Stiner argues that issues of fact precluded the grant of summary judgment, and that the trial court failed to construe the evidence in favor of Stiner as the non-moving party. However, Stiner has not identified any factual dispute as to the specific actions Tenkoris and Amazon each took with respect to the transaction that resulted in the sale of the pure caffeine powder to K.K. Although Stiner asserts a "divergent view" of Amazon's role in the transaction, Stiner has not pointed to evidence, relevant to whether Amazon otherwise participated in placing the caffeine powder in the stream of commerce, that the trial court failed to construe in its favor.

{¶36} The evidence clearly demonstrates that Tenkoris made the decision to sell the caffeine powder, engaged the services of Amazon in order to offer the product, procured the materials, determined the terms of the sale, retained possession of the product at all times, and ultimately fulfilled the order by packaging and shipping the product to K.K. There is nothing in the record contradicting the evidence that Amazon provided a platform through which Tenkoris, as a third-party seller, offered and sold products in an online marketplace. There is no dispute that, as a part of its service, Amazon displayed the product listing to customers searching for related products, notified the seller when a sale of the product was made, and captured payment for the sale. Further, there is simply no evidence in the record to support Stiner's claim that Amazon took any action to lead K.K. to believe she was making the purchase from Amazon rather than the seller, and no evidence that Amazon somehow falsely mislead K.K. to believe she was purchasing a "safe" product when, as Stiner alleges, she was not. The evidence shows that The Bulk Source was clearly identified as the seller of the product at all times relevant to K.K.'s purchase of the caffeine powder.

{¶37} Stiner has not shown any dispute of facts material to an essential element of the claim. In the absence of a factual dispute as to the respective actions of Tenkoris and Amazon, the issue to be determined is how those actions factor in to supplier liability under the applicable products liability statutes. Stiner's contention that Amazon is a supplier relies on allegations of Amazon's complicity in a scheme to market products to consumers, engender trust by implying the ensured safety of the products, and, meanwhile, willfully disregard evidence of known dangers. We are cognizant of the requirement that evidence be viewed in favor of Stiner as the non-moving party. *Grafton*, 77 Ohio St.3d at 105. Nevertheless, the facts in evidence do not support Stiner's contention. Reasonable minds can come to but one conclusion when viewing the evidence regarding Amazon's role in this transaction; the evidence cannot support Stiner's claim that Amazon was a supplier of the caffeine powder. Based on the foregoing, we conclude that the trial court did not err in interpreting the law and applying the law to the relevant facts to determine that Amazon is not a "supplier" within the meaning of R.C.2307.71(A)(15).

3. Stiner's Public Policy Argument

{¶38} Stiner cites to "*Inman*, *Welch*, and *Friedland*" to support the contention that public policy dictates Amazon should be held liable as a supplier because doing so would incentivize safety. *See Inman*, *supra*; *Welch*, *supra*; *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067, 1068 (Fla.1994). Stiner's public policy arguments fail under the facts of this case because Stiner has not pointed to evidence to demonstrate that holding Amazon liable would incentivize safety. The facts demonstrate that Amazon was not in a reasonable position to safeguard against allowing this caffeine powder, as a potentially dangerous product, to enter the stream of commerce. Amazon was not conducting business for the purpose of selling caffeine powder and did not choose to offer the product for sale. Amazon merely

provided a service and platform for Tenkoris to offer and sell its product and, as part of this service, Amazon displayed Tenkoris's listing for caffeine powder to customers searching for relevant products. Amazon had no role in procuring the caffeine powder from its manufacturer, storing, packaging, or distributing the product. Tenkoris determined the sale price, provided all product information for the listing, packaged and fulfilled all orders. Amazon lacked discretion as to the product specifications or listing details, and exercised no control over the packaging or fulfillment of orders.

{¶39} Stiner has not presented a compelling basis for extending the definition of "supplier" to subject a service provider such as Amazon to liability for its very limited role in the sale of a product. Stiner has not identified any instances where a court has applied the law with such an expansive interpretation of the definition of supplier that it could encompass imposing liability on Amazon under facts similar to those at issue here. Upon the facts of this case, this Court declines to expand, on the basis of public policy, the definition of "supplier" in R.C. 2307.71, to extend liability by shifting the burden to safeguard consumers against third-party seller's products to an enterprise such as Amazon.

4. Conclusion

{¶40} The trial court correctly concluded that Amazon met its burden to show the absence of a genuine dispute as to Amazon's role in this particular transaction. Furthermore, Stiner has not directed this Court to any evidence in the record to establish an essential element of Stiner's products liability claims: that Amazon is a supplier. Despite Stiner's claim that the trial court failed to consider evidence, Stiner failed to point to any evidence to demonstrate that Amazon "otherwise participated" in placing Tenkoris's product into the stream of commerce. This evidentiary failure renders immaterial any facts relating to other elements of these claims,

and confirms the absence of any genuine issues of material fact. Consequently, this Court concludes that the trial court did not err in granting summary judgment on the claims Stiner presented in counts four through seven.

E. Claims under Ohio Food and Drug Safety Act

{¶41} Stiner argues that the trial court erred by granting summary judgment on the claims under the pure food and drug law. "The following acts and causing them are prohibited" by R.C. 3715.52(A):

> (1) The manufacture, sale, or delivery, holding or offering for sale of any food, drug, device, or cosmetic that is adulterated or misbranded;
>
> (2) The adulteration or misbranding of any food, drug, device, or cosmetic;
>
> (3) The receipt in commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise;
>
> (4) The sale, delivery for sale, holding for sale, or offering for sale of any article in violation of section 3715.61 or 3715.65 of the Revised Code; * * *.

Additionally, "a dietary supplement is adulterated if it presents a significant or unreasonable risk of illness or injury under the conditions of use recommended or suggested in its labeling or, if there are no recommended or suggested conditions of use, under the ordinary conditions of use." R.C. 3715.83

{¶42} Considering R.C. 3715.52, the trial court observed that the statute does not define the terms "sale" or "offering for sale" as stated in R.C. 3715.52(A)(1). The court looked to define the term "sale" and observed the following definition, which it attributes to Black's Law Dictionary (5th Ed.1979):

> A contract between two parties, called, respectively, the "seller" (or vendor) and the "buyer" (or purchaser), by which the former, in consideration of the payment

> or promise of payment of a certain price in money, transfers to the latter the title and possession of the property.

The trial court determined, based on the previous discussion of the evidence, that Tenkoris, not Amazon, was the seller of the caffeine powder. The court concluded that Amazon did not manufacture, sell, deliver, or offer for sale the caffeine powder at issue as stated in R.C. 3715.52(A)(1). Further, the trial court determined that R.C. 3715.52(A)(2) and (3) were inapplicable because Amazon was never in a position to cause the adulteration or misbranding of the product and had never been in possession or control of the caffeine powder.

{¶43} The trial court stated that, despite the lack of a precise definition of "offering for sale", it is clear, when viewed from the perspective of which entity created the listing to sell the product on Amazon's Site, that the entity offering the caffeine powder for sale was Tenkoris, not Amazon. The trial court reasoned that, while Amazon created a template for sellers to upload products to sell in its marketplace, the seller provided the information to populate the fields. Therefore, Tenkoris set the price, created the product description, and supplied the product images and all other product information to generate the listing that constituted an offer for the sale of the caffeine powder: an offer which K.K. accepted. Having concluded that Amazon met its burden to show the absence of a genuine issue of material fact as to whether Amazon sold or offered for sale the caffeine powder, the trial court further concluded that Stiner did not meet the burden to show an issue of fact for trial. Accordingly, the trial court granted summary judgment on Stiner's claims under the Ohio Food and Drug Safety Act.

{¶44} It is Stiner's position that the parties presented "divergent accounts of Amazon's role" in the sale of the caffeine powder that caused Logan's death, which created questions of fact. Stiner also asserts that the trial court erroneously construed the facts in favor of Amazon and applied an "overly restrictive construction of the key phrase * * * 'offering for sale.'"

However, Stiner's argument actually aims to challenge the manner in which the trial court approached its analysis, viewing the listing on Amazon's site from the standpoint of which entity created it.

{¶45} In support of its argument, Stiner contends that Amazon's actions could be construed as an offer for sale. Stiner cites to an unreported federal court decision from the Western District of Washington examining the definition of liability for an "offer to sell" under 35 U.S.C. 271(a) in the context of patent infringement. *See Milo & Gabby, LLC v. Amazon.com, Inc.*, W.D.Wash. No. C13-1932-RSM, 2015 WL 4394673 (July 16, 2015). In that case, the court stated that "where an item is 'sold' by a third-party vendor and 'fulfilled' by Amazon," the actions of Amazon "*could be regarded* as an offer for sale for the reasons discussed in [*MEMC Electronic Materials, Inc. v. Mitsubishi Materials Silicon Corp.*, 420 F.3d 1369, 1376 (Fed.Cir.2005)]. (Emphasis added.) *Id.* at *14. The court in *Milo & Gabby*, concluded there were issues as to who made the offer for sale. *Id.* The analysis in *Milo & Gabby*, and its comparison to *MEMC*, involves a completely different statutory scheme and the court's focus in that case was based, at least in part, on the particular purpose behind the addition of the phrase "offer to sell" in the Patent Act. Moreover, that court subsequently entered a judgment finding that Amazon was not liable for offering to sell the product at issue because Amazon, through its website, did not communicate or provide the description of the products, did not set the price or quantities for the purchase of the products, and did not "communicate that it was willing to enter into a bargain to sell the * * * products." *Milo & Gabby, LLC v. Amazon.com*, 144 F.Supp.3d 1251, 1253 (W.D.Wash.2015).

{¶46} We find Stiner's argument for such a broad construction of the term "offer to sell" unpersuasive. It is true that R.C. 3715.52(A)(1) does not define "sell" or "offer to sell."

However, where a term is not defined in a statute, we give the undefined term its plain and ordinary meaning. *Great Lakes Bar Control, Inc. v. Testa*, Slip Opinion No. 2018-Ohio-5207, ¶ 8. When interpreting the language of a statute, "'[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage.'" *Id.* quoting R.C. 1.42. "Thus, we must consider the ordinary meaning of [offer to sell] in the context of [actions prohibited under Ohio's Food and Drug Safety Act]." *Id.* at ¶ 10.

{¶47} The trial court looked to Black's Law Dictionary (5th Ed.1979) to define a sale in contractual terms where a seller conveys title and possession of property to the buyer in consideration for payment. Similarly, the most recent edition of Black's Law Dictionary defines "sale" as "[t]he transfer of property or title for a price. *See* UCC § 2-106(1)." Black's Law Dictionary (10th Ed.2014). It defines "offer" in relevant part as "[t]he act or an instance of presenting something for acceptance * * *." *Id.* Hence, an "offer to sell," pursuant to its plain and ordinary meaning in the context of R.C. 3715.52(A)(1), involves the act of presenting for acceptance the transfer of title or of property consisting of "any food, drug, device, or cosmetic that is adulterated or misbranded," for a price. This definition is consistent with the trial court's analysis of the role Amazon played in the sale of the caffeine powder.

{¶48} Additionally, Stiner urges that the trial court should have considered several factors in determining Amazon's status as an "offeror" of the product. This includes Stiner's contention that Amazon "promoted" the caffeine powder to K.K., "engendered her trust" in Amazon, lead K.K. to believe she was "dealing" with Amazon, listed itself as a merchant on the credit card statement, and profited from the sale. As discussed above, Stiner has not demonstrated that the facts of this case support the claim that Amazon actively sought to promote the caffeine powder to K.K. as a "safe product" sold by Amazon. Regarding Stiner's

assertion that K.K.'s mother's credit card statement reflected that Amazon processed the charge to her account—an uncontested fact—Stiner failed to explain how a *post-transaction* statement could have misled K.K. as to the identity of the seller. More significantly, Stiner has not explained how Amazon processing the payment, or displaying the product listing—created by Tenkoris—to customers searching for pre-workout products, could render Amazon liable for selling or offering to sell Tenkoris's caffeine powder.

{¶49} Further, Stiner attempts to analogize the facts of this case to a scenario where a drug store might offer this product for sale and direct a customer requesting post-workout supplements to this caffeine powder. However, Stiner's analogy disregards a crucial distinction between the role of Amazon and that of a drug store. Whereas a store typically selects the products it places on its shelf and offers them for sale, Amazon has only provided the forum or marketplace which Tenkoris utilized to offer and sell its product. Tenkoris, not Amazon, chose to offer this product and, as the trial court correctly recognized, Tenkoris determined the terms of the sale and product description. Tenkoris provided the information which allowed potential buyers to find the product, accept the offer, and purchase the caffeine powder product that Tenkoris offered for sale.

{¶50} The trial court concluded that Amazon met its burden to show the absence of a genuine dispute as to Amazon's liability for the sale of an allegedly adulterated product. Stiner failed to meet the reciprocal burden under Civ.R. 56(E) to demonstrate the existence of a material fact regarding an essential element: whether Amazon sold or offered to sell a product prohibited by R.C. 3715.52(A)(1). Here again, we recognize that evidence must be viewed in favor of Stiner as the non-moving party. *See Grafton*, 77 Ohio St.3d at 105. However, Stiner has not demonstrated the existence of evidence sufficient to permit reasonable minds to reach

different conclusions on this essential element of the claim, and has not supported the contention that the trial court failed to construe any relevant evidence in Stiner's favor. Consequently, this Court concludes that the trial court did not err in granting summary judgment on the claims Stiner presented in counts one, two, and three.

F. Conclusion

{¶51} Stiner's assignments of error one, two, three, and four are overruled.

Assignment of Error V

In applying the Communications Decency Act, 47 U.S.C. §230(c), the trial court erred in: (1) finding that Stiner seeks to hold Amazon liable as the publisher of third-party information, rather than as the supplier of the caffeine powder; and (2) suggesting that, if it applies, the Communications Decency Act would provide immunity under the facts of this case.

{¶52} Amazon presented the trial court with an argument in its defense claiming that the Communications Decency Act ("CDA"), 47 U.S.C. 230, bars all of Stiner's claims against Amazon. Stiner disputed the applicability of this statute in this case. In its summary judgment ruling, despite having already granted summary judgment on Stiner's claims against Amazon, the trial court concluded as follows:

> After reviewing cases from other jurisdictions that have considered an[d] applied section 230 [of the CDA] to cases similar to the case at hand, the court finds that to the extent that section 230 [of the CDA] is applicable to the instant case, the immunity provided thereunder would further support the finding already made by the court that Amazon is not a supplier or seller of the pure caffeine powder and that it cannot be held liable under the specific facts of this case.

{¶53} Stiner contends the trial court erred in its interpretation of Stiner's claims and in its application of the CDA. In its statement, it appears that the trial court concluded that *if* this section of the CDA is applicable, then it would support the conclusion made by the trial court that Amazon is not liable as a supplier or seller. The trial court did not, however, actually make

such a finding regarding applicability and, in any event, was not required to do so in light of the fact that it granted summary judgment in favor of Amazon on all of Stiner's claims. This Court will not decide this issue in the first instance. *Price v. Carter Lumber Co.*, 9th Dist. Summit No. 26243, 2012-Ohio-6109, ¶ 22 ("As this Court remains a reviewing court, we will not consider the issues relevant to the motion for summary judgment in the first instance.") However, in light of our resolution of the first four assignments of error affirming the trial court's grant of summary judgment on all of Stiner's claims against Amazon, we must conclude that the issue of Amazon's purported affirmative defense raised in Stiner's fifth assignment of error is moot and we decline to address it. *See* App.R. 12(A)(1)(c).

III.

{¶54} Stiner's first, second, third, and fourth assignments of error are overruled. This Court declines to address Stiner's fifth assignment of error as it is moot. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

- Costs taxed to Appellant.

JULIE A. SCHAFER
FOR THE COURT

TEODOSIO, J.
CALLAHAN, J.
CONCUR.

APPEARANCES:

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TOM ORLANDO

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

TOM ORLANDO, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge

Date 9/20/17 Case No. 15CV185837

DENNIS STINER
Plaintiff

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VS

AMAZON.COM INC
Defendant

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ENTRY AND ORDER ON AMAZON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and PLAINTIFF DENNIS STINER'S MOTION FOR SUMMARY JUDGMENT

This cause came to be heard upon the Amazon Defendants'[1] Motion for Summary Judgment and Plaintiff Dennis Stiner's Motion for Summary Judgment. Both sides have filed briefs opposing the other's motion as well as reply briefs.

Amazon Defendants' Motion for Summary Judgment

Amazon seeks summary judgment on each count of Plaintiff's Second Amended Complaint, which as to said defendants contains the following counts: 1) violation of Ohio's Food & Drug Safety Act (OFDSA) – prohibited acts, adulterated drugs, unapproved new drugs; 2) violation of OFDSA – misbranded drugs; 3) violation of OFDSA – adulterated dietary supplement; 4) Strict Products Liability – design defect; 5) Strict Products Liability – Inadequate Warning; 6) Strict Product Liability – non-conformance with representations; 7) Supplier Liability – negligence; 8) Breach of UCC

[1] The court's reference to the "Amazon Defendants" herein include: Amazon.com, Inc., Amazon Fulfillments Services, Inc., Amazon Web Services, Inc. and Amazon Services, LLC.

– implied warranty of merchantability;[2] 11) Conscious, Intentional Acts – Punitive Damages; and, 12) Fraud.

Factual Background

Plaintiff's claims arise from the tragic death of his son, Decedent Logan Stiner on May 17, 2014 as a result of a cardiac arrhythmia and seizure due to acute caffeine toxicity due to excess caffeine ingestion.[3] The decedent obtained a product called Hard Rhino Pure Caffeine Powder from a high school classmate, Defendant Kelsey Kidd. Kidd testified that she was searching Amazon.com for pre-work out products. See, Kidd Deposition at 12. Products on the Amazon Marketplace could be sold directly by Amazon, sold by a third party seller, shipped by Amazon, sold and shipped by a seller, or could be merely ads.[4]

While searching the marketplace, Amazon's search algorithms suggested a *number* of products which Kidd might like. Id. at 58-59. Included in those suggestions was a powdered caffeine product, Hard Rhino Pure Caffeine Powder, from a company named "The Bulk Source." Id. at 54-56. On the Amazon web page, the caffeine powder was identified as being "Sold by TheBulkSource." See, Kidd Deposition, Exhibit 4. The customer order page indicated that the caffeine powder was both sold and the order fulfilled by TheBulkSource. Id., Exhibit 3. In no less than three places, the purchase order generated as a result of the sale indicated that the order and purchase was made from TheBulkSource. See, Amazon's motion, page 4.

Kidd placed her order for the product, 500 grams for $14.99 and $5.49 for shipping. Id., at 18. Kidd paid for the product using an Amazon gift card and her mother's Visa. Id at 20-21. Kidd was not sure that she purchased the Hard Rhino product solely because the Amazon site suggested it. Id. at 22. Kidd made her own choice in purchasing the Hard Rhino product from a number of suggested products made by Amazon. Id. at 22, 57.

At Logan Stiner's request, Kelsey Kidd poured some of the caffeine powder into a Ziploc bag and gave it to the decedent. Id. at 36-37. Kidd never showed the decedent the Tenkoris label or packaging. Id. at 80. However, she did advise him that 1/8 of a teaspoon of the caffeine powder was 100 mg of caffeine, equivalent to about 16 oz. of coke and ¼ teaspoon of the powder was about 40 mg. of caffeine - more than a

[2] Counts 9 and 10 were directed toward Defendant Kelsey Kidd who is no longer a party to this case.

[3] Coroner's Verdict, Stephen B. Evans, M.D.

[4] See, Rachel Greer Deposition, at 34. This case involves an item sold and shipped by third party seller, Tenkoris. Greer also testified that Amazon is a retailer where Amazon.com is selling the product, but the Amazon Marketplace also allows other sellers to retail their own products. Id. 47. Greer also testified, "In the context of a marketplace, the way that a marketplace operates is as an independent platform for everyone to use. It's a technology platform." Id. 111-112.

monster or rock star energy drink. Id., Exhibit 2. Kidd told the decedent that she used "usually 1/8 teaspoon and after school another 1/8 and my pre-workout has 400 mg." Id. The decedent asked again how much an eighth of a teaspoon was and she again advised it was 100 mg. Id. Although the actual amount of Hard Rhino Pure Caffeine Powder that the decedent ingested is disputed, the dose appears to have been substantially more than what Kidd advised and was unquestionably fatal.

The Hard Rhino Pure Anhydrous Caffeine Powder (100 Percent USP Pharma Grade) purchased by Kidd was sold by TheBulkSource. TheBulkSource was an Amazon storefront owned by Tenkoris, LLC and through which Tenkoris sold its Hard Rhino products. See, Ken Olcher Depo. at 38-39. Tenkoris sold its products not only on Amazon but also on other selling platforms such as eBay and through its own website. Id. 10-19, 72. Olcher testified that Tenkoris sold "products on the platform that Amazon provides." Id. 24. Olcher described Tenkoris' actions with regard to product listings as "we uploaded product information onto your [Amazon's] computers for sale on the Amazon platform." Id. 25. The only identifier added to the product by Amazon was an Amazon Standard Identification Number (ASIN). Greer Depo. at 37, Damon Jones Depo. at 75.

The Amazon listing for Tenkoris' caffeine powder was uploaded by Tenkoris using a template created by Amazon and which Olcher described as a "flat file format upload template." Id. 36. Data entered by Tenkoris included the product name, description, related images, product details, price, quantities, unit measures, dimensions, among other things. Id. 36-37.

Olcher described the order/fulfillment process as:

> A. Roughly, a Amazon customer searches for a product that he or she would like. If they agree that this is the product that they want, they select a seller of that product and they purchase the product. At that point, from my understanding – I don't know what the back end is on Amazon, but we are notified through a digital or electronic download that a product was sold by Amazon, or you know, a customer purchased it, however, you want to put it, and the transaction number has been provided, and shipping particulars have been provided, and selling price has been provided, and some other customer information has been provided. And then it is up to us to fulfill that order, and we do. And then after that order is fulfilled, meaning shipped, tracking information is uploaded up to Amazon service, which it – which – who then – or Amazon who then notifies the customer of the pending shipment.

Id. 32-33.

Ken Olcher testified that Tenkoris would order the caffeine powder from a distributor who would deliver the bulk powder to Tenkoris. Id. 42-43. After clearing Tenkoris' quarantine and testing to ensure the product was what Tenkoris ordered, it was released to Tenkoris' general inventory. Id. The product was then taken into a separate room where it is bagged and the labels attached. Id. 46.

At least as it concerns the caffeine product in this case, Amazon never had possession of the product and never physically touched the product. Id. 50. Olcher testified:

> Q. And in this instance the Caffeine Powder – Hard Rhino Pure Caffeine Powder that was sold to Kelsey Kidd by Tenkoris, it was never sent to Amazon?
>
> A. No. We fulfilled directly from Tenkoris.
>
> Q. And Amazon did not package Hard Rhino Pure Caffeine Powder, correct?
>
> A. No, they did not.
>
> Q. And Amazon did not label Hard Rhino Pure Caffeine Powder, correct?
>
> A. No, they did not.
>
> Q. Amazon did not ship the Hard Rhino Pure Caffeine Powder at issue in this case to Kelsey Kidd, did it?
>
> A. No, they did not.

Id. 51. When questioned further, Olcher testified:

> Q. And Amazon never had possession of the Hard Rhino Pure Caffeine Powder that Tenkoris supplied to Ms. Kidd, did it?
>
> MR. GRIECO: Objection.
>
> THE WITNESS: How do you define supplied? It is up to, you know, legal interpretation, but I know where you're going with it. So I would say no, they did not. It was Amazon, excuse me. Tenkoris had supplied it.

Id. 88-89. At the time Kelsey Kidd purchased the caffeine powder, there was no FDA or state regulation prohibiting the sale of bulk pure caffeine powder. Id. at 134.

Defendant Tenkoris was selling its products on Amazon.com under an Amazon Services Business Solutions Agreement. See, Amazon's Motion for Summary Judgment, Exhibit C. Specifically, under the Selling on Amazon Service, Tenkoris agreed:

> **S-2.1 Sale and Fulfillment**. Other than as described in the Fulfillment by Amazon Service Terms (if applicable to you) you will: (a) *source, sell, fulfill, ship and deliver your Seller-Fulfilled Products * * * in each case in accordance with the terms of the applicable Order Information, these Service Terms and the Agreement, and all terms provided by you and displayed on the Amazon Site at the time of the order and be solely responsible for and bear all risk for such activities*; (b) package each of Your Products in a commercially reasonable manner and ship each of Your Products on or before its Estimated Ship Date; * * * (e) ship Your Products throughout Your Elected Country (except to the extent prohibited by Law or this Agreement); * * * (h) *notwithstanding any other provision of these Service Terms, ensure that you are the seller of all products made available for listing for sale hereunder*; (i) include an order specific packing slip, and, if applicable, any tax invoices, within each shipment of Your Products; (j) identify yourself as the seller of the product on all packing slips or other information included with Your Products and as the Person to which a customer may return the applicable product; * * * (Emphasis added.)

See, Exhibit C to Amazon's Motion for Summary Judgment. This same agreement defines "Your Product" as "any product that is made available for listing for sale, offered for sale, or sold by you through the WebStore Service or the Selling on Amazon Service * * *." Id.

The Summary Judgment Standard

In *Ponder v. Culp*, Summit App. No. 28184, 2017 WL 192609 (9th Dist., 2017), the Ninth District Court of Appeals set forth the standard to be applied when ruling on a motion for summary judgment:

> Summary judgment is only appropriate where (1) no genuine issue of material fact exists; (2) the movant is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. Civ.R. 56(C). Before making such a contrary finding, however, a court must view the facts in the light most favorable to the non-moving party and must resolve any doubt in favor of the non-moving party. *Murphy v. Reynoldsburg,* 65 Ohio St.3d 356, 358–359 (1992).
>
> Summary judgment consists of a burden-shifting framework. To prevail on a motion for summary judgment, the party moving for summary judgment must first

be able to point to evidentiary materials that demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt,* 75 Ohio St.3d 280, 293 (1996). Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 449 (1996).

Amazon has moved for summary judgment on all of Plaintiff's claims in the second amended complaint.

Ohio Products Liability Act Claims

a. Manufacturer Liability

Counts Four through Seven of Plaintiff's second amended complaint are claims brought under Ohio's products liability statutes. Counts Four through Six are claims which apply directly to manufacturers (design defects, inadequate warning and non-conformance with representations). The OPLA defines a "manufacturer" as:

> "Manufacturer" means a person engaged in a business to design, formulate, produce, create, make, construct, assemble, or rebuild a product or a component of a product.

See, R.C. §2307.71(A)(9). Amazon, which never had possession or control over the caffeine powder, did none of these things. Rather it was Defendant Tenkoris and/or CSPS Pharmaceutical Co., Ltd. that performed these functions relative to the caffeine powder. Because Amazon is not a "manufacturer" of the caffeine powder at issue in this case, Counts Four through Six do not apply to Plaintiff's claims against Amazon.

Despite this, Plaintiff argues that Amazon may be held liable as a "manufacturer" under R.C. §2307.78 which provides in part:

> (B) A supplier of a product is subject to liability for compensatory damages based on a product liability claim under sections 2307.71 to 2307.77 of the Revised Code, as if it were the manufacturer of that product, if the manufacturer of that product is or would be subject to liability for compensatory damages based on a product liability claim under sections 2307.17 to 2307.77 of the Revised Code and any of the following applies:

(1) The manufacturer of that product is not subject to judicial process in this state;

(2) The claimant will be unable to enforce a judgment against the manufacturer of that product due to actual or asserted insolvency of the manufacturer.

Plaintiff argues that Amazon is liable as a manufacturer because CSPC Pharmaceutical, Inc. is a Chinese company and not subject to process and Defendant Tenkoris is insolvent. However, the court finds that because Amazon is not a "supplier" as further detailed below, this section does not apply to hold Amazon liable as a manufacturer.[5] The court finds that there is no question of fact in this case on this issue and that Amazon has met its initial *Dresher* burden and Plaintiff has failed to meet his corresponding burden of showing the existence of a genuine issue of material fact for trial. Amazon is entitled to summary judgment on Counts Four through Six of the second amended complaint.

b. Supplier Liability

Count Seven alleges that Amazon is liable under OPLA as a "supplier." The act defines a "supplier" as:

"Supplier" means, subject to division (A)(15)(b) of this section, either of the following:

(i) A person that, in the course of a business conducted for the purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce;

(ii) A person that, in the course of a business conducted for the purpose, installs, repairs, or maintains any aspect of a product that allegedly causes harm.

(b) "Supplier" does not include any of the following:

(i) A manufacturer;

[5] The court notes that Plaintiff settled with Defendant Tenkoris prior to it becoming insolvent, and so even if this section applied, Plaintiff did recover from defendant rendering this section inapplicable to Tenkoris. As for CSPC Pharmaceutical, Plaintiff has attached the affidavit of counsel indicating that he has retained the services of First Legal Investigations and has had the Complaint transcribed into Mandarin Chinese and forwarded but has heard nothing pertaining to service. While there may be a question as to whether CSPC is subject to judicial service, this section is inapplicable as the court finds that Amazon is not a supplier.

* * * *

(iv) Any person who acts only in a financial capacity with respect to the sale of a product, or who leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor. (Emphasis added.)

R.C. §2307.71(A)(15). Amazon does not meet the definition of a "supplier" under R.C. §2307.71(A)(15)(b)(ii) as it did not install, repair or maintain any aspect of the product that allegedly caused the harm.

With respect to R.C. §2307.71(A)(15)(b)(iv), Amazon was not the "seller" of the caffeine powder. Rather, Defendant Tenkoris was the seller that uploaded the specific product and all related information to Amazon's website. Likewise, Amazon was not the entity that distributed, leased, prepared, blended packaged or labeled the caffeine powder. Again, Defendant Tenkoris was the entity that performed these functions. The issue in this case is whether or not Amazon qualifies as a "supplier" for "otherwise participat[ing] in placing the product in the stream of commerce."

Unfortunately, the legislature did not define this phrase or provide examples of how it should be interpreted. Moreover, the parties have not directed the court to any prior decision from this appellate district (either state or federal) interpreting this section of the statute. Although plaintiff argues that whether or not Amazon is a seller or supplier is a question of fact, the Ohio Supreme Court has confirmed that undefined words or phrases in a statute present a question of law for the court to decide. *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012 Ohio 5317, 981 N.E.2d 795 (2012) ("[T]he interpretation of undefined terms within a statute is a question of law for the court.") citing *Akron Centre Plaza, L.L.C. v. Summit Cty. Bd. of Revision,* 128 Ohio St.3d 145, 2010-Ohio-5035, 942 N.E.2d 1054. In this regard, a review of cases from other jurisdictions is instructive.

Amazon did not in any way modify the caffeine powder purchased by Kelsey Kidd. Nor did Amazon distribute the product as the packaging, handling and shipping were performed by Defendant Tenkoris and shipped directly to Defendant Kidd. Amazon's services -- allowing the product to be uploaded to its marketplace -- were not connected to any aspect of the product which ultimately resulted in the decedent's death. Any issues with labeling, concentration, instructions, warnings, etc., were aspects of the product are unconnected to the services Amazon performed.

In *Inman v. Technicolor USA, Inc.*, U.S. Dist. Case No. 11-666, 2011 WL 5829024, (W.D. Pa., 2011), the plaintiff sued eBay when he contracted acute mercury poisoning from handing and using vacuum tubes he purchased from the online auction site. Inman's Complaint pled strict products liability claims against eBay for selling,

distributing and/or placing the vacuum tubes into the stream of commerce. Inman argued that eBay placed the tubes into the stream of commerce by selling, shipping, distributing and packaging an unreasonably dangerous product, failed to warn of dangers associated with the product and shipped defective products. EBay filed a motion to dismiss the Complaint. In dismissing these claims, the court stated:

> Plaintiff has not set forth any facts demonstrating that eBay acts as anything more than an online forum where sellers such as Tube Zone may peddle their wares to buyers such as Inman. Inman has not pled facts alleging that eBay is so connected to the overall chain of distribution as to suggest a relationship with the manufacturer or product "beyond their immediate sale." * * * Specifically, he has not alleged that eBay, at any time, had anything more than a fleeting connection to the allegedly defective products. He has not alleged that eBay ever had physical possession of the products, that they were moved or stored in a facility owned by eBay, or any other facts to suggest that holding eBay responsible would incentivize safety, that eBay is the only member of the marketing chain available, or that eBay is in a better position than Inman to prevent the circulation of such defective vacuum tubes.

Id. 6. Likewise, Plaintiff has failed to demonstrate that the actions of Amazon in this particular transaction, amounted to anything more than providing an online forum for the seller, Defendant Tenkoris, to peddle its caffeine powder. Amazon never had physical possession of the product, the product was never moved or stored in a facility owned by Amazon. Furthermore, Amazon never fulfilled the sale by labeling, packaging or shipping the product. Plaintiff has failed to provide any evidence that Amazon was so connected to the overall chain of distribution to suggest a relationship with Tenkoris that went beyond their immediate sale.

Plaintiff's brief in opposition makes extensive argument as to Kelsey Kidd's impression that Amazon was the seller of the caffeine powder in question, however, all of the information presented to Kidd on the transaction receipt indicated that the seller and product supplier was TheBulkSource (Tenkoris).

Plaintiff's expert Jon Edward Clark testified that he believed putting a product into the stream of commerce consisted of selling it, that is -- creating a transaction and arranging for shipment. See, Clark Deposition at 46. However, in this specific case, Defendant Tenkoris is the entity that placed the product specific information on Amazon's marketplace and it was Defendant Tenkoris that held the product in hand and arranged for shipment and shipped the product.

Based upon the foregoing, the court finds that Amazon has met its initial burden under Civ.R. 56 of showing the absence of a genuine issue of material fact as to Amazon's liability as a supplier. Plaintiff has failed to meet his corresponding burden of showing

the existence of a disputed issue of material fact for trial. The court finds that as a matter of law, Amazon, under the facts of this case, was not a supplier and did not otherwise participate in in the placing of the caffeine powder in the stream of commerce.[6] Amazon's motion for summary judgment is therefore granted on this issue (Count 7).

Ohio Food & Drug Safety Act

Amazon moves for summary judgment on Plaintiff's claims under Ohio's Food and Drug Safety Act, R.C. §§3715.01 to 3715.99. These claims were also the subject of a prior motion to dismiss wherein the court found that, under the standard applicable to a motion to dismiss, the Complaint pled negligence claims for which the statute would support a negligence *per se* finding should plaintiff be able to prove a violation of the statue.

Revised Code §3715.52(A) provides in part:

> (A) The following acts and causing them are prohibited:
>
> (1) The manufacture, sale, or delivery, holding or offering for sale of any food, drug, device, or cosmetic that is adulterated[7] or misbranded;

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[6] It is important to note that this finding is made under the specific facts of this case. Amazon has a number of different selling formats including but not limited to: proprietary/private label products, products fulfilled by Amazon and products warehoused and shipped directly by Amazon. These selling formats are not implicated in this case where Defendant Tenkoris was an independent third party seller.

[7] Revised Code §3715.52 provides in part:

> Food is adulterated * * * if any of the following apply:
>
> (A) It bears or contains any poisonous or deleterious substance that may render it injurious to health; but in case the substance is not an added substance, the food shall not be considered adulterated if the quantity of the substance in the food does not ordinarily render it injurious to health.

The court has reviewed the statute, and section (A) is the only section that would arguably apply in this case to render the caffeine powder adulterated. The FDA apparently sent warning letters to five bulk caffeine suppliers (not including Defendant Tenkoris) and the adulteration warned of by the FDA (under the Dietary Supplement Health and Education Act (DSHEA)) was an "unreasonable risk of illness or injury under the recommended conditions of use." The precise issue was the difficulty in measuring a safe level of caffeine. See, Clark Depo., at 52-55. This goes to correct dosing, which are complicated in this case by the fact that the decedent never saw the Tenkoris packaging, the Tenkoris packaging recommended a dose that would not have been injurious to health, the decedent had only information supplied by Defendant Kidd as to dosing and which recommended a dosing higher than the product packaging but not a lethal dose, and what appears to have been ingestion by the decedent of a dose well in excess of either. Defendant Tenkoris did not receive a warning letter from the FDA, it is unclear whether or not the

(2) The adulteration or misbranding of any food, drug, device, or cosmetic;

(3) The receipt in commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise;

The statute does not define "sale" or "offering for sale." Black's Law Dictionary defines "sale" as:

> A contract between two parties, called, respectively, the "seller" (or vendor) and the "buyer" (or purchaser), by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and possession of the property.

Black's Law Dictionary, 5th Ed., 1979. The court discussion above addresses the fact that at all times, Defendant Tenkoris was the seller of the Hard Rhino Pure Caffeine Powder. The seller's agreement between Amazon and Tenkoris indicated that Tenkoris was the seller and responsible for the products it uploaded to the Amazon marketplace.

As to (A)(1), Amazon did not manufacture, sell, deliver or offer for sale the subject caffeine powder (which is alleged to be adulterated or misbranded). To the extent any adulteration or misbranding occurred, as set forth in section (A)(2), it would have been at the hands of Defendant Tenkoris or CSPC Pharmaceutical, not Amazon. Under section (A)(3), because Amazon never had possession of the caffeine powder and it at all times remained under the possession and control of Defendant Tenkoris, this section would likewise not apply.

As for the "offering for sale" language in the statute, again, there is no definition of what constitutes "offering for sale" however, when the listing on Amazon's webstore is viewed from the standpoint of what entity created it, it is clear that the entity offering the caffeine powder for sale was Defendant Tenkoris, not Amazon.

Amazon created a template for uploading products to its marketplace. The information that populated the fields in the Amazon created template, however, originated from the *seller*. Defendant Tenkoris set the price, created the product descriptions, selected and uploaded the product images and all other information pertinent to the product listing. In order to complete the sale, all the customer, in this case Defendant Kelsey Kidd, needed to do was select a quantity and then purchase the product. All of the

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Hard Rhino product at issue here suffered from the same measurement issues that concerned the FDA. Pure caffeine powder was not (and is not now) considered an illegal substance.

components that resulted in an "offer" were generated by Defendant Tenkoris, not Amazon. This is true notwithstanding the fact that they were *viewable* on Amazon's online marketplace. The template was not the offering for sale, rather, the information supplied by the seller, in this case Tenkoris, was the substance of the "offer for sale."

The court finds that Amazon has met its initial burden of showing the absence of a genuine issue of material fact as to whether it sold or offered for sale the Hard Rhino Pure Caffeine Powder and that Plaintiff has failed to meet his corresponding burden under Civ. R. 56 to show a genuine issue of fact for trial. Amazon's motion for summary judgment is granted on Plaintiff's claims (Counts 1,2 and 3) under the Ohio Food & Drug Safety Act.

Breach of UCC Implied Warranty of Merchantability

Amazon moves for summary judgment on Count 8 of Plaintiff's Second Amended Complaint which sets forth a claim for breach of UCC Implied Warranty of Merchantability under Revised Code §1302.27.[8] Section 1302.27 provides:

> (A) Unless excluded or modified as provided in section 1302.29 of the Revised Code, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
>
> (B) Goods to be merchantable must be at least such as:
>
> (1) pass without objection in the trade under the contract description; and
>
> (2) in the case of fungible goods are of fair average quality within the description; and
>
> (3) are fit for the ordinary purposes for which such goods are used; and
>
> (4) run, within the variations permitted by the agreement, of even kind, quality and quantity, within each unit and among all units involved; and

[8] The Court previously dismissed Plaintiff's UCC claim for breach of fitness for a particular purpose because the decedent was not the purchaser of the caffeine powder and therefore could not have relied upon Amazon's skill or judgment as it pertained to the product.

(5) are adequately contained, packaged, and labeled as the agreement may require; and

(6) conform to the promises or affirmations of fact made on the container or label if any.

The threshold determination is whether Amazon is a seller and a merchant with respect to goods of that kind. As set forth above with regard to Plaintiff's other claims, Amazon is not the seller of the caffeine powder, Defendant Tenkoris was the seller and Tenkoris was the "merchant with respect to goods of that kind."

Beyond this, the decedent was not the purchaser of the caffeine powder and there was no contractual privity between him and Defendant Tenkoris. In *U.S. Fidelity & Guaranty Co. v. Truck & Concrete Equipment Co.*, 21 Ohio St.2d 244, 257 N.E.2d 380 (1970), the Ohio Supreme Court held:

> In order to maintain an action in contract for injury to personal property based upon a contract of sale, which injury is alleged to be caused by a 'breach of an implied warranty of merchantability' under the provisions of the Ohio Uniform Commercial Code covering contracts of sale, the plaintiff must establish a contractual relationship with the defendant.

Id. at syllabus ¶1. In *O'Bryon v. Poff*, Wayne County App. No. 02CA0061, 2003 WL 21487756 (9th Dist.) the court stated that the under the relevant sections of the UCC:

> Goods are defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities, and things in action." R.C. 1302.01(A)(8). A buyer is a person who buys or contracts to buy goods, and a seller is a person who sells or contracts to sell goods. R.C. 1302.01(A)(1) and (A)(4).

In this case there is no relationship, contractual or otherwise, between Defendant Tenkoris and the decedent. The sale of the Hard Rhino Caffeine Powder took place between Defendant Kidd (as the buyer) and Defendant Tenkoris (as the seller). As a result, none of the warranties set forth in R.C. §1302.27(B) are applicable to the decedent.

The UCC code sections do create an application for implied warranties to third party beneficiaries, however, it is limited in scope. Revised Code §1302.31 provides:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is

reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty. * * *

In this case, the decedent still fails to qualify as a natural person who is in the family or household of the buyer or a guest in the home who could reasonably be expected to use or consume the goods. The court finds that the decedent, under the facts of this case, was not an intended third party beneficiary of any implied warranty of merchantability.

Lastly, other courts have held that Amazon's role as a third party platform for sales does not "qualify it as a merchant or seller under * * * [the] UCC." See, *McDonald v. LG Electronics USA, Inc.,* 219 F.Supp.3d 533, 542. (Dismissing plaintiff's UCC breach of implied warranty claims against Amazon.)

For the foregoing reasons, the court finds that Amazon has sustained its burden under Civ. R. 56 and there is no genuine issue of material fact for trial. Plaintiff has failed to meet his corresponding burden and summary judgment is granted in favor of Defendant Amazon on Plaintiff's UCC claim for implied warranty of merchantability (Count 8).

Fraud

Defendants Amazon have moved for summary judgment on Plaintiff's claim for fraud. The Court addressed this claim in the Amazon's motion to dismiss and found that the fraud claim was abrogated by the OPLA to the extent that it was directed at a duty to warn. See, Order dated September 1, 2015. Nevertheless, the court did not dismiss plaintiff's common law fraud claim as it was pled for concealment and deceit. Defendants now move for summary judgment on this claim arguing that there is no representation made by or that can be linked to Amazon. The only representation was the product listing and that information was supplied solely by Defendant Tenkoris, not Amazon. Plaintiff does not address the fraud claim in his brief in opposition to Amazon's motion.

The elements of fraud consist of:

(1) a representation (or concealment of a fact when there is a duty to disclose)

(2) that is material to the transaction at hand,

(3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, and

(4) with intent to mislead another into relying upon it,

(5) justifiable reliance, and

(6) resulting injury proximately caused by the reliance.

See, *Bear v. Bear*, 2014 Ohio 2919, 2014 WL 2986461 (9th Dist.). It is undisputed in this case that the only representation at issue here (the product listing information and/or the product label information) was created and uploaded by Defendant Tenkoris. It is also undisputed that these representations would have only been made to the purchaser, Defendant Kelsey Kidd, and not to the decedent. It is undisputed that the decedent was never provided with the packaging or dosing instructions on the Tenkoris label, nor did he ever see them.

The court finds that Amazon has met its burden of showing the absence of a genuine issue of material fact as to Plaintiff's claim for common law fraud and Plaintiff has failed to meet its reciprocal burden. Summary judgment is hereby granted in favor of Amazon on Count 12 of Plaintiff's Second Amended Complaint.

Punitive Damages

Plaintiff's Complaint also states a claim for punitive damages. The burden of proof as to punitive damages is by clear and convincing evidence. R.C. 2315.21(D)(4). However, in *Moskovitz v. Mt. Sinai Medical Center*, 69 Ohio St.3d 638, 635 N.E.2d 331, 1994 Ohio 324 (1994), the Ohio Supreme Court stated in regard to punitive damage claims:

> In Ohio, no civil action may be maintained simply for punitive damages. * * * Rather, punitive damages are awarded as a mere incident of the cause of action in which they are sought. *Id.* Thus, compensable harm stemming from a cognizable cause of action must be shown to exist before punitive damages can be considered. [Citations omitted.]

Id. 650, 342. See also, *Miller v. City of Xenia*, Greene App. No. 2001 CA 82, 2002 WL 441386 (2nd Dist., 2002). (Dismissing punitive damage claim were underlying claims did not survive summary judgment motion.) Because this court has granted summary judgment on plaintiff's underlying claims, the claim for punitive damages may not stand independently, and therefore, summary judgment is likewise granted on plaintiff's punitive damage claim.

Section 230 Immunity – Communications Decency Act (CDA)

Finally, Amazon advances an argument under 47 U.S.C.A. Section 230 (eff. 10/21/1998), which has been applied to interactive computer service providers such as

Amazon, Ebay, Craigslist and others where the service provider has been sued based upon information supplied by another party but which was published and/or appeared on the service providers' website. This federal statute provides in pertinent part:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." (47 U.S.C. § 230(c)(1).)[9]

The statute further provides:

> (e) Effect on other laws * * *
>
> (3) State Law
>
> Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. *No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.* (§ 230 (e)(1)(3), italics added.)

Plaintiff disputes the applicability of this statute to the instant case, however, it would appear relevant to the extent that where, as here, the plaintiff is attempting to hold Amazon liable for information it published, but which was created and uploaded by another (Defendant Tenkoris) and where the claim is that Amazon's publishing of the information was a violation of law. A number of the cases where courts have applied the section 230 immunity addressed situations involving illegal goods. While the act appears to have been created for the purpose of addressing the blocking and screening of offensive material such as pornography, there can be no question but that courts have applied it where there have been allegations that an interactive computer service was responsible for "publishing" a specific product or listing – whether it be illegal, dangerous or recalled.

As set forth above, at the time Tenkoris sold the pure caffeine powder to Defendant Kidd up to the current time, it is not illegal to sell pure caffeine powder. However, even assuming that there was some liability for selling the caffeine powder in the first instance, the act has been applied by the courts to answer the direct question of whether an interactive computer service may be held liable as the publisher of the information supplied by another content provider. Courts applying the act to this precise

[9] 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, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." The term "information content provider" is defined 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 system."

question have found in the negative. See, *Lars Gentry v. eBay,* Inc., 99 Cal.App.4th 816 (2002) (Finding eBay not responsible under Section 230 for its dissemination of representations made by the individual defendants or the posting of compilations or information generated by those defendants and third parties.") *Doe v. American Online, Inc.*, Dist. Ct. App. No. 97-2587, 718 So.2d 385,(Fla., 1998). ("By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.")

In *Gibson v. Craigslist*, U.S. Dist.Ct. Case No. 08CIV7735, 2009 WL 1704355 (S.D. NY, 2009) the court considered claims brought by a plaintiff against Craigslist for injuries he sustained when he was shot by a handgun purchased from a Criagslist seller. Craigslist asserted immunity under Section 230 and the court stated:

> Courts engage in a three part inquiry when determining the availability of immunity under the CDA, *i.e.,* "[i] whether Defendant is a provider of an interactive computer service; [ii] if the postings at issue are information provided by another information content provider; and [iii] whether Plaintiff's claims seek to treat Defendant as a publisher or speaker of third party content." * * * "Courts across the country have repeatedly held that the CDA's grant of immunity should be construed broadly."
>
> Plaintiff seeks to hold Defendant liable for its alleged failure to block, screen, or otherwise prevent the dissemination of a third party's content, *i.e.,* the gun advertisement in question, * * * alleging, among other things, that Defendant "failed to monitor, regulate, properly maintain and police the merchandise being bought and sold on its ... website" and "is either unable or unwilling to allocate the necessary resources to monitor, police, maintain and properly supervise the goods and services sold on its ... website." * * * It is clear that Plaintiff's claims are directed toward Craigslist as a "publisher" of third party content and "Section 230 specifically proscribes liability in such circumstances." [Citations omitted.]

The court held that Craigslist was immune under Section 230. As in *Gibson*, Stiner seeks to hold Amazon liable in this case for the dissemination of Defendant Tenkoris' content. Because Plaintiff's claims are for the "publishing" of a third party's consent, if Section 230 applies at all, it would provide immunity to Amazon under these facts.

In *Hinton v. Amazon.com.dedc, LLC*, U.D. Dist.Ct. No. 2:13CV237, 72 F. Supp.3d 685 S.D. Mississippi, 2014), the plaintiff sued eBay for selling defective hunting equipment that had been recalled by the United States Consumer Product Safety Commission.[10]

[10] The plaintiff's amended complaint in *Hinton* set forth claims for : 1) injunction; 2) negligence; 3) intentional conduct; 4) gross negligence; 5) breach of implied warranty of merchantability; 6) failure to warn; 7) breach of duty

Ebay filed a motion to dismiss on the basis that plaintiff's claim against it were barred by section 230. Finding that section 230 immunity applied, the court observed:

> Plaintiff's central factual allegation in support of liability is that eBay permitted a retailer "to advertise and sell the aforementioned recalled product to the Plaintiff through a listing on its auction website after eBay knew or should have known of the CPSC recall." * * * Based on these particulars, the Court finds that all of the Plaintiff's claims against eBay arise or "stem from the publication of information [on www.ebay.com] created by third parties...." CDA immunity will attach in the absence of a statutory exception.

Id. at 690.

In *Stoner v. eBay, Inc.*, Superior Ct. San Francisco Cty. Case No. 305666, 2000 WL 1705637 (Nov. 1, 2000), the plaintiff sued eBay claiming that eBay profited from selling bootleg and other unauthorized sound recordings in violation of law. Specifically, the claims against eBay alleged that:

> (1) eBay actually sells, or at minimum, advertises and offers for sale, and causes the sale of, various bootleg and other infringing sound recordings;
>
> (2) eBay engages in unfair business practices in that, knowing full well that infringing sound recording auctions are prevalent on its site, eBay actively promotes and enables those auctions and takes a commission on each sale, even though it could eliminate said infringing auction if it wanted to; and
>
> (3) eBay itself engages in conduct likely to deceive the public in that it knows about and actively facilitates infringing sound recording auctions even though, as it also knows, many of the ultimate purchasers of the recordings truly do not realize they are buying illegal items with no resale value.

The *Stoner* court noted that under the section 230:

> The undisputed facts establish that the descriptions of the goods and services auctioned over the eBay service are created entirely by the sellers. * * * EBay is not responsible for the creation or development of information relating to any of the products for which it provides auction services. While eBay may add additional information to its web pages, such as logos, category headings and seller ratings, this information is not unlike the information added to many web pages, the purpose of which is to facilitate ease of use and access to the content

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of good faith and fair dealing; 8) violation of Mississippi Consumer Protection Act (MCPA); 9) violation of federal law' and 10) punitive damages.

provided by the third-party. EBay, therefore, is not an information content provider or joint information content provider with respect to the description of auctioned goods. [Citations omitted.][11]

Id. In ultimately granting summary judgment in favor of eBay, the court held:

> Despite plaintiff's attempt to characterize eBay as an active participant in the sale of products auctioned over its service, plaintiff is seeking to hold eBay responsible for informing prospective purchasers that illegal recordings may be purchased-information that originates with the third party sellers who use the computer service. The uncontroverted facts establish that eBay's role does not extend beyond the scope of the federal immunity. EBay provides an interactive computer service by which sellers of goods and services describe over the Internet the products they wish to sell, and sell them to the person who agrees, by submitting a bid through eBay's web site in accordance with the rules of the service, to pay the highest price for the product. EBay provides interactive computer services for which it charges a fee, just as America Online provides interactive services for which it charges a fee. EBay does not select items to be auctioned, does not inspect or come into possession of those items at any time, does not describe the items to prospective bidders, and does not determine the minimum price which the seller will accept for the item. EBay does advertise and promote its auction service, and charges a fee for the use of its service. However, neither aggressive advertising nor the imposition of a fee-including a fee based in part on the price at which an item is sold-transforms an interactive service provider into a seller responsible for items sold. [Citations omitted.]

After reviewing cases from other jurisdictions that have considered an applied section 230 to cases similar to the case at hand, the court finds that to the extent that section 230 is applicable to the instant case, the immunity provided thereunder would further support the finding already made by the court that Amazon is not a supplier or seller of the pure caffeine powder and that it cannot be held liable under the specific facts of this case.

For all of the foregoing reasons, Defendant Amazon's motion for summary judgment on all claims in Plaintiff's Second Amended Complaint is GRANTED.

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[11] The court also addressed the handling of payment for sold items and stated: "eBay's Billpoint service enables buyers to pay for auctioned items by credit card or electronic check. Neither the escrow service nor the Billpoint, however, renders eBay a seller. Both are merely additional services which promote the provident and efficient use of eBay's auction service, irrespective of the legality or illegality of the item being auctioned. These additional features are available with respect to all goods and services auctioned-they are not limited to recordings, much less to illegal recordings."

Plaintiff Dennis Stiner's Motion for Summary Judgment.

Plaintiff Dennis Stiner has also filed a motion for summary judgment in this case on the issue of Defendants Amazon's status as a "supplier" of the pure caffeine powder and also that Amazon may be held liable as a manufacturer under Revised Code §2307.78(B). For the reasons set forth above, and conversely construing the evidence and testimony before it in favor of Plaintiff Stiner on these issues, the court finds that Plaintiff has failed to meet his initial burden of showing the presence of a genuine issue of material fact for trial, and accordingly, Plaintiff's motion for summary judgment is hereby DENIED.

There is no just reason for delay. Case closed. Costs to Plaintiff Dennis Stiner.

IT IS SO ORDERED.

VOL____PAGE____

John R. Miraldi, Judge

cc: All Parties

TO THE CLERK: THIS IS A FINAL APPEALABLE ORDER PLEASE SERVE UPON ALL PARTIES NOT IN DEFAULT FOR FAILURE TO APPEAR, NOTICE OF THE JUDGMENT AND ITS DATE OF ENTRY UPON THE JOURNAL.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Amazon Services, LLC, Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No. 17-ALJ-17-0238-CC **FINAL ORDER**

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (the Court) pursuant to a Request for Contested Case Hearing filed by Amazon Services, LLC (Petitioner or Amazon Services) challenging the final determination of the South Carolina Department of Revenue (Department), in which the Department assessed Amazon Services for a total of $12,490,502.15 in taxes, penalties, and interest for the period of January 1, 2016, through March 31, 2016.[1] Specifically, the Department found Amazon Services is a retail seller who owes sales and use tax on certain retail sales involving third-party (Merchant) products on Amazon Services' online sales platform known as the Marketplace. Amazon Services contends the third-party Merchants are the sellers and are thus responsible for collecting and remitting sales and use tax. The Department issued its Department Determination on June 21, 2017. Amazon Services timely appealed to this Court on July 21, 2017. On December 7, 2018, Amazon Services and the Department filed cross-motions for summary judgment, which this Court denied in an order dated January 29, 2019. Thereafter, a hearing on the merits was held before this Court on February 4-6, 2019, in Columbia, South Carolina.

[1] The amount of assessed taxes is an estimated figure based on information Amazon Services provided to the Department. By agreement of the parties, this estimated amount was used to allow Amazon Services to proceed with this contested case, and the final amount will be determined at the Department level following the conclusion of this litigation. Additionally, the Department issued the proposed assessment without looking into whether any Merchants had already submitted sales tax for their sales in South Carolina. The Department agrees it would be inappropriate to collect sales tax for the same transaction from two different taxpayers. However, the Department also stated it was not provided with information about the identity of Merchants who made sales on the Marketplace so it could "look to see if any of those [Merchants] are registered and remitting any tax."

FINDINGS OF FACT

Amazon Services is an Amazon.com, Inc., subsidiary that operates the website amazon.com (the Marketplace) which lists various products for sale, including products of third-party Merchants. The Marketplace was founded in 2000. The three primary sources of products listed for sale on the Marketplace are: (1) Amazon; (2) Amazon Affiliates[2]; and (3) third-party Merchants. At issue in this case are the sales and use taxes due on retail sales of third-party Merchant products on the Marketplace.[3]

Amazon Services is registered in South Carolina as a "retailer" for the purposes of the South Carolina Sales and Use Tax Act. Besides Amazon Services, two other subsidiaries of Amazon.com, Inc., are also involved in the transactions at issue: Amazon Payments, Inc. (Amazon Payments) and Amazon Fulfillment Services, LLC (Amazon Fulfillment). Amazon Payments processes payments for products listed for sale on Amazon.com.[4] Amazon Fulfillment offers fulfillment services to Merchants (storage, packing, shipping, and delivery).

Approximately fifty percent of the transactions that take place on the Marketplace are sales involving Merchant products. There are approximately 2.5 million active Merchants listing products on the Marketplace. Merchants include both individuals and large corporations. Merchants do not necessarily list their products exclusively on the Marketplace; many Merchants list their products on their own websites, on other online marketplaces, or sell their products in brick and mortar stores.

Relationship Between Amazon Services and Merchants

To use the Marketplace, Merchants must create an online seller account with Amazon Services through an online portal called "Seller Central" and pay Amazon Services various fees. The Marketplace provides Merchants with tools and services to help them list, advertise, and

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[2] These affiliates include Amazon.com LLC, AmazonFresh LLC, Fabric.com, Woot, Inc., Zappos Retail, Inc., 6pm.com, LLC, Amazon Web Services, Inc., Quidsi Retail LLC, IMDb.com, BOP LLC, Warehouse Deals LLC, and Amazon Digital Services LLC.

[3] Sales and use taxes for Affiliate sales on the Marketplace are not at issue in this case because Amazon Services already collects tax for its Affiliates.

[4] Amazon Payments, Inc., is a subsidiary of Amazon.com, Inc. Amazon Services and Amazon Payments have a "Payment Processing Services Agreement" that governs Amazon Payments' collection and processing of payments from customers on the Marketplace. Under this agreement, Amazon Payments "act[s] on [Amazon Services'] behalf solely as a limited agent for the collection, processing and holding of funds in [Amazon Services'] Account." Amazon Services remains the owner of all funds processed by Amazon Payments and Amazon Payments remits the funds to Amazon Services minus any fees charged for its services.

market their products. To create an account, a Merchant must agree to the Amazon Services Business Solutions Agreement (BSA), which is the governing contract between the Merchant, Amazon Services, and several Amazon entities.[5] The BSA may be modified at any time by Amazon. Any modifications are deemed accepted by a Merchant simply by the Merchant continuing to list products on the Marketplace after notice of the modification. Merchants do not have the option of altering the terms of the BSA.

For Merchants whose "Elected Country" is the United States, Amazon Services is the contracting party for the following services: Selling on Amazon, Fulfillment by Amazon, Amazon Webstore, and Amazon Clicks. The contracting party for "Transaction Processing Services," is Amazon Payments.[6] The BSA contains general provisions covering the relationship between Amazon Services and Merchants, as well as more specific provisions governing particular parts of Amazon Services' sales platform, including "Selling on Amazon," "Fulfillment by Amazon," "Amazon Clicks," and "Transaction Processing."

The BSA provides that, except for Amazon Payments' limited role as a payment processing agent, the relationship between Amazon Services and Merchants is that of independent contractors and "nothing in this Agreement will create any partnership, joint venture, agency, franchise, sales representative, or employment relationship between us."[7] In addition, the BSA includes many restrictions on how Merchants can conduct business on the Marketplace. For example:

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[5] Interestingly, Mr. Revich, who is a Merchant on the Marketplace, testified he did not know that he was subject to the BSA when he and/or his company signed up for a Seller Central account. He said he never needed to read the BSA. He also testified he did not know about Amazon Services' published procedures and requirements for Merchants offering products on the Marketplace.

[6] If the Merchant registered for or used Amazon Payments prior to June 30, 2014, "then Amazon Services may in its discretion perform the Transaction Processing Services." However, there was no evidence in this case that Amazon Services exercised that option regarding any of the transactions at issue.

Furthermore, there has been some discussion in this case whether the Department improperly conflated Amazon Services with Amazon Payments and Amazon Fulfillment when it only named Amazon Services as the party responsible for tax in this case. However, based on the BSA, Amazon Services is the contracting party for Merchants whose elected country is the United States except Amazon Payments is an additional contracting party in some circumstances. As this Court noted in footnote 4, *supra*, Amazon Payments is an agent of Amazon Services for processing payments and routing the funds from the customer to Amazon Services. Therefore, Amazon Payments is acting on behalf of Amazon Services in these transactions. Accordingly, I find Amazon Services is the Amazon entity that is ultimately in charge of the transactions at issue.

[7] This language does not absolve Amazon Services of the responsibilities of a seller. Rather, it is a factor to consider when evaluating the true nature of the transactions at issue.

- Merchants agree not to contact a customer who ordered a product with the intent to collect any amounts in connection therewith or influence the customer to engage in an alternate transaction;
- Merchants agree not to target any communications of any kind on the basis of the intended recipient being an Amazon Site user;
- Merchants agree to only use tools and methods Amazon Services designates for communications with Amazon Site users regarding transactions;
- Merchants agree Amazon Services will enable Merchants to list products, conduct merchandising and promote products "as permitted by us";
- Merchants agree Amazon Services may use mechanisms to rate Merchants or allow customer ratings and feedback to be publicly available;
- Merchants agree Amazon Services will provide order information to Merchants;
- Merchants agree that if they are not enrolled in the order fulfilment program, they will set their own shipping and handling charges "subject to" Amazon Services' "program policies and standard functionality (including any category-based shipping and handling charges we determine) and when Amazon Services determines the shipping and handling charges, Merchants will accept them as payment in full for their shipping and handling;
- Merchants agree Amazon Services may, in its sole discretion, withhold for investigation, refuse to process, restrict shipping destinations for, or stop and/or cancel any Merchant transactions;
- Merchants agree to stop any transaction when Amazon Services requests them to do so and they agree to refund a customer in accordance with Amazon's policy when a customer has been charged for an order that Amazon Services stopped or cancelled;
- Merchants agree to "accept and process cancellations, returns, refunds and adjustments in accordance with [the BSA] and the Amazon Refund Policies for the applicable Amazon Site published at the time of the applicable order, and we may inform customers that these policies apply to" Merchant products.

Although these restrictions do not individually establish that Amazon Services is the seller or in the business of selling Merchant products, together they reflect Amazon Services' extensive level of control over transactions on the Marketplace.

Offering a Product on the Marketplace from the Merchant Perspective

Listing a Product

Once a Merchant creates an account, the Merchant can add products to be sold on the Marketplace. At this stage, Merchants set the product price, elect how many units (inventory) will

be available to be sold, determine how the product will be fulfilled, and choose from a variety of advertising campaigns. Although Merchants are ostensibly free to determine the price of their products, they agree in the BSA that the price (including shipping and handling charges, and discount, rebate, or "low price guarantee") must be as "favorable" as the price at which the Merchant offers the product through other sales channels.[8] Once the Merchant uploads the minimum product-specific details, the offer can be published on the Marketplace.

An important aspect of the sale of products on the Marketplace is the "Buy Box." When a customer searches for a product, one Affiliate or Merchant is featured in the Buy Box so that if a customer elects to click the "Buy Now" button, the customer will buy from this default, featured Merchant or Affiliate. Whether a Merchant or Affiliate product is featured in the Buy Box is determined by Amazon Services' algorithm. Although Amazon Services offers a guide to Merchants advising them how to "win" the Buy Box, it does not disclose the functionality of the algorithm to Merchants nor was it disclosed to the Court.[9] Therefore, the Court cannot determine if it is neutral or has inherent biases. Nevertheless, it is clear the Buy Box significantly impacts the sale of products on the Marketplace.[10] It appears analogous to product placement in retail stores.

Communicating with Customers

Amazon Services prohibits Merchants from contacting customers in a manner they do not specifically provide and approve. This limited communication arrangement is by design pursuant to the BSA, which provides that Amazon Services handles all communications related to order confirmation, cancellation confirmations, and notices of auto-renewal for certain programs regardless of whether the Merchant uses the FBA program or not. Thus, once a customer purchases a product on the Marketplace, it is Amazon Services, and Amazon Services only, that sends the

[8] Indeed, if Amazon Services discovers a product is not "in parity" with other sales channels, Merchants agree that if they do not lower the price to be in parity within twenty-four hours then Amazon Services can lower the price to match the more favorable offer. Moreover, if Amazon Services so requests, Merchants agree to reimburse customers adversely affected by the price that was not in parity with other sales channels.

[9] The evidence presented indicates the algorithm takes into account factors like price, the amount of product in stock, the Merchant's customer rating, and the speed of delivery, and puts the "best" offer forward. However, the algorithm is proprietary and how these factors are weighted and meshed together is not known to the Court.

[10] The witness that Amazon presented to "methodically" explain the sale of Merchant products on the Marketplace testified that though the data as to the percentage of customers who purchase from the Buy Box is known by Amazon Services, he had not seen the report. He eventually stated that his "instinct" was that sales attributable to the Buy Box are greater than fifty percent. This figure should have been readily available from a credible witness.

customer an order confirmation via email. Customers typically receive only one Amazon.com order number and one invoice from Amazon Services for a transaction, regardless of the number of items purchased in the transaction and the number of Merchants involved. Communications notifying customers that an order has been received or shipped also come from Amazon Services, not Merchants.

Communication between Merchants and customers must be made using a feature on the Marketplace called the "Buyer-Seller Messaging Service" or through a direct phone call to the Merchant. The "Buyer-Seller Messaging Service" connects customers to Merchants through the Merchant's business or personal email address that is connected to their Seller Central account. However, communication between customers and Merchants is not required to complete transactions on the Marketplace. Therefore, a customer on the Marketplace can purchase a Merchant product without ever interacting with the Merchant. Amazon Services did not dispute this fact or explain the regularity of its occurrence.

Purchase and Delivery

Customers can purchase multiple products from different Merchants and Affiliates one at time or at the same time. When customers are ready to buy the product(s) in their Amazon Cart, they click the "Proceed to Checkout" button and are directed to Amazon's Checkout page where they input their shipping address and payment method (or confirm a previously entered shipping address and payment method associated with the account). The customer also selects a shipping or delivery option (if more than one option is available).

Once a customer purchases a Merchant product, the order is shipped to the customer in one of two ways. First, the Merchant can ship the product itself. In this case, Amazon Services provides the Merchant with the customer's shipping information after the purchase is completed and the Merchant ships the product to the customer subject to Amazon Services' "Program Policies and standard functionality." These "Program Policies" set shipping and handling charges for certain types of products, and Merchants are required to accept these pre-determined charges as payment in full for shipping and handling even if it actually costs a Merchant more to ship that particular product.[11]

[11] Amazon Services provides Merchants with a "standard shipping credit" when an order is shipped. A Merchant "must ship orders even if the shipping credit is less than your total shipping costs" and can off-set any difference by adjusting shipping costs or the price of his product.

Second, Merchants can, for an additional fee, use Amazon Fulfillment's Fulfillment By Amazon (FBA) program to pack and ship their products. To utilize this service, Merchants must ship their products to an Amazon fulfillment center for storage. Amazon Fulfillment can comingle products and move them between fulfillment centers but keeps track of the products in its warehouses with bar codes. Merchants can remove their products from a fulfillment center at any time, and they remain the owners of the products they store at Amazon fulfillment centers. If there is an issue related to packaging, handling, shipping, or a customer return of a product in the FBA program, then Amazon Services handles the customer service for that product.

Payment

Customers cannot make payments directly to Merchants, and Amazon Services expressly prohibits Merchants from requesting payment from customers. Rather, when a purchase is made, it must be made directly through Amazon Services' website. Customers input their payment information directly into the Amazon.com website—there is no pop-up window or other action directing customers to another website operated by someone else. Therefore, Amazon Services conducts the point of sale[12] for any product sold on the Marketplace.

When a product is purchased on the Marketplace, Amazon Payments obtains pre-authorization from the customer's credit card company to ensure funds are available to complete the purchase.[13] When asked whether a hold is placed on the card's available funds, Amazon Services' witness testified that some type of hold "may" be placed on a customer's card between the order being placed and shipment. I thus find that credit card companies place a hold on the available credit of Marketplace customers for some period of time.[14] Once a product is shipped, either by the Merchant or the FBA program, Amazon Payments completes the charge to the customer's credit card.

Amazon Services and Amazon Payments' actions during a transaction are governed by the BSA. In signing the BSA, Merchants authorize Amazon Payments to act as the Merchant's agent "for the purposes of processing payments, refunds and adjustments for Your Transactions,

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[12] The Court will address the phrase "point of sale" more fully *infra*.

[13] Furthermore, Amazon Services also accepts debit cards, U.S.-based checking accounts, "Amazon Store Cards," and Amazon gift cards. It is unclear whether these instruments are immediately charged or not.

[14] Amazon Services' witness should have been aware of how the process works. This finding is therefore based upon an evaluation of the witness's credibility, Petitioner's burden of proof, and common sense.

receiving and holding Sales Proceeds on your behalf, remitting Sales Proceeds to Your Bank Account, charging your Credit Card, and paying Amazon and its Affiliates amounts you owe in accordance with this Agreement or other agreements you may have with Amazon Affiliates." Merchants further agree Amazon Services will receive all sales proceeds on behalf of the Merchant "and [Amazon Services] will have the exclusive rights to do so."

Customer Service

If a customer has an issue with a Merchant product, Merchants are required to accept and process cancellations, returns, and refunds in accordance with the BSA and the applicable Amazon Refund Policies. Amazon Services informs customers that the Amazon Refund Policies apply to Merchant products. If a refund is requested, then Merchants agree Amazon Services "will process all payments, refunds and adjustments for Your Transaction." In other words, all refunds are routed through Amazon Services. Where fraud is suspected, Amazon Services bears the risk of credit card fraud, but Merchants bear the risk of all other fraud and loss. The BSA authorizes Amazon Services to "in [its] sole discretion withhold for investigation, refuse to process, restrict shipping destinations for, stop and/or cancel any [Merchant] Transactions." Additionally, Merchants agree to "stop or cancel order of [Merchant] Products if [Amazon Services]" so requests.

Receipt of Funds

Amazon Services controls the flow of funds between customers, Amazon Services, and Merchants. Amazon Services receives customer payments for Merchant products and then remits the proceeds to Merchants on a bi-weekly basis or more frequently at Amazon Services' option.[15] The proceeds are held in an Amazon Services' account and may be combined with other funds or other users, invested, or otherwise used as permitted by law before disbursement to Merchants. Merchants do not receive interest on any sales proceeds held on their behalf. Furthermore, Amazon Services deducts its fees, including the Referral Fee, the Variable Closing Fee (if applicable), the Selling on Amazon Subscription Fee ($39.99/month), and any other applicable

[15] The BSA provides that Merchants "will not have the ability to initiate or cause payments to be remitted to you." However, Amazon Services provided testimony that even though the BSA prohibits Merchants from requesting disbursement of their funds sooner than the fourteen-day period, they often do, and Amazon Services will remit the funds sooner. Amazon Services also provided testimony that it typically takes a couple days for a customer's funds to become available, and then a Merchant can request those funds from Amazon Services. I find Amazon Services ultimately controls when funds are disbursed.

fees owed to Amazon Services before remitting any proceeds to Merchants. Additionally, all customer refunds must be routed through Amazon Services, including refunds resulting from orders that are cancelled at the direction of Amazon Services. Thus, Amazon Services maintains control over the flow of funds from the sale of Merchant products and controls the flow of funds if a transaction unwinds as well.

Referral Fees

Amazon Services charges a Referral Fee for each Merchant product sold. The BSA describes the Referral Fee as "the applicable fee ***based on the Sales Proceeds*** from Your Transaction through the applicable Amazon Site . . . ***based on the categorization*** by Amazon of the type of product that is the subject of Your Transaction . . . ." Amazon Services' witness described the Referral Fee as "a percentage fee of the product charges which varies by category" that is charged for "all the services Amazon Services offers like listing a product, the ability to upload images and so on." In sum, Referral Fees are charged by product category and are based, in part, on the expected gross margin of the product. The fee ranges from a minimum Referral Fee of $1.00 to 45% of the total sales price for Amazon Device Accessories. If a customer requests a refund, Amazon Services will refund the Referral Fee to the Merchant minus a "refund administration fee," which is the lesser of 20% of the product's value or $5.00.

Taxes

Although Amazon Services issues 1099-Ks to Merchants who sell more than $20,000 worth of product within a year, Amazon Services only collects sales tax when it is obligated to by state law. Although no person or entity other than Amazon Services interfaces with customers during Marketplace transactions, the BSA requires Merchants to agree to be responsible for the collection, reporting, and payment of all taxes. However, Amazon Services will collect sales tax if a Merchant elects to pay for Amazon Services' tax collection service, but **only if** the merchant is a Professional Seller or Webstore Seller, not an Individual Seller. Therefore, Amazon Services' Marketplace platform and sales model precludes Individual Sellers from having the opportunity or means to collect taxes at the point of sale.

Additionally, if a Merchant subscribes to Amazon Services' tax collection service, then Amazon Services charges the customer the sales tax and remits that amount back to the Merchant. Accordingly, Amazon Services merely collects "the value of the sales tax." Therefore, Amazon

Services collects the sales tax due at the point of sale but places the responsibility upon the Merchant to disburse the sales tax to the relevant state.

Amazon Services' Example of a Merchant's Experience

Amazon Services presented the testimony of one Merchant, Matthew Revich of Yedi Houseware Appliances (Yedi), who utilizes the Marketplace to sell his Yedi products. Amazon Services appeared to offer Mr. Revich's testimony as an example of how all Merchants operate and interact with customers on the Marketplace. At the outset, the Court does not find that one Merchant's perspective establishes the perspective of all 2.5 million Merchants on the Marketplace. In fact, Mr. Revich had only compared his experiences with three other Amazon Merchants. Additionally, the Court did not find Mr. Revich's testimony very probative or compelling considering he was unaware of many details about how his own business is run, including how his inventory is tracked, who his employees are (despite being a very small company), and what fees he is charged. Although Mr. Revich believes he is the seller of Yedi's products on the Marketplace, Mr. Revich testified he was not familiar with how Amazon Services' Referral Fee is charged, and he was unaware of the Amazon Services' policies and guidelines or where to find them. He had never read the BSA.

Nevertheless, Mr. Revich's testimony offered an interesting correlation between what Amazon Services claims to be evidence showing Merchants are retail sellers and what this Court finds to be evidence showing Mr. Revich functions like a wholesale distributer. When Mr. Revich is interested in selling a product, he researches what products he believes are marketable and then contacts his source, "Vinnie," in Hong Kong to find factories in China that can manufacture the product. He tests the prototypes of the manufacturer, and then selects and determines the specifications of what he wishes to have manufactured. Once the product is manufactured, the product is sent to his warehouse in California. While I agree this testimony reflects Yedi controls the manufacturing of its products, that control does not reflect who is the ultimate seller of Yedi products.

Mr. Revich sells products through the Marketplace, Walmart's website, his own website, mom-and-pop shops, and supermarket chains. The sale of his products via mom-and-pop shops and supermarket chains are clearly as a wholesaler to brick-and-mortar stores, yet the product development is the same regardless of whether the product is sold to the brick-and-mortar store (wholesale) or sold on the Marketplace (retail). Thus, Yedi's control over product development is

not dispositive of whether Yedi, or by implication any other Merchant, is a retail seller as opposed to a wholesale seller.

Furthermore, Yedi provides the same customer services whether the product is sold on the Marketplace or to a brick-and-mortar retail store. Specifically, Mr. Revich provides customer service to address, for example:

- why the product did not come with the waffle plates,
- missing gloves from pressure cookers, and
- whether the product can be returned.

All Yedi products are sold with a product manual providing Yedi's e-mail address so that purchasers of its products can contact Yedi about product concerns and warranty claims. In other words, Yedi offers similar customer service no matter how the product is sold—at wholesale or at retail. Therefore, this evidence does not reflect that the customer service Merchants offer to Amazon customers is distinct from the customer support a wholesale seller would offer to a retail purchaser at a brick-and-mortar store.

Finally, Mr. Revich remits sales taxes to the state of California because his warehouse and business office are located there, but he does not know who should pay sales tax on products he currently sells to South Carolina customers. He does not currently pay sales tax to South Carolina. He further testified he does not know whether he should be paying sales tax on his products sold in South Carolina.

Buying a Product on the Marketplace from a Customer's Perspective

Finding a Product

No testimony was presented from an actual Marketplace customer; however, Amazon Services' executive, Mr. Poad, explained what he believes to be a typical customer purchase of a Merchant product.[16] He testified that a customer typically begins the process by searching for a product on the Marketplace (Amazon.com). Once the customer selects a product from the search results, the customer is taken to the Product Detail Page to see an image of the product, its description, and customer reviews. The Product Detail Page also has a link to purchase the product from the default offeror (the winner of the Buy Box) or the customer can click on a link lower

[16] Although I set forth some of Mr. Poad's observations, I do not find they are representative of a typical purchase on the Marketplace because his testimony was not supported by statistical data and is ultimately conjecture of how a typical purchase from the 2.5 million individual active Merchants would occur.

down on the right side of the page to see other sellers of the product. The name of the offeror whose product is in the Buy Box is visible, but not prominent underneath the "Buy Now" button. The link to other sellers is even less prominent. Unless a customer intentionally seeks out other sellers, the customer will probably purchase the product from the default offeror who won the Buy Box.[17]

If the customer clicks on the link to the other sellers, she will see all the Merchants and Affiliates on the Marketplace who offer the product. Although Mr. Poad testified most customers visit the "offer listing page," his opinion was not supported by data. The Court is thus left to speculate what his characterization of "most" means; in particular, whether "most" means the customer visits the page only once in conjunction with hundreds of purchases or visits the page for each and every purchase. Thus, the Court did not find this evidence particularly probative. In fact, if most customers visit the "offer listing page," it is equally clear the remaining number of customers, who do not meet the witness's characterization of "most," never consult the "offer listing page."

Purchasing a Product

Once the customer determines to purchase a Merchant product, the customer can click the "Buy Now" button or put the product in the customer's shopping "Cart" to purchase later. All purchases on the Marketplace go through the customer's Amazon.com account even if the customer has multiple products in their Cart from different Merchants. Once the customer clicks "Proceed to Checkout," the customer enters her shipping address and payment method using Amazon Services' functionality. Then, without leaving that page, Amazon Payments (operating in the background) processes the customer's payment.[18]

On the Checkout page, Amazon Services provides an "Order Summary," which identifies the total cost of the product(s), shipping and handling, and estimated tax to be collected (if any). No fees or per-transaction costs are listed on the Order Summary. Once the purchase is complete, Amazon Services sends the customer an Order Confirmation email along with an Amazon.com

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[17] Surprisingly, Amazon Services' witness was unable to testify with any confidence about the percentage of sales that result from the customer clicking on the Buy Box product although this would seem to be an important figure for the company to know.

[18] As discussed *supra*, Amazon Payments conducts a "pre-authorization" confirming the customer's card has available funds immediately after the order is placed, but the customer's card is not actually charged until shipping is confirmed.

order number. The confirmation states, "Thank you for shopping with us," and is signed by "Amazon.com." Amazon Services also sends the customer a Shipping Confirmation email, at which point the customer's credit card is officially charged. The Merchant is not mentioned on either email.[19]

Although the BSA provides that Merchants "are always the seller of record," the evidence indicated Amazon Services' name or one of its Affiliates' names is the name that appears on the customer's credit card statement. Specifically, as explained by Mr. Poad, the charge on the customer's credit card statement usually reflects the charging entity to be Amazon or Amazon Marketplace in the field descriptor.

Customer Service Issues and the "A to Z Guarantee"

If, after receiving the product, the customer has questions about how to use it or is missing a part, the customer can seek answers through Amazon's Buyer-Seller Messaging service or call the Merchant for customer service.[20] However, if a dispute arises between the customer and the Merchant that cannot be resolved, Amazon Services will "make the customer whole" through its "A to Z Guarantee" program. In other words, Amazon Services guarantees purchases from "third-party sellers" made via the Marketplace to ensure customers "buy with confidence." Specifically, Amazon Services guarantees the condition of the product and its timely delivery under this program. Amazon Services will also reimburse customers who do not receive an agreed upon refund from a Merchant or who were charged more than the customer authorized for the purchase. Customers can receive up to $2,500 of the purchase price, including shipping charges.

The Department's Administrative Policy

The Court finds the Department has no longstanding administrative policy regarding the taxation of online marketplace facilitators like Amazon Services. The Court's determination is based upon the Department's own admission to this effect at the hearing and the testimony of its former Appeals Administrator, Ricky Taylor, who opined the Department did not have a longstanding policy as of 2016 with respect to how to apply sales tax law to products sold by

[19] However, if the customer clicks on the link to the order number or "Manage My Order," they will see a page that identifies the Merchant as the seller.

[20] As previously noted, Amazon Services did not explain how this customer service is distinct from the customer service a customer would receive from a manufacturer of a product sold at a brick-and-mortar store.

Merchants on Amazon.com. Indeed, there was no evidence presented that the Department ever held a position on the taxation of marketplace facilitators until this case arose in 2016.

Amazon Services also sought to introduce evidence of the Department's position regarding taxing third-party sales in various legislative settings after the Determination was issued. For example, Amazon Services cites to a document of the Legislative Oversight Committee of the South Carolina House of Representatives dated October 23, 2018, that recommends amending existing legislation to add a provision taxing marketplace facilitators. A specific phrase in the recommendation states, "[w]ithout this ability [to collect tax from marketplace facilitators], DOR would have the right to collect sales tax directly from some third-party sellers, but it predicts that the significant administrative burden of collecting from so many individuals and companies would result in a large percentage of these taxes going uncollected."

The Court allowed this evidence to be entered into the Record to the extent it might be probative. However, this evidence has little probative value because the Court has already determined the Department is not entitled to deference and, therefore, there is no need to impeach their interpretation. Moreover, this is a *de novo* hearing where it is the Court's province to determine whether Amazon Services is liable under the Sales and Use Tax regardless of what position(s) the Department may have taken in the context of legislative hearings after the Determination was issued. Accordingly, the Court does not find the Department's statements in legislative proceedings after the Determination was issued persuasive to this Court's charge to interpret and apply the law in this case.

ISSUES

1. Whether the Department erred in assessing Amazon Services for sales and use tax on the sale of third-party Merchant products on its Marketplace.
2. Whether the Department's imposition of the sales and use tax on Amazon Services violates Amazon Services' due process rights.
3. Whether the Department's imposition of the sales and use tax on Amazon Services violates Amazon Services' right to equal protection under the law.

STANDARD OF REVIEW

This Court has subject matter jurisdiction in this case pursuant to section 1-23-600(A) of the South Carolina Code (Supp. 2018) and section 12-60-460 of the South Carolina Code (2014). This is a contested case, and it is heard *de novo*. *Be Mi, Inc. v. S.C. Dep't of Revenue*, 408 S.C.

290, 297, 758 S.E.2d 737, 740 (Ct. App. 2014) ("In reaching a decision in a contested violation matter, the ALC serves as the sole finder of fact in the de novo contested case proceeding." (citation omitted)); *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002) (explaining that a contested case before the ALC is "in the nature of a de novo hearing with the presentation of evidence and testimony"). The standard of review is thus a preponderance of the evidence. S.C. Code Ann. § 1-23-600(A)(5) (Supp. 2018); *see also Anonymous (M-156-90) v. State Bd. Of Med. Exam'rs*, 329 S.C. 371, 375-78, 496 S.E.2d 17, 19-20 (1998) ("Absent an allegation of fraud or a statu[t]e or a court rule requiring a higher standard, the standard of proof in administrative hearings is generally a preponderance of the evidence."). Because Amazon Services is challenging a Department Determination, Amazon Services has the burden of proof to show by a preponderance of the evidence that the Department's Determination was incorrect. *Leventis v. Dep't of Health and Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that generally, the complaining party bears the burden of proof).

CONCLUSIONS OF LAW

Statutory Construction of Tax Laws

To the extent the Court must engage in statutory construction to resolve this case, the primary goal is to discern the intent of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); *see also Multi-Cinema, Ltd. v. S.C. Tax Comm'n*, 292 S.C. 411, 413, 357 S.E.2d 6, 7 (1987) ("The usual rules of statutory construction apply to the interpretation of tax statutes.").

"The first question of statutory interpretation is whether the statute's meaning is clear on its face." *Wade v. Berkeley Cty.*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581.

In the context of tax statutes, our Supreme Court has held that "where the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor." *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012). The Supreme Court's decision in *Alltel* reflects our courts' long-

standing precedent that "any *substantial doubt* must be resolved against the state and in favor of the taxpayer." *Edisto Fleets, Inc. v. S.C. Tax Commission*, 256 S.C. 350, 357, 182 S.E.2d 713, 716 (1971) (Bussey, J., dissenting) (emphasis added); *Rent-A-Ctr. E., Inc. v. S.C. Dep't of Revenue*, 425 S.C. 582, 587, 824 S.E.2d 217, 220 (Ct. App. 2019), *reh'g denied* (Mar. 21, 2019) ("[A]ny substantial doubt in the application of a tax statute must be resolved in favor of the taxpayer.").

But what is "substantial doubt"? In *Alltel*, the Supreme Court held "[t]he presence of an ambiguity in a tax assessment statute requires that a court resolve that doubt in favor of the taxpayer." 399 S.C. at 316, 731 S.E.2d at 870. Thus, the Supreme Court associated "substantial doubt" with "ambiguity."[21] Further, something is ambiguous if it is "susceptible to two reasonable interpretations." *S.C. Dep't of Soc. Servs. v. Lisa C.*, 380 S.C. 406, 416, 669 S.E.2d 647, 652 (Ct. App. 2008); *see also Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001) ("[S]ince the plain language of the statute lends itself to two equally logical interpretations, this Court must apply the rules of statutory interpretation to resolve the ambiguity and to discover the intent of the General Assembly."). Therefore, a taxpayer is entitled to have an "ambiguity" or "substantial doubt" resolved in his favor if the statute is susceptible to two ***reasonable*** interpretations.

Further, whether a certain interpretation is reasonable is not made in a vacuum; rather, the Sales and Use Tax Act is construed in light of "the purpose of the whole statute" and "the policy of the law." *Enos v. Doe*, 380 S.C. 295, 305, 669 S.E.2d 619, 623 (Ct. App. 2008). Indeed, our Supreme Court's decision in *Crescent Manufacturing Co. v. Tax Commission* stands for the principle that even if a single statute is ambiguous as applied to a taxpayer, if that ambiguity is resolved by the overall legislative purpose evidenced by the tax scheme as a whole, then the taxpayer is not entitled to have the statute construed in his favor. 129 S.C. 480, __, 124 S.E. 761, 765 (1924) ("That rule of strict construction of . . . tax statutes is subordinate to the rule of reasonable, sensible construction, having in view effectuation of the legislative purpose, and does not prevent the courts from calling to their aid all the other rules of construction and giving each its appropriate scope, etc." (internal quotation marks and citations omitted)).[22]

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[21] Equivocating substantial doubt to ambiguity is further supported by the Supreme Court's conclusion in *Alltel* that "[t]he existence of an ambiguity in section 12–20–100 raises substantial doubt regarding the section's application to Petitioners" and "[t]his doubt must be resolved in favor of Petitioners." *Id.* at 321, 731 S.E.2d at 873.

[22] Another facet of statutory construction in administrative law is agency construction. If a statute is ambiguous, the long-standing interpretation of the statute by the agency tasked with administering it is entitled to deference if the interpretation is not arbitrary, capricious, or manifestly contrary to the statute. *See Kiawah Dev. Partners, II v. S.C.*

Finally, there is yet one more distinction that must be made in this case. The fact that there is a disagreement about the application of a tax statute to the facts does not mean that the tax statute itself is ambiguous. It is the province of this Court to make findings of fact, and facts may clarify the application of the law. *See Brown*, 348 S.C. at 512, 560 S.E.2d at 413 (explaining that a contested case before the ALC is "in the nature of a de novo hearing with the presentation of evidence and testimony"). This point is most salient in this case because, before the Court can find Amazon's interpretation of the tax laws is reasonable, it must first agree with Amazon's view of the facts.

Legislative Documents

Amazon Services argues certain statements made by the Department in legislative documents after the Determination constitute admissions by the Department that the Sales and Use Tax Act is ambiguous as applied to Amazon Services, and the ambiguity should be construed in its favor. Specifically, Amazon Services argues statements, primarily made by the Department's Director at legislative proceedings (which were held after the Department issued its Determination in this case), show the Department does not believe it can tax marketplace facilitators without new legislation.

A change in the Department's position does not inherently show ambiguity in the statute or its application. This Court has witnessed state agencies change their position numerous times, sometimes as the result of the change in directors, sometimes for other reasons.[23] Although the Department's position may change, therefore diminishing the worthiness of its interpretation in a deference analysis, the law remains the same. Furthermore, no matter what position the Department may espouse, it cannot circumvent the obligations imposed upon it by the General Assembly. *See TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 627, 503 S.E.2d 471, 480

Dep't of Health & Envtl. Control, 411 S.C. 16, 34–35, 766 S.E.2d 707, 718 (2014) (holding "where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons" and "[w]e defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute'"); *Etiwan Fertilizer Co. v. S.C. Tax Comm'n*, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950) ("We have held in many cases that where the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons."). In this case, the Department admitted it has no-longstanding interpretation of the Sales and Use Tax Act as applied to third-party sellers or marketplace facilitators in an online marketplace. Therefore, the Court finds the Department has no long-standing interpretation that is entitled to deference in this case.

[23] Indeed, Amazon Services' own expert witness confirmed that different Directors present different viewpoints concerning the law.

(1998) (holding that the "Department does not have the authority to waive the application deadline and annual determination requirements" set forth in the statute). Therefore, the Court finds the Department's statements in the legislative context after the Determination was issued do not render the Sales and Use Tax Act ambiguous because it is the Court's province to interpret the law and establish ambiguity, not the Department's. *See Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) ("Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below."); *see also Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995) ("An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose.").

Novelty of Amazon Services' Business Model

Amazon Services also argues that its self-proclaimed function as a "marketplace facilitator" precludes it from being a seller under Sales and Use Tax Act because "marketplace facilitators" are not named in the Act. All parties agree that at the time of the tax audit, no specific statutory provision imposed the responsibility to collect sales or use tax on a "marketplace facilitator" when a product is sold on the facilitator's online marketplace.[24] However, even though

[24] At the time this case arose in 2016, the Sales and Use Tax Act contained no reference to businesses, such as Amazon Services', that style themselves as "marketplace facilitators." During this case, Amazon Services sought to introduce evidence of pending legislation regarding marketplace facilitators to show the Act was ambiguous because it required an amendment to incorporate marketplace facilitators into the tax scheme. The Court explained at the merits hearing that it was not comfortable relying on pending legislation as a tool of statutory construction. *See CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 80-81, 716 S.E.2d 877, 884 (2011) (holding failed legislative proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute" and "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change"). Since the merits hearing in this case, the General Assembly passed legislation amending the Sales and Use Tax Act to specifically add marketplace facilitators to the statutory scheme. *See* 2019 S.C. Acts No. 21 (effective April 26, 2019).

Generally, "[w]hen a statute is amended, there is a presumption that the legislature intended to change the existing law." *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008). "Nonetheless, a subsequent statutory amendment may also be interpreted as clarifying original legislative intent." *Id.* Sometimes the General Assembly will indicate whether it intended an amendment to clarify its original intent in the enacting legislation, as the Court recognized in *Duvall*. *See id.* at 47, 659 S.E.2d at 130 ("Given that the title of the Act itself indicates the amendment was a clarification of, rather than a change to, the law, we find a remand to the ALC is unnecessary."); *see also Hock RH, LLC v. S.C. Dep't of Revenue*, 423 S.C. 208, 215, 813 S.E.2d 540, 544 (Ct. App. 2018) (noting "Act 208 is titled, 'An act to amend section 59-40-140 . . . so as to clarify that property of charter schools exempt from such taxation includes owned or leased property'" and finding "by its own words, the General Assembly's stated purpose for the 2014 amendment was to clarify rather than broaden the exemption already afforded"). It may also be appropriate to look to the enacting legislation to determine legislative intent. *Hock RH, LLC*, 423 S.C. at 214, 813 S.E.2d at 543 ("It is [also] 'proper to consider the title or caption of an act in aid of construction to show the intent of the legislature.'" (citation omitted)).

Here, when the General Assembly amended the Sales and Use Tax Act to include a definition for, and references to, "marketplace facilitator," it specifically stated in the enacting legislation that "this act shall not be construed as a statement concerning the applicability of the South Carolina Sales and Use Tax Act to any sales and use tax liability

Amazon Services' business model is new and not specifically referenced in the Act, the novelty of its business model does not mean the application of the Act to Amazon Services is necessarily ambiguous such that it requires a resolution in Amazon Services' favor.

Specifically, "[w]hile every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (emphasis in the original); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 86 (2012) ("The meaning of rules is constant . . . [o]nly their application to new situations presents a novelty."). As Justice Scalia explained, "[d]rafters of every era know that technological advances will proceed apace and that the rules they create will one day apply to all sorts of circumstances that they could not possibly envision." SCALIA & GARNER at 86. Consistent with these principles, courts have routinely found changed circumstances and new technologies that were beyond the conception of the legislature at the time it enacted a statute are to be included within statutory definitions. *See Diocese of Trenton v. Toman*, 74 N.J. Eq. 702 (N.J. Ch. 1908) (deciding that an automobile is a carriage within the meaning of a covenant passed before the invention of automobiles and which reserved a strip of land for a "carriageway" forever); *Crispin v. Christian Audigier, Inc.*, 717 F.Supp.2d 965 (C.D. Cal. 2010) (holding that Facebook is an Electronic Communication Service under the Stored Communication Act, which is a statute that predated Facebook and the Internet); *State v. Espinoza*, 264 So.3d 1055, 1067 (3rd Fla. Dist. Ct. App. 2019) (finding that "[a]lthough Bitcoin did not exist at the time the registration requirements of chapter 560 were enacted, Bitcoin undoubtedly qualifies as a 'medium of exchange'").

Therefore, although the legislature may not have envisioned the facts of this case when it passed our tax laws, this does not mean the facts of this case do not fit within the existing laws.

General Sales and Use Tax Law

In this State, a "sales tax, equal to five percent of the gross proceeds of sales, is imposed upon

in matters currently in litigation or being audited." 2019 S.C. Acts No. 21 § 5 (effective April 26, 2019). This case was, and is, "currently in litigation" as the result of an audit. Therefore, consistent with the legislative intent expressed in the enacting legislation, the Court will interpret the Sales and Use Tax Act as it existed at the time this case arose without reference to the new legislation and without drawing any inferences from it.

- every person
- engaged or continuing within this State
- in the business of selling tangible personal property
- at retail."

S.C. Code Ann. § 12-36-910(A) (2014) (emphasis added). Section 12-36-910(A) clearly imposes the sales tax upon the ***person*** engaged in the ***business of selling*** tangible personal property at retail. Further, the term "business" is broadly defined to mean "***all activities***, with the object of gain, profit, benefit, or advantage, ***either direct or indirect***." S.C. Code Ann. § 12-36-20 (2014) (emphasis added). This broad application of who is engaged in the business of selling is also reflected in the definition of "retailer" or "seller," which includes, in relevant part, every person "selling or auctioning tangible personal property whether owned by the person **or others**." S.C. Code Ann. § 12-36-70(1)(a) (2014) (emphasis added). Therefore, reading the statutes as a whole, a person is "engaged in the business of selling" if the object of the activity is to achieve a profit, benefit, or advantage by either a direct or indirect means whether the property is owned by the person or others.

Next, the person who is taxed under section 12-36-910(A) must be engaged in "retail" sales. A "retail sale mean[s] all sales of tangible personal property except those defined as wholesale sales." S.C. Code Ann. § 12-36-110 (2014). Moreover, a "sale" or "purchase" is defined to mean:

> any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration ***including***:
>
> * * *
>
> (4) a transfer of title ***or*** possession, or both.

S.C. Code Ann. § 12-36-100 (2014) (emphasis added). Importantly, under section 12-36-100, a sale does not require the transfer of title ***and*** possession, nor is a sale limited to the transfer of title or the transfer of possession.

Although the tax is imposed upon the person in the business of selling, the seller may pass it onto, and collect it from, the purchaser. *See* S.C. Dep't of Revenue, South Carolina Sales and Use Tax Manual, Chap. 2, Pg. 2 (2015) ("The seller may pass the sales tax on to the purchaser when billing the purchaser, but while many sellers collect the sales tax from the purchaser, this is

not a requirement.").[25] The seller's failure to collect the sales tax from the purchaser does not relieve the seller of his obligation to remit the tax. *See* S.C. Code Ann. § 12-36-940(B) ("The inability, impracticability, refusal, or failure [of the retailer] to add these amounts [of sales tax] to the sales price and collect them from the purchaser does not relieve the taxpayer from the tax levied by this article."); *see also* S.C. Dep't of Revenue, South Carolina Sales and Use Tax Manual, Chap. 2, Pg. 2 (2015) ("However, the seller's inability, refusal or failure to collect the sales tax from the customer does not relieve the seller from remitting the sales tax to the State."); 85 C.J.S. *Taxation* § 2214 ("The seller has the duty to remit the sales tax to the appropriate administrative agency even if the seller does not collect the tax from the buyer at the time of sale.").

Additionally, the sales tax is calculated based upon the "gross proceeds of sales," which means "the value proceeding or accruing from the sale, lease, or rental of tangible personal property." S.C. Code Ann. § 12-36-90(1) (2014). "Gross proceeds" also includes "the proceeds from the sale of property sold on consignment by the taxpayer." *Id.* The inclusion of the proceeds from consignment sales is notable because our statutory scheme does not directly define or address consignment sales, yet the reference to consignment sales in section 12-36-90(1) makes it clear that our State recognizes them. Our Supreme Court has recognized consignment sales and has distinguished between a regular sale and a consignment sale as follows:

> There is hardly any conflict as to the law on the distinction between a sale and a consignment. The whole difficulty arises, as is usual, in applying the law to the particular facts of each case. It is, of course, of the greatest importance to determine the real character of every transaction, for if it is a sale, title to the property, with all its attendant advantages and responsibilities, passes; while if it is a consignment, title does not pass, being merely an agency for the purpose of the sale.

Greenwood Mfg. Co. v. Worley, 222 S.C. 156, 160–61, 71 S.E.2d 889, 891 (1952); *see also* Black's Law Dictionary 1364 (8th ed. 2004) (defining "consignment sale" to mean a "sale of an owner's property (such as clothing or furniture) by a third party entrusted to make the sale").

Recognizing consignees as sellers for the purpose of the Sales and Use Tax Act is consistent with the statutory definition of "seller," which includes persons selling or auctioning

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[25] Indeed, for small sales (mostly under a dollar), our code includes a provision that a "retailer" may add a specific number of cents to the price of a product to reflect the tax, thus implying that a retailer has the power to set prices. S.C. Code Ann. § 12-36-940(A) ("Each retailer may add to the sales price as a result of the five percent state sales tax . . . ."). Also, it has been the Department's policy that the seller is not required to collect the sales tax from the purchaser and may absorb the tax themselves. *See* S.C. Dep't of Revenue, South Carolina Sales and Use Tax Manual, Chap. 2, Pg. 2 (2015) ("[T]he seller may advertise that the seller will absorb the sales tax and not collect it from the purchaser.").

tangible personal property of ***others***, which is what a consignee does. § 12-36-70(1)(a). And, indeed, the Department treats the retailer/consignee as the seller for the purposes of remitting sales tax. *See* S.C. Dep't of Revenue, South Carolina Sales and Use Tax Manual, Chap. 23, Pg. 19 (2015) ("The retailer selling the items on consignment is the person responsible for remitting the tax on the consignment sale.").

Finally, in considering when the tax is imposed, it is helpful to consider the complementing provision of the sales tax: the use tax. A use tax is "imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use, or other consumption in this State, at the rate of five percent of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State." S.C. Code Ann. § 12-36-1310 (2014). The use tax must be collected by the seller "at the time of making the sales or, if the storage, use, or consumption is not then taxable, at the time the storage, use, or other consumption is taxable" and the seller must "give to the purchaser a receipt showing the amount subject to the tax and the amount of tax collected." S.C. Code Ann. § 12-36-1350(A).

Application of Tax Laws

The parties agree the transactions at issue are retail sales that are subject to tax. However, the parties disagree as to whom the tax is imposed. Amazon Services argues, in part, that it cannot be the seller of Merchant products (and therefore responsible for the tax) because it does not hold title to Merchant products and cannot transfer title. Thus, under Amazon Services' theory, Merchants are by default the sellers because they transfer title and/or possession in exchange for consideration, which constitutes a sale under section 12-36-100. Amazon Services thus takes the statutory definition of "sale" and makes two assumptions: (1) whoever transfers title or possession (or both) is the seller and (2) whoever receives the consideration is the seller. However, Amazon Services erroneously interprets a sale as requiring the transfer of title and/or possession when this is merely one type of sale defined under section 12-36-100.

The basic definition of a sale under § 12-36-100 only requires a ***transfer of tangible personal property for consideration***. § 12-36-100. Section 12-36-100's use of the word "including" after this basic definition of a sale signals that what follows is a non-exhaustive list of types of factual scenarios that would constitute sales under the basic definition, to *include* the transfer of title and/or possession. *See* Black's Law Dictionary 777 (8th ed. 2004) (explaining "[t]he participle *including* typically indicates a partial list"). Furthermore, section 12-36-70(1)(a)

dispels the notion that a seller must be the person who transfers title because a seller can clearly sell things to which he does not have title. This is also consistent with the concept of consignment sales. *See Greenwood Mfg. Co.*, 222 S.C. at 160–61, 71 S.E.2d at 891. A sale thus does not require the transfer of title ***and*** possession, nor is a sale limited to the transfer of title or the transfer of possession

The Supreme Court's decision in *Travelscape, LLC v. South Carolina Department of Revenue* also demonstrates the falsity of Amazon Services' argument. 391 S.C. 89, 705 S.E.2d 28 (2011). In *Travelscape*, the Supreme Court declined to hold hotels responsible for remitting sales tax on hotel rooms they transferred to customers where the online booking company was the party who initially accepted money in exchange for the right to occupy the hotel rooms. *Id.* Consequently, the person physically transferring the product (the hotel) was not deemed the seller. Similarly, *Travelscape* also establishes that the person (the hotel) who ***ultimately*** receives consideration in exchange for the transfer of a product is not necessarily the "seller" or "retailer" under the Sales and Use Tax Act (the online booking company). *See id.* Indeed, Amazon Services' theory that the seller is the person who receives consideration does not hold up in the context of a consignment sale where it is the consignee—the person who initially accepts the money for the product—who is responsible for the sales tax even though the consignee passes on the consideration to the consignor.

Therefore, while Amazon Services' assumptions may be factually true in many situations, they are assumptions and not legal rules Amazon Services can use to shield itself from tax liability. The Court thus must determine whether the object of Amazon Services' business activity is to achieve a profit, benefit, or advantage by either direct or indirect means from the sale of property owned by Amazon Services or others on its Marketplace. Here again, since the South Carolina Supreme Court's decision in *Travelscape* evaluated a case in which both the statutory scheme and the factual circumstances were very similar to the one here, it is highly relevant to this case. This Court turns to an analysis of this case in light of *Travelscape's* holding.

Application of *Travelscape*

In *Travelscape*, the Supreme Court upheld this Court's determination that Travelscape, an online travel company offering hotel reservations on Expedia.com, was responsible for remitting sales tax because it was "engaged or continuing within this State in the business of furnishing accommodations to transients for consideration." 391 S.C. 89, 705 S.E.2d 28 (2011); *see also*

§ 12-36-920(E). Travelscape facilitated the sale of third-party hotel rooms to the public at negotiated discounted rates on its website, Expedia.com. *Travelscape*, 391 S.C. at 95, 705 S.E.2d at 31. When a customer booked a room through Expedia.com, Travelscape would charge the customer the discounted room rate, a facilitation fee, a service fee, and a tax recovery charge.[26] *Id.* Travelscape would physically process the customer's payment and, after the customer checked out of the hotel, the hotel would invoice Travelscape for the room rate and the sales tax owed on the room. *Id.* Travelscape remitted the room rate and sales tax (tax recovery charge) to the hotel and retained the facilitation and service fees, upon which it did not remit taxes. *Id.* at 95-96, 705 S.E.2d at 31. During an audit of Travelscape, the Department determined Travelscape owed sales tax on the gross proceeds received from furnishing hotel accommodations, which included the room rate, the facilitation fee, and the service fee. *Id.* at 96, 705 S.E.2d at 31-32.

Travelscape argued it could not be held liable for sales tax because it did not "furnish" hotel rooms under section 12-36-920(E). *Id.* at 99, 705 S.E.2d at 33. It argued it was "only an intermediary providing hotel reservations to transients and d[id] not physically provide sleeping accommodations." *Id.* The Supreme Court determined that, while the term "furnish" carried the connotation of physically providing hotel rooms, one could be "in the business of" furnishing hotels rooms without physically furnishing them because "business" was statutorily defined as "all activities, with the object of gain, profit, benefit, or advantage, either **direct or indirect**." *Id.* at 101 705 S.E.2d at 34 (emphasis added).

Thus, the Supreme Court concluded "we find the context of 'furnish' . . . demonstrates that it encompasses the activities of entities such as Travelscape who, whether directly or indirectly, provide hotel reservations to transients for consideration." *Id.* It further concluded that "[w]hile Travelscape does not physically provide accommodations, it is in the business of doing so." *Id.* The Supreme Court found its determination was supported by the legislative purpose of section 12-36-20, which was "to levy the tax not merely on those physically providing sleeping accommodations, but on those entities who were ***accepting money in exchange for supplying hotel rooms***," to include "real estate agents, brokers, corporations, and listing services." *Id.* at 102, 705 S.E.2d at 35 (citing *City of Charleston, S.C. v. Hotels.com*, 520 F.Supp.2d 757 (D.S.C. 2007)) (emphasis added).

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[26] The tax recovery charge was only based on the cost of the hotel room and excluded Travelscape's fees from the calculation of the tax.

Comparatively, the factual positions of Travelscape and Amazon Services are very similar. Both provide an online platform where they facilitate the sale of other persons' products. Both are the sole entity that interacts with the customer at the point of sale, processes the customer's payment, accepts the customer's consideration, takes a fee, and then remits the proceeds from the sale to the owner. And, although in *Travelscape* the Supreme Court was determining who is "engaged or continuing within this State in the business of furnishing accommodations to transients for consideration," that determination is quite similar to the determination in this case of who is "engaged or continuing within this State in the business of selling tangible personal property at retail." *Compare* § 12-36-920(E) *with* § 12-36-910(A).

Because of these similarities, several relevant principles can be distilled from *Travelscape* that guide the Court's factual analysis in this case, although it is by no means an exclusive list of the factual circumstances this Court finds material to this case. Indeed, if we analogize "furnish" in *Travelscape* to "sale" in this case, then *Travelscape* stands for the following: (1) an "intermediary" sales facilitator is not immune from sales tax; (2) the person accepting money in exchange for a product is responsible for sales tax; (3) the person who the customer interacts with at the point of sale is presumed to be the seller; (4) an agency relationship between the sales facilitator and the seller/provider is not necessary to create sales tax liability on the part of the facilitator under the Sales and Use Tax Act; (5) a person does not have to own the product to sell it; (6) the customer's awareness that the seller is not the owner does not impact the seller's sales tax liability; and (6) the tax imposition statute is interpreted broadly to incorporate all persons engaged in the business of furnishing/selling, whether directly or indirectly.

Using these principles as a starting place, the Court analyzes the facts and circumstances of this case to determine who is in the business of selling for the purposes of the Sales and Use Tax Act.

"Point of Sale"

The Department contends that whoever accepts money at the "point of sale" is the seller. Amazon Services takes issue with the Department's use of the phrase "point of sale" because it is not a defined term in our statutes. Nevertheless, Amazon argues the point of sale occurs when a sale is complete, and in this case the sale is complete after the product has shipped (title is transferred) and Amazon Payments completes the credit card charge. Although our statutes do not

use the phrase "point of sale," identifying the point in time when a sale takes place and who is present at that point is an elementary consideration in determining who is the seller.

When a customer purchases a Merchant product on the Marketplace, the customer enters his credit card number and Amazon Payments obtains pre-authorization from the customer's credit card company to ensure funds are available to fulfill the order. This pre-authorization places a hold upon the customer's available credit. These facts indicate the point of sale occurs when the customer places the order and Amazon Services confirms the order after encumbering the customer's card, thereby ensuring its receipt of funds. This concept—that the transfer of the funds is not as significant as the agreement to receive the funds—is illustrated in *Travelscape*.

Furthermore, concluding that a sale occurs when the credit card or other payment is encumbered is judicious, if for no other reason, then because Amazon Services' theory, leads to an uncertain outcome. Under Amazon's theory, the determination of when a transaction is consummated is nebulous: is it concluded when an item is shipped, thereby resulting in the transfer of title, or is it concluded when the charge is finally processed after the product has shipped?

Currently, Amazon Services does not charge a customer's card until the product has shipped. When that occurs, title to the property has already passed to the customer. Therefore, though Amazon asserts that the final processing of the charge is important, the significance of charging the card is questionable because, under Amazon Services' theory, title passes to the customer before the credit card charge is concluded. This begs the question, if the sale can be completed without the consumer receiving the product, then why would the sale not be completed when the customer agrees to purchase the product and his card is encumbered?

Moreover, Amazon Services' theory is further clouded by the fact that it chooses when to finally process the credit card charge. Although Amazon Services currently processes the charge after the product has shipped, there is nothing to prevent Amazon Services from processing the final charge earlier. Accordingly, the event that creates certainty for all the parties involved in the transaction is when the customer gives the credit card number to Amazon Services, agrees to the payment, and places the order. Identifying this moment as the point of sale is not only judicious, but likely also reflects the point in time when the customer believes the sale has been completed based on the following:

- Customers purchase the products by submitting payments directly to Amazon Services through the website;

- Upon completing the purchase on the website, customers receive the right to possession of the product;
- Customers receive confirmation of their order from Amazon Services;
- Customers' credit card invoices show the products were purchased from Amazon, not from the Merchant; and
- Customers frequently complete purchases of Merchant products without ever interacting with the Merchant.

In defense of its theory, Amazon Services nevertheless argues section 12-36-100 requires title or possession to pass to the customer before a sale can be final. But section 12-36-100 contains no such demand. Rather, section 12-36-100 sets forth that a sale or purchase is "defined to mean: any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration ***including***: . . . (4) a transfer of title **or** possession, or both." In interpreting the meaning of this statute, we must again recognize that when the General Assembly used the term "including," it was not intended to limit the application of a law but to reference examples from a broader general class. *Lightner*, *supra*. Thus, section 12-36-100 provides examples that must be applied contextually to the facts.

Here, the Court finds that the point of sale occurs not upon shipment, but when the customer places the order and his card is encumbered. This determination is not only in line with section 12-36-100 but with common sense. Indeed, when a customer purchases a product in a retail store that must be subsequently shipped to the customer's home, would it not be reasonable to determine that the sale occurred when payment was made at the register?

Intermediary Sales Facilitator

Travelscape argued it was "only an intermediary providing hotel reservations to transients and does not physically provide sleeping accommodations." *Travelscape*, 391 S.C. at 99, 705 S.E.2d at 33. Similarly, Amazon Services argues it merely facilitates sales and Amazon Payments is only a "conduit" for money exchanged between customers and Merchants. However, the Supreme Court determined Travelscape was not merely an "intermediary," but was "in the business of furnishing" hotel rooms for consideration, which suggests a similar inference here. *See Travelscape*, 391 S.C. at 101, 705 S.E.2d at 34. Amazon Services nevertheless argues its services are distinct from Travelscape's services because it serves as a conduit for funds **after** a customer places an order and it does not charge the customer until the product has shipped. This argument is fundamentally flawed.

In *Travelscape*, the Supreme Court determined Travelscape was responsible for sales tax despite (1) its self-characterization as a service provider and (2) the fact that it charged "service fees" to customers. *Id.* at 98-102, 705 S.E.2d at 33-35. Here, Amazon Services does not charge any "service fees" to ***customers***. It charges them to ***Merchants***. The fact that customers paid "service fees" to Travelscape but customers do not pay "service fees" to Amazon Services creates an even greater inference that Amazon Services is engaged in the business of selling Merchant products *to **customers*** even if it is providing a service to Merchants.

Moreover, it is Amazon Services' website and functionality, not the Merchants', which are used to consummate the sales at issue.[27] In completing a sale on the Marketplace, the customer never leaves Amazon Services' website. When the customer purchases a Merchant product, she gives her name, address, credit card, and shipping information to Amazon Services. Amazon Services confirms the sale and provides an Amazon order number to the customer, indicating the finality of the transaction. In fact, when Amazon Services sends the Order Confirmation email to the customer, the Merchant is not mentioned in the email. These facts reflect an entity that is more than an intermediary or conduit. It also important to recognize that Amazon Services' purposefully controls the consummation of these sales in order to provide a seamless and uniform buying experience for each customer on Amazon Services' platform despite dealing with millions of independent Merchants. Furthermore, Amazon Services emphasized that the payment processing function is distinct from itself. Indeed, it is Amazon Payments (on behalf of Amazon Services) that serves as the payment processer that routes the customer's money from the customer's bank account to Amazon Services' bank account.

Therefore, Amazon Services only acts as a "conduit" to send money to the Merchant after the product it sold has shipped. In fact, contrary to Amazon Services contention, it is not just facilitating sales, it is consummating them. To sell products on the Marketplace, Merchants must agree Amazon Services has the exclusive right to process transactions, confirm orders, and confirm shipping. Specifically, the BSA provides Merchants must not only "accept and process [Amazon

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[27] If Amazon Services only provided advertising services or only provided fulfillment services, the Court would find that Amazon Services is a service provider not subject to sales and use taxes. *See* S.C. Regs. Ann. 117-308 (The receipts from services, when the services are the true object of the transaction, are not subject to the sales and use tax . . . ."); *see also id.* (providing the receipts from advertising agencies for professional services are not subject to sales tax). However, this case involves more than several discreet service transactions between Amazon Services and Merchants because the evidence shows Amazon Services takes a very direct role in consummating sales transactions on behalf of Merchants.

Services'] cancellations, returns, refunds and adjustments," but must do so "in accordance with this Agreement and the Amazon Refund Policies." For instance, in the case of an A to Z Guarantee claim, Amazon determines whether the customer is due a refund. Thus, Amazon Services controls not only the consummation of the transaction but its unwinding as well.

In sum, although Amazon Services characterizes itself as a conduit for funds *after* a customer places an order, it:

- restricts the types of communications Merchants can have with Amazon.com customers,
- controls all information about Amazon.com customers,
- requires the use of an Amazon affiliate for payment processing,
- controls the flow of funds for all transactions and refunds, and
- provides the order confirmations and receipts for all purchases.

Indeed, during the entire transaction, the customer only interacts with Amazon Services. Amazon Services is the party present at the consummation of the sale who accepts money from the customer in exchange for the product. Amazon Services' actions are not the actions of a simple payment processor but are the actions of someone who is in the business of selling.[28]

Based upon these conclusions and the fact that Amazon Services is the only party present at the consummation of the sale, I find Amazon Services is not merely a conduit or intermediary. Amazon Services' actions demonstrate it is in the business of selling under section 12-36-910(A).

Accepting Money in Exchange for Products

In *Travelscape*, Travelscape was the entity that initially accepted money in exchange for the promise to transfer a product. After Travelscape accepted the card payment, it transferred the money (less its fees) to the hotel. The Supreme Court did not find it dispositive that Travelscape accepted money before the purchased product (occupancy of the room) was actually transferred. Rather, the Supreme Court focused on who accepted money for the transfer. Indeed, despite Travelscape remitting the consideration it received for the rooms to the hotels, the Supreme Court determined Travelscape accepted consideration and was responsible for collecting and remitting the sales tax because the tax liability was imposed upon the person accepting money in exchange

[28] Importantly, although this determination is based upon a recognition of the broad application of section 12-36-910(A), it is nevertheless clear that the legislature did not intend to impose the sales tax on businesses whose sole purpose truly is payment processing and who are otherwise uninvolved in sales transactions. Such businesses clearly are not engaged in selling, even if they are making a profit off sales.

for furnishing the product. *Travelscape*, 391 S.C. at 103, 705 S.E.2d at 35 ("Clearly, Travelscape was engaged in the business of furnishing accommodations in South Carolina during the audit period, seeing as it . . . (3) booked reservations in exchange for consideration at hotels located in this State.").

The same situation exists here. Amazon Services accepts money from customers in exchange for the promise that the Merchant will transfer her product to the customer. Amazon Services receives the money and eventually remits a portion of the proceeds—minus its fees—from the sale to the Merchant on its bi-weekly disbursement schedule.[29] Amazon Services also receives interest on the money it collects on behalf of Merchants. Thus, both Amazon Services and Travelscape initially accept consideration/money in exchange for another person's product that is being sold to the customer, suggesting Amazon Services is similarly responsible for the sales tax.

Although Amazon Services concedes it accepts money from customers in exchange for products, it argues it does not receive consideration because Amazon Services (via Amazon Payments) merely functions as a conduit or intermediary for the consideration to pass through it from the customer to the Merchant.[30] But as explained above, Amazon Services clearly does not accept the money as an "intermediary" payment processor because that function is carried out by Amazon Payments, which routes the customers' payments to Amazon Services. As illustrated in *Travelscape*, simply because a party transfers a portion of the profits to the supplier of a product does not establish that the supplier, (or in this case, the Merchant) is the seller.

Since Amazon Services is not the payment processor, the money it accepts from customers must be accepted either as consideration for its role in the transaction, as a fiduciary holding the

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[29] Amazon Services distinguishes *Travelscape* because, unlike the hotels in *Travelscape*, Merchants do not invoice Amazon Services for the cost of the product. However, in both cases, Travelscape and Amazon Services remit the money received for a product back to the owner and transfer the product in exchange for consideration, yet the Supreme Court found Travelscape received consideration and remained responsible for the sales tax. The Court does not find this distinction to be probative. Similarly, the Court does not find it probative that customers in *Travelscape* only purchased the "right to occupy the room for a particular time" from Travelscape, whereas customers in this case purchased all rights to products (title and possession) from Merchants and not Amazon Services. As the Court has already noted, a seller can sell things he does not own, and identifying who owns title to the product is not determinative of who is the seller. See § 12-36-70(1)(a).

[30] Amazon Services' arguments address the actions of Amazon Payments but neglect to explain Amazon Services' role in this process.

money for Merchants, or as both. Here, the facts established that there is bargained-for consideration between Amazon Services and customers.

"Valuable consideration may consist of 'some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.'" *Hennes v. Shaw*, 397 S.C. 391, 399, 725 S.E.2d 501, 505 (Ct. App. 2012) (quoting, in part, *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship,* 331 S.C. 385, 503 S.E.2d 184 (Ct.App.1998)). In addition, as explained in the Restatement (Second) of Contracts § 79 (1981), if the requirement of consideration is met, there is no additional requirement that there be "a gain, advantage, or benefit." Through the sales structure outlined in the BSA, Amazon Services initially receives the consideration for a sale, and then, after deducting its fees, transfers the remaining funds to the Merchant. Amazon Services' fees are thus not reimbursed to them after the Merchant receives its funds but is rather part of the sales transaction. Indeed, simply because Amazon Services transfers a portion of the consideration it receives does not mean the portion it retained was not consideration paid to Amazon Services for its role in the transaction.

This discussion further highlights an incongruity in Amazon Services' reasoning. If Amazon Services only accepts money on behalf of the Merchants, it is acting as an agent for the Merchants—a position that Amazon contends it does not hold. And, if Amazon Services acts in the capacity of an agent, then the door is opened to determine that they function as a consignee.

Moreover, from the customer's perspective, the customer provides consideration to Amazon Services for the right to receive title and possession. In fact, there is no evidence showing customers have any knowledge of the behind-the-scenes exchange of money between Amazon Services and Merchants. Nor does that information matter to a customer's product purchase. Customers are not paying Amazon Services for any services—they are paying Amazon for the right to receive tangible personal property.

No matter how Amazon Services characterizes itself or the money it receives, Amazon Services operates a website on which customers pay Amazon Services directly for products that will be received in a matter of days without any further interaction with Amazon Services. Therefore, although Amazon Services' fees may be deducted from the proceeds distributed to the Merchant, these fees are directly related to the sale of tangible personal property. In fact, most of the fees are charged on a "transaction-by-transaction" basis, and the "Referral Fee" is imposed as a percentage of the gross price paid by the customer for the product. Accordingly, Amazon

Services owns and operates a website where Amazon Services' compensation is, in part, directly tied to the amount of sales it can generate, not for any one Merchant's products, but on its website as a whole. Amazon Services thus directly receives consideration for a customer's purchase, a portion of which is retained by Amazon Services as various fees.

Profiting or Benefiting from Transactions

The sales tax is imposed upon the person engaged in the business of selling tangible personal property, and the term "business" means "all activities, with the object of gain, ***profit, benefit, or advantage, either direct or indirect.***" § 12-36-20 (emphasis added). Amazon Services claims the fees it charges for its services do not represent any form of profit-sharing. While the monthly subscription fee appears to be a legitimate service fee, the Referral Fee is separate from the flat, monthly subscription fee, and it is based upon a percentage of the sale price of each product depending upon the category of product sold and the typical profit margin for that product. Thus, instead of simply providing a service and charging Merchants a fee based on the operating cost of listing products on a website and processing payments, Amazon Services **indirectly** retains a share of the profits from each sale through the Referral Fee. Amazon Services therefore profits from every product that is sold upon its website—its profits are simply set by a fee structure.[31] Indeed, since its service is the selling of the product, then calling its "profit, benefit, or advantage" a fee is simply a matter of semantics. Additionally, like Amazon Services' other fees, the Referral Fee is not reimbursed to Amazon Services after the Merchant receives her funds; rather, it is withheld by Amazon Services before the Merchant's funds are disbursed.

Amazon Services nevertheless seeks to distinguish the Referral Fee from "profit" because the Referral Fee is charged "whether the [Merchant] actually earns a profit or loss on its sale, and Amazon Services has no way of knowing what profit or loss a [Merchant] earns on each of its sales." However, simply because one party does not profit from a sale does not imply that the other party did not profit from the sale. In fact, here the evidence established that Amazon Services assures itself of a profit off every sale. Moreover, the distinction that Amazon Services assures itself of profit is even more indicative that Amazon Services is in the ***business*** of ***directly or indirectly*** making a profit off of tangible personal property sold on the Marketplace.

[31] Although this fee is refundable, the fee is refunded minus a "refund administration fee" that can range anywhere up to $5.00.

The definition of "business" reveals Amazon Services' mischaracterization of its profits as services fees. In section 12-36-20, the definition of "business" includes all activities with the object of "benefit, or advantage." § 12-36-20. In this instance, the object of Amazon Services business model is to profit from the sale of products upon its website even, as Amazon Services points out, if Merchants do not. Further, a profit requires proof of a valuable return, but a benefit may result from any "good or helpful results or effects." *Benefit*, WEBSTER'S ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/benefit (last visited July 23, 2019). In this case, it can be reasonably inferred that Amazon Services benefits from every sale upon its website.

In sum, despite its claims that it does not engage in "profit-sharing," the Referral Fee appears to be a transaction-by-transaction fee that either compensates Amazon Services for consummating the sale or constitutes profit for Amazon Services as a result of a sale. Either way, Amazon Services' activities and collection of the Fee show it is engaging in the "business" of selling because business includes "all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect." § 12-36-20. Moreover, as illustrated in *Travelscape*, the transfer of funds is not as significant as the acceptance of funds when the transaction is made. Accordingly, under the circumstances of this case, I find the Referral Fee is charged for selling the product.

Interaction with the Customer at the Point of Sale

In *Travelscape*, the Supreme Court acknowledged that Travelscape was not actually furnishing hotel rooms, yet it found Travelscape was "in the business" of furnishing hotel rooms because section 12-36-920(E) "encompass[ed] the activities of entities such as Travelscape who, whether ***directly or indirectly*** provide hotel reservations to transients for consideration." *Travelscape*, 391 S.C. at 101, 795 S.E.2d at 35 (emphasis added).

This determination reflects the broad application of the statutory phrase "in the business of." Even though Travelscape did not physically provide hotel accommodations, since Travelscape was the only person accepting money in exchange for supplying hotel rooms at the point of sale, that fact created an inference that Travelscape was in the business of furnishing hotel rooms. Similarly, Amazon Services is the only party present at the point of sale accepting money from customers, and this creates an inference that they are in the business of selling.

Amazon Services nevertheless argues it is not the only entity that interacts with the customer during the sale. Specifically, it contends the customer and Merchants have "meaningful

and vital" contact, and this contact occurs through phone or e-mail (Buyer-Seller Messaging) conversations about products. Amazon Services also contends Merchants "interact" with customers when they read a product description the Merchant wrote and uploaded to the Amazon.com website.[32]

At the outset, I find that a significant portion of the evidence offered to show customers and Merchants have meaningful interactions was unconvincing. Although the evidence showed one Merchant has had direct communications with customers through phone or email, the evidence did not establish that these communications occurred at the point of sale, nor did it establish that such communications occur extensively or even frequently for the millions of the other Merchants. I therefore do not find the evidence shows meaningful interactions between the customers and Merchants take place regularly at the point of sale. In fact, the evidence clearly establishes that sales can be made, and often are made, without any interaction between customers and Merchants.

Moreover, whether the customer interacts with the Merchant before or after the point of sale is not determinative of who is selling the product. For example, a Travelscape customer could call a hotel before booking a room through Expedia.com to confirm the hotel has spa services available. Then, the customer could make the reservation on Expedia.com because it has the best price, they have an account with them, or for whatever reason. After the reservation, the customer could call the hotel again to actually book the spa service, which could not be booked through Expedia.com. In this hypothetical, the customer may have "interacted" with the hotel at several points before and after the transaction, but ***contact was not required*** to book the hotel room when the money was exchanged.

Likewise, in this case, a customer might contact a Merchant before or after purchasing a product on Amazon.com to ask questions or discuss a missing part upon delivery. However, this evidence does not establish that the Merchant is the seller. Rather, the evidence reflects that once a customer purchases a product on the Marketplace, it is Amazon Services that sends the customer an order confirmation. Afterwards, Amazon Services also sends the communications notifying a customer that an order has been received or shipped. Amazon Services also controls refunds and,

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[32] Amazon Services nonetheless avers they do not control the point of sale because Merchants have the authority to refuse to fulfill or cancel a customer's order after a customer places the order with Amazon Services. However, simply because a person possesses the authority to nullify a sale does not negate the events that already occurred or the fact that a sale took place. If the authority to nullify a sale exemplifies who is in control of the point of sale or consummation of the sale, then Amazon Services equally holds that right and, in fact, holds that right in the first instance.

to a great extent, return policies. In fact, it is possible a customer on the Marketplace can complete an entire purchase of a Merchant product ***without any interaction*** between the customer and the Merchant. This set-up is similar to a customer at a retail store who can communicate with the manufacturer about a product and then go to the respective retail store to purchase the product. Therefore, at most, Amazon Services has proven that it is possible for customers and Merchants to interact for the purpose of receiving customer service before or after the transaction—not that these services occur on a regular basis and not that such communications dictate that Merchants are the sellers of their products.[33]

The South Carolina District Court's decision in *City of Charleston, S.C. v. Hotels.com, LP*, further supports this Court's conclusion that the person who is present with the customer at the point of sale is indicative of who is "in the business" of selling the product under the Sales and Use Tax Act. 520 F. Supp. 2d 757 (D.S.C. 2007). In *City of Charleston*, the District Court concluded that Hotels.com, like Travelscape, was in the business of furnishing accommodations and was required to pay the accommodations tax on the gross proceeds of furnishing hotel rooms. *Id.* In its analysis, the District Court remarked that "[a]ccording to the facts as alleged by Plaintiffs," Hotels.com was subject to the tax. *Id.* at 768. The facts alleged by the Plaintiffs which the District Court found probative included the following:

> Defendants are the ones directly dealing with the consumer on the internet. Defendants are consummating the sale, calculating the tax, and collecting the retail rate for the room and the tax. Most significantly, Defendants are the only entity on

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[33] Indeed, Amazon Services' case centered on one Merchant witness, Mr. Revich. However, the testimony of Mr. Revich established that Yedi orchestrates the manufacture of its products, administers the product-specific warranties, creates the packaging for the product, and handles product-related customer service issues. These activities are not generally indicative of a retailer. In fact, although the Court recognizes that a business can serve in the capacity as manufacturer and retailer, the evidence established that Yedi's participation on the Marketplace more closely resembles the actions of a manufacturer or wholesaler rather than a retail seller.

A retailer is primarily defined by its position in the sales chain as the person who sells to the end consumer, not by its ability to develop and manufacture a product. It is also telling that no one argued a retailer who does not engage in product development is any less of a "seller" or "retailer" under our tax laws. Mr. Revich's testimony also showed Yedi's ability to provide customer service and otherwise process sales is more restricted on the Marketplace than on Yedi's own website. Thus, when Yedi "sells" products on the Marketplace, its restricted actions more closely mirror the actions of a manufacturer, distributer, or wholesaler who delivers his products to a retailer to sell, refund, return, or otherwise handle various aspects of customer service related to the sale.

Furthermore, communication with a customer that occurs after the sale of a product is not nearly as indicative of who is the seller as evidence showing communication at the point of the sale. In fact, Amazon Services failed to distinguish the customer service offered by Merchants from customer service offered by manufactures and suppliers in a more traditional retail setting. This type of after-purchase customer service is often required by the warranties associated with products.

> the selling part of the transaction who know the amount of the gross price paid by the consumer.

Id. From these facts, the Court concluded:

> If consumers access a website, use it to book a hotel room, pay the website directly, and never pay the hotel, or interact with the hotel at all until they arrive, the court cannot accept Defendants' assertion that they do not furnish accommodations to consumers.

Id.

The District Court obviously found the complete absence of interaction between the customer and the hotel to be of consequence to its decision. *See id.* Here, likewise, a customer only interacts with Amazon Services at the point of sale and all communications about the order and shipment go through Amazon Services.

The Court is also not persuaded by Amazon Services' argument that customers meaningfully interact with Merchants during a sale when they read the product listing or description on the Amazon.com website. The testimony revealed that if a Product Detail Page already exists for a product, a new seller of the product on Amazon.com cannot create a new Product Detail Page. Therefore, if a customer buys from this new seller, they are not even, under Amazon Services' definition, "interacting" with the new seller by reading the Product Detail Page. Rather, they are "interacting" with the original seller of the product who created the Product Detail Page. Additionally, the evidence did not establish the Product Detail Page is materially different from a manufacturer's product description on the packaging of products sold in retail stores. Therefore, I do not find this interaction meaningful or determinative of who is the seller

Ownership of Property Sold

Amazon argues it cannot be the seller of Merchant products because it does not own the products and thus cannot transfer title to them. This issue was addressed in *Travelscape*. The Supreme Court determined Travelscape was in the business of furnishing hotel rooms even though it did not own or physically furnish to its customers. Therefore, it follows that Amazon Services can be in the business of selling Merchant products even though it does not own or physically transfer these products.[34]

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[34] Recently, the Sixth Circuit Court of Appeals determined that a "seller" under Tennessee's products liability law is not required to hold title to the product he is selling. *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 422 (6th Cir. 2019) (rejecting defining "seller" as "any individual or entity regularly engaged in transferring title to a product for an agreed upon price, for livelihood or gain"). Rather, the Sixth Circuit determined that "seller" is defined broadly to include

Furthermore, section 12-36-70(1)(a) specifically provides that a person selling tangible personal property can be a seller of goods that are either owned by them or owned by others.[35] This law presents two sides of a coin. It is certainly lawful to sell another person's property when properly authorized to do so. On the other hand, a person cannot sell something they do not own without the true owner's authorization. Selling someone else's property does not appear to be an unusual occurrence in the retail sales setting and is indeed the crux of consignment sales.

Section 12-36-70(1)(a) thus provides that a person who lawfully sells a product he does not own, but has been granted the authority to do so, may be found to be the seller under the sales tax laws. Nevertheless, simply because a non-owner can be subject to sales tax does not mean that he is by rule; the court must review the transaction to determine if the product was sold with the authority of the owner. Here, the evidence establishes Merchants grant Amazon Services the authority under the BSA to allow Amazon Services to sell their products on their behalf.

The sale of property owned by another assumes the existence of an agency relationship. The facts of this case thus open the door to the conclusion that the sale of Merchant products on the Marketplace constitute consignment sales. As explained above, I find that whether such an agency relationship exists between Amazon Services and Merchants is a factual matter in this case.

Agency and Consignment

Amazon Services attempts to distinguish *Travelscape* because the hotels in *Travelscape* supplied rooms to Travelscape at pre-negotiated rates whereas Merchants do not supply products to Amazon Services. Essentially, Amazon Services' argument suggests Travelscape contracted with the hotels to allow it to sell rooms at a discounted rate as the hotels' agent, whereas no agency relationship exists between Amazon Services and Merchants. Amazon cites to the provision in the BSA that states, except for Amazon Payments' role as a payment processing agent, the relationship between Amazon Services and Merchants is that of independent contractors and

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"any individual regularly engaged in exercising sufficient control over a product in connection with its sale, lease, or bailment, for livelihood or gain." *Id.* at 425. Although products liability law is not directly analogous to tax law, the Sixth's Circuit's analysis concerning the scope of the definition of "seller" is still informative.

[35] Similarly, although the transfer of title is not irrelevant to determining who the seller is, it is nonetheless not a legal prerequisite. Again, it is a fact to consider. In this case, Amazon Services' contention that it cannot be the seller because it does not transfer title ignores its role in consummating the transaction, securing the consideration, and then notifying the Merchant to ship the product, which results in the transfer of title. Furthermore, as discussed earlier, Amazon's theory that title must pass before a sale can occur presents an uncertain result that would not have been intended by the General Assembly.

"nothing in this Agreement will create any partnership, joint venture, agency, franchise, sales representative, or employment relationship between us." Nevertheless, this language does not absolve Amazon Services of the responsibilities of a seller's agent if the facts show it is acting as an agent for Merchants. This provision is simply a factor to consider in the Court's review of the nature of the transactions at issue. In other words, a person cannot contract away their obligations under the South Carolina tax laws. *See Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908) ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them."); *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977) (holding "[t]he States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired . . . [o]therwise, one would be able to obtain immunity from the state regulation by making private contractual arrangements"); *see also* 71 Am. Jur. 2d *State and Local Taxation* § 61 ("The sovereign power to tax may be abrogated by contract only if it has been specifically surrendered in terms which admit of no other reasonable interpretation.").

Moreover, an agency relationship is not necessary to impose an obligation to collect sales tax under the facts of this case. Notably, in deciding *Travelscape*, the Supreme Court did not identify a legal agency relationship between Travelscape and the hotels, nor did its decision rely on such a relationship being established to hold Travelscape responsible for remitting sales tax. Rather, the Supreme Court relied on the plain language of the statutes at issue, which evidenced a legislative intent that whoever was accepting money in exchange for "directly or indirectly" furnishing hotel rooms was responsible for the sales tax. *See Travelscape*, 391 S.C. at 102, 705 S.E.2d at 35. Following the Supreme Court analysis in *Travelscape*, an actual agency relationship between Amazon Services and Merchants is not necessary to impose sales tax liability under the Sales and Use Tax Act.

Rather, as demonstrated by *Travelscape*, the most important consideration is who is accepting money in exchange for the product at the point of sale. In *Travelscape*, the Supreme Court cited to the legislative purpose of section 12-36-20, which was "to levy the tax not merely on those physically providing sleeping accommodations, but on those entities who were ***accepting money in exchange for supplying hotel rooms***," to include "real estate agents, brokers, corporations, and listing services." *Id.* at 102, 705 S.E.2d at 35 (citing *City of Charleston*, 520 F.Supp.2d at 757) (emphasis added). All the persons listed in the statute recited by the Supreme

Court—such as real estate agents and brokers—are persons who are usually present at the point of sale acting on behalf of someone else to consummate a transaction (agents). The responsibility to collect tax is similarly imposed on warehousemen when they engage in selling:

> When, however, warehousemen buy and sell property as a regular course of business such sales, if not otherwise exempted, are subject to the sales tax, including sales of goods held on consignment and including transactions in which the warehouseman acts as a broker selling goods not actually owned by him or in his possession at the time he accepts the order.

S.C. Code Ann. Regs. 117-319 (2012). Again, we see the word "broker," like in section 12-36-920(C), which was discussed in *Travelscape*. Brokers, and in this regulation, warehousemen, are assessed for sales tax despite acting on behalf of another who may own the property. *See* Reg. 117-319.

Here, section 12-36-910(A) likewise does not impose an obligation to establish an agency relationship. Rather, the Court's consideration is whether the object of Amazon Services' activities is to achieve a profit, benefit, or advantage by either a direct or indirect means whether the property is owned by it or by others. Based on the facts of this case, the object of Amazon Services' business activities are to achieve a profit or benefit, by either direct or indirect means, from the sale Merchant property on its Marketplace. In other words, the evidence shows Amazon Services, at a minimum, ***indirectly*** receives a profit or benefit from the sale of Merchant property on the Marketplace. Moreover, Amazon Services is the party who is present at the point of sale and who accepts consideration in exchange for the transfer of the product. In this case, this Court does not need to determine whether Amazon is contractually designated as an agent.

Nevertheless, even though evidence of agency is not required by the statute, I find Amazon Services functions like a consignee for the purposes of the Sales and Use Tax Act. Indeed, the strong similarities between the sales on the Marketplace and consignment sales cannot be ignored for the purpose of determining legislative intent when looking the Sales and Use Tax Act as a whole. Amazon Services, like a consignee, provides a service to the owner of a product that directly facilitates the sale of that product. Also like a consignee, Amazon Services retains a percentage of the sales price as a fee (Referral Fee).[36] Amazon Services is also the person who processes the transaction, just like a consignee.

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[36] Amazon Services also seeks to distinguish the service fees charged by Travelscape, which were charged to customers, from the service fees charged in this case, which Amazon Services charges to Merchants. Although the fees in *Travelscape* were determined to be part of the gross proceeds of sales, they otherwise were not important to

Further, this Court finds the testimony presented by Amazon Services' executive officer, Mr. Poad, about the differences between consignment transactions and the transactions at issue, to be unpersuasive. Mr. Poad argued, for example, that in a consignment transaction the retailer/consignee determines what to sell whereas in this case the Merchant decides what to sell. However, a consignee can only sell what the consignor first decides to sell. In other words, the consignee can only sell what other people choose to allow him to sell (even if the consignee thereafter has discretion to reject what the consignor offers). Similarly, Merchants must decide to sell their products before they can be listed on the Marketplace and the Marketplace can only list those products Merchants decide to post. Therefore, the two situations are very similar. Thus, while it is true that a consignee often has control over how many of a single product they sell, whereas Merchants control their inventory on the Marketplace, the basic set-up is the same: someone, who is not the owner of a product, is hired to help sell a product for the owner.[37]

Amazon Services nonetheless contends this comparison is not proper because a consignment inherently requires an agency relationship. However, I do not find that a formal agency relationship is required under the tax laws. What matters is the nature of the transactions at issue and the resulting nature of the relationship between the relevant parties, not contractual provisions. Moreover, even if a contractual agency relationship were required,

> [a]gency may be created by law as well as by an action of the principal. Where parties place themselves in a position requiring the relationship of principal and agent to be inferred by the courts, and if from the circumstances there appears at least an implied intention that agency be created, the law will create the relationship, regardless of whether the parties deny the relationship or understood it to be agency. Agency may be implied from the course of dealings of parties, from course of conduct, or by circumstances or apparent relations.

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the Supreme Court's determination that Travelscape owed the sales tax. Therefore, the Court likewise does not find this distinction probative. If anything, a similarity can be drawn between Travelscape's facilitation fee and Amazon Services' Referral Fee—each appear to be fees charged for the assistance Travelscape and Amazon Services provided to the hotel or Merchant to consummate each individual sale. In other words, the fees were exchanged for the facilitation of the sale of the product, much like a consignee retains a fee for selling someone else's product.

[37] Amazon Services also cites to Tennessee law for the proposition that "[g]enerally, when the identity of the seller is disclosed to customers, a consignee is not required to collect sales taxes on behalf of the seller." Amazon Services' Proposed Order 56. However, Amazon Services has provided no South Carolina law to support this assertion, and the Department's policy manual advises that consignees are responsible for sales tax with no exceptions for the disclosure of the owner's identify. *See* S.C. Dep't of Revenue, South Carolina Sales and Use Tax Manual, Chap. 23, Pg. 19 (2015) ("The retailer selling the items on consignment is the person responsible for remitting the tax on the consignment sale.").

23 S.C. Jur. *Agency* § 8, *see also Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 242, 597 S.E.2d 165, 168 (Ct. App. 2004) ("[T]he relationship of agency need not depend upon express appointment and acceptance thereof. Rather, an agency relationship may be, and frequently is, implied or inferred from the words and conduct of the parties and the circumstances of the particular case.").

Overall, I find Amazon Services is "engaged in the business of selling." Furthermore, the "true nature" of the relationship between Amazon Services and Merchants is that Amazon Services acts as the Merchants' agent in selling their products, even if a formal agency relationship is not recognized by the parties.

Identification of the Merchant as the "Seller"

Amazon Services contends it is obvious and apparent to customers on the Marketplace that they are purchasing products from a Merchant rather than Amazon Services because Merchants are identified as the sellers on the website. It thus argues the sales on its Marketplace are made by Merchants and are distinguishable from consignment sales. The Supreme Court's holding in *Travelscape* is instructive because, in that case, the customer using Expedia.com knew the identity of the hotel at which they were reserving a room (and, correspondingly, the fact that the hotel was not owned or operated by Travelscape or Expedia.com), but the Supreme Court still found Travelscape was in the business of furnishing hotel rooms.

Even apart from the holding in *Travelscape*, I find Amazon Services' argument unavailing. Section 12-36-70(1)(a) defines "retailers" or "sellers" as those "selling or auctioning tangible personal property whether owned by the person or others." Critically, it does not state "whether owned by the person or others whose identities are unknown to the buyers" or anything to a similar effect. Indeed, nothing in the Sales and Use Tax Act imposes or even implies such a limitation. Rather, as discussed above, the relevant statutory provisions focus on the person selling goods in exchange for payment from the customer, regardless of whether those goods are owned by that person or others.

Furthermore, I do not find that the customer's knowledge that they are purchasing a Merchant product rather than an Amazon product is as pervasive as Amazon Services propounds. Rather, I find that although the knowledge that a product is sold by a Merchant is obtainable by the customer, the evidence did not establish the instances in which customers sought out that

information.[38] Moreover, even in instances in which a customer seeks out this information, it equally appears that customers are assured that those purchases are made under the umbrella and protection of Amazon Services' corporate assurances, such as its A to Z Guarantee.

Also, a customer's knowledge of who sells the product is not distinctly different from sales of products in a tradition retail setting. In almost all retail sales, the manufacturer or company that developed the product is known to the customer. For example, a customer buying a bottle of Tide detergent at Walmart typically views the product in packaging created by the company that developed Tide, which usually includes the name of that company, a description of Tide, and images of the product. There is also often contact information of that company on the packaging so that customers can contact it to ask questions about Tide prior to purchasing the product. However, Walmart, not the company who makes Tide, is considered the seller when you purchase the detergent at Walmart. Similarly, the fact that a customer knows the identity of a Merchant and can view descriptions and images created, in some cases, by the Merchant on Amazon.com, and can initiate contact with the Merchant to ask product specific questions, is not determinative of whether the Merchant or Amazon Services is the "retailer" or "seller."

Finally, although Amazon Services contends that generally when the identity of the seller is disclosed to customers a consignee is not required to collect sales taxes on behalf of the seller, the evidence does not support this conclusion.

Control Over the Marketplace and Merchant Products

The parties disagree over who has control of Merchant products on the Marketplace and its legal significance. Amazon Services argues control can indicate ownership or, at the least, authority over the product, including the authority to sell the product. Based upon this premise, Amazon Services contends that it is not the seller of Merchant products because Merchants exercise control over the products they list on the Marketplace. Inversely, the Department contends Amazon Services exercises pervasive control over Merchant products listed on the Marketplace such that Amazon Services is the seller of the products. To analyze this issue, the

[38] Indeed, several of the products liability cases Amazon Services cites show that other courts around the country have found it is not the seller for the purpose of products liability include allusions to customers being under the impression that Amazon was selling the products at issue rather than a third-party Merchant. *See Allstate New Jersey Ins. Co. v. Amazon.com, Inc.*, No. 17-2738, 2018 WL 3546197, at *1 (D.N.J. July 24, 2018) (slip op.); *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 418 (6th Cir. 2019) ("At that time, Plaintiff believed that [Amazon] owned the hoverboard, and that she purchased the hoverboard from [Amazon]."

Court focuses upon the facts that are indicative of the exercise of control over Marketplace sales, with particular attention paid to who controls the point of sale and who accepts money in exchange for products.[39]

The evidence established Amazon Services wields significant control over the Marketplace. In particular, it controls many aspects of the sales transaction process on its Marketplace to create a brand-centric, unified customer buying experience to promote further sales. Specifically, the facts show Amazon Services controls the flow of money between the customer, itself, and Merchants; indeed, Merchants are prohibited from exercising this function. Amazon Services controls the unwinding of the sale as well. Amazon Services also restricts communication on the Marketplace, prohibiting Merchants from communicating with customers in ways not expressly provided by or approved by Amazon Services. Amazon Services also provides its customers with an "A-to-Z- Guarantee," which brings dissatisfied Merchant customers under the umbrella of its protection. Amazon Services also enforces its own Return and Refund policy for Merchant items.

These rules and restrictions Amazon Services places upon its Marketplace are by design. They ensure the Amazon brand is not tarnished by a Merchant who might take advantage of a customer, refuse or botch returns, use an un-safe payment processor, or otherwise engage in practices that would be received badly by a customer. These provisions may protect the Merchant's customer, but they are intended to protect ***Amazon's*** customer, ***Amazon's*** reputation as a seller, and the reputation of the Marketplace. Thus, Amazon Services controls how sales transactions are processed on the Marketplace and that control shows Amazon Services is in the business of making sales on its Marketplace.

Moreover, Amazon Services actively participates in the selling process through its proprietary algorithm that selects a certain product to offer in the Buy Box. Unless the customer clicks a hyperlink on the Product Detail Page for "Other Sellers on Amazon," the product

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[39] Amazon Services emphasizes the Merchants' control over their products listed on the Marketplace. Importantly, consideration of that control necessitates consideration of Amazon Service's control over the products listed on the Marketplace because the party that controls the sale inversely suggests the other party does not. Additionally, Amazon Services cited to several products liability cases from other jurisdictions in which those courts found Amazon Services or another Amazon company did not exercise enough control over the product to be liable under the theory of products liability in those jurisdictions. The Court is unpersuaded by citations to cases in other jurisdiction that are not controlling in South Carolina and are not reflective of tax laws, much less this State's specific statutory scheme at issue in this case.

purchased by the customer will be from the default Buy Box offeror. Amazon Services refers to the default offeror as the winner of the Buy Box. How a merchant "wins" the Buy Box is a mystery, but what is clear is that winning the Buy Box significantly effects sales. Even Amazon Services' witness testified he believed the percentage of sales attributable to the winner of the Buy Box was at least 50%, although, surprisingly to this Court, he was unable to testify as to a more precise percentage or even a range of percentages.

Control of Pricing

Amazon Services also contends that since Merchants set the price of their products on the Marketplace, they are the sellers. Amazon Services' theory presumes that only retailers control pricing. However, suppliers or manufacturers of products can also exercise control over the price at which their products are sold. Specifically, a supplier or manufacturer can sell products to a retailer with the requirement that the retailer sell the products at a minimum retail price, yet the supplier or manufacturer will not be deemed the retail seller by virtue of its control over the price. *See, e.g., Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 883, 899 (2007) (evaluating, under federal antitrust law, resale price maintenance contracts by which a manufacturer "refused to sell to retailers that discounted . . . goods below suggested prices"); *see also Travelscape,* No. 08-ALJ-17-0076-CC, 2009 WL 769017, at *12 n.15 ("[I]n a consignment sale, the owner of tangible personal property allows a third party to sell the property. At the time of sale, the third party collects and remits sales tax on the gross proceeds of its retail sale to customers, retains its fee as compensation and then pays the owner for the property."). In fact, if a wholesaler controls the cost of a product and the minimum retail price, it would exercise greater control than Amazon Services' wields over prices on the Marketplace, yet the wholesaler would not be the retail seller.[40]

Here, both Amazon Services and Merchants influence the price of Merchant products sold on the Marketplace. While it is true that Merchants ultimately set the price, they are constrained by Amazon Services' requirements and fees. In particular, Amazon Services requires Merchants

[40] Although the Court has compared Merchants to manufacturers or wholesalers several times, the Court is not implying that Merchants are manufactures or wholesalers; rather, these examples are meant to illustrate that neither product development, customer service, nor pricing, on their own, are determinative of who is the seller. Indeed, if the Court agreed with Amazon Services' argument that whoever develops, prices, and replaces parts for products is the seller, then we would conclude that manufacturers are the sellers of products in the retail setting, which is obviously incorrect.

to set prices to be at least as favorable as the lowest price in other sales channels. Additionally, Amazon Services deducts its fees from the sales price of Merchant products. Therefore, Merchants must charge their lowest price on Amazon while also ensuring the price is high enough to cover the cost of Amazon Services' fees and still yield a profit. Complicating this further, Amazon Services has sole discretion to modify its fees when it wishes, and its fee structure is variable according to the profitability of the category of the product sold. Amazon Services clearly benefits from these parameters governing pricing because it receives a profit off every sale through its fees while ensuring that the offers listed on its website are the most attractive sales offers to encourage more sales on its Marketplace. Thus, the Marketplace pricing structure also shows Amazon Services is in the business of selling.

Overall Conclusions

Notably, the Supreme Court engaged in statutory construction in its analysis in *Travelscape*—where it obviously was not clear at first glance whether the tax was imposed on Travelscape—yet the Supreme Court did not find the statutory scheme to be ambiguous or to require substantial doubt to be resolved in Travelscape's favor. *See Travelscape*, 391 S.C. 89, 705 S.E.2d 28. A complete reading of *Travelscape* shows that although the application of specific statutes to a set of facts may not be initially clear, this does not mean that the statutes are ambiguous such that the case must be resolved in the taxpayer's favor. Rather, the existence of an ambiguity must be determined by reading the statutory scheme as a whole in light of the pertinent facts of the case. The Supreme Court's decision in *Travelscape* is therefore consistent with its prior opinion in *Crescent Manufacturing Co.* in which the Supreme Court noted the "rule of strict construction of . . . tax statutes is subordinate to the rule of reasonable, sensible construction, having in view effectuation of the legislative purpose, and does not prevent the courts from calling to their aid all the other rules of construction and giving each its appropriate scope, etc." 129 S.C. at 480, 124 S.E. at 765 (internal quotation marks and citations omitted)).

Indeed, the Supreme Court's decision in *Travelscape* highlights the broad application of the "in the business of" language. Construing the statutes at issue here like the Supreme Court did in *Travelscape* and applying "in the business of selling" in keeping with the broad statutory framework logically results in the conclusion that someone who facilitates or consummates a sale as a "service provider" can be "in the business of selling" for the purposes of the Sales and Use Tax Act.

I conclude, based upon the factual discussion above and the broad application of the statutes, that Amazon Services is in the business of selling tangible personal property at retail for the purposes of the Sales and Use Tax Act. Additionally, while Amazon Services and Merchants have not legally entered into a consignment relationship, for the purposes of the Sales and Use Tax Act the relationship between Amazon Services and Merchants functions as a consignment-type relationship. Indeed, it would be an oddity to deem a Merchant a seller when: (1) a purchase is often completed through Amazon Services' website without any interaction between the customer and the Merchant other than a product description (possibly) written by the Merchant; (2) the Merchant is prohibited from accepting payment from the customer; (3) Amazon Services sends the order confirmation to the customer; (4) Amazon Services notifies the customers when an order has been received or shipped; and (5) Amazon is the only party that provides a receipt for the products purchased.

It is also notable that in discerning what activities signal someone is "engaged in the business of selling," this Court's interpretation of the state tax laws must reach a "reasonable, sensible construction, having in view effectuation of the legislative purpose." *Crescent Manufacturing Co.*, 129 S.C. at 480, 124 S.E. at 765. Here, without Amazon Services collecting the sales tax at the point of sale, it is unlikely the tax would ever be collected, which would not effectuate the legislative intent of the Sales and Use Tax Act. Amazon Services completely controls the point of sale and restricts its offering of tax collection services to certain "professional" Merchants.[41] Thus, a non-professional Merchant would not even have a chance to collect sales tax at the point of sale. For example, the Court heard no testimony to suggest that a non-professional Merchant could intervene on Amazon Service's platform to add the tax themselves at the point when the customer is charged for the product. The only conclusion the Court is left with is that if a non-professional Merchant wished to collect the sales tax, the Merchant would have to invoice the customer for the sales tax after the sale or absorb the tax itself. And because it is

[41] Notably, only Merchants with "Marketplace Professional" and "Amazon Webstore" accounts can register to have Amazon Services collect sales and use taxes on their behalf in conjunction with sale of their products on the Marketplace. Merchants without these types of accounts presumably cannot enable this feature. Merchants who maintain these types of accounts must pay Amazon Services an additional fee to enable this service and are then reliant on Amazon Services' functionality to collect the appropriate amount of tax. In other words, even for Merchants who can use this tax collection feature, there is no way for them to independently comply with the tax collection requirements under the Act; they must instead rely on Amazon Services, as the person present at the point of sale, to perform these tasks for them.

Amazon Services who sends communications, order confirmations, and receipts to customers, there is also no way for Merchants to send this invoice as part of a receipt.

Similarly, if Merchants are deemed to be the "sellers" under South Carolina law, it would still be incumbent on Amazon Services to collect the use tax when it was applicable because there is no opportunity for Merchants to "collect the use tax from the purchaser and give to the purchaser a receipt showing the amount subject to the tax and the amount of tax collected" and to do so "***at the time of making the sales.***" § 12-36-1350(A). Like with the sales tax, there is no way for Merchants to "give the purchaser a receipt showing the amount subject to the tax and the amount of tax collected" as required by the use tax statute. § 12-36-1350(A).

Even more disconcerting, under Amazon Services' business model, if a Merchant pays for Amazon Services' tax collection service, Amazon merely collects "the value of the sales tax" that it deems is owed to a state and then remits that amount back to the Merchant. It is thereafter the responsibility of the Merchant to "disburse" sales tax to the relevant state. This creates a process by which Amazon collects tax from a purchaser that may not ever be paid by a Merchant. Therefore, there are no tax collection options for Merchants, in particular non-professional Merchants, that are effectual or are likely to encourage Merchants to submit their taxes to taxing authorities.

Considering the above findings and conclusions, Amazon Service's attempt to segregate all that it does into discrete "service" buckets creates an unreasonable interpretation of the State's Sales and Use Tax Laws. Amazon Service is the owner and operator of the Marketplace. It is through that Marketplace that products are offered for sale and it is Amazon Service who directly receives payments from its customers. Its affiliate, Amazon Payments, serves as the payment processor that must be used for all transactions, but it is not the entity with whom customers interact or to whom they provide their payment information. Customers meaningfully interact with Amazon Services to consummate the sales of Merchant products and no one else. Moreover, Amazon Services' self-characterization as a service provider could be employed by any brick-and-mortar retail store or consignment shop to evade tax responsibility as a seller. Either could claim that instead of being engaged in the business of selling tangible personal property, they just provide an array of discrete, non-taxable services, charging the same types of "service" fees as Amazon Services even though, in reality, they are selling products. Separating the actions of a retail seller such as Target into discrete, non-taxable services would be absurd, and so it is here.

Amazon Services' interpretation of this State's tax laws is thus incongruent to the way these transactions actually occur. Furthermore, because Amazon Services accepts customer payments and is the point of sale for all transactions on the Marketplace, Amazon clearly has the responsibility to collect the sales and uses taxes owed for these transactions and, indeed, has the mechanism in place to perform that function. Therefore, given that the obvious purpose of the Sales and Use Tax Act, is not reasonable to interpret the tax laws as requiring Merchants to remit the sales tax when they are prohibited from accepting money from customers in exchange for their products at the point of sale. In other words, when two actors are both "engaged in the business of selling" of a product, the Court finds it is the actor who is present at the point of sale and accepting money in exchange for the transfer of the product who is responsible for the sales and use tax under our tax laws. This is especially true under the circumstances of this case.

Section 12-36-920(A) is written to broadly to impose sales tax on persons "in the business of selling tangible personal property at retail," which includes a person accepting money in exchange for products, whether owned by themselves or others. When we consider that the activity can be for profit or benefit—directly or indirectly—Amazon Services' activities and collection of the Referral Fee exemplify that it is engaging in the "business" of selling because business includes "all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect." § 12-36-20. Amazon Services accepts money in exchange for Merchant goods that are not owned by Amazon Services and receives fees in exchange, including a fee for consummating each individual sale. Therefore, I find Amazon Services is "in the business of selling" for the purpose of the Sales and Use Tax Act and is responsible for sales tax on the sale of third-party Merchant products on the Marketplace.

Due Process

Amazon Services contends the Department's attempt to require it to remit sales and use tax for the sales at issue violates the U.S. Constitution's guarantee of due process of law. U.S. Const. amend. V; U.S. Const. amend. XIV. Specifically, Amazon Services cites to *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) for the proposition that "laws regulating persons or entities must give fair notice of what conduct is required or proscribed" because this is "essential to the protections provided by the Fifth Amendment's Due Process Clause . . . which requires the invalidation of impermissibly vague laws." Based upon this principle, the United States Supreme Court outlined the "void for vagueness doctrine," which has two requirements: "first, that regulated

parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* at 253. As a result of its analysis in *Fox Television Stations*, the United States Supreme Court declined to enforce a change in policy that the FCC tried to retroactively apply to sanction two TV stations for conduct that would have previously been permissible. *Id.* at 249-255. The United States Supreme Court found the policy was void for vagueness as applied in those circumstances. *Id.* at 258.

Amazon Services argues the Department, like the FCC in *Fox Television Stations*, is trying to impose a change in tax policy on it without "fair notice." Amazon Services claims the Department is trying to prospectively apply recommended/pending legislation (the proposed "Marketplace Facilitator Legislation," which has since been enacted) to place a legal obligation on Amazon Services that does not exist under the current tax scheme. Amazon Services maintains it could not have had "fair notice" that is was subjecting itself to a sales tax when it provided services to third-party Merchants.

In response, the Department argues the South Carolina Sales and Use Tax Act is not impermissibly vague or ambiguous with respect to Amazon Services' liability for collecting and remitting sales and use tax under the current statutory scheme. The Department cites to the *Travelscape* decision in 2011 to argue Amazon Services should have been on notice that the responsibility for collecting sales and use tax could be imposed upon online retailers "in the business" of selling. The Department also notes that Amazon Services never sought clarification of its tax obligations in a private letter ruling from the Department.

The Court finds Amazon Services' situation is not comparable to the circumstances described in *Fox Television Stations* and there is no constitutional violation. Unlike the FCC in *Fox Television Stations*, the Court finds no evidence that the Department imposed, or was trying to impose, pending legislation on Amazon Services to obligate Amazon Services to remit sales and use tax for these transactions. *See Fox Television Stations*, 567 U.S. at 249-255. Nowhere has the Department cited to the pending legislation in an attempt to apply it to Amazon Services in this case. Therefore, the Department is not seeking to impose a new law retroactively on Amazon Services in the same way the FCC was attempting to do in *Fox Television Stations*. Rather, the Court finds that this case is more reflective of an existing tax scheme being applied to a relatively new business model (the online marketplace). Just because a new business structure

is created does not mean that this new structure is immune from existing tax obligations or other legal obligations simply because the existing statutory scheme does not specifically incorporate the new business model. Moreover, this Court has even emphasized in its previous rulings in this case the folly of relying on unenacted legislation to interpret legislative intent or construe existing statutes. *See* Order on Motion for Summary Judgment (January 29, 2019) (citing and quoting *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011)).

Equal Protection

Amazon Services argues that the Department has singled it out for imposition of tax to the neglect of other e-commerce sites or online marketplaces, which is an equal protection violation.

Under the South Carolina Constitution, no "person shall be denied the equal protection of the laws." S.C. Const. art. I, § 3. *See also Bodman v. State*, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013) (citing S.C. Const. art. I, § 3). "In order to establish an equal protection violation, a party must show that similarly situated persons received disparate treatment." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 626, 503 S.E.2d 471, 479 (1998). Moreover, "[a] crucial step in the analysis of any equal protection clause is the identification of the pertinent class . . . ." *Bodman*, 403 S.C. at 69, 742 S.E.2d at 367 (quoting *Sloan v. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 481, 636 S.E.2d 598, 613 (2006). Equal protection does not require that all taxpayers be treated the same, rather, only similarly-situated taxpayers be treated the same. *See id.* "Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." *Town of Hollywood v. Floyd*, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013). "To prevail under the rational basis standard, a claimant must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose." *Town of Hollywood v. Floyd*, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013). Moreover, "[t]o prove that a statute has been administered or enforced discriminatorily, more must be shown than the fact that a benefit was denied to one person while conferred on another." *Whaley v. Dorchester Cty. Zoning Bd. of Appeals*, 337 S.C. 568, 576, 524 S.E.2d 404, 408 (1999). "A violation is established only if the plaintiff can prove that the state intended to discriminate." *Id.* at 576, 524 S.E.2d at 408; *see Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 329 (4th Cir. 2005) ("Even if we were to determine that plaintiffs' project was similarly situated to other projects, they would still need to show purposeful discrimination."); *id.* ("If disparate treatment alone was sufficient to support a

Constitutional remedy then every mistake of a local zoning board in which the board mistakenly treated an individual differently from another similarly situated applicant would rise to the level of a federal Constitutional claim.").

Amazon Services did not devote much time at trial developing a foundation for its equal protection argument. In its closing argument, Amazon Services' attorney argued that "[t]he Court must know that these websites like Amazon and eBay and Etsy, that's where people buy stuff." Amazon Services' executive, Mr. Poad, also briefly testified eBay operates a marketplace, and he believes Wayfair and Walmart have marketplaces. Amazon Services also argued that pending marketplace facilitator legislation showed that the Department had no intention of assessing the tax against other marketplace facilitators except for the "pending litigation," which referred to this litigation.

However, Amazon Services has failed to submit any evidence specifically identifying other online marketplaces *and* showing that these other online marketplaces are similarly situated. *See Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 70, 663 S.E.2d 497, 504 (Ct. App. 2008) (upholding the denial of an equal protection claim where the plaintiffs "summarily" argued their property was similarly situated to the neighboring property and failed "to cite any evidence of record that support these assertions"); *Town of Hollywood*, 403 S.C. at 482, 744 S.E.2d at 169 ("The pertinent issue before this Court is whether the developers presented evidence that the Planning Commission treated them differently than other similarly situated developers."). Indeed, in its proposed order making the equal protection argument, Amazon Services does not even address what level of review is to be used—in this case, rational basis. Thus, Amazon Services has not argued that its "disparate treatment did not bear a rational relationship to a legitimate government purpose." *Id.* at 480, 744 S.E.2d at 168 ("To prevail under the rational basis standard, a claimant must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose.").

Amazon Services contention was rather based upon a negative inference that the Department "has not sought to audit or collect sales or use taxes on third-party sales from any other ecommerce site or online marketplace." However, the transcript reflects the Department merely testified that, at the time it audited Amazon Services, it had not previously audited any online marketplace or ecommerce business.

Although the Court acknowledges there are other businesses with online marketplaces or ecommerce websites potentially similarly situated to Amazon Services, there was no evidence presented to establish this fact. In fact, Amazon Services offered no evidence regarding whether the Department assessed sales and use tax on another online marketplace or why the Department failed to impose the tax on such a similarly situated business. Thus, there is no evidence that the Department purposefully singled-out Amazon Services to intentionally discriminate against them with the imposition of the tax. *See Sunrise Corp. of Myrtle Beach*, 420 F.3d at 329 (4th Cir. 2005) ("Even if we were to determine that plaintiffs' project was similarly situated to other projects, they would still need to show purposeful discrimination."); *id.* ("If disparate treatment alone was sufficient to support a Constitutional remedy then every mistake of a local zoning board in which the board mistakenly treated an individual differently from another similarly situated applicant would rise to the level of a federal Constitutional claim."). A summary observation that other online marketplaces appear not to have been taxed is not enough, and it is incumbent upon Amazon Services to show, through evidence, that an equal protection violation has occurred. *See Olson*, 379 S.C. at 70, 663 S.E.2d at 504 (upholding the denial of an equal protection claim where the plaintiffs "summarily" argued their property was similarly situated to the neighboring property and failed "to cite any evidence of record that support these assertions").

Finally, this case is heard *de novo* before the ALC. This Court would not allow the singling out of any company for selective enforcement and, indeed, recognizes that Amazon is a respected company that contributes to this State's economy. Although, there will always be instances in which a business will be placed in the position to be the first to challenge viewpoints propounded by the Department before the ALC, that primordial position does not in turn imply disparate treatment.

ORDER

Having considered the parties' submission, the testimony at the hearing, and the applicable South Carolina statutes and case law,

IT IS HEREBY ORDERED that the Department's determination that Amazon Services owes sales and use tax on the sale of third-party product sold on the Marketplace for audit period at issue is AFFIRMED.

IT IS FURTHER ORDERED that pursuant to the parties' agreement, now that the litigation is complete the Department will calculate the specific amount of tax owed on the sales at issue in this case.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

September 10, 2019
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

September 10, 2019
Columbia, South Carolina

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version Held Unconstitutional by State ex rel. Ohio Academy of Trial Lawyers v. Sheward, Ohio, Aug. 16, 1999

Baldwin's Ohio Revised Code Annotated
Title XXIII. Courts--Common Pleas (Refs & Annos)
Chapter 2307. Civil Actions (Refs & Annos)
Product Liability Claims (Refs & Annos)

R.C. § 2307.71

2307.71 Definitions

Effective: October 31, 2007
Currentness

(A) As used in sections 2307.71 to 2307.80 of the Revised Code:

(1) "Claimant" means either of the following:

(a) A person who asserts a product liability claim or on whose behalf such a claim is asserted;

(b) If a product liability claim is asserted on behalf of the surviving spouse, children, parents, or other next of kin of a decedent or on behalf of the estate of a decedent, whether as a claim in a wrongful death action under Chapter 2125. of the Revised Code or as a survivorship claim, whichever of the following is appropriate:

(i) The decedent, if the reference is to the person who allegedly sustained harm or economic loss for which, or in connection with which, compensatory damages or punitive or exemplary damages are sought to be recovered;

(ii) The personal representative of the decedent or the estate of the decedent, if the reference is to the person who is asserting or has asserted the product liability claim.

(2) "Economic loss" means direct, incidental, or consequential pecuniary loss, including, but not limited to, damage to the product in question, and nonphysical damage to property other than that product. Harm is not "economic loss."

(3) "Environment" means only navigable waters, surface water, ground water, drinking water supplies, land surface, subsurface strata, and air.

(4) "Ethical drug" means a prescription drug that is prescribed or dispensed by a physician or any other person who is legally authorized to prescribe or dispense a prescription drug.

(5) "Ethical medical device" means a medical device that is prescribed, dispensed, or implanted by a physician or any other person who is legally authorized to prescribe, dispense, or implant a medical device and that is regulated under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 21 U.S.C. 301-392, as amended.

(6) "Foreseeable risk" means a risk of harm that satisfies both of the following:

(a) It is associated with an intended or reasonably foreseeable use, modification, or alteration of a product in question.

(b) It is a risk that the manufacturer in question should recognize while exercising both of the following:

(i) The attention, perception, memory, knowledge, and intelligence that a reasonable manufacturer should possess;

(ii) Any superior attention, perception, memory, knowledge, or intelligence that the manufacturer in question possesses.

(7) "Harm" means death, physical injury to person, serious emotional distress, or physical damage to property other than the product in question. Economic loss is not "harm."

(8) "Hazardous or toxic substances" include, but are not limited to, hazardous waste as defined in section 3734.01 of the Revised Code, hazardous waste as specified in the rules of the director of environmental protection pursuant to division (A) of section 3734.12 of the Revised Code, hazardous substances as defined in section 3716.01 of the Revised Code, and hazardous substances, pollutants, and contaminants as defined in or by regulations adopted pursuant to the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 94 Stat. 2767, 42 U.S.C. 9601, as amended.

(9) "Manufacturer" means a person engaged in a business to design, formulate, produce, create, make, construct, assemble, or rebuild a product or a component of a product.

(10) "Person" has the same meaning as in division (C) of section 1.59 of the Revised Code and also includes governmental entities.

(11) "Physician" means a person who is licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board.

(12)(a) "Product" means, subject to division (A)(12)(b) of this section, any object, substance, mixture, or raw material that constitutes tangible personal property and that satisfies all of the following:

(i) It is capable of delivery itself, or as an assembled whole in a mixed or combined state, or as a component or ingredient.

(ii) It is produced, manufactured, or supplied for introduction into trade or commerce.

(iii) It is intended for sale or lease to persons for commercial or personal use.

(b) "Product" does not include human tissue, blood, or organs.

(13) "Product liability claim" means a claim or cause of action that is asserted in a civil action pursuant to sections 2307.71 to 2307.80 of the Revised Code and that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, that allegedly arose from any of the following:

(a) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;

(b) Any warning or instruction, or lack of warning or instruction, associated with that product;

(c) Any failure of that product to conform to any relevant representation or warranty.

"Product liability claim" also includes any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public.

(14) "Representation" means an express representation of a material fact concerning the character, quality, or safety of a product.

(15)(a) "Supplier" means, subject to division (A)(15)(b) of this section, either of the following:

(i) A person that, in the course of a business conducted for the purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce;

(ii) A person that, in the course of a business conducted for the purpose, installs, repairs, or maintains any aspect of a product that allegedly causes harm.

(b) "Supplier" does not include any of the following:

(i) A manufacturer;

(ii) A seller of real property;

(iii) A provider of professional services who, incidental to a professional transaction the essence of which is the furnishing of judgment, skill, or services, sells or uses a product;

(iv) Any person who acts only in a financial capacity with respect to the sale of a product, or who leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor.

(16) "Unavoidably unsafe" means that, in the state of technical, scientific, and medical knowledge at the time a product in question left the control of its manufacturer, an aspect of that product was incapable of being made safe.

(B) Sections 2307.71 to 2307.80 of the Revised Code are intended to abrogate all common law product liability claims or causes of action.

CREDIT(S)

(2006 S 117, eff. 10-31-07 (*State ex rel. Ohio Gen. Assembly v. Brunner*); 2004 S 80, eff. 4-7-05; 2001 S 108, § 2.01, eff. 7-6-01; 2001 S 108, § 2.02, eff. 7-6-01; 1996 H 350, eff. 1-27-97 (*State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999)); 1987 H 1, eff. 1-5-88)

Notes of Decisions (229)

R.C. § 2307.71, OH ST § 2307.71
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