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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2019-001706

Trial Court Case No. 17-ALJ-17-0238-CC

Amazon Services, LLC,..... Appellant,

v.

South Carolina Department of Revenue, ... Respondent.

APPENDIX - VOLUME I of VII

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM THE ADMINISTRATIVE LAW COURT
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Amazon Services, LLC, ... Appellant,
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**RECORD ON APPEAL
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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

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."

FILED

September 10, 2019

SC ADMIN. LAW COURT

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 Affiliates²; 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

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:

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 fulfillment 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 combine 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 sale¹² 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,

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 distributor. 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

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

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 long-standing 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

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).

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 processor 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

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

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,

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

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, distributor, 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

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

"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.

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.

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 identity. 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

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 manufacturers 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 it 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.

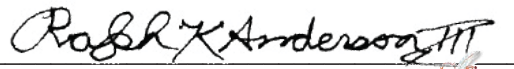
ORDER

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.

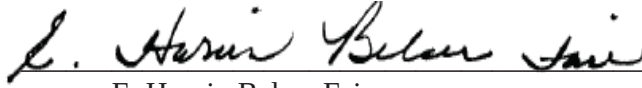
A handwritten signature in black ink, reading "Ralph King Anderson, III", is positioned above a horizontal line. To the right of the signature, there is a small red "eSign" logo.

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).

A handwritten signature in black ink, reading "E. Harvin Belser Fair", written over a horizontal line.

E. Harvin Belser Fair
Judicial Law Clerk

September 10, 2019
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

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) challenging the final determination of the South Carolina Department of Revenue (Department), in which the Department assessed Amazon for a total of \$12,490,502.15 in taxes, penalties, and interest for the period of January 1, 2016, through March 31, 2016. Specifically, the Department found that Amazon is a retail seller who owes sales and use tax on certain retail sales involving third parties (Merchants) participating on Amazon's online sales platform known as the Marketplace. Amazon contends the third-party Merchants are the sellers and are responsible for collecting and remitting sales and use tax.

The Department issued its Department Determination on June 21, 2017. Amazon timely appealed to this Court on July 21, 2017. On December 7, 2018, Amazon and the Department filed cross-motions for summary judgment pursuant to Rule 68 of the Rules of Procedure for the Administrative Law Court (SCALC Rules) and Rule 56 of the South Carolina Rules of Civil Procedure (SCRCP). Each party attached extensive exhibits to their motion. Both parties filed responses. Upon review of the motions and filings by the parties, I deny both parties motions for summary judgment for the reasons stated below.

BACKGROUND

Petitioner, Amazon Services, LLC, is an Amazon subsidiary that operates the website amazon.com (the Marketplace) which lists various items for sale, including items listed for sale by third-party Merchants. The three primary types of entities that list items for sale on the

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January 29, 2019

SC ADMIN. LAW COURT

Marketplace are: (1) Amazon; (2) Amazon affiliates¹; and (3) third-party Merchants. Amazon already collects and remits sales and use taxes for items purchased from Amazon or Amazon Affiliates. At issue in this case are the sales and use taxes due on retail sales on the Marketplace involving third-party Merchants who have not already contracted with Amazon to collect the taxes.

Approximately fifty percent of the sales on Marketplace are through Merchants. Generally, a sale starts with a customer searching for a product on amazon.com. After the customer selects a product from the search results, Amazon's algorithm determines which seller of the product will be the default seller of the product unless the customer clicks a hyperlink for "Other Sellers on Amazon." Thus, if a customer does not actively seek out other sellers, the customer's sale will go to the default seller selected by Amazon's algorithm. Amazon refers to the default seller as a seller who wins the "Buy Box." Amazon, its affiliates, and Merchants all compete for the Buy Box, and the algorithm uses price, shipping cost, and other variables to determine the winner. Amazon provides Merchants with directions on how to "win" the Buy Box; however, the complete method of evaluating criteria to be selected as the Buy Box has not been disclosed to the Court.

When a customer buys a product, the seller's identity is listed in the product description. For example, the product description might include the phrase, "ships from and is sold by Merchant" or "ships from and is sold by Amazon." The seller's name also appears on the cart page, the customer's order page, and the customer's invoice.

If a customer orders from a Merchant, their order is shipped to the customer in one of two ways. Either the Merchant ships the order or the Merchant can pay to use Fulfillment By Amazon (FBA) to ship the order.

Fulfilled by Merchant

Merchants fulfill approximately half their orders by themselves. When a Merchant's product is purchased, Amazon sends the Merchant an email notifying them of the sale. The Merchant then ships the product to the customer and is required to notify Amazon when the item ships. Once Amazon receives notice that the Merchant has shipped the product, Amazon processes the customer's credit card through its affiliate, Amazon Payments, Inc.

¹ 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.

Amazon records the transaction in the Merchant's "Seller Account." The Seller Account is part of the Seller Central online portal where Merchants can see the proceeds of sales along with the applicable fees paid to Amazon. Every two weeks, or more frequently if requested and at Amazon's discretion, Amazon transfers the sales proceeds to the Merchant's bank account.

In sales in which the item is fulfilled by the Merchant, the Amazon Business Solutions Agreement (BSA) provides that Merchants are responsible for non-performance, non-delivery, mis-delivery, theft, or mistake when sales are made of Merchants' goods. Merchants are also required to handle returns and refunds (through Amazon). However, Amazon has an "A-to-Z Guarantee Program," which processes claims that cannot be solved by the Merchant. Under this program, Amazon contacts the Merchant about the complaint to confirm certain info about the transaction and then determines how to settle the claim, which may include reimbursement at the Merchant's expense.

Fulfillment By Amazon

If a Merchant chooses to pay for FBA, then Amazon stores, packages, and ships the Merchant's products when they are sold. To start the process, Merchants register each product for FBA, which is run by another Amazon affiliate, Amazon Fulfillment Services (AFS). Merchants initially ship their products to an Amazon fulfillment center and pay storage fees to Amazon. Merchants agree that once Amazon receives their products, Amazon can commingle products of the same type and is not required to individually identify a Merchant's specific product units. Merchants may, at any time, request their product units be returned to them at the Merchant's expense or have Amazon dispose of a unit.

When a customer purchases a product that is in the FBA program, Amazon sends an automated email to AFS, and the product is packaged and shipped to the customer. Upon shipment, Amazon processes the customer's credit card and the funds are distributed in the same manner as if a Merchant shipped the item himself. Under the BSA, Amazon has sole discretion regarding all customer services issue relating to FBA products.²

² Additionally, third-party sellers who do not list their products on the Marketplace can also use the FBA service for storing and shipping their products, but in those cases Amazon does not provide customer service.

The Relationship Between Amazon and Merchants

Amazon's relationship with the Merchants who own products that are sold on the Marketplace is set forth in the BSA. The BSA contains general provisions covering the overall relationship between Amazon and Merchants, as well as more specific provisions governing particular parts of Amazon's sales platform, including "Selling on Amazon," "Fulfillment by Amazon," "Amazon Clicks," and "Transaction Processing." The BSA states that the relationship between Amazon and Merchant is an independent contractor relationship "and nothing in this Agreement will create any partnership, joint venture, agency, franchise, sales representative, or employment relationship."

However, Amazon acknowledges it does act as an agent of the Merchant for the limited purpose set out in the Transaction Processing Service Terms (i.e. payment collection and processing). Specifically, the BSA provides that Amazon acts as the Merchant's agent for "purposes of processing payments, refunds and adjustment for Your Transactions, 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."³ Furthermore, although Amazon disclaims any agency relationship, the BSA includes many limitations on how Merchants participate in Marketplace transactions. For example, the BSA section discussing "Selling on Amazon" provides the following:

- Amazon "will also receive all Sales Proceeds on [Merchant's] behalf for each of these transactions and will have exclusive rights to do so, and will remit them to you in accordance with these Selling on Amazon Service Terms."
- Merchant is responsible for determining shipping and handling charges unless a product is FBA; however, shipping charges are subject to Amazon's Program Policies and standard functionality.
- Amazon bears the risk of credit card fraud (unless a sale was noncompliant with Amazon terms). Amazon, at sole discretion, can withhold transaction for investigation, refuse to process the transaction, restrict shipping, or stop/cancel a transaction and Merchant must stop/cancel orders when asked to do so.
- Merchant must "ensure that you are the seller of each of Your Products" and "identify yourself as the seller of each of Your Products on all packing slips or other information

³ Interestingly, prior to disbursing funds to a Merchant, "Amazon Payments may combine Sales Proceeds held with the funds of other users of the Services, invest them, or use them for other purposes permitting by applicable Laws." Thus, Amazon makes money off sales proceeds before they are distributed to Merchants.

included or provided in connection with Your Products and as the Person to which a customer may return the applicable product” but “except as expressly permitted by this Agreement, not send customers emails confirming orders or fulfillment of Your Products.”

- Refunds and returns are made by Merchants, but in accordance with the BSA and the Amazon Refund Policies for the applicable Amazon Site published at the time of the order. All payments will be routed through Amazon, who will pay the customer, and then Merchant will reimburse Amazon.
- Merchant is required to supply Amazon with requested info about an order when an Amazon A-Z claim is made.
- Sales offers on Amazon must be at least as favorable as Merchant’s sales offers through other sales channels.

Sales and Use Tax Collection

In the BSA, Merchants agree to be responsible for the collection, reporting and payment of all taxes unless they subscribe to Amazon’s Tax Calculation Service, which calculates and withholds tax for them. If Merchants use the tax collection service, they set their own product tax codes. Additionally, Merchants are solely responsible for taxes related to storage with Amazon at its fulfillment centers.

Amazon’s Compensation for Its Services

Amazon is compensated for its services through: referral fees, applicable variable closing fees, the non-refundable monthly Selling on Amazon subscription fee, and other applicable fees related to other services. The referral fees vary based upon the product being sold and range from 45% of the total sale value for “Amazon Device Accessories” to 6% for personal computers.

DISCUSSION

SCRCP Rule 56(c) provides a motion for summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP; *see also* SCALC Rule 68 (stating the South Carolina Rules of Civil Procedure may be applied in proceedings before the ALC to resolve questions not addressed by the ALC rules). “In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.” *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378–79, 534 S.E.2d 688, 692 (2000). “[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a

mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). “[B]ecause summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues.” *Lord v. D & J Enterprises, Inc.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014). “Summary judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law.” *Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991). Moreover, “[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.” *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000).

Relevant Sales and Use Tax Law

In this state, a “sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business⁴ of selling tangible personal property at retail.” S.C. Code Ann. § 12-36-910(A) (2014). Complementing this tax is the use tax, which 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).

A “retailer” and “seller” 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). Section 12-36-70 also includes the “efficient administration,” which provides:

The department, when necessary for the efficient administration of this chapter, may treat any salesman, representative, trucker, peddler, or canvasser as the agent of the dealer, distributor, supervisor, employer, or other person under whom they operate or from whom they obtain the tangible personal property sold by them, regardless of whether they are making sales on their own behalf or on behalf of the dealer, distributor, supervisor, employer, or other person. The department may also

⁴ “‘Business’ includes all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect.” S.C. Code Ann. § 12-36-20.

treat the dealer, distributor, supervisor, employer, or other person as a retailer for purposes of this chapter.

§ 12-36-70.

A “retail sale mean[s] all sales of tangible personal property⁵ except those defined as wholesale sales.” S.C. Code Ann. § 12-36-110 (2014). More generally, a “sale” or “purchase” is specifically defined to mean:

any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration including:

(1) a transaction in which possession of tangible personal property is transferred but the seller retains title as security for payment, including installment and credit sales;

(2) a rental, lease, or other form of agreement;

(3) a license to use or consume; and

(4) a transfer of title or possession, or both.

S.C. Code Ann. § 12-36-100 (2014).

Additionally, the tax is on the “gross proceeds of sales,” which means “the value proceeding or accruing from the sale, lease, or rental of tangible personal property,” and includes “the proceeds from the sale of property sold on consignment by the taxpayer.” S.C. Code Ann. § 12-36-90(1)(a) (2014).

In contrast to retail sales of tangible personal property, “[t]he receipts from services, when the services are the true object of the transaction, are not subject to the sales and use tax, unless the sales and use tax is specifically imposed by statute on such services (i.e. accommodation services, communication services).” S.C. Code Ann. Regs. 117-308 (2012).

Analysis

The facts in this case appear to be relatively straight forward even if the transactions at issue are complicated and consist of several components. However, although the facts underlying the transactions at issue appear to be relatively straight forward, summary judgment is generally

⁵ Tangible personal property means “personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses” S.C. Code Ann. § 12-36-60 (2014).

not appropriate when “there is dispute as to the conclusion to be drawn from those facts.” *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000).⁶

Dispute Over Whether the Facts Support the Conclusion that Amazon is a Seller

At the heart of this case is a disagreement between the parties as to whether Amazon is a “retailer” or “seller” or “in the business of selling” such that Amazon owes sales and use tax on certain retail sales involving third-party Merchants participating on Amazon’s online sales platform known as the Marketplace. Drilling down further, Amazon contends it cannot be a seller because it does not engage in sales as defined in section 12-36-100. Specifically, in its Motion for Summary Judgment, Amazon contends there is no genuine dispute that the sales at issue are made by Merchants, not Amazon, because Amazon does not have title to the products sold on the Marketplace, does not transfer possession of the products, and does not receive consideration in exchange for those products.⁷ Rather, Amazon contends it provides services to Merchants and does not engage in sales. The Department disagrees, arguing Amazon is a seller because it offers products to the public for sale and accepts payment in exchange for those products, essentially transferring tangible personal property for consideration. The Department further argues that Amazon’s self-identification as a service provider belies its true role in these transactions, over which it exercises subtle, but extensive control.

Underlying this larger issue are several sub-issues that control the resolution of this case and illustrate how the parties disagree about the conclusions to be drawn from the facts in this case. For example, the parties disagree about how to categorize the payments Amazon receives from customers who purchase Merchant goods. It is undisputed that Amazon charges the customer for the product that is purchased, receives the payment, and holds the payment for up to two weeks before releasing the payment to Merchants minus Amazon’s various fees. The Department argues

⁶ Because this Court finds summary judgment is inappropriate due to the various disputes regarding the factual implications of this case, the Court does not reach the issue of whether the South Carolina Sales and Use Tax Act is ambiguous with regards to whether third-party sellers listing items on an online marketplace are required to remit sales and use tax for those items. Accordingly, the Court does not find Amazon’s argument in its Summary Judgement Motion concerning statutory construction and construing ambiguous tax statutes in the taxpayer’s favor to be applicable at this juncture.

⁷ Amazon also argues the Department has effectively admitted that Merchants are the sellers because, in February 2018, the Department encouraged Merchants to register as retailers and remit sales and use tax for products sold on the Marketplace. The court rejects this argument because what the Department did in February of 2018 is irrelevant to the time at which the alleged sales and use tax accrued in 2016. Moreover, as the Department correctly asserts, it cannot singlehandedly change the law that was in place when this case arose through taking precautionary steps pending the outcome of this litigation.

that when Amazon receives these payments from customers, it is receiving consideration in exchange for the transfer of a product. In other words, the Department contends that the facts reflect a sale under section 12-36-100 because there is a “transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration.”

In contrast, Amazon argues that the payments it receives from customers do not constitute consideration. Rather, Amazon contends it receives payments “on behalf of” Merchants.” It describes its role in the transaction as a payment servicer who “might be a promisor as to the third-party sellers to whom it is providing the services, and the customers might be third-party beneficiaries of this arrangement, but there is no bargained-for consideration between Amazon Services and the customers.” Nevertheless, if contractual “consideration” is an issue in this case, the determination of the extent to which a sale consists of a profit or benefit accruing to Amazon is, in part, a factual one. See *Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998) (“Valuable consideration to support a contract 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.”). Amazon also appears to suggest that it does not receive consideration because another subsidiary, *Amazon Payments*, as opposed to *Amazon Services*, is the payment processor. Thus, the parties clearly disagree as to the legal conclusions to be drawn from the factual scenario that describes Amazon’s receipt of payment from customers.⁸

Similarly, the parties disagree about who transfers title and/or possession of the purchased goods and the resulting legal conclusions. Again, the facts are relatively clear. A customer buys a product and Amazon either (1) notifies the Merchant that a good has been purchased and the Merchant ships the good to the customer or (2) if the good is in the FBA program, Amazon picks, packages, and ships the good to the customer. Looking again at section 12-36-100, Amazon argues that for it to be a seller, it must engage in sales, which require “a transfer of title or possession, or

⁸ Indeed, the disagreement of the parties described here only touches the surface of this issue. The parties further disagree about the significance of Amazon receiving a variable fee from the Merchant upon the sale of the good. This variable fee is in addition to the service fee Amazon charges the Merchant for listing the good on its marketplace, and it is purportedly based upon the profit margin associated with the type of good that was sold. The Department also takes issue with Amazon holding onto payments for up to two weeks and receiving interest on that money before remitting it to Merchants. The Department contends other payment servicers, such as PayPal, remit payments much faster. Amazon maintains its use of an interest-bearing account is completely within the limits of the law and Merchants can request to receive their payments sooner.

both” in exchange for consideration. § 12-36-100(4). Amazon contends that it does not own or hold title to Merchant products listed on its Marketplace and it does not transfer possession of these products. Rather, Amazon argues title passes upon shipment, and Merchants ship their products directly to consumers. Notably, Amazon appears to be arguing they cannot be a seller because, in part, it does not physically transfer possession of Merchant products to customers. However, Amazon has not explained how its theory applies to the second factual scenario above—Merchant products that are part of its FBA program, and are, thus, physically stored, packed, and shipped to the customer by Amazon.

Taking a different view, the Department contends that Amazon’s reading of section 12-36-100 is too limited and ignores the antecedent language in this statute, which merely describes a sale as “any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration.” The Department interprets the description of a sale as the “transfer of title or possession, or both” in subsection (4) of section 12-36-100 to be a non-exclusive *example* of a type of transaction that is a sale under the statute. Moreover, the Department points to section 12-36-70(1)(a), the definition of “retailer” or “seller,” for the proposition that a seller can be someone who is “selling or auctioning tangible personal property . . . owned by . . . others.” (emphasis added). Therefore, the Department argues Amazon can be a seller even if they do not own the product or transfer title. Whether the Department is correct requires, in part, a consideration of whether, under the facts, Amazon is selling tangible personal property owned by others.

The Department further argues that Amazon is a seller not only because it transfers tangible personal property for consideration pursuant to section 12-36-100, but also because of the nature of the interaction and the bargaining of the parties. Specifically, the Department points out that Amazon advertises and displays Merchant goods, helps the customers identify items they want, helps customers independently pick a Merchant/Affiliate through Amazon’s algorithm, communicates with the customer to confirm the purchase and provide a receipt for the transaction, processes the payment for the good, and often picks the good from its (possibly comingled inventory), and then packages and ships the product.⁹ These are all facts that are weighed in determining the resolution of this case.

⁹ Amazon argues that defining whether someone is a seller based upon the nature of the interaction and bargaining of the parties is a novel legal standard, articulated for the first time in the Department’s motion and is unsupported by long-standing Department practice, policy, or position.

Obviously, the disagreement between the parties about the requirements of section 12-36-100 is an issue of statutory construction, which is the Court's province. The Court finds the transfer of title is not irrelevant to a sale, but it is not a prerequisite either. However, the Court withholds judgement beyond this observation at this time. As Amazon argues in its Response to the Department's Motion for Summary Judgment, the Department "is unable to identify how property can be transferred other than by exchanging possession, title, *or some right inherent to holding title.*" Indeed, as Amazon seems to identify, the Department's argument implies that a physical transfer of the good is unnecessary to complete a sale; rather, a transfer of the *right* to possession or the *right* to title is enough, which further implies an agency relationship between Amazon and Merchants. Whether the facts of this case imply an agency relationship, despite Amazon disclaiming such a relationship in the BSA, is something to be determined in this case. *See Brockbank*, 341 S.C. at 378, 534 S.E.2d at 692 ("Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.").

The parties also disagree about what constitutes an "interaction" between Merchants, Amazon, and customers during these transactions. For example, the Department argues a customer can search for a good on the Marketplace, identify it, buy it, pay Amazon for it, receive a confirmation and receipt of transaction from Amazon, and then receive the good from Amazon's FBA (for FBA-enrolled products) without ever interacting with the Merchant. The Department asserts Amazon is the "point of contact" for the sale and argues that the customer's lack of interaction with the Merchant in this scenario shows that Amazon is the true seller. The Department also maintains that any interaction between Merchants and customers is so heavily controlled by Amazon that the Merchant is not able to meaningfully participate in transaction at any point to calculate, charge, and collect sales and use tax from the customer. For example, the Department cites to the BSA's requirements that Merchants "only use tools and methods that we [Amazon] designate to communicate with [customers] regarding Your Transactions" and "except as expressly permitted by this Agreement, not send customers emails confirming order or fulfillment of Your Products" to argue Amazon prohibits Merchants from contacting a customer "in a manner not specifically provided and approved by Amazon."

Amazon disagrees with the Department's interpretation of the facts and contends Merchants and customers interact and communicate in many ways, including through Merchants

“describing their products, providing photos of their products, setting prices, providing shipping terms, and answering questions about their products.” Amazon maintains Merchants also interact with customers by “accepting or rejecting offers, shipping products, receiving payments, and receiving customer feedback and reviews.” Amazon further states that it provides an “Internet-based messaging system that helps facilitate all of these communications and interactions.” Moreover, Amazon claims that whether the Merchant and customer interact has no legal significance because the South Carolina Sales and Use Tax Act does not require “actual contact” between two parties for those parties to be considered a seller and a customer. The Court thus must determine whether the types of “interactions” described by Amazon between Merchants and customers are meaningful enough to be truly be called interactions. This also involves an evaluation of whether a sale requires interaction between Merchants and customer or can be completed without it.

In sum, even if many of the facts are relatively well-settled, there is a dispute as to whether those facts imply that Amazon is a “seller” or “retailer” under South Carolina’s Sales and Use Tax Act and, as such, is responsible for remitting sales and use tax for sales of Merchant products.¹⁰ Summary Judgment is therefore inappropriate as to this issue. Moreover, with regards to the level of control Amazon wields during these transactions, the Court could benefit from “further inquiry into the facts” to “clarify the application of the law.” *Rothrock*, 305 S.C. at 405, 409 S.E.2d at 368. For instance, while Amazon states that Merchants control almost all aspects of the transactions at issue, including setting the sales price and shipping costs, it is also clear from the BSA that Amazon requirement restrict, to some extent, the Merchants’ control over the sales price and shipping costs.

Dispute Whether Amazon is a Consignee.

Amazon argues that it is undisputed that it is not a consignee in the transactions at issue. It contends the sales of Merchant products on the Marketplace are distinguishable from consignment sales because Merchants on Amazon.com control virtually all aspects of the sales process, the identity of the Merchant is displayed for customers during every part of the

¹⁰ The Court does not find Amazon’s argument that other courts around the country have found the Merchants, and not Amazon, to be the seller persuasive for the purpose of determining Amazon’s liability under South Carolina’s tax scheme. Moreover, several of the cases cited by Amazon do not deal directly with tax, but rather product liability, and other issues.

transaction, and Amazon and Merchants specifically disclaim any form of agency between them in the BSA.

To the contrary, the Department’s analogizes the transactions as issue to consignment sales. Specifically, the Department notes that the term “gross proceeds of sales” for tax calculation purposes includes proceeds from consignment sales and consignees can sell property that they do not own. See § 12-36-90(1)(a) (providing “gross proceeds of sales” includes “the proceeds from the sale of property sold on consignment by the taxpayer”). The Department contends that under the current statutory scheme, sales and use tax is intended to be collected at the point of sale, and Amazon is functioning as the point of sale in these transactions, much like a retailer or consigner.

The Court finds that further clarification of the facts is necessary to construe whether Amazon is functioning as a consignee or not. See *Rothrock*, 305 S.C. at 405, 409 S.E.2d at 368 (“Summary judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law.”). Specifically, the Court does not find Amazon’s argument that the BSA disclaims any agency or consignment relationship to be compelling. A person cannot contract away their obligations under the South Carolina tax laws to prevent the Court from engaging in a factual analysis of the true nature of the relationship between the contractual parties. Furthermore, since Amazon contends that there is a sale in the Marketplace of items it does not own, Amazon opens the door to the factual inquiry of whether those sales could be construed as consignment sales or a joint venture between Amazon and the Merchants. Accordingly, whether the facts of this case imply Amazon is engaged in consignment sales or a joint venture with third parties, despite Amazon disclaiming such a relationship in the BSA, is a potential factual issue in this case.

Dispute Whether Amazon is “Engaged in the Business of Selling”

Regardless of whether Amazon is obligated to remit sales and use tax as a “seller” or “retailer” pursuant to section 12-36-70, the Department argues Amazon is obligated to remit the tax as a person “engaged or continuing within this State in the business of selling tangible personal property at retail” pursuant to section 12-36-910(A). The Department relies on the South Carolina Supreme Court’s decision in *Travelscape, LLC v. South Carolina Department of Revenue* to support its argument. 705 S.E.2d 28, 391 S.C. 89 (2011). Amazon disagrees, arguing *Travelscape* is factually and legally distinguishable from this case.

This Court finds *Travelscape* is relevant and not inapposite to the case at hand. However, a proper analysis of its relevance relies on a determination of the exact nature of the transaction occurring between Amazon, customers, and Merchants. The language “engaged in the business of selling” does not specifically define what “selling” is, but nevertheless encourages a closer examination of the transactions at issue because it establishes an initial assumption that if a person is engaged in the business of sales, they are generally subject to being classified as a seller. The court then looks to the other criteria of the statute to determine the application under the facts of the case. Therefore, whether Amazon is “engaged in the business of selling” is a factor in determining whether Amazon is, in fact, a seller under the circumstances of this case, or not the seller but merely a service provider engaged in profit-motivated activities “with respect to” retail sales. As described above in this order, because of the unresolved factual implications regarding who is the true seller in these transactions, the Court finds summary judgment is not appropriate as to this issue. *See Brockbank*, 341 S.C. at 378, 534 S.E.2d at 692 (noting that even if there is no genuine issue of material fact, summary judgment is not appropriate when “there is dispute as to the conclusion to be drawn from those facts”).

Dispute Whether Amazon is Liable Under the “Efficient Administration” Clause

The Department argues that even if this Court does not find Amazon to be a “seller” or “retailer” under section 12-36-70, Amazon should be construed as a retailer under the “efficient administration clause” of section 12-36-70. This clause provides:

The department, when necessary for the efficient administration of this chapter, may treat any salesman, representative, trucker, peddler, or canvasser as the agent of the dealer, distributor, supervisor, employer, or other person under whom they operate or from whom they obtain the tangible personal property sold by them, regardless of whether they are making sales on their own behalf or on behalf of the dealer, distributor, supervisor, employer, or other person. The department may also treat the dealer, distributor, supervisor, employer, or other person as a retailer for purposes of this chapter.

§ 12-36-70. The Department contends Amazon “clearly qualifies” as a “salesman” or “representative” of the Merchants under this clause because Amazon is operating to make sales on behalf of Merchants. The Department argues this clause was meant to apply to persons, like Amazon, who are integral to the sale of the products, whether they are selling the products on their own behalf or on behalf of others. Further, the Department argues that Amazon is the most efficient person to collect and remit the tax in these transactions, which are undisputed retail sales

to South Carolina customers. The Department points to the BSA's provision that Amazon has the exclusive right to receive sales proceeds on behalf of Merchants in these transactions to show Amazon is in the best position to collect the tax because they are the point of contact for the sale. Moreover, the Department argues Amazon already collects and remits sales tax for sales involving its own products and its affiliates' products, so it has the ability and infrastructure in place to collect tax on Merchant products. The Department maintains that collecting the tax through one point—Amazon—is much more efficient than trying to collect the tax from individual Merchants.

In opposition, Amazon argues the Department's retroactive attempt to invoke the efficient administration clause to obligate Amazon to remit the tax is improper. Amazon contends the Department did not rely on this clause as a ground for obligating Amazon to remit sales and use tax when it issued its Department Determination, nor did it mention the clause in its Pre-Hearing Statement. Accordingly, Amazon maintains the Department has waived this argument. Further, Amazon contends retroactive application of this clause fails to give Amazon the constitutionally required "fair notice"¹¹ that it could be taxed under this provision. Amazon emphasizes that the Department failed to previously apply this provision during the almost twenty years Amazon has been in business.

Amazon also argues the application of this clause would contravene the South Carolina Constitution's Equal Protection Clause because it would impose a tax on Amazon rather than on all similarly situated marketplace facilitators. Additionally, Amazon argues this clause is inapplicable because statutes cannot be applied retroactively without an expressed intent that they do so. Next, Amazon argues it is not a "salesman" under the clause because it does not "sell" anything and it is not a "representative" because it is not an "agent." And finally, Amazon argues the Department exceeds its authority in attempting to collect sales and use tax from Amazon because this is the "most efficient way." Amazon points out that the Department has already started to collect the tax from individual Merchants and can continue to do so.

Taking Amazon's arguments in turn, if Amazon is implying that the Department has failed to comply with SCALC Rule 14 in raising the issue of the efficient administration clause, then it has a point. SCALC Rule 14 provides that "the administrative law judge assigned to the case, by

¹¹ For the principle of "fair notice," Amazon cites to *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), in which the U.S. Supreme Court held 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."

pre-hearing order, may request each party to prepare and return a Pre-Hearing Statement setting forth with particularity the issues in the contested case.”¹² Nevertheless, since filing its Pre-Hearing Statement, the Department has clearly set forth its position that the efficient administration clause should be an issue considered by this court. Furthermore, in light of that contention, whether this argument is waived must be evaluated at the conclusion of the preceding and not at its initial stages. For instance, SCALC Rule 16 provides that “[a]ny document filed with the Court may be amended at any time upon motion and for good cause shown, unless the amendment would prejudice any other party in the presentation of its case.” Here, for some reason the Department has made no effort to amend its Pre-Hearing Statement. However, the Department’s actions (or in this case, inaction) have yet to operate as a waiver because the time to amend the Pre-Hearing Statement has not been exhausted. If the Department subsequently fails to amend its Pre-Hearing Statement before the conclusion of this case, this Court will certainly entertain this issue again.

Second, Amazon contends retroactive application of this provision fails to give it constitutionally required “fair notice” that it could be taxed pursuant to this provision. Amazon emphasizes that the Department failed to previously apply this provision during the almost twenty years Amazon has been in business. Clearly, the language of a statute gives notice as to its provisions. In fact, Amazon is not contending that the statutory provision fails to notify a taxpayer that the Department could utilize the “efficient administration clause” of section 12-36-70. Rather, Amazon appears to assert that the Department should be estopped from utilizing this provision because it has not exercised its option to utilize the provision for almost twenty years. However, “[t]he doctrine of estoppel will not be applied to deprive the State of the due exercise of its police

¹² Notably, SCALC Rule 14 was amended in response to the South Carolina Court of Appeals’ decision in *Sierra Club v. South Carolina Department of Health & Environmental Control*, 387 S.C. 424, 432, 693 S.E.2d 13, 17 (Ct. App. 2010). In *Sierra Club*, the Court of Appeals held that because “the Sierra Club raised overall compliance with regulation 61–63 in its prehearing statement,” any issue falling under that extensive regulation could be considered at trial. The implication of that holding was that a party could raise any issue by simply asserting an overall violation of a broad regulation, and then the ALC and the other parties would have to discern from the Department’s extensive regulatory scheme what specific parts of the regulation were at issue in the proceeding. Moreover, if the Court failed to discern and address those issues, a party could explicitly raise the sub-issue for the first time in a motion for reconsideration.

In light of this holding, the ALC amended Rule 14 to provide that the administrative law judge “may request each party to prepare and return a Pre-Hearing Statement setting forth *with particularity* the issues in the contested case.” SCALC Rule 14 (emphasis added). Moreover, the note to the Rule provides that “Rule 14 is amended to require that prehearing statements must set forth with particularity the issues for consideration in the contested case.” Therefore, it is now abundantly clear that if a prehearing statement is requested, a party must now set forth the issues it wishes to be considered with particularity. A party can no longer rely upon a blanket assertion of a violation of a regulation to raise a sub-issue to the ALC.

power or to thwart its application of public policy.” *S.C. Coastal Council v. Vogel*, 292 S.C. 449, 357 S.E.2d 187 (Ct. App. 1987). Estoppel also cannot be applied against the State based upon “unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment.” *Id.* at 453, 357 S.E.2d at 189.

Third, Amazon has not established that the undisputed evidence reflects that Amazon is being treated differently than similarly situated marketplace facilitators by the Department’s decision to enforce the existing law.

Fourth, Amazon has not established at this stage of the litigation that it is entitled to judgment as a matter of law because the Department failed to give express notice of its intent to utilize this provision to collect the taxes owed. In other words, the Court wishes to inquire into the facts further to determine whether this provision requires notice of its retroactive utilization or whether it imposes an obligation to the taxpayer to inquire into their tax collecting responsibilities based upon the nature of their business.

Fifth, whether Amazon can be construed as a “salesman,” “representative,” or “agent” under this provision is a factual issue that is not necessarily resolved by the terms of the BSA, but is rather a determination that must be made in light of all the evidence before the Court. And finally, whether collecting sales and use tax from Amazon is the “most efficient way” to collect these taxes is clearly a factual issue that is genuinely disputed.

Genuine Dispute Whether Amazon is a Service Provider

Amazon argues there is no genuine dispute that it is a service provider and, therefore, it is not liable for sales and use tax on retail sales involving Merchant goods. Amazon cites to regulation 117-308 to support its position. S.C. Regs. Ann. 117-308 provides that “[t]he receipts from services, when the services are the true object of the transaction, are not subject to the sales and use tax” *Id.* Amazon contends it merely provides “listing and advertising services,” “order fulfillment or distribution services,” and “payment processing services.” Amazon cites to South Carolina Revenue Ruling 14-4 for the proposition that out-of-state sellers who have a physical presence in South Carolina are subject to the State’s taxing jurisdiction when they sell tangible personal property to residents in South Carolina, over the internet, and ship their products “to a third-party distributor located in South Carolina that performs the functions such as labeling, packaging, and shipping.” S.C. Revenue Ruling No. 14-4 (Sept. 10, 2004). Amazon contends this

guidance shows that mere distribution service providers, like itself, are not subject to collecting sales and use tax.

On its face, Amazon's BSA indicates it is a service provider. However, the Department has sufficiently raised a factual issue regarding Amazon's practices and control over the retail sales of Merchant products to warrant inquiry into whether the provision of services is the true nature of the transactions at issue. Indeed, as the Department asserts, with regard to its "listing and advertising service," Amazon does not just charge a fee for this service—it also takes a portion of the profit via a sliding scale based on the type of item sold. *See Hancock*, 381 S.C. at 330, 673 S.E.2d at 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."). Therefore, the Court finds summary judgment is inappropriate because "further inquiry into the facts is desirable to clarify the application of the law." *Rothrock*, 305 S.C. at 405, 409 S.E.2d at 368.

Violation of the U.S. Constitution.

Amazon 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 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 in *Fox Television Stations*, 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 that case, 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 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 claims the Department is trying

to prospectively apply recommended/pending legislation (the proposed “Marketplace Facilitator Legislation”) to place a legal obligation on Amazon that does not exist under the current tax scheme. Amazon maintains it “could not have had ‘fair notice’ that it was subjecting itself to a sales tax when it provided services to third-party sellers.”

In response, the Department argues the South Carolina Sales and Use Tax Act is not impermissibly vague or ambiguous with respect to Amazon’s 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 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 never sought clarification of its tax obligations in a private letter ruling from the Department.

The Court finds Amazon’s 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 is trying to impose, pending legislation on Amazon to obligate Amazon 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 in this case. Therefore, the Department is not seeking to impose a new law retroactively on Amazon 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.

Furthermore, the Court admonishes the parties not to rely on the faulty argument that pending legislation may, in the future, affect similar factual situations as the one presented in this case. The folly of relying on unenacted legislation to interpret legislative intent or construe existing statutes is succinctly stated in our Supreme Court’s decision in *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 80–81, 716 S.E.2d 877, 884 (2011). In *CFRE*, our Supreme Court found the ALC erred relying on unenacted legislation, noting that:

failed legislative proposals are “a particularly dangerous ground on which to rest an interpretation of a prior statute. Congressional 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.”

Id. at 80–81, 716 S.E.2d at 884 (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994)); see also *Whitner v. State*, 328 S.C. 1, 9, 492 S.E.2d 777, 781 (1997) (“Generally, the legislature’s subsequent acts ‘cast no light on the intent of the legislature which enacted the statute being construed.’”).

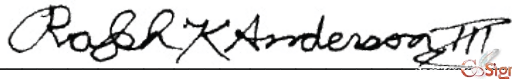
ORDER

Having considered the parties’ written memoranda of law and the applicable South Carolina statutes and case law,

IT IS ORDERED that Amazon’s Motion for Summary Judgment is DENIED; and

IT IS FURTHER ORDERED that the Department’s Motion to for Summary Judgement is DENIED.

AND IT IS SO ORDERED.

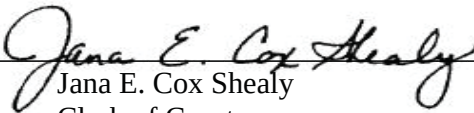
A handwritten signature in black ink that reads "Ralph K. Anderson, III". The signature is written in a cursive style. To the right of the signature, there is a small red circular stamp with the word "Sign" inside.

Ralph King Anderson, III
Chief Administrative Law Judge

January 29, 2019
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Jana E. Cox Shealy, 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).



Jana E. Cox Shealy
Clerk of Court

January 29, 2019
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Amazon Services, LLC,	)	Docket No. 17-ALJ-17-0238-CC
	)	
	)	
Petitioner,	)	
	)	
vs.	)	Respondent's Response in
	)	Opposition to Petitioner's Motion
	)	for Summary Judgment
	)	
South Carolina Department of	)	
Revenue,	)	
	)	
Respondent.	)	
	)	

I. Introduction

The South Carolina Department of Revenue opposes the Motion for Summary Judgment of Petitioner Amazon Services, LLC (“Amazon”) filed on December 7, 2018 (the “Motion”). The Department notes that, rather than focusing on the determinative facts at issue in this case, such as the details of its business model or the manner in which sales take place on the Website, Amazon instead spends much of its brief discussing events outside of and unrelated to this litigation, such as new legislation proposed by the Department, and also editorializing the way that the litigation has unfolded in this case. As discussed below and in the Department’s Memorandum in Support of its Motion for Summary Judgment (the “Department’s Memorandum”), however, the facts that *are* relevant to this litigation paint a clear picture: Amazon is the seller of tangible personal property under South Carolina law with respect to the goods sold on the Website, and it is engaged in the business

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of selling tangible personal property at retail. Amazon's Motion should be denied and the Department's cross motion should be granted.

II. Argument¹

A. Amazon sells tangible personal property on its Website.

As explained in detail in the Department's Memorandum, Amazon is the seller of tangible personal property with respect to goods sold on the Website because it offers those goods to the public for sale and accepts payment in exchange for those goods. *See* Dep't Mem. at 18-31. This simple and unavoidable fact places Amazon squarely within the definition of a "seller" under the South Carolina Sales and Use Tax Act (the "Act"). *See* S.C. Code Ann. § 12-36-70; S.C. Code Ann. § 12-36-100 ("Sale' and 'purchase' mean any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration"). It does not matter under South Carolina law whether Amazon or its affiliates own those goods, *see* § 12-36-70 ("Retailer' and 'seller' include every person ... selling or auctioning tangible personal property *whether owned by the person or others*"), which is the only notable difference between sales for which Amazon agrees it must collect sales tax, and those for which it refuses any obligation to do so.

In support of its argument that it is not the seller of tangible personal property with respect to the Third-Party owned goods sold on the Website, Amazon

¹ For the purposes of this Response, the Department incorporates by reference the "Statement of Facts" set forth in the Department's Memorandum, pp. 4-17, filed on December 7, 2018. Additionally, the Department will not identify or rebut every misstatement and mischaracterization in Amazon's Motion, of which there are many. A lack of specific denial should not be construed as an admission or acknowledgment of any statement or assertion or argument by Amazon, and the Department denies any assertion not specifically addressed in this Response.

advances a strained and narrow reading of the Act. Specifically, it reads into the Act a requirement that, in order to sell a good, one must physically transfer either title or actual possession of that good to the consumer. In order to accomplish this reading, Amazon recites a portion of § 12-36-100 that it says is “relevant here”: “any transfer ... of tangible personal property for a consideration including ... a transfer of title or possession, or both.” Mot. at 15. In so doing, it omits much of the language of this section in order to reach the last of four *examples* offered in § 12-36-100 of what constitutes a “sale.”

Amazon’s construction of § 12-36-100, however, ignores the effect of the antecedent language in this statutory provision. Before § 12-36-100 ever gets to the four enumerated examples of transactions that unquestionably constitute a sale under the Act, it first defines what a sale is: “*any* transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration.” (emphasis added). The four examples that follow this definition are neither exhaustive nor do they limit the broad definitional language with which § 12-36-100 begins. Instead, these examples are illustrations meant to help the reader understand the broad nature of the definition of “sale” under the Act. This is shown by the fact that each of these examples arguably expands, rather than limits, the meaning of what might otherwise be considered a “transfer” or “exchange” of tangible personal property for a consideration. Specifically, they include: “a transaction in which possession of tangible personal property is transferred but the seller retains title as security for payment”; “a rental, lease, or other form of

agreement”; “a license to use or consume”; and “a transfer of title *or* possession, *or* both.” § 12-36-100 (emphases added). Amazon’s attempt to limit the broad definition of “sale” and “purchase” in § 12-36-100 to these four specific examples does not withstand a plain reading of this statutory provision.

Rather than attempting to force the transactions occurring on the Website within the confines of one of the four illustrative examples offered in § 12-36-100, the Court need only reference the actual definitional language with which this section begins: “any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration.” *Id.* Again, because Amazon accepts money, through the Website, in exchange for tangible personal property, it is the seller of those goods. Add to this the fact that Amazon also advertises and displays the good to the customer, helps the customer find the good and then independently selects—through Amazon’s proprietary internal algorithm, *see* Dep’t Mem. at 5-6—which good is displayed for the customer’s purchase, communicates with the customer about the purchase of the good and its delivery, including the transmission to the customer of the order confirmation and receipt for the transaction, and in many cases actually picks, packages, and delivers the good to the customer from its own inventory of products, *see* Dep’t Mem. at 4-17, and there can be no question that Amazon is the seller of tangible personal property with respect to the goods sold on the Website.

Contrary to Amazon’s disconnected reading of the statute, what is clear throughout the Act—as well as the cases interpreting it—is that the obligation to

collect and remit sales and use tax is intended to fall upon the person or entity who is the point of sale for the good being exchanged. *See, e.g.,* S.C. Code Ann. § 1350(A) (requiring the seller to collect the use tax “at the time of making the sales” and to “give to the purchaser a receipt showing the amount subject to the tax and the amount of tax collected”); § 12-36-1340 (requiring the collection of the use tax by any seller who, among other things, “distributes catalogs, or other advertising matter, and by reason of that distribution *receives and accepts orders* from residents within the State.”) (emphasis added); § 12-36-90(1)(a) (including in the definition of “gross proceeds of sales” the “proceeds from the sale of property *sold on consignment* by the taxpayer”) (emphasis added); § 12-36-940 (setting forth the amount that “[e]ach retailer may add to the sales price as a result of the five percent state sales tax”); § 12-36-70 (allowing the Department to “treat any salesman, representative, trucker, peddler, or canvasser as the agent of the dealer, distributor, supervisor, employer, or other person under whom they operate or from whom they obtain tangible personal property sold by them, regardless of whether they are making the sales on their own behalf”). This only makes sense—the most logical point at which to collect a transaction-based tax from a consumer is at the time and place of the transaction. Amazon, as the sole and exclusive point of sale for the transactions taking place on its Website, is the only person or entity that can effectively collect the tax. *See* Ex. B to Dep’t Mem. (the “BSA”) at 15-16 (“We will also receive all Sales Proceeds on your behalf for each of these transactions *and will have exclusive rights to do so*”) (emphasis added).

Courts considering the provisions of the Act, as well as language similar to it, have recognized the importance of who the customer's point of contact is during the transaction. Notably, this Court in its Final Order and Decision in *Travelscape, LLC v. S.C. Department of Revenue* observed that:

[I]t is significant that the customer's transaction of booking a hotel room does not involve interaction with the hotel at all. Petitioner is the merchant of record for the transactions in which a hotel room is booked by Petitioner. It is Petitioner who accepts money from the customer and thereafter makes arrangements with the hotel to reserve the room, and then communicates the appropriate reservation information to its customer. The customer's credit card invoice shows that the hotel reservations were purchased not from the hotel but from Petitioner. In renting a room, a customer makes no payments to anyone other than Petitioner unless he or she purchases additional guest services at the hotel site.

Dkt. No. 08-ALJ-17-0076-CC at 11 (Feb. 12, 2009). Likewise, in *City of Charleston, S.C. v. Hotels.com, LP*, the District of South Carolina reasoned that “[i]f 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.” 520 F.Supp.2d 757, 768 (D.S.C. 2007).

The attenuation noted by the district court in *City of Charleston* is even more extreme for the transactions at issue here, as the customer never interacts with the Third Parties at all in the ordinary course of a transaction on the Website. As explained in the Department’s Memorandum, Amazon not only serves as the point of contact for customers on its Website, but it also (1) insists that it have the *exclusive* right to accept and process payments from customers, (2) specifically

directs Third Parties not to make contact with customers in the form of order or shipment confirmation, and (3) requires that any communication that might take place between the Third Party and the customer (which is admittedly not necessary to complete a transaction) take place through functionality on its Website. *See* Dep't Mem. at 25-26 & Ex. C at 114-15; BSA at 6, 15-17. Thus, beyond being the point of sale for these goods, Amazon ensures that it is the exclusive conduit for any money flowing from or to customers, or any communications with customers, leaving only Amazon to be the seller with the obligation to collect sales and use tax.

Finally, the Department notes once more that, even if Amazon's reading of the statute were correct, which it is not, Amazon would still be liable for sales tax with respect to all of the sales taking place under its "Fulfillment by Amazon" or "FBA" program because in those instances it actually transfers physical possession of the goods to the customer. *See* Dep't Mem. at 13-15, 30-31. Amazon's argument that its activities in this regard make it a mere common carrier ignores the innumerable and obvious other ways that Amazon is involved with and directs these transactions, including its acceptance of payment for the good. Amazon cannot separate out its activities in this manner by asserting that it has its "delivery hat" on when fulfilling orders rather than its "seller hat."

i. Amazon is not merely a service provider.

Continuing this line of thought, Amazon argues more broadly that, rather than selling goods on its Website, its activities are actually just a collection of non-taxable services, including “listing and advertising services,” “order fulfillment [and] distribution services,” and “payment processing” services. Mot. at 23-24. In support of this argument, Amazon cites a series of South Carolina and other states’ regulations for the proposition that the provision of such services does not give rise to tax liability. *Id.*

The problem with this argument is readily apparent. Imagine that a customer enters a retail store intent on purchasing tangible personal property for consumption. The customer views the products on display at the store, which might include brands from numerous different suppliers in their own branded and labeled packaging, and might also include the retail store’s own brands of goods. The customer, perhaps with the assistance of personnel at the store but not necessarily, selects the desired good and takes it to the register to pay. Having paid for the good, the customer looks at the receipt and discovers that no sales tax has been charged for this transaction. Concerned, the customer asks why no sales tax was charged for this purchase and learns that, rather than having been sold a good by the store, the customer has instead just experienced the convergence of a series of independent services that happened to result in the customer receiving the desired tangible personal property, but none of which independently gave rise to an obligation by the store to collect and remit sales tax.

The foregoing hypothetical is absurd, but it is precisely the argument and statutory interpretation advanced by Amazon in the Motion. It is also exactly what happens on Amazon’s Website with respect to sales of goods owned by Third Parties. Simply, Amazon can no more argue that its activities—which include but are not limited to advertising and displaying goods for sale, assisting the customer in selecting which good to purchase, *taking the customer’s money*, and in many cases, actually picking, packaging, and delivering goods to the customer from its own inventory of products—are merely a series of non-taxable services than can Walmart or Target make this argument. Amazon’s attempt to parse the transaction into separate steps does not prevent their coalescence into a sale of tangible personal property. The Department submits that Amazon’s integral involvement in each of these steps easily satisfies the statutory requirement of a sale of tangible personal property, and not a service, to which the sales and use tax applies.

ii. The Department has not “effectively admitted that third parties are the sellers.”

Beginning on page 18 of its brief, Amazon argues that “[t]he Department has effectively admitted that the third parties are the sellers” with respect to goods sold on the Website. In support, it cites several documents that were generated outside of this litigation and that have nothing at all to do with core facts in this case—that is, the manner and functionality by which Amazon sells tangible personal property on its Website.² The first of these documents is a February 2018 notice issued by the

² These issues are nothing more than side shows designed to distract the Court from the limited question of law before it. Moreover, it bears pointing out that neither the Department nor its employees are capable of altering state law by any

Department allowing Third Parties to submit retail sales tax applications for goods sold on Amazon's Website. Mot. at 18; Akins Aff. Ex. 11. This document unequivocally states that "SCDOR maintains that under South Carolina law, Amazon Services, LLC is the retailer responsible for collecting and remitting Sales and Use Tax on all goods sold on Amazon.com." Akins Aff. Ex. 11. That the Department gave Third Parties who were concerned about their potential tax liability an opportunity to voluntarily remit sales tax to the Department during the pendency of this litigation has no bearing on Amazon's own tax liability in this case. While the Department is highly confident in its position that Amazon is a retailer under South Carolina law responsible for paying sales tax, the Department does not control the outcome of this case. Recognizing this, and wishing to respond to the concerns of taxpayers who desire to limit their potential tax liability, the Department gave Third Parties an opportunity to remit sales tax if they wished to do so. This voluntary program, however, is in no way an admission that Amazon is not the retailer of goods sold on the Website.

means, including but not limited to written presentations, oral pronouncements, or deposition testimony, as the Department is incapable of exceeding the authority granted to 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 (1998) (holding that the "Department does not have the authority to waive the application deadline and annual determination requirements" set forth in the statute); *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."); *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) (stating that "[a]s a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged").

The second document Amazon relies on, S.C. Revenue Ruling 18-14, concerns when a taxpayer has nexus with the State sufficient to give rise to an obligation to pay sales tax and was issued in response to the U.S. Supreme Court’s decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). *See* Akins Aff. Ex. 15. The question of whether one has sufficient nexus with a state for tax purposes is plainly not the same inquiry as whether one is the retailer for a particular transaction. Rather, the nexus determination inquires as to the overall amount of economic activity and connection that a person has with a state. Thus, Revenue Ruling 18-14 does not declare that Third Parties are the retailers with respect to transactions on the Amazon Website as Amazon asserts, and it certainly does not absolve Amazon of its liability as the retailer for these transactions. It simply concerns another issue entirely.

Finally, Amazon seizes on language in an October 2018 report from the Legislative Oversight Committee concerning legislation proposed by the Department to add language to the Act concerning online marketplaces. Mot. at 19-20; Akins Aff. Ex. 21. First, the Department is informed and believes that the language cited by Amazon in its brief was drafted by staff at the Legislative Oversight Committee, and not by any Department staff or employees.³ It certainly

³ In fact, the statement cites—and appears to be a very loose paraphrase of—earlier language appearing in a “Program Evaluation Report” submitted in connection with a Legislative Oversight Committee audit of the Department of Revenue. *See* Ex. A, October 23, 2018 Legislative Oversight Committee Meeting Packet at 150 (citing endnote 84), 161 (citing “Agency PER (May 31, 2018), pp. 7-8; 33”) (available at <https://www.scstatehouse.gov/CommitteeInfo/HouseLegislative>

was not drafted by anyone who is involved in this litigation, or who has carefully examined the evidence in this case (much of which is protected against disclosure) concerning Amazon's business model and the methods by which it sells tangible personal property on the Website. Thus, it is simply not relevant to the determination of any issues in this case.

More broadly, the "marketplace facilitator" legislation that the Department has proposed, and which is featured heavily in Amazon's brief, also has no bearing on Amazon's tax liability under current South Carolina law. Notably, Amazon ignores the fact that this legislation, if enacted, would apply much more broadly than just to Amazon, and would capture online retail sales activity of website operators that exercise far less control and dominion over transactions than does Amazon. *See Akins Aff. Ex. 16 at DOR 1236-38.*

Ultimately, Amazon's extensive preoccupation with these extraneous topics and materials does nothing to advance its argument that it is not a seller of tangible personal property under existing South Carolina law. The only thing it demonstrates is Amazon's desire that the Court divert its attention away from the application of the current provisions of the Act to Amazon's sales practices. That is the only inquiry that is pertinent to this case, however, and it yields a clear answer as to Amazon's liability for sales and use tax—Amazon is the retailer responsible for remitting sales and use tax on its sales of Third-Party owned goods.

B. Amazon is Engaged in the Business of Selling Tangible Personal Property at Retail.

OversightCommittee/AgencyWebpages/DisabilitiesandSpecialNeeds/Meeting%20Packet%2010.23.18%20pdf.PDF); *compare with Akins Aff. Ex. 17 at DOR 1736-37.*

As the Department explained in its Memorandum, the obligation to pay sales tax is imposed not just on those persons who meet the definition of “seller” under the Act—it is imposed on “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. Our Supreme Court has explained that this language, where it appears in the Act, adds important context to the determination of who is responsible for the tax:

Travelscape’s argument ignores the antecedent language in (E) that it applies to all persons ‘engaged ... in the business of furnishing accommodations. **‘Business’ includes ‘all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect.’** S.C. Code Ann. § 12-36-20 (2000). Accordingly, we find the context of ‘furnish’ as it appears in subsection (E) demonstrates that it encompasses the activities of entities such as Travelscape who, **whether directly or indirectly**, provide hotel reservations to transients for consideration. Contrary to the dissent’s view, we do not read the term ‘furnish’ differently in subsection (E) than we do in (A). Instead, we interpret subsection (E) in such a manner as to give effect to all the language contained therein—particularly that the entity be ‘engaged ... in the business of furnishing accommodations—rather than focusing on the term ‘furnish’ in isolation. **While Travelscape does not physically provide accommodations, it is in the business of doing so.**

Travelscape, LLC v. S.C. Dep’t of Revenue, 391 S.C. 89, 101 705 S.E.2d 28, 34 (2011) (emphases added). Likewise, the Supreme Court observed in *International Harvester Co. v. Wasson*, under a prior version of the Act, that “Section 12-35-510, South Carolina Code of Laws, 1976, as amended, imposes the sales tax ‘upon every person engaged or continuing within this State in the business of selling at retail any tangible personal property’” and that “Section 12-35-20 defines business as ‘all activities engaged in ... with the object of gain’” 281 S.C. 458, 460, 316 S.E.2d 378, 379 (1984). These cases make it abundantly clear that the sales tax in § 12-36-

910 is imposed upon, and may be collected from, not just those actually selling tangible personal property, but those who are engaged in “activities, with the object of gain, profit, benefit, or advantage, either direct or indirect,” with respect to the sale of tangible personal property. §§ 12-36-910, 12-36-20.

Despite this case law interpreting almost precisely the same language that imposes the sales tax at issue in this case, Amazon contends that “Travelscape is ... inapposite and does not control the Court’s decision in this case.” Mot. at 26.⁴ Its reasons for this contention are either inaccurate or are not determinative for the purposes of this case. Its first reason is that “the Department has admitted” that Amazon’s tax liability is narrower than the Supreme Court’s interpretation of the Act. The Department has made no such admission,⁵ and in any event, the Department is neither this Court nor the Supreme Court of South Carolina (which has the ultimate authority to interpret the laws of this State).

⁴ Amazon makes this argument despite acknowledging earlier in its brief, when discussing the legal standards that should govern this case, that “[i]n South Carolina, the Sales and Use Tax Act ... imposes a ‘sales tax ... upon every person engaged or continuing within [the state] in the business of selling tangible personal property at retail.’” Mot. at 14 (citing § 12-36-910).

⁵ Throughout its brief, Amazon cites isolated portions of deposition testimony from Department witnesses for the proposition that the Department agrees with Amazon on certain points and questions of law. And in fact, much of the testimony elicited from Department witnesses in these depositions was given in response to questions that plainly called for the witness to reach a legal conclusion. Testimony from Department staff is of course not admissible for this purpose because it is the province of the Court to resolve questions of law applicable to this case and not the Department’s witnesses, especially where that question involves the interpretation of a statute. *See Alltel Commc’ns, Inc. v. S.C. Dep’t of Revenue*, 399 S.C. 313, 316 (2012) (“The question of statutory interpretation is one of law for the court to decide.”); *see also* discussion *supra* at n.2.

Its second reason is that “unlike in Travelscape, Amazon Services does not contract with third-party sellers to purchase those sellers’ products at a fixed rate and then resell them for a higher price (as Travelscape did with hotels to resell rooms).” Mot. at 25. In point of fact, rather than “reselling” rooms that it had purchased from hotels, the contractual arrangement that the Petitioner in *Travelscape* maintained with the hotels provided for a “‘base’ number of rooms available for booking through the Petitioner” and “set room rates that the hotels are willing to accept for reservations.” *Travelscape*, Dkt. No. 08-ALJ-17-0076-CC at 2.⁶ This is not at all unlike the arrangement between Amazon and Third Parties, who inform Amazon of the quantity of products they will supply and the price they wish to fetch for those products before allowing Amazon to sell those goods through the Website and retain a margin of the sales proceeds. See Dep’t Mem. at 5-13.

In any event, however, the fact that Amazon does not separately purchase goods from Third Parties before selling them on the Website does not change its liability for sales tax because the Act is clear that ownership of the good being sold is not determinative of who is the seller of that good. See § 12-36-70 (“‘Retailer’ and ‘seller’ include every person ... selling or auctioning tangible personal property *whether owned by the person or others.*”) (emphasis added). As this Court noted in *Travelscape*, a contractual provision “assigning the risk for failure to book a room does not affect the rights the customer receives upon receiving a hotel reservation,

⁶ In fact, the contract between the Petitioner and the hotels in *Travelscape* explicitly stated that “nothing in this agreement constitutes a sale or rental of rooms from [the hotel] to [Petitioner].” *Id.* at 10 n.9.

but is rather a contractual agreement between the hotels and the Petitioner regarding liability for failure to book a room.” See Dkt. No. 08-ALJ-17-0076-CC at 10 n.9. Put another way, the arrangement that Amazon maintains with Third Parties regarding ownership of goods and the risk of those goods not being sold does not change the fact that Amazon sells those goods to customers. See *id.* (“Petitioner’s agreement with a hotel that its acts do not constitute a sale or rental of [a] room, does not absolve Petitioner of its responsibilities under South Carolina law.”).

Ultimately, and as the Department noted in its Memorandum, *Travelscape* is highly relevant to these proceedings because it analyzed both (1) the basic bargain that occurs between online shoppers and the operator of a website with the ability to provide shoppers with what they seek in exchange for consideration, and (2) the same statutory language that is at issue in this case. See Dep’t Mem. at 23-24, 33-34; see also *Travelscape*, Dkt. No. 08-ALJ-17-0076-CC at 7 n.6 (“[G]iven the definition of ‘business’ found in Section 12-36-20 for purposes of sales tax, it is clear that even the ‘facilitation’ of reservations for South Carolina hotels in the merchant sales model on behalf of its customers squarely places Petitioner ‘engaged or continuing in this State in the business of furnishing accommodations to transients for consideration.’”). Amazon’s attempt to draw this unimportant and inaccurate distinction between the transactions on its Website and the contractual arrangement in *Travelscape* falls flat.

Third, Amazon claims that “with respect to each product, the third-party sellers remain in control of their sales and communicate with customers about their orders.” Mot. at 25. This claim is in stark contrast to both the contract that Amazon maintains with Third Parties, *see, e.g.*, BSA at 17 (requiring that Third Parties “not send customers emails confirming orders or fulfillment of Your Products”), as well as the testimony of its Rule 30(b)(6) witness, *see* Ex. C to Dep’t Mem. at 114-15 (testifying that “[n]o, typically you wouldn’t have to use [Amazon’s buyer/seller] messaging service to complete a transaction” on the Website).⁷ Anyone who has purchased a good on the Website knows full well that all a customer must do in order to complete a transaction is select the desired good and give his or her credit card information to Amazon, and the customer will receive the purchased good shortly thereafter. At no point is communication with the Third Party required in order to complete the transaction.

Finally, Amazon argues that *Travelscape* does not apply to this case because “there is no ‘tax gap’ created when third-party sellers sell products in the Marketplace,” Mot. at 26, referring to *Travelscape*’s argument that its fees should

⁷ Nor is it true that Third Parties otherwise “remain in control of their sales” or even the goods being sold. *See, e.g.*, BSA at 20 (“We [being Amazon] have the right in our sole discretion to determine the content, appearance, design, functionality and all other aspects of the Amazon Sites, including by redesigning, modifying, removing or restricting access to any of them, and by suspending, prohibiting or removing any listing.”); BSA at 35 (“We will not be required to physically mark or segregate Units from other inventory units (e.g., products with the same Amazon standard identification number) owned by us, our affiliates or third parties in the applicable fulfillment center(s). If we elect to commingle Units with such other inventory units, both parties agree that our records will be sufficient to identify which products are Units.”); *see generally* Dep’t Mem. at 4-17.

not be included in the calculation of gross proceeds of sales. This is a separate issue, however, from whether Amazon is engaged in the business of selling tangible personal property at retail. The fact that Amazon is willing to concede that all of the proceeds from the sales of goods on its Website should be included in the tax base does not change Amazon's liability as a taxpayer, and nothing about its position in this regard lessens the applicability of *Travelscape* to this case.

Amazon's summary dismissal of *Travelscape* as applicable to the facts of this case demonstrates that, rather than confronting this precedent, Amazon simply wishes not to address the question of whether it is engaged in the business of selling tangible personal property at retail. This is perhaps unsurprising, because there is a clear answer to that question. *See Travelscape*, 319 S.C at 102 ("The application of the tax to 'every person engaged ... in the business of furnishing accommodations' also reveals that the legislature intended 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.*") (emphasis added). Because Amazon is engaged in the business of selling tangible personal property at retail under South Carolina law, it is liable for the sales tax imposed by § 12-36-910.

C. The Cases Cited by Amazon Are Inapposite.

In support of its argument that it is not a seller of tangible personal property with respect to the goods sold on the Website, Amazon draws on a number of cases from around the country that concern topics other than the application of the Act to

Amazon's business practices. Notably, Amazon cites a ruling from the Virginia Department of Taxation concerning Amazon's liability for sales tax under Virginia law, which Amazon says contains "statutory language similar to that of South Carolina's Tax Act." Mot. at 17. In fact, the Virginia statute to which Amazon cites is materially different from the Act, notably in that it defines "sale" as "any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property" Va. Code Ann. § 58.1-602. Likewise, the Virginia tax ruling that Amazon cites says multiple times that "[i]n order for a transaction to constitute a 'sale' under Virginia law, 'there must be a transfer of title or possession for a consideration.'" Akins Aff. Ex. 19 at 4. As noted above, the Act defines "sale" more broadly than does Virginia's statute, as "any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration," and lists the "transfer of title or possession, or both" as an example of what can constitute a sale. § 12-36-100. Thus, the Virginia statute and ruling to which Amazon cites are readily distinguishable from the analysis that is relevant in this case.⁸

⁸ On page 18 of its Motion, Amazon also references an email sent to the Department in March 2016 from an official at the North Carolina Department of Revenue explaining, very briefly, that "[w]e concluded the retailer of record was the party issuing the invoice, which was the third party. The retailer of record was responsible for charging and collecting the tax." Akins Aff. Ex. 2 at DOR 1263. It is not clear to the Department how the NCDOR reached this conclusion or what factual investigation it undertook with respect to Amazon's business model and activities. The Department notes, however, that it is actually Amazon—and not Third Parties—that issues invoices and sends order confirmations to customers, and that it is also Amazon that is the merchant of record for sales taking place on the Website. See Dep't Mem. at 7-8, 10-11.

Beginning on page 26 of its brief, Amazon also discusses a number of cases concerning whether Amazon could be held liable in tort for allegedly defective products sold on its Website, and then coyly acknowledges that “many of these cases do not involve tax matters.” Mot. at 28. Indeed. The analysis of whether someone can be held responsible for an allegedly defective product is an entirely different analysis from whether that person is a “seller” of tangible personal property, and it is certainly a different inquiry than whether that person is “engaged in the business” of selling tangible personal property at retail. *See, e.g., Eberhart v. Amazon.com, Inc.*, 325 F.Supp.3d 393, 399 (S.D.N.Y. 2018) (stating that “it appears that every court to consider the question of Amazon’s liability has concluded that Amazon is not *strictly liable for defective products sold on its marketplace*” (emphasis added), and then citing most of the cases to which Amazon cites in this section of its brief). The Department submits that none of these cases cited by Amazon, which otherwise appear to concern whether Amazon could be held liable for violating federal copyright laws,⁹ is either relevant or helpful for the analysis before this Court.

⁹ Amazon cites *Milo & Gabby, LLC v. Amazon.com, Inc.*, 693 F. App’x 879, 888 (Fed. Cir. 2017) for its reliance on a “general U.C.C. definition that a party must transfer title in a product to a buyer in order to be considered a seller.” Mot. at 16. This case concerned whether Amazon could be held liable for violating 17 U.S.C. § 106(3) for distributing copyrighted work “to the public ... by sale or other transfer of ownership.” *Id.* at 886. Again, this analysis is plainly different from the one here, where the statute makes clear that one can be a seller whether or not he owns the property being sold. *See* § 12-36-70. In short, the general U.C.C. definitions are irrelevant here because the General Assembly has specifically defined what constitutes a “sale” and a “seller” or “retailer” for purposes of the Act.

It is of note, however, that even these types of cases have diverged on whether Amazon's selling activities expose it to liability in these contexts. A case not cited by Amazon but also concerning its liability for selling infringing products to buyers under federal copyright laws is *Area 55, Inc. v. Amazon.com, Inc.*, No. 11-CV-00145-H (NLS), 2012 WL 12517661 (S.D. Cal. May 3, 2012). In that case, the court denied Amazon's motion for summary judgment after finding that there was "a genuine issue of material fact as to whether Defendant Amazon's substantial involvement in the sales transaction demonstrates that it sold the infringed product and went beyond simply providing a service for a fee." *Id.* at *3. The court continued:

Although the terms and conditions cited by Defendant Amazon state that Amazon provides "selling services," the participation agreement also states that Amazon provides a "platform for third-party sellers," restricts the seller's role in the negotiation and sales process, and indicates Amazon's right to collect referral and closing fees for sales. Amazon controlled the content of the webpage on which the products were listed; collected order, shipping, and payment information from customers; provided order and shipping confirmation and invoices; almost exclusively interacted with customers; and in some cases, warehoused, picked, packaged, and shipped the allegedly infringing products.

Id. In response to Amazon's argument that "it never owned the products and therefore could not sell the products," *id.* at *2, the court further observed that "[u]nder general contract principles, a sale can take place in the absence of a transfer of title," and that "[a] party can sell a product so long as the party has the authority to enter into transactions for property, even if not the legal owner." *Id.* at *4. The court therefore found that "Amazon's arguments that it could not have sold

the products because it did not hold title are unpersuasive to the Court.” *Id.* Not long after this ruling was issued, Amazon settled this case. *See* 2012 WL 5416262 (S.D. Cal. Sept. 28, 2012).

Thus, while the relevant analysis in this case concerns the application of South Carolina law to the facts of this case, and the Department believes that these cases from other jurisdictions are easily distinguishable from the inquiry at issue here, it is also simply not true, as Amazon claims, that “in every such case the court has held that the third-party sellers are the sellers.” Mot. at 26.

D. The Act Is Not Ambiguous.

Beginning at page 28 of its Motion, Amazon argues that the Act is ambiguous and that Amazon should therefore receive the benefit of that ambiguity. In support, it relies almost entirely on the marketplace facilitator legislation recently proposed by the Department, arguing at one point that “[t]he Department appears to argue that all of the recommended/underlined text is *impliedly* included within the sparse language of the existing Tax Act.” Mot. at 29 (emphasis original). That is hardly the Department’s position. While the proposed legislation, if enacted, would certainly cover Amazon’s online sales activities within its provisions, that does not mean that Amazon’s online retail sales do not make it a retailer under current South Carolina law, or that its comprehensive profit-seeking activities tied to the sale of tangible personal property are insufficient to make it “engaged in the business” of selling tangible personal property at retail. As the Department noted previously, this legislation, by its terms, would cover many more entities and businesses than

Amazon. So the implication that the Department has sought to pass a law just for Amazon is incorrect.

Helpfully, this Court was confronted with a similar argument to the one that Amazon now raises in *Travelscape*:

In addition, Petitioner points out that, since 1955, the General Assembly has amended or recodified the Accommodations Tax several times, but it has never specifically expanded the tax to cover online companies like Petitioner or any other intermediary which is compensated by a party other than the hotel or other place of accommodation. For instance, in 1976, the General Assembly expanded the list of businesses set forth in Section 12-36-920(A) to include campgrounds. The 1976 amendment, however, was clearly necessary to clarify whether a space at a campground was an accommodation subject to the tax or simply a lease of property. Here, the statute, as it currently exists, imposes a tax upon Petitioner because it was furnishing an accommodation as contemplated by the statute. Thus, there was no need for the statute to be amended to specifically enumerate companies like Petitioner since those companies already fell within the broad language of the statute. Therefore, since it was unnecessary to amend the statute to expressly cover companies like Petitioner, there can be no inference ensuing from the General Assembly's failure to do so.

Dkt. No. 08-ALJ-17-0076-CC at 12. Precisely the same reasoning applies here—for the reasons now thoroughly explained by the Department, current South Carolina law imposes sales and use tax requirements on Amazon for its sales of tangible personal property. The fact that the current law does not specifically cover sales on the internet does not mean that internet sales are not sales, or that those entities that direct and facilitate them are not retailers or are not engaged in the business of selling tangible personal property at retail. And the fact that the Department has proposed legislation to make it clear with respect to other online companies that maintain markedly less control over transactions taking place on their websites

that they are responsible for collecting and remitting sales and use tax to the Department in no way changes Amazon’s tax liability or renders the Act ambiguous with respect to Amazon.¹⁰

Ultimately, it is only “[w]here 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” that “the person will be excluded, any substantial doubt being resolved in his favor.” *See Alltel*, 399 S.C. at 318 (quoting *Cooper River Bridge, Inc. v. S.C. Tax Comm’n*, 182 S.C. 72, 76 (1936)). Here, because the language of the statute clearly encompasses Amazon—especially after the Supreme Court’s ruling in *Travelscape*—there is no “substantial doubt” to be resolved in Amazon’s favor. The Act is not ambiguous with respect to Amazon, and Amazon’s argument on this point fails.

E. The Department’s Position in this Case Does Not Violate the U.S. Constitution.

¹⁰ Here and at other points in its Motion, Amazon makes repeated reference to statements made by the Department’s Director to members of the South Carolina legislature discussing the impetus for this legislation. Contrary to Amazon’s assertions, none of these statements demonstrates that current South Carolina law is ambiguous with respect to Amazon’s liability for sales and use tax, and in fact, the Director consistently stated in these legislative sessions that South Carolina law is clear with respect to Amazon given the manner in which it sells property on its Website. However, as the Department noted in correspondence to Amazon (which was transmitted in response to Amazon’s odd request that the Department notify Amazon whether the Director would “notify ... the General Assembly that any statements related to the proposed marketplace facilitator legislation, Amazon, and/or this case were inaccurate or incorrect”), statements by the Director or other Department staff made to legislators for the purpose of informing them about the need for new legislation cannot—and should not—be employed to resolve questions of fact in this case. They certainly cannot be used to resolve questions of law about Amazon’s obligations under the Act. *See Alltel* and *TNS Mills, Inc.*, *supra*.

Amazon also argues that the Department's position in this case violates the U.S. Constitution because South Carolina law and the Department's guidance were impermissibly vague with respect to Amazon's activities in the first quarter of 2016. There are a number of problems with this argument.

First, for the reasons already stated, the Act itself is neither vague nor ambiguous with respect to Amazon's liability for sales and use tax. This is made doubly clear by the fact that in the summer of 2011, the Supreme Court of South Carolina issued the *Travelscape* opinion, which squarely covers the key issues in this case and unambiguously explains the Act's application to online sellers, like Amazon, who are "engaged in the business" of selling things on the internet.

Also, the *Travelscape* ruling came at a time when Amazon was already clearly concerned with its tax obligations under South Carolina law, evidenced by the fact that it lobbied for the passage of the 2011 Distribution Facility Sales Tax Exemption in connection with placing a large distribution center in Lexington County. That the *Travelscape* decision and its obvious implications for Amazon went unnoticed by Amazon seems unlikely. So the idea that Amazon was taken by surprise with respect to its obligation to collect and remit sales and use tax is difficult to comprehend.

Finally, if Amazon were unsure about its tax obligations in the run-up to January 1, 2016—when it knew that it would begin collecting and remitting sales and use tax with respect to its online sales in South Carolina—it could have easily sought a private letter ruling from the Department to seek clarification. Amazon,

after all, had not been shy up to that point about inquiring as to its tax obligations under South Carolina law, and as noted in its brief, Amazon had made a similar request to Virginia in 2013. It made no such request to the Department, perhaps because the answer that it would have received was already clear. In any event, however, nothing about Amazon's tax obligations were vague in the first quarter of 2016, and the Department's position in this case in no way violates the U.S. Constitution.

III. Conclusion

For the foregoing reasons, as well as those presented in the Department's Memorandum, South Carolina law requires Amazon to pay both sales and use tax with respect to the sales of tangible personal property taking place on the Website. Amazon's Motion for Summary Judgment filed on December 7, 2018 should be denied, and the Department's cross motion for summary judgment should be granted.

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Respectfully submitted,

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Columbia, South Carolina
January 4, 2019

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Amazon Services, LLC,	)	Docket No. 17-ALJ-17-0238-CC
	)	
	)	
Petitioner,	)	
	)	
vs.	)	Respondent's Memorandum in
	)	Support of Motion for Summary
	)	Judgment
	)	
South Carolina Department of	)	
Revenue,	)	
	)	
Respondent.	)	
	)	

I. Introduction

The South Carolina Sales and Use Tax Act, S.C. Code Ann. § 12-36-5 to -2692 (the “Act”), imposes a sales tax “equal to five¹ percent of the gross proceeds of sales ... upon 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).² The word “sale” is itself broadly defined in the Act to mean “*any* transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration” S.C. Code Ann. § 12-36-100 (emphasis added)). But whether accomplished in person, via the mail, over the telephone, or through an online retail sales platform,

¹ S.C. Code Ann. § 12-36-1110 imposes an additional one percent sales and use tax.

² The Act also imposes a use tax 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 [six] percent of the sales price of the property ...” S.C. Code Ann. § 12-36-1310(A), and further imposes the responsibility for collecting and remitting the use tax on retail sellers who maintain a place of business in South Carolina, *see* S.C. Code Ann. §§ 12-36-1340, 12-36-1350.

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a sale occurs when one person provides another with payment for the right to take possession of property. § 12-36-100; *see also Travelscape, LLC v. S.C. Dep't of Revenue*, Dkt. No. 08-ALJ-17-0076-CC, Final Order and Decision at 9 (Feb. 12, 2009) ("In other words, as a result of the transaction that occurs upon Petitioner's website, a customer obtains *the right* to be furnished a room.") (emphasis added).

This process is precisely what takes place on www.amazon.com (the "Website"), which is owned and operated by the Petitioner ("Amazon"). Indeed, and not unlike the fact pattern considered by this Court in *Travelscape*, customers on the Amazon Website can complete their entire transaction without any contact or interaction with anyone other than Amazon. *See Travelscape*, Final Order and Decision at 11. Thus, Amazon is "selling ... tangible personal property" under South Carolina law. S.C. Code Ann. § 12-36-70(1)(a). At the very least, it is "engaged or continuing within this State in the business of selling tangible personal property at retail." § 12-36-910(A).

Despite these facts, and despite the fact that Amazon performs many acts and functions as part of the sale of tangible personal property that are above and beyond what would be required to make it a retailer under South Carolina law, Amazon asserts that it is not responsible for paying sales tax with respect to items sold on its Website for which title is held by third parties who are not directly affiliated with Amazon ("Third Parties"). But the evidence in this case demonstrates that for sales taking place on the Website, there is no meaningful difference between how products that are owned by Third Parties are sold versus how

products that are owned by Amazon affiliates are sold. *See* Ex. A, Protest to Proposed Notice of Assessment Issued to Amazon Services LLC for the Tax Period January 1, 2016 through March 31, 2016 at 11 (March 9, 2017) (the “Protest”) (“The Selling on Amazon service enables Merchants to sell new and used products in the Marketplace right alongside the Amazon affiliates’ Retail Sales offerings.”). Thus, the only difference between transactions for which Amazon and its affiliates agree that they must pay sales tax and those for which they argue they have no obligation to do so is that legal title to the goods being sold formalistically is held by an unrelated Third Party. But this distinction is not determinative because South Carolina law provides that the person or entity that holds title to the goods being sold does not define who is the seller of those goods. *See* § 12-36-70 (“‘Retailer’ and ‘seller’ include every person: ... selling or auctioning tangible personal property *whether owned by the person or others*” (emphasis added))).

Simply put, Amazon is obligated by South Carolina law to pay both sales and use tax with respect to all proceeds from the sales of goods taking place on its Website, and there is no genuine issue as to any material fact. The Department therefore is entitled to summary judgment. Rules 19 and 68, SCALCR; Rule 56, SCRCR.³

³ The Department Determination issued with respect to Amazon on June 21, 2017 assessed a total amount due of \$12,490,502.15, which included tax, penalty, and interest, and only captured Amazon’s tax liability for the first quarter of 2016. The tax base amount contained in the Determination of \$9,576,549.12 was an estimated figure derived from information supplied by Amazon and based on an agreement between the parties. As noted in the Determination, the Department will

II. Statement of Facts

A. Overview

Petitioner owns and operates www.amazon.com, which has grown from an online bookstore founded in the mid-1990s into one of the world's largest online retailers. *See* Protest at 8. Through the Website, Amazon offers for sale a variety of goods and products, some of which are owned by affiliated entities,⁴ and others of which are owned by unaffiliated Third Parties. *See id.* Amazon and its affiliated entities currently collect and remit sales tax to South Carolina for sales of goods and products on the Website that are owned by Amazon affiliates; however, Amazon does not collect sales tax for goods that are owned by Third Parties unless it is paid an additional fee by those Third Parties. *See* discussion *infra* Part II.F.

Amazon's relationship with the third parties that own goods that are sold on the Website is governed by a contract called the Amazon Business Solutions Agreement. *See* Ex. B (the "BSA").⁵ The BSA contains general provisions covering the overall relationship between Amazon⁶ and Third Parties, as well as more

make adjustments to this figure as necessary after the issues presented in this litigation are resolved.

⁴ These affiliates include, on information and belief and at a minimum, 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. Protest at 8 n.1.

⁵ The copy of the BSA attached as Exhibit B is the version of the agreement that was in effect during the audit period in this case.

⁶ Beginning on page 9, the BSA specifies the "Amazon Contracting Party" with which a Third Party is contracting. *See* Ex. B at 9. This specification depends largely on which country the Third Party elects; however, for the United States, the Amazon Contracting Party is primarily the Petitioner Amazon Services, LLC,

specific provisions governing particular portions or phases of Amazon's sales platform, including "Selling on Amazon," "Fulfillment by Amazon," "Amazon Clicks," and "Transaction Processing." *See generally* Ex. B.

B. Transactions on the Website

A customer seeking to purchase a product on the Website will typically begin the online shopping experience by searching for a particular good or product that the customer wishes to purchase. *See* Ex. C, Rule 30(b)(6) Dep. of Amazon at 46-47. The results of that search will populate on the Website, and then the customer will select the good or product the customer wishes to buy from the search results. The customer will then be taken to the "product detail page" on the Website, which will display the good that has been selected. *Id.*; Protest at 12. It is at this point that the customer—perhaps unwittingly—interacts with a sophisticated algorithm that determines which product offered by a particular supplier will be offered to the customer for sale. Amazon R. 30(b)(6) Dep. at 59-64; Protest at 12-13. More specifically, when a particular product is offered for sale on the Website by multiple suppliers—whether they are Third Parties or an Amazon affiliate—the algorithm determines which supplier's product is the "best overall offer for this product." Amazon R. 30(b)(6) Dep. at 60. That particular supplier then becomes "the default seller of the product, such that their product is added to a customer's shopping cart

except with respect to "Transaction Processing Services," in which case the Amazon Contracting Party is Amazon Payments, Inc. *See id.* at 10. It is noteworthy, however, that the terms of the BSA do not change depending on which entity is selected as the "Amazon Contracting Party," *see id.*, and in fact the BSA simply refers throughout to "we," "us," and "Amazon," when referring to Amazon and its affiliated entities.

if the customer clicks the 'Buy Box' on the product detail page, which is the yellow box in the top-right corner of the page that says 'Add to Cart.'" Protest at 12.

In this way, Amazon, through its algorithm, effectively chooses which particular product the customer likely will purchase, assuming the customer clicks "Add to Cart" on the product detail page. Amazon refers to this algorithmic selection process as "winning the buy box." Amazon R. 30(b)(6) Dep. at 63; *see* Ex. D, "Increase Your Chances of Winning the Buy Box," AS0000115. Amazon does "not disclose specific targets for becoming Buy Box eligible." Ex. D. It does require that suppliers meet "very high standards" in order to win the Buy Box, and to "[e]xcel[] in all areas that deliver an outstanding customer experience," which areas include pricing, availability, fulfillment, and customer service. *See id.* In other words, Amazon controls the process by which a "default" supplier of a good is selected for the customer.

Although Third Parties technically set the price of their goods that are sold on the Website, Amazon heavily controls this process like it does every other aspect of sales taking place on the Website. The BSA requires Third Parties to ensure that the price they select, as well as any other terms or conditions with respect to the product they wish to be sold on the Website, "is at least as favorable to Amazon Site users as the most favorable terms upon which a product is offered or sold via [the Third Party's] Sales Channels" BSA at 18. This is tantamount to a "most favored nations" clause and requires that the price selected by the Third Party must be as low as the price that it offers the product anywhere else. Further, when Third

Parties are selecting the price for goods to be sold on the Website, Amazon “informs Merchants of the lowest price at which a given product is listed on the Marketplace, as a reference point.” Protest at 11. Finally, the price that is set for an item is a key input in Amazon’s “buy box” algorithm, making it a critical factor in whether that item is selected by Amazon to “win the buy box.” *See* Ex. D; Amazon R. 30(b)(6) Dep. at 59-64.

A transaction on the Amazon Website can—and typically does—take place without any actual contact between the customer and the Third Party. *See* Amazon R. 30(b)(6) Dep. at 114-15. If there is contact, Amazon requires that it take place through a feature on the Website called “buyer/seller messaging,” and prohibits the use of any other methods or media not expressly provided or approved by Amazon. *See id.* at 114-15, 124-25;⁷ BSA at 6. However, “typically you wouldn’t have to use that messaging service to complete a transaction with the [Third Party].” Amazon R. 30(b)(6) Dep. at 115. In short, the Third Party’s presence has no bearing on a customer’s purchase of goods from the Website.

Once a customer purchases a good on the Website, Amazon sends the customer an order confirmation via email. *Id.* at 139-40. If the Third Party is responsible for shipping the item, Amazon notifies the Third Party of the order, whereupon the Third Party ships the item and then notifies Amazon. *Id.* But the Third Party does so only after it is notified and instructed to do so by Amazon. *See*

⁷ In fact, a Third Party is not even allowed access to the customer’s email address, and instead only “can see an encrypted version of the customer’s e-mail address which they can send messages to and it would be routed to the customer through buyer/seller messaging.” *Id.* at 125.

id. at 115-16. If the Third Party has opted in to the “Fulfillment by Amazon” program, then Amazon ships the item to the customer itself through an affiliated entity, the item having already been shipped to Amazon by the Third Party. *Id.* at 139-40; *see* discussion *infra* Part II.D. In either case, however, Amazon—and not the Third Party—interacts with the customer, in this instance sending notification to the customer by email that the product has shipped. *Id.*

This limited communication arrangement is by design and is a requirement of the arrangement by which a Third Party agrees to allow Amazon to sell its goods. The BSA explicitly requires that Third Parties, “except as expressly permitted by this Agreement, *not send customers emails confirming orders or fulfillment of Your Products.*” BSA at 17 (emphasis added). Thus, regardless of whether Amazon or the Third Party ships the goods to the customer, Amazon mandates that it be the one that emails the order and shipping confirmation to the customer, thereby ensuring that it is the only point of contact for the customer making a purchase on the Website.

In fact, beyond just serving as the point of contact for customers, Amazon closely guards its customers’ data, and places strict controls on how and when Third Parties may use that data and communicate with Amazon’s customers. In particular, paragraph 14 of the “General Terms” section of the BSA reads in part as follows:

14. Use of Amazon Transaction Information.⁸

You will not, and will cause your Affiliates not to, directly or indirectly: (a) disclose any Amazon Transaction Information (except that you may disclose that information solely as necessary for you to perform your obligations under this Agreement if you ensure that every recipient uses the information only for that purpose and complies with the restrictions applicable to you related to that information); (b) use any Amazon Transaction Information for any marketing or promotional purposes whatsoever, or otherwise in any way inconsistent with our or your privacy policies or applicable Law; (c) contact a Person that has ordered Your Product with the intent to collect any amounts in connection therewith or to influence that Person to make an alternative transaction; (d) disparage us, our Affiliates, or any of their or our respective products or services or any customer; or (e) target communications of any kind on the basis of the intended recipient being an Amazon Site user. **In addition, you may only use tools and methods that we designate to communicate with Amazon Site users regarding Your Transactions, including for the purpose of scheduling, communicating, or cancelling the fulfillment of Your Products.**

BSA at 6 (emphasis added). Thus, Amazon maintains strict control over the information of customers purchasing goods on the Website. Third Parties are restricted from using Amazon's customer information for any purpose other than those tasks that are necessary to fulfill the third parties' duties related to the transaction on Amazon's Website. To the extent that any communications take place between Third Parties and Amazon's customers, the Third Parties are

⁸ "Amazon Transaction Information" is defined in the BSA as "Order Information and any other data or information acquired by you or your Affiliates from Amazon, its Affiliates, or the parties' performance under this Agreement." BSA at 11. "Order Information" is then defined as "with respect to any of Your Products ordered through an Amazon Site or a Webstore Site, the order information and shipping information that we provide or make available to you." *Id.* at 12.

required to use tools on the Website to communicate with those customers and may not use any other means or methods of communicating with those customers. *Id.*⁹

C. Payment for the Goods.

Customers pay for a purchase on the Website by entering their credit card information on the Website. *Id.* at 138. Consequently, it is the Petitioner that is the actual point of sale for the product. *See* Protest at 15 (“Amazon Services charges the customer’s credit card.”). An affiliate of the Petitioner, Amazon Payments, Inc., then processes the payment upon shipment of the purchased item. *Id.* at 29-38. All payments for purchases made on the Website are processed in this manner, and no other types of payment methods, such as PayPal, are permitted. *See* Amazon R. 30(b)(6) Dep. at 29-38, 137-38. In fact, Amazon’s contract with Third Parties makes clear that it has the exclusive right to receive sales proceeds for sales taking place on the Website. *See* BSA at 15-16 (“We will also receive all Sales Proceeds on your behalf for each of these transactions *and will have exclusive rights to do so*, and will remit them to you in accordance with these Selling on Amazon Service Terms.”) (emphasis added).¹⁰ A customer reviewing the customer’s credit card statement will

⁹ Further, paragraph 11 of the BSA defines as “Confidential Information” any information “relating to us or to the Services, including but not limited to Amazon Transaction Information, that is not known to the general public.” BSA at 5. Third Parties are required to agree, among other things, that “all Confidential Information will remain Amazon’s *exclusive property*” *Id.* (emphasis added). Thus, not only does Amazon closely guard its customers’ information—it considers it to be its exclusive proprietary information.

¹⁰ Amazon also requires that any payments flowing from the Third Party to the customer, for example in the case of returns or refunds, take place through Amazon. *See* BSA at 17 (“You will route all payments to customers in connection with Your Transactions through Amazon. We will provide those payments to the

see an abbreviation of the words “Amazon marketplace payments” in the merchant descriptor field, Amazon R. 30(b)(6) Dep. at 103, making Amazon the “merchant of record” for the transaction. This status is further illustrated by the fact that Amazon, and not the Third Party, bears the risk of credit card fraud with respect to transactions taking place on the Website. See BSA at 16.

Once the customer’s payment to Amazon is processed, the proceeds from the sale are deposited into a bank account in the name of Amazon Payments, Inc. Amazon R. 30(b)(6) Dep. at 41. Amazon does not maintain separate bank accounts for different Third Parties, instead comingling sales proceeds from different transactions in “one or a number of bank accounts.” *Id.* at 41-42. In fact, Amazon explicitly maintains the right to “combine Sales Proceeds held with the funds of other users of the Services, invest them, or use them for other purposes permitted by applicable Laws.” BSA at 48. Those funds “can be invested in highly liquid cash equivalents,” and the interest from those investments is “retained with Amazon Payments, Inc.,” and is not credited back to the third party. Amazon R. 30(b)(6) Dep. at 42-43; BSA at 48 (“You will not receive interest or any other earnings on any Sales Proceeds.”).

In addition to the interest earned from investing sales proceeds, Amazon is compensated through receipt of a portion of the sales proceeds as its “fees.” Thus, although Amazon remits to the Third Parties the proceeds from the sales of their

customer (which may be in the same payment form originally used to purchase Your Product or as otherwise determined by us), and you will reimburse us for all amounts we pay.”).

goods on the Website every two weeks, it retains “(a) the Referral Fees; (b) the applicable Variable Closing Fee; (c) any Selling on Amazon Subscription Fees; and (d) any other applicable fees described in this Agreement” BSA at 19. Third Parties may request more frequent payments than every two weeks, but the BSA states expressly that “[y]ou will not have the ability to initiate or cause payments to be remitted to you.” *Id.* In other words, those more frequent payments are a privilege given by Amazon in its discretion, not a right held by the Third Parties under the BSA, illustrating the control that Amazon maintains over the entire sales process, and especially over the sales proceeds.

Among the different kinds of fees Amazon charges and extracts from the proceeds of a sale before remitting those proceeds to the Third Party are “Referral Fees.” *Id.* Referral fees vary based on the kind of item being sold and range from 45% of the total sale value for “Amazon Device Accessories,” to 20% for jewelry, and down to 6% for personal computers. *See* Ex. E, “Selling on Amazon Fee Schedule,” AS0000156-62. Amazon’s 30(b)(6) witness explained that the percentage referral fee that Amazon receives for a transaction is based on the typical profit margin for the type of good being sold. *See* Amazon R. 30(b)(6) Dep. at 151-54 (“Different products have different margins. Typically, fashion products have high gross margins, electronics have low gross margins.”). Thus, rather than a convenience fee based on the cost to Amazon of operating the Website, or on the opportunity cost of displaying, selling, and processing the payment for each good, Amazon’s fee is tied

directly to the sale price of the item, and is based on the expected profit margin from the sale of that item. *See id.*

D. Fulfillment of the Purchase

Part of Amazon's comprehensive sales platform is its "fulfillment" services. As its name suggests, Amazon's fulfillment program goes beyond simply providing delivery services with respect to goods sold on the Website. Indeed, Third Parties who participate in the "Fulfillment by Amazon" or "FBA" program will encounter a wide-reaching supply chain capable of receiving, locating, storing, selecting, packaging, and delivering goods to Amazon's customers.

Third Parties may opt in to the FBA program and may select which products will be "fulfilled" by Amazon. *See BSA* at 33. Third Parties then ship their goods to an Amazon fulfillment center where those goods are stored until they are sold or otherwise disposed of. *See id.* at 33, 35-36. Amazon exercises broad discretion over where and how goods are stored:

We will not be required to physically mark or segregate Units from other inventory units (e.g., products with the same Amazon standard identification number) owned by us, our Affiliates or third parties in the applicable fulfillment center(s). If we elect to commingle Units with such other inventory units, both parties agree that our records will be sufficient to identify which products are Units. We may move Units among facilities. If there is a loss of or damage to any Units while they are being stored, we will, as your sole remedy, reimburse you in accordance with the FBA Guidelines If we reimburse you for a Unit, we will be entitled to dispose of the Unit pursuant to Section F-7.¹¹

¹¹ Section F-7.2 of the BSA further provides that "[w]e may dispose of any Unit we are entitled to dispose of in the manner we prefer. Title to each disposed Unit will transfer to us at no cost to us as necessary for us to dispose of the Unit, and we will retain all proceeds, if any, received from the disposal of any Unit." *Id.* at 36.

Id. at 35. Once an item is sold, Amazon “will ship Units from our inventory of Your Products to the shipping address in the Elected Country included in valid customer orders” and “may ship Units together with products purchased from other merchants, including any of our Affiliates.” *Id.* at 35.

Third Parties not participating in the FBA program are generally responsible for shipping their goods to customers; however, like every other aspect of transactions taking place on its Website, Amazon maintains a high degree of control over how this process takes place:

For Your Products ordered by customers on or through an Amazon Site that are not fulfilled using Fulfillment by Amazon, you will determine the shipping and handling charges subject to our Program Policies and standard functionality (including any category-based shipping and handling charges we determine, such as for products offered by sellers on the Individual selling plan and BMVD Products generally). When we determine the shipping and handling charges, you will accept them as payment in full for your shipping and handling.

Id. at 16. Thus, while Third Parties technically determine shipping and handling charges for non-FBA sales in some cases, those charges must remain within parameters set by Amazon. And in the case of “any category-based shipping and handling charges we determine, such as for products offered by sellers on the Individual selling plan¹² and BMVD Products¹³ generally,” Amazon itself

¹² Amazon’s Rule 30(b)(6) witness explained that the “individual” selling plan is a type of arrangement that Amazon maintains with Third Parties who typically supply a lower volume of goods to be sold on the Website, and is distinguished from a “professional” selling plan, which carries an additional subscription fee but a lower referral fee structure. *See* Amazon 30(b)(6) Dep. at 69-72.

¹³ “‘BMVD Product’ means any book, magazine or other publication, sound recording, video recording, and/or other media product in any format ...” BSA at 20.

determines those charges, which Third Parties are obligated to “accept ... as payment in full for your shipping and handling.” *Id.*

E. Customer Service

The customer’s interaction with Amazon alone continues with respect to customer service issues. Amazon handles all customer service inquiries that relate to “(i) payment; (ii) credit card processing, debiting, or crediting; or (iii) use of the www.amazon.com website and its features.” Protest at 16. As it relates to non-FBA products, the BSA provides that Third Parties must “accept and process cancellations, returns, refunds and adjustments,” but must do so “in accordance with this Agreement and the Amazon Refund Policies,” and Amazon “may inform customers that these policies apply to Your Products.” BSA at 17. Further, when determining the amount of any refund or adjustment, Third Parties must “us[e] functionality we enable for your account.” *Id.*

With respect to FBA products, the BSA further allocates responsibility for customer service issues as follows:

F-8.2 We [meaning Amazon and its affiliates] will be responsible for and have sole discretion regarding all customer service issues relating to packaging, handling and shipment and customer returns, refunds and adjustments related to Amazon Fulfillment Units. We will have the right to determine whether a customer will receive a refund, adjustment or replacement for any Amazon Fulfillment Unit and to require you to reimburse us where we determine you have responsibility in accordance with this Agreement.

BSA at 37.

Finally, Amazon maintains a program called the “A-to-z Guarantee” program, by which customers can submit a claim to Amazon with respect to transactions on

the Website. *See* BSA at 17-18. This program is available to make customers whole in the event they are dissatisfied with their purchase. *See* Amazon R. 30(b)(6) Dep. at 143 (describing the program as “a backstop, if you like, that will make the customer whole.”). If Amazon receives an A-to-z Guarantee claim, it will notify the Third Party, which is then responsible for providing Amazon with information about the transaction, including proof of fulfillment (where applicable) and a description of the product. *Id.* If the Third Party fails to provide this information, or “if the claim, chargeback, or dispute is not caused by: (i) credit card fraud for which we are responsible under Section S-1.4; or (ii) our failure to make your Order Information available as the same was received by us or resulting from address verification, then you will promptly reimburse us in accordance with the Service Fee Payments section of this Agreement for the amount of the customer purchase” BSA at 18. Thus, in the case of an A-to-z Guarantee claim, Amazon itself determines whether the customer is due a refund. *See id.*; Amazon R. 30(b)(6) Dep. at 143-45. Having made this determination, Amazon issues a refund to the customer, “which could be a reversal of the original transaction, or it could be a payment and the value of that payment from Amazon Payments to the customer will be debited from the seller’s current balance held by Amazon Payments.” Amazon R. 30(b)(6) Dep. at 144-45. Thus, Amazon controls not only the consummation of the transaction but its unwinding as well.

F. Tax Collection

Third Parties that maintain “Marketplace Professional” or “Amazon Webstore” accounts may—but are not required to—enable functionality on the Amazon Website that will collect sales tax for sales of their goods on the Website for specified jurisdictions. *See* Ex. F, “Tax Collection Service Terms,” AS0000429-32; Amazon R. 30(b)(6) Dep. at 165-66. In order to use this feature, Third Parties must provide Amazon with a reference to a product tax code for each of their products. *See* Ex. F at 2-3. Amazon will then calculate the appropriate sales tax for that product based on the jurisdiction to which it is sold and charge the customer sales or use tax as part of the transaction on the Website. *Id.* Amazon then remits the tax collected from the customer back to the Third Party at the same time the Third Party receives its regular disbursements of the proceeds from sales of its goods on the Website (again, less the fees charged by Amazon). *Id.* at 3. In exchange for this service, Amazon charges Third Parties “2.9% of all sales and use taxes and other transaction-based charges we collect.” *Id.* at 2.¹⁴ In other words, Amazon generates revenue from collecting sales and use taxes that it alleges it does not owe.

III. Legal Standard

Motions for summary judgment are properly brought in the Administrative Law Court. Rule 68, RPALC, provides that “[t]he South Carolina Rules of Civil Procedure ... may, in the discretion of the presiding administrative law judge, be

¹⁴ However, for “states that have enacted Marketplace Facilitator or similar laws,” Amazon does not charge this fee, and “automatically calculates, collects, and remits tax.” *See* Ex. G, “Marketplace Tax Collection FAQ,” AS0000528-30.

applied in proceedings before the Court to resolve questions not addressed by [the RPALC].” “Summary judgment is appropriate when it is clear there is no genuine issue of material fact such that the moving party must prevail as a matter of law.” *David v. McLeod Reg’l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006); *see* SCRCF 56(c). “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 355, 559 S.E.2d 327, 336 (Ct. App. 2001); *Duke Energy Corp. v. S.C. Dep’t of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016).

IV. Argument

In South Carolina, a sales tax “is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail.” § 12-36-910(A). The Act also imposes a use tax 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 ...,” § 12-36-1310(A), and further imposes the responsibility for collecting and remitting the use tax on retail sellers who maintain a place of business in South Carolina, *see* §§ 12-36-1340, 12-36-1350. As explained more fully below, Amazon is liable for both sales and use tax with respect to all sales of tangible personal property on the Website because it is both a “seller making retail sales” and is “engaged ... in the business of selling tangible personal property at retail.” §§ 12-36-1340, 12-36-910(A).

A. Amazon sells tangible personal property on its Website.

Section 12-36-100 defines “sale” and “purchase” as “any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration” Section 12-36-70 further defines “seller” and “retailer” to “include every person ... selling or auctioning tangible personal property whether owned by the person or others.” It is undisputed that the transactions taking place on the Website are “sales” within the meaning of § 12-36-100. *See* Protest at 10 (“Amazon’s website, www.amazon.com, operates as a virtual marketplace where physical and electronic products are sold.”). Amazon disputes, however, that it is the seller or retailer of goods owned by Third Parties. As discussed below, the evidence demonstrates otherwise.

i. Amazon accepts money in exchange for tangible personal property.

Amazon is a seller of tangible personal property pursuant to the Act because it accepts money, through the Website, from customers in exchange for goods. The purchase of goods on the Website is thus, in the most basic sense, a “transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration.” § 12-36-100. Amazon, as the owner and operator of the Website, is thus a “person ... selling or auctioning tangible personal property.” § 12-36-70.

Notably, there is no requirement in the Act that a person must hold title to or have physical possession of an item in order to sell it.¹⁵ In fact, the Act specifically

¹⁵ The transfer of *either* title or possession is sufficient to constitute a sale under the Act. *See* § 12-36-100(4) (noting as an example that “sale” and “purchase” include “a transfer of title or possession, or both”).

provides that a “seller” or “retailer” includes any person who sells tangible personal property, “*whether owned by the person or others.*” § 12-36-70(1)(a) (emphasis added).¹⁶ In addition, the term “gross proceeds of sales,” upon which the calculation of sales tax under § 12-36-910 is based, specifically includes “the proceeds from the sale of property sold on consignment by the taxpayer.” § 12-36-90(1)(a).¹⁷ As further support, the Sales and Use Tax Regulations promulgated by the Department also clearly express the policy that one need not hold title to or physically possess a good in order to sell it. *See, e.g.,* S.C. Code Regs. 117-319 (“When, however, warehousemen buy and sell property as a regular course of business of 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.*”) (emphasis added); *see also* *Home Med. Sys., Inc. v. S.C. Dep’t of Revenue*, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009) (“Regulations authorized by the Legislature have the force of law.”) (quoting *Goodman v. City of Columbia*, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995)). Thus, whether a person is a “seller” or “retailer” under the Act depends not on whether the person has title to or possession

¹⁶ “Person’ includes any individual, firm, partnership, limited liability company, association, corporation, receiver, trustee, any group or combination acting as a unit, the State, any state agency, any instrumentality, authority, political subdivision, or municipality.” S.C. Code Ann. § 12-36-30.

¹⁷ A consignment sale is a type of sale in which property is sold by someone other than the owner of that property. *See Travelscape*, Dkt. No. 08-ALJ-17-0076-CC, Final Order and Decision at 18 n.15. In *Travelscape*, this Court pointed out the similarities between the online sales taking place on the petitioner’s website and a consignment sale. *See id.* (“This scenario is similar to the transactions in which Petitioner is engaged.”).

of the property being sold, but rather on the nature of the person's interaction and bargain with the purchaser of that property.

Setting aside for a moment the myriad ways in which Amazon participates in, coordinates, facilitates, and effectuates the sale of goods at retail, one key fact about transactions on the Website is unavoidable: a customer can log on to the Website, search for and find, using functionality created and maintained exclusively by Amazon, a product the customer wishes to purchase, provide the necessary credit card information directly to Amazon, and in a few days, receive tangible personal property at the customer's doorstep without ever interacting with a Third Party. See *supra* Part II.B. In so doing, the customer will have provided consideration to Amazon in exchange for tangible personal property, and that interaction almost certainly would have taken place entirely with Amazon. See Amazon R. 30(b)(6) Dep. at 114-15. This is a "sale" as contemplated by § 12-36-100.

In determining that Amazon is the retailer of goods purchased on the Website, the Department has found instructive this Court's reasoning in *Travelscape*. There, this Court considered whether the operator of an online sales platform that provided hotel reservations to customers was responsible for the accommodations tax under S.C. Code Ann. § 12-36-920. *Travelscape*, Dkt. No. 08-ALJ-17-0076-CC, Final Order and Decision at 7. The Court examined the meaning of the word "furnishing" as it appears in § 12-36-920, employing both rules of statutory construction and the ordinary meaning of the word, and then provided the following description of the transaction on Expedia.com:

In simple terms, a customer who wishes to book a hotel room upon Petitioner's site enters a request to book the room. After payment is assured via credit card, Petitioner, through its computers, verifies the availability of the room(s) with the hotel and then issues the customer a confirmation of his room reservation. Accordingly, the facts establish that Petitioner was not merely receiving payment on behalf of a hotel when it booked a room. Here, a customer with a prepaid hotel room reservation purchased on Petitioner's website has a right to occupy the room for a particular time. In other words, as a result of the transaction that occurs upon Petitioner's website, a customer obtains the right to be furnished a room.

Id. at 9. The transaction that takes place on www.amazon.com is strikingly similar to the transaction that took place in *Travelscape*. A customer on the Website searches for and selects a product the customer wishes to buy. The customer provides the necessary credit card information to Amazon on its Website, and then, with no additional effort or action by the customer, Amazon notifies the owner of the good that the customer wishes to purchase the good and it is shipped to the customer; or in the case of FBA sales, Amazon just ships the product to the customer itself. *See supra* Part II.B. Amazon communicates with the customer and, some short time later, the customer receives the purchased good.

Considering these facts and employing the reasoning in *Travelscape*, the critical question in this case is this: what is it that a customer receives as a result of interacting with Amazon's Website? The answer is that, having completed a transaction on the Website, the customer receives not only the *right* to take possession of tangible personal property, but actually receives the tangible personal property itself. And, this contact having taken place entirely between the customer and Amazon, the seller of that good is Amazon. *See City of Charleston, S.C. v.*

Hotels.com, LP, 520 F.Supp.2d 757, 768 (D.S.C. 2007) (“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.”).

Amazon has asserted that the Court’s decision in *Travelscape* is inapplicable to the facts of this case, in part because it was based on an examination of the word “furnishing,” whereas the relevant inquiry in this case concerns what it means to “sell” tangible personal property. *See* Protest at 37-40. But unlike the word “furnishing,” the words “sale” and “seller” are defined in the Act, and they are defined broadly as “any transfer, exchange, or barter” and “every person ... selling or auctioning tangible personal property, *whether owned by the person or others.*” §§ 12-36-100 and 12-36-70 (emphases added). Further, the Court noted in *Travelscape* that “there is no requirement that a person own the property to meet the criterion of furnishing a room under any portion of Section 12-36-920.” *See Travelscape*, Final Order and Decision at 8. Likewise, the Act explicitly states that a person need not own tangible personal property in order to sell it. *See* § 12-36-70. Finally, and as discussed in more detail below, the statutory provision that imposes the sales tax—§ 12-36-910(A)—applies to “every person *engaged or continuing within this State in the business of* selling tangible personal property at retail.” (emphasis added). This language is congruent to that contained in § 12-36-920(E)— “[t]he taxes imposed by this section are imposed on every person *engaged or continuing within this State in the business of* furnishing accommodations to

transients for consideration” (emphasis added)—further illustrating the analytical similarities between these cases.

Thus, the core reasoning in *Travelscape*, which analyzed the basic bargain that occurs between an online shopper and the operator of a website that has the ability and functionality to provide shoppers with what they seek in exchange for consideration, is highly probative of the issues in this case, especially given the factual similarities between these transactions. Like the petitioner in *Travelscape*, Amazon, through the Website, accepts consideration from customers in exchange for an object of value. Because the object of the exchange on the Website is tangible personal property (rather than a hotel reservation), Amazon is a “seller,” as defined in § 12-36-70.

ii. Amazon is the point of contact for customers on the Website, not Third Parties.

Another portion of the Court’s decision in *Travelscape* concerning the customer’s point of contact during a transaction is also helpful to the analysis in this case:

Moreover, it is significant that the customer’s transaction of booking a hotel room does not involve interaction with the hotel at all. Petitioner is the merchant of record for the transactions in which a hotel room is booked by Petitioner. It is Petitioner who accepts money from the customer and thereafter makes arrangements with the hotel to reserve the room, and then communicates the appropriate reservation information to its customer. The customer’s credit card invoice shows that the hotel reservations were purchased not from the hotel but from Petitioner. In renting a room, a customer makes no payments to anyone other than Petitioner unless he or she purchases additional guest services at the hotel site.

Travelscape, Final Order and Decision at 11. Likewise, a customer on the Website can complete an entire purchase without any interaction with the supplier of the good the customer wishes to buy. *See, e.g.*, Amazon R. 30(b)(6) Dep. at 114-15. Communications notifying customers that an order has been received or shipped come from Amazon, not Third Parties. *Id.* at 139 (“Amazon Services, as a function of the website, sends e-mails to customers confirming orders and fulfillment of orders on behalf of the third-party seller.”). A customer’s credit card statement will contain an abbreviation of the words “Amazon marketplace payments” in the merchant descriptor field, *id.* at 103; thus, Amazon is the “merchant of record” for the transaction.¹⁸ A customer makes no payments to anyone other than Amazon, and in fact, Amazon’s contract with Third Parties gives Amazon the *exclusive right* to receive sales proceeds from transactions on the Website. *See* BSA at 15-16 (“We will also receive all Sales Proceeds on your behalf for each of these transactions *and will have exclusive rights to do so*”) (emphasis added).

Beyond the fact that Amazon performs all of the critical functions necessary to complete the customer’s transaction, Amazon’s BSA prohibits Third Parties from contacting customers in a manner not specifically provided and approved by Amazon. *See, e.g.*, BSA at 6 (“[Y]ou may only use tools and methods that we designate to communicate with Amazon Site users regarding Your Transactions, including for the purpose of scheduling, communicating, or cancelling the

¹⁸ In fact, and as noted above, Amazon’s control of this transaction is so pervasive that Amazon and not the Third Parties voluntarily accepts the risk of credit card fraud with respect to transactions taking place on the Website. *See* BSA at 16.

fulfillment of Your Products.”). Third Parties are directed, for example, to “except as expressly permitted by this Agreement, not send customers emails confirming orders or fulfillment of Your Products.” BSA at 17. Thus, not only is Amazon the regular point of contact for customers, but to the extent any communications between customers and Third Parties do take place, Amazon controls the medium for those communications, further illustrating the fact that Amazon is the retailer of the goods sold on its Website.

Applying these contractual provisions and Amazon’s business practices to South Carolina law leads to the conclusion that Amazon, and not the Third Parties, is the seller of goods on the Website, notably because it is the exclusive point of sale for those goods and because Amazon otherwise meets the statutory definitions of a seller and a retailer. Further, the Sales and Use Tax Act provides that

[e]very seller making sales of tangible personal property for storage, use, or other consumption in this State, not otherwise exempted, *shall 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, 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.*

§ 12-36-1350(A) (emphasis added). Accepting for a moment Amazon’s argument that Third Parties are the “sellers” under South Carolina law, it would be incumbent on them to, for transactions that are subject to the use tax, “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.” *Id.* However, because Amazon exclusively controls the point of sale and the

functionality by which customers' payments are accepted and processed, there is no opportunity for Third Parties to themselves collect the tax at the time of the sale. See BSA at 15-16.¹⁹ And because it is Amazon that sends communications and order confirmations to customers, there is also no way for Third Parties to themselves "give the purchaser a receipt showing the amount subject to the tax and the amount of tax collected." § 12-36-1350(A); see BSA at 17 ("[E]xcept as expressly permitted by this Agreement, [you will] not send customers emails confirming orders or fulfillment of Your Products."). Thus, under the arrangement that Amazon maintains with Third Parties, it would be impossible for those Third Parties to independently comply with their responsibilities under South Carolina law were they considered to be the "seller," further demonstrating that, in fact, it is Amazon who is the seller of goods on the Website with the responsibility to collect and remit sales and use tax.

iii. Other facts demonstrate that Amazon is the retailer, not the Third Parties.

A host of other facts demonstrate that Amazon is the retailer of goods sold on the Website. To begin with, when Amazon (through its affiliate) processes a

¹⁹ As noted in Part II.F. *supra*, Third Parties with "Marketplace Professional" and "Amazon Webstore" accounts can register to have Amazon collect sales and use taxes on their behalf in conjunction with sales of their goods on the Website. Third Parties without these types of accounts presumably cannot enable this feature. Third Parties who do maintain these types of accounts must pay Amazon an additional fee in order to enable this service, and are then reliant on Amazon's functionality to collect the appropriate amount of tax. See Ex. F. In other words, even for Third Parties who are allowed to use this feature, there is no way for them to independently comply with the tax collection requirements under the Act, and must instead rely on Amazon, as the point of sale, to perform these tasks for them.

payment it does not immediately remit that payment to the Third Party. Rather, it holds those funds for a two-week period and invests them in “cash-equivalent short-term liquid investments,” the interest from which it retains. Amazon R. 30(b)(6) Dep. at 42-43. Thus, rather than simply passing a Third Party’s funds through to it after a transaction on the Website, Amazon retains those funds for a period of time, invests them, and remits them back to the Third Party only after it has extracted its fees (and of course retains the interest earned from the investment). The fact that the Third Party has no right to immediately obtain these funds but must await the realization of Amazon’s opportunity to generate additional revenue for itself from the use of these funds before releasing the balance less fees to the Third Party further demonstrates that Amazon is the retailer for the purchases on its Website.

Amazon’s own payment processing expert testified that a normal period of time in which a person can expect to receive funds from a typical payment processing service is “a day or two.” See Ex. H, Deposition of Scott Loftesness at 50-52. Lest there be any doubt, Mr. Loftesness confirmed that a two-week waiting period for the remittance of funds is unusual in the payment processing industry. See *id.*; BSA at 19, 47-48. The fact that other payment processing services like Square or PayPal, for example, accomplish this straightforward task in no more than “a day or two” negates the idea that Amazon only provides a payment processing service for Third Parties. Instead, the delayed remittance of a portion of the sales proceeds from Amazon to the Third Party demonstrates that Amazon is

actually the retailer of the goods sold on its Website who later pays a portion of the sales proceeds to the Third Party for supplying the good.

The manner in which Amazon charges Third Parties for its “services” further illustrates that it is the retailer. Rather than charging Third Parties a standard fee for each good sold on the Website, Amazon’s “referral fee” structure is a percentage of the value of the sale, which percentage is based on the typical profit margin for that type of item. *See* Amazon R. 30(b)(6) Dep. at 151-54; Ex. E. Thus, instead of simply providing a service and charging third parties a fee based on the operating cost of listing products on a website and processing payments, Amazon sells the product on its Website and retains a share of the profits from the sale, the amount of which varies based on the profitability that type of product. *See id.* This is plainly inconsistent with, for example, a service provider who charges a fee based on the cost of labor and materials for its service, and is instead more like a retailer (or consignee) that earns a profit margin percentage based on its sales of goods.

Another indication that Amazon is the seller of Third-Party owned goods is the fact that Amazon offers some form of customer service with respect to every good sold on the Website. In the case of FBA sales, “Amazon Services manages customer service for Merchants who sell products on the Marketplace and utilize FBA.” Protest at 19. Otherwise, Amazon offers the A-to-z Guarantee Program through which customers can submit customer service claims and have their claims determined by Amazon, the Third Parties being obligated to comply with whatever decision Amazon makes, including the issuance of a refund. *See* BSA at 17-18. This

acceptance of responsibility for customer service issues demonstrates that customers on the Website are in fact *Amazon's* customers rather than Third Parties' customers.

Finally, near the conclusion of a customer's shopping experience on the Website, Amazon effectively chooses, as between its affiliates and Third Parties, whose goods will be sold to the customer. *See* Amazon R. 30(b)(6) Dep. at 63; Ex. D. This algorithmic selection process of choosing a "default seller" (the details of which Amazon does not disclose) is distinguishable even from Expedia.com, where customers on that website actually select the hotel in which they will stay. *See Travelscape*, Dkt. No. 08-ALJ-17-0076-CC, Final Order and Decision at 2. Amazon removes this burdensome deliberative process from the customer's experience, and simply chooses itself which is the "best overall offer for this product." Amazon R. 30(b)(6) Dep. at 60. This process of selecting which goods from among suppliers that a customer will purchase is again inconsistent with the idea that Amazon is a hands-off marketplace facilitator, and further demonstrates that it is in fact a retailer of tangible personal property.

iv. With respect to FBA sales, it is especially clear that Amazon is the retailer.

Amazon argues that it does not sell tangible personal property because it transfers neither title nor possession of goods to the customer. *See, e.g.,* Protest at 38-39. Again, however, the plain language of the Act does not require that a seller have physical possession of a good in order to sell it, and it explicitly dispenses with any requirement that the seller must have title to the good. *See* §§ 12-36-70,

12-36-100. In any event, even under Amazon's reading of the statute, its sales of goods as part of the FBA program are "sales of tangible personal property" because Amazon and its affiliates actually take possession of the goods and deliver them, either themselves or through a common carrier, to the consumer. *See* BSA at 33, 35-36. In fact, Amazon acknowledges that when it ships goods to consumers, it does so "from *our inventory* of Your Products" *Id.* at 35 (emphasis added). Having received goods from a Third Party, Amazon retains broad discretion over what to do with those items, and "may ship Units together with products purchased from other merchants, including any of our Affiliates," *id.*, demonstrating that it is in fact *Amazon's* on-hand inventory of tangible personal property, the possession of which it transfers to the consumer once a sale has been completed. Thus, for FBA sales, Amazon and its affiliates actually take and transfer physical possession of the goods, making it especially clear that Amazon is the seller of those goods. *See* § 12-36-100(4) (noting that the words "sale" and "purchase" include "a transfer of title or possession, or both").

B. At the very least, Amazon is engaged in the business of selling tangible personal property at retail.

For the reasons explained above, Amazon is a seller, as that term is contemplated in § 12-36-70, of tangible personal property with respect to the sale of goods on its Website. Even if the Court were inclined to disagree, however, the South Carolina Supreme Court has had occasion to determine whether a person is nevertheless responsible for paying sales tax (or the accommodations tax) based on whether the person is *engaged in the business of* selling tangible personal property

at retail. See *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 101 (2011); *Int'l Harvester Co. v. Wasson*, 281 S.C. 458, 460 (1984); § 12-36-910(A).

In *International Harvester v. Wasson*, a case discussed by this Court in *Travelscape*, see Dkt. No. 08-ALJ-17-0076-CC, Final Order and Decision at 22-23, the Supreme Court adopted the order of a lower court that examined the plaintiff's obligation to pay sales tax with respect to the sale of trucks to a South Carolina company. *Int'l Harvester*, 281 S.C. at 459. In order to determine whether the plaintiff was in fact responsible for paying sales tax, the court performed a three-prong analysis. The court inquired: (1) whether the plaintiff was "engaged or continuing within this State in the business of selling at retail any tangible personal property"; (2) whether the sales in question were "retail sales"; and (3) whether the retail sales were made in South Carolina. See *id.* at 460.

With respect to the first prong, the court observed that:

Section 12-35-510, South Carolina Code of Laws, 1976, as amended, imposes the sales tax 'upon every person engaged or continuing within this State in the business of selling at retail any tangible personal property ...' Thus to be subject to the tax, the plaintiff must be in the business of making retail sales in South Carolina. Section 12-35-20 defines business as 'all activities engaged in ... with the object of gain' There is little question that the plaintiff is in business in South Carolina for a profit since it maintains outlets in Greenville and Charleston as well as soliciting business in this State by a resident salesman from Carolina Fleet Sales of Charlotte, North Carolina.

Id. With respect to the second prong, the court noted that "retail sales are any sales except those defined as wholesale sales," that "wholesale sales" exclude sales to a user or consumer, and that the buyer of the trucks in question "is the user and consumer of the trucks"; thus, the sales in question were retail sales. *Id.* Finally,

the court inquired whether the sale in question was a sale within South Carolina. Finding that the trucks were delivered via common carrier to a buyer in South Carolina, the court determined that the sale was a sale within South Carolina. *Id.*

Applying *International Harvester* here, the question is whether Amazon is “engaged ... in the business of selling tangible personal property at retail.” *Id.*; § 12-36-910(A). It is undisputed that the sales taking place on Amazon’s Website are retail sales. *See* Protest at 10. Nor is it disputed that the goods in question are delivered to buyers in South Carolina. Consequently, it is—or should be—beyond dispute that Amazon is “engaged ... in the business of selling tangible personal property at retail.” This conclusion is supported by the Supreme Court’s 2011 decision in *Travelscape*. The petitioner in *Travelscape* argued that it was not responsible for paying the accommodations tax in South Carolina because it did not physically furnish hotel rooms to transients, and that the word “furnishing” as used in the Act contemplated the physical provision of hotel rooms. *Travelscape*, 391 S.C. at 99, 101. The Supreme Court resolved this question thusly:

Travelscape is correct in pointing out that ‘furnish’ as used in subsection (A) invokes the connotation of physically providing sleeping accommodations to customers. Indeed, the American Heritage Dictionary defines ‘furnish’ as ‘to equip with what is needed’ and to ‘supply’ or ‘give.’ *Am. Heritage Dictionary* 540 (2d College Ed. 1982). Relying on *Powerex*, Travelscape argues the term ‘furnish’ as used in subsection (E) should be read consonant with its use in subsection (A). We agree. As used in subsection (E), ‘furnish’ does mean to physically provide sleeping accommodations. However, Travelscape’s argument ignores the antecedent language in (E) that it applies to all persons ‘engaged ... in the business of furnishing accommodations. **‘Business’ includes ‘all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect.’** S.C. Code Ann. § 12-36-20 (2000). Accordingly, we find the context of ‘furnish’ as it appears in

subsection (E) demonstrates that it encompasses the activities of entities such as Travelscape who, **whether directly or indirectly**, provide hotel reservations to transients for consideration. Contrary to the dissent's view, we do not read the term 'furnish' differently in subsection (E) than we do in (A). Instead, we interpret subsection (E) in such a manner as to give effect to all the language contained therein—particularly that the entity be 'engaged ... in the business of furnishing accommodations—rather than focusing on the term 'furnish' in isolation. **While Travelscape does not physically provide accommodations, it is in the business of doing so.**

Id. at 101 (emphases added).

So it is here. The number of ways in which Amazon engages in “activities, with the object of gain, profit, benefit, or advantage, either direct or indirect” with respect to the retail sales of goods on its Website is perhaps too large to count. For example, it displays those goods on its Website, enables features for its customers to search for and find the goods they want, assists its customers in determining which is the “best offer” for that customer by employing a sophisticated algorithm, takes its customer's money (through an affiliate) and invests it for two weeks. *See* discussion *supra* Part II. Only after that does it remit the money to the “seller” of that good, less Amazon's fees, which are actually just a cut of the profits for that item, variable depending on just how profitable that item is. *See id.* For roughly half of the Third-Party involved transactions at issue in this case, *see* Protest at 14, Amazon also receives, stores, selects, packages, and delivers those items directly to consumers. *See* discussion *supra* Part II.D. Simply put, among the universe of “activities, with the object of gain, profit, benefit, or advantage” with respect to sales of tangible personal property on the Website, there are few if any in which Amazon *does not* engage. Indeed, profiting from the sale of tangible personal property to

consumers is its business. At the very least, these activities demonstrate that Amazon is “engaged ... in the business of selling tangible personal property at retail,” and is therefore obligated to pay the sales tax imposed by § 12-36-910.

C. Amazon is Liable for Sales and Use Tax Under the “Efficient Administration” Provision in S.C. Code. Ann. § 12-36-70

For the reasons noted in Part IV.A. above, Amazon itself falls squarely within the definition of a “seller” or “retailer” in § 12-36-70. However, to the extent the Court discerns otherwise, the Department submits in the alternative that Amazon should be construed as a retailer under the “efficient administration” clause of § 12-36-70, which reads as follows:

The department, when necessary for the efficient administration of this chapter, may treat any salesman, representative, trucker, peddler, or canvasser as the agent of the dealer, distributor, supervisor, employer, or other person under whom they operate or from whom they obtain the tangible personal property sold by them, regardless of whether they are making sales on their own behalf or on behalf of the dealer, distributor, supervisor, employer, or other person. The department may also treat the dealer, distributor, supervisor, employer, or other person as a retailer for the purposes of this chapter.

For the reasons already noted, even if this Court accepts Amazon’s argument that Third Parties are the “sellers” of their goods on the Website, and that Amazon is only providing a service to those Third Parties, Amazon then clearly qualifies as a “salesman” or “representative” of those third parties, insofar as it is “operat[ing]” on their behalf, and insofar as it “obtain[s] the tangible personal property sold by them.” *Id.* The words “regardless of whether they are making sales on their own behalf or on behalf of the dealer, distributor, ... or other person” make clear that this provision was meant to apply to actors like Amazon who are integrally involved in

the sale of goods, whether or not those sales are made for their benefit or someone else's. *Id.*

The Department further submits that the invocation of this provision in this case is necessary for the efficient administration of the Act. Again, it is undisputed that the sales taking place on Amazon's Website are retail sales to consumers in South Carolina. *See* Protest at 10. There is no dispute, then, that tax is owed for these transactions, and the only question posed in this litigation is who should be responsible under the provisions of the Act for paying the tax.

Regardless of Amazon's liability under the Act, however, it is clearly in the best position to collect the sales and use tax with respect to the sales taking place on its Website. In support of this, the Court need look no further than Section S-1.2 of the BSA, wherein Amazon mandates that it "will [] receive all Sales Proceeds on [Third Parties'] behalf for each of these transactions *and will have exclusive rights to do so*." BSA at 15-16. Thus, not only is Amazon in the most logical position to collect sales tax from customers with respect to these transactions—it is the *only* entity that can do so effectively.

Moreover, Amazon *already* collects sales and use tax for at least half of the sales taking place on its Website, where the property being sold is owned by an Amazon affiliate. *See* Protest at 9-10. Even where the property being sold belongs to a Third Party, Amazon offers (in exchange for a fee) to calculate and collect the tax on behalf of the Third Party at the point of sale through functionality already in place on its Website. *See* Ex. F; Amazon R. 30(b)(6) Dep. at 165-66. Thus, there is no

impediment whatsoever to Amazon collecting sales and use tax with respect to all of the transactions on the Website—it could begin doing so tomorrow. This would clearly be more efficient than many thousands of Third Parties calculating and remitting to the Department the tax from their proceeds which are diminished by Amazon’s fees and profit-cut. These Third Parties, crucially, have no opportunity to separately collect the sales and use tax from customers at the point of sale *because they are not the point of sale*. See BSA at 15-16; discussion *supra* Part IV.A.ii.

In short, this is precisely the kind of situation for which the efficient administration provision was crafted—Amazon is obviously in the best and most logical position to collect sales and use tax with respect to sales taking place on the Website. Thus, should the Court find that Third Parties, and not Amazon, are the sellers of their goods on the Amazon Website, the Department, in the alternative, submits that Amazon ought to be construed as a retailer under the “efficient administration” clause of § 12-36-70, and held responsible for collecting and remitting sales and use tax under the Act.

D. All of the proceeds from the sales of goods on the Website should be included in Amazon’s tax base.

The sales tax imposed by § 12-36-910(A) is 6% “of the gross proceeds of sales.” “Gross proceeds of sales” is defined in the Act to mean “the value proceeding or accruing from the sale ... of tangible personal property” and includes “the proceeds from the sale of property sold on consignment by the taxpayer” and “the proceeds from the sale of tangible personal property without any deduction for” various expenses listed in the Act. § 12-36-90(a)-(b). Similarly, the use tax imposed by

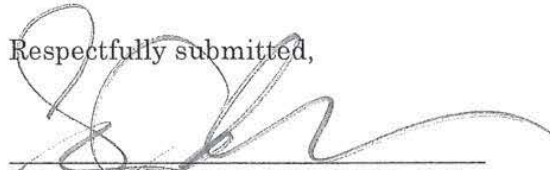
§ 12-36-1310 is 6% “of the sales price of the property,” and “sales price” is defined as “the total amount for which tangible personal property is sold, without any deduction for [various] expenses.” S.C. Code § 12-36-130. Thus, Amazon’s tax liability in this case should be based upon the entire amount of money that it collects from customers with respect to the sales of tangible personal property taking place on the Website, including the amount of Amazon’s fees, without deduction for expenses or cost of goods sold. *See* §§ 12-36-90, 12-36-130.

V. Conclusion

For the reasons set forth herein, Amazon is obligated to pay both sales and use tax with respect to all proceeds from the sales of tangible personal property taking place on its Website, and there is no genuine issue as to any material fact.

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Respectfully submitted,



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Columbia, South Carolina
December 7, 2018

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
Docket No. 17-ALJ-17-0238-CC

Amazon Services, LLC,)
)
Petitioner,)
)
v.)
)
South Carolina Department of)
Revenue,)
)
Respondent.)
-----)

ADMINISTRATIVE HEARING

Monday, February 4, 2019

9:55 a.m. - 6:24 p.m.

Monday, February 5, 2019

9:30 a.m. - 5:06 p.m.

Monday, February 6, 2019

9:31 a.m. - 5:06 p.m.

The hearing before the Honorable Ralph King Anderson, III was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 4th day of February, 2019 through the 6th day of February, 2019 before Travis McLeod, Court Reporter and Notary Public in and for the State of South Carolina.



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EXHIBITS

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(Weldele Affidavit)	
Hearing Exhibit Number 130	21
(SC Revenue Ruling # 18-x (Draft - 8/10/18) Retailers without a physical presence economic nexus)	
Hearing Exhibit Number 131	21
(SC Revenue Ruling # 18-x (Draft - 8/10/18) online marketplaces -- physical and economic nexus)	
Hearing Exhibit Number 132	21
(SC Revenue Ruling # 18-x (Draft - 8/10/18) Online marketplace - physical and economic nexus persons using another persons online marketplace to sell their products)	
Hearing Exhibit Number 133	21
(International SCDOR presentation "SC Amazon: statutory construction: inside the state's decision to designate Amazon a "vendor")	
Hearing Exhibit Number 134	21
(SCDOR news release "SCDOR now accepting retail sales tax applications from third party suppliers of products sold on Amazon.com to SC purchases)	
Hearing Exhibit Number 135	21
(SCDOR remote sellers FAQ)	



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Hearing Exhibit Number 136	21
(SC Private letter ruling 16-1 (July 6, 2016))	
Hearing Exhibit Number 137	21
(SC Revenue Ruling # 18-14: Retailers without a physical presence (remote sellers) - economic nexus (Sept. 18, 2018))	
Hearing Exhibit Number 138	21
(Affidavit of W. Hartley Powell (December 1, 2017))	
Hearing Exhibit Number 139	21
(Loftesness email to Starling Marshall "background" (June 12, 2017))	
Hearing Exhibit Number 140	21
(Loftesness email to Starling Marshall and Sean Akins, "2016 Cyber Source Fraud Report" (Sept. 8. 2017))	
Hearing Exhibit Number 141	21
(Cyber Source, Annual Fraud Benchmark Report: A balancing act)	
Hearing Exhibit Number 142	21
(Cyber Source, The role of machine learning in fraud management)	
Hearing Exhibit Number 143	21
(Email attaching Travelscape decision with highlighting from Starling Marshall to Scott Loftesness)	
Hearing Exhibit Number 144	21
(Trial Court Feb. 12, 2009 Travelscape Final Order and Decision with highlighting)	
Hearing Exhibit Number 145	21
(Cardona Affidavit Exhibits 10, 11, 12 (online checkout page for other retailers))	
Hearing Exhibit Number 146	21
(Covington - questions for Sean, Prepared Monday July 23, 1:00 our time)	
Hearing Exhibit Number 147	21
(Loftesness notes from July 23 and July 25, 2018)	
Hearing Exhibit Number 148	21
(Loftesness "notes for initial Covington calf")	
Hearing Exhibit Number 149	21
(Big Commerce "Chapter 2, Sales tax guide for Amazon FBA Sellers)	
Hearing Exhibit Number 150	21
(Payability "sales tax tips for Amazon FBA sellers)	



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Hearing Exhibit Number 151	21
(Blog taxjar.com "Amazon.com now collects sales tax in every state (and what that means for FBA sellers))	
Hearing Exhibit Number 152	21
(Blog taxjar.com "does inventory give FBA sellers sales tax nexus in other states)	
Hearing Exhibit Number 153	21
(CNBC "Amazon faces a tax fight in SC that could change how online sellers do business")	
Hearing Exhibit Number 154	21
(Bloomberg BNA "States v Marketplace v third-party sellers - the Amazon sales tax challenge")	
Hearing Exhibit Number 155	21
(Avalara.com "What Amazon's decision to collect sales tax in all states does and doesn't mean for your business)	
Hearing Exhibit Number 156	21
(Tax Policy Center "Platforms collect sales tax for third -party sellers")	
Hearing Exhibit Number 157	21
(True Partners Consulting "What does Amazon's decision to start collecting sales tax nationwide mean for third-party Sellers)	
Hearing Exhibit Number 158	21
(Newsmax Finance "WSJ: States hungry for sales tax eye Amazon's third-party sellers)	
Hearing Exhibit Number 159	21
(Visa Merchant data standard manual (November 2016))	
Hearing Exhibit Number 160	21
(Loftesness email to Starling Marshall and Sean Akins "Questions re: Merchant Descriptions, Aggregation" (Sept. 8, 2017))	
Hearing Exhibit Number 161	21
(Loftesness C.V.)	
Hearing Exhibit Number 162	21
(Loftesness handwritten notes - "Depo Prep")	
Hearing Exhibit Number 163	21
(Visa Merchant data standards manual (April 14, 2018))	
Hearing Exhibit Number 164	21
(Resume of Michael Ian Shamos as of October 15, 2018)	
Hearing Exhibit Number 165	21
(Email from Starling Marshall to Erik Doerring and attachments (April 23, 2018))	



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Hearing Exhibit Number 166	21
(Email from Erik Doerring to Starling Marshall (April 18, 2018))	
Hearing Exhibit Number 167	21
(Email exchange between Erik Doerring and Starling Marshall (April 23-24, 2018))	
Hearing Exhibit Number 168	21
(Email exchange between Erik Doerring and Starling Marshall (April 18, 2018))	
Hearing Exhibit Number 169	21
(Notes of Erik Doerring)	
Hearing Exhibit Number 170	21
(Emails from Erik Doerring to Sean Akins and attachments (Aug. 13, 2018))	
Hearing Exhibit Number 171	21
(Letters from SCDOR to Amazon.com tax dept. re: dept. determination (June 21, 2017))	
Hearing Exhibit Number 172	21,529
(Initial audit appointment letter and summons sent to Amazon Services, LLC (Sept. 1, 2016))	
Hearing Exhibit Number 173	21
(Emails between Ricky Taylor and Jim Jackson (Feb. 25, 2016))	
Hearing Exhibit Number 174	21
(Computer assisted audit questionnaire (October 28, 2016))	
Hearing Exhibit Number 175	21,531
(Amazon Services PNOA (December 9, 2016))	
Hearing Exhibit Number 176	21
(Explanation of audit assessment (December 9, 2016))	
Hearing Exhibit Number 177	21
(Waiver of restriction (Dec. 9, 2016))	
Hearing Exhibit Number 178	21,233
(Protest to Proposed Notice of assessment issued to Amazon Services, LLC for the tax period Jan. 1, 2016-Mar. 31, 2016 (March 9, 2017))	
Hearing Exhibit Number 179	21
(SCDOR Conference report (Mar. 22, 2017))	
Hearing Exhibit Number 180	21
(Email Exchange (April 28, 2017))	
Hearing Exhibit Number 181	21,523
(Audit appointment letter and summons is sent to Amazon.com, LLC and Amazon.com (March 24, 2016))	



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Hearing Exhibit Number 182	21,533
(Explanation of audit assessment and adjustments issued to Amazon Services, LLC (March 22, 2017))	
Hearing Exhibit Number 183	21
(AMZN response to DOR's 1st RFP (January 31, 2018))	
Hearing Exhibit Number 184	21
(AMZN response to DOR's 1st ROG (January 31, 2018))	
Hearing Exhibit Number 185	21
(AMZN production letter to DOR re RFP Numbers 6&7 (August 9, 2018))	
Hearing Exhibit Number 186	21
(AMZN Supp Responses to DOR's 1st RFP (August 9 2018))	
Hearing Exhibit Number 187	21
(AMZN Supp Responses to DOR's 1st RFP (August 28, 2018))	
Hearing Exhibit Number 188	21
(AMZN Supp Responses to DOR's 1st RFP (September 26, 2018))	
Hearing Exhibit Number 189	21
(AMZN Services' Notice of rule 30(b)(6) deposition to the SCDOR (Oct. 3, 2018))	
Hearing Exhibit Number 190	21
(AMZN 4th Supp Responses to DOR's 1st RFP (cot. 26, 2018))	
Hearing Exhibit Number 191	21
(AMZN responses to DOR's 1st RFPs (October 30, 2018))	
Hearing Exhibit Number 192	473
(Meeting Packet fro the Legislative Oversight Committee meeting (Oct. 23, 2018))	
Hearing Exhibit Number 193	473
(Video of Director Powell's sworn testimony before the Legislative Committee (October 23, 2018))	
Hearing Exhibit Number 194	473
(Video of Director Powell's sworn testimony before the Joint Ed. And Finance Study Committee of the SC General Assembly (October, 23, 2018))	
Hearing Exhibit Number 195	473
(Video of Cabinet Meeting of SC's Governor (August 1, 2018))	



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Hearing Exhibit Number 196	473
(Video of Director Powell's sworn testimony before the Economic Subcommittee (August 13, 2018))	
Hearing Exhibit Number 197	473
(Video of Director Powell's sworn testimony before the Economic Subcommittee (July 10, 2018))	
Hearing Exhibit Number 198	473
(Video of Director Powell's sworn testimony before the Economic Subcommittee (June 18, 2018))	
Hearing Exhibit Number 199	473
(Video of Director Powell's sworn testimony before the Economic Subcommittee (September 10, 2018))	
Hearing Exhibit Number 200	473
(Video of Director Powell's statements to WLTX Channel 19 (August 13, 2018))	
Hearing Exhibit Number 201	473
(Video of Director Powell's sworn testimony before the Joint Senate Ed. And Finance Study Committee (October 23, 2018))	
Hearing Exhibit Number 202.	473
(SCDOR House Legislative Oversight Committee (June 18, 2018))	
Hearing Exhibit Number 203.	473
(Meeting packet from the Economic Development, Transportation, and National Resources Subcommittee meeting (September 10, 2018))	
Hearing Exhibit Number 204.	473
(Email from D. Taylor to C. Smith and R. Thomas copying R. Taylor and T. Donovan (March 9, 2016))	
Hearing Exhibit Number 205.	473
(SCDOR, Program Evaluation Report (May 31, 2018))	
Hearing Exhibit Number 206	473
(Email from A. Wright to A. Thomas and S. Skeeter re: Insert Loc emerging concerns with the sales tax base (May 31, 2018))	
Hearing Exhibit Number 207	473
(Meeting packet for the Economic Subcommittee Meeting (July 10, 2018))	
Hearing Exhibit Number 208	473
(Emails between L. Watts, V. Wetzel, M. Cleland, M. Norman, and A. Thomas re: PER word document updated (June 13, 2018))	



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Hearing Exhibit Number 209	473
(Emails between S. Skeeter. L. Watts, V. Wetzal, M. Cleland, M. Norman, and others re: PER final (June 12, 2018))	
Hearing Exhibit Number 210	154,155
(Screen shots of Amazon Website)	
Hearing Exhibit Number 211	299
(Revich's handwritten notes)	
Hearing Exhibit Number 212	484
(Erik Doerring C.V.)	
Hearing Exhibit Number 213	515
(Designation Run Report)	
Hearing Exhibit Number 214	511
(Senate Joint Finance and Ed. Study Testimony of Department Director Hartley Powell (October 23, 2018))	
Hearing Exhibit Number 215	516,560
(SC Sales and Use tax Manual 2015 Edition)	

(The original exhibits were retained by the Court.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Court and the South Carolina Rules of Civil Procedure.



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1 (All Exhibits were marked prior to the hearing.)

2 CALL TO ORDER:

3 **THE COURT:** This is a hearing in the matter of
4 Amazon Services, LLC, Petitioner, versus South
5 Carolina Department of Revenue, Respondent.
6 The Docket number is 17-ALJ-17-0238-CC. Are
7 there any additional motions or stipulations
8 the parties wish to make before we proceed?

9 **MR. GREEN:** No motions, Your Honor, or stipulations
10 per se though I think we with a slight
11 extension have agreed on the set of joint
12 exhibits for submission to the Court and
13 introduction in the record. I don't know if
14 now is the appropriate time for that but I do
15 want to go ahead and if we -- to state that we
16 have agreed I think on a set of exhibits for
17 the record and for the Court's consideration so
18 ...

19 **THE COURT:** All right.

20 **MR. RAZI:** That's right, Your Honor, and there are
21 no additional motions but we do have a couple
22 of preliminary motions that are outstanding.
23 I don't know if the Court wants to entertain
24 those now or during the course of the
25 proceeding.



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1 **THE COURT:** I can do it either way. I can tell you
2 I find it interesting that a lot of lawyers
3 don't understand the concept of motion in
4 limine. I doubt y'all two are in that
5 category, but a motion in limine is binding
6 only in two instances. I don't know if y'all
7 know those but the first is if the motion is
8 made and the evidence occurs immediately
9 thereafter, the second is if the judge rules on
10 the motion in limine and sets forth that he or
11 she shall not change that ruling, which I'm not
12 going to do. So, y'all can take that into
13 consideration. I don't mind -- see I treat
14 motions in limine as those to educate me as to
15 what's coming down the pike. I think I have
16 slowly been educated by reading your arguments.
17 The Department has responded to some of those,
18 but, so -- I went up here and I just got
19 something hand delivered. Is that another
20 motion?

21 **MS. FAIR:** It's a reply.

22 **THE COURT:** Oh, a reply. All right. I haven't read
23 that yet.

24 **MR. RAZI:** That's fine, Your Honor. And we're fine.
25 The intent of our motions was just as Your



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1 Honor outlined and it is to flag issues that
2 may come up during the course of ---

3 **THE COURT:** And I appreciate that.

4 **MR. RAZI:** And, you know, we're happy to take them
5 out ---

6 **THE COURT:** And you did a very good job at it too,
7 by the way.

8 **MR. RAZI:** Thank you, Your Honor. We're happy to
9 take those issues up as they come.

10 **MR. GREEN:** Then so with the set of exhibits there's
11 a small subset of the exhibits that we would be
12 agreed on with regard to authenticity and all
13 of that, but the Department would not concede
14 to those with respect to I guess relevance or
15 admissibility and we can obviously take that up
16 at a later time. I think the rest of the
17 exhibits were all agreed on or admissible and
18 appropriate to be entered into the record, Your
19 Honor. So we can move those in at the end or
20 the beginning or however you'd like to handle
21 that.

22 **THE COURT:** If you want to go ahead and get them in
23 now I think it would make everything flow -- do
24 you need to talk?

25 **MR. RAZI:** No, Your Honor.



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1 **THE COURT:** I'm okay with y'all talking.

2 **MR. RAZI:** No, we're good. Thank you.

3 **THE COURT:** Let's go ahead and get in what we can
4 get in and I think it'll help everything flow
5 better.

6 **MR. GREEN:** Then I think -- y'all agree with this,
7 Mr. Razi, but it looks like then we would agree
8 -- be agreeable to the admissibility of
9 everything except -- it looks like 192 through
10 201 -- through 202. Now, hang on just a
11 second. I think we would be admissible to
12 everything -- agreeable to everything except
13 192 through 209. I believe that was what we
14 had discussed before, wasn't it, Mr. Razi?

15 **MR. RAZI:** That's right.

16 **MR. GREEN:** Okay.

17 **THE COURT:** All right.

18 **MR. GREEN:** Everything else we're agreeable to enter
19 in, so the last 16, 17 exhibits we are not yet
20 -- we don't agree to it admissibility.

21 **THE COURT:** Those are the last?

22 **MR. GREEN:** They're the last ones, yes, sir. So ---

23 **THE COURT:** So I assume that means one through 191?

24 **MR. GREEN:** Correct. I could have made that a
25 little easier couldn't I?



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1 **THE COURT:** Could have. But that's okay. We learn
2 to do the math in the Pee Dee.

3 **MR. GREEN:** Like Levy Johnson said one time in a
4 trial to me, he said, when this case is over
5 I'll know exactly what it was all about. So
6 that's probably how I'll feel as well, so ...

7 **THE COURT:** Okay.

8 **MR. GREEN:** Thank you, Your Honor.

9 **THE COURT:** So -- Exhibit 1 through 191 -- Exhibits
10 1 through 191 are admitted without objection.

11 **(Hearing Exhibit Numbers 1 through 191 were admitted**
12 **into evidence.)**

13 **MR. GREEN:** Yes.

14 **MR. RAZI:** That's right.

15 **THE COURT:** All right.

16 **MR. RAZI:** Thank you. And we have hard copies of
17 those for the Court but maybe we'll just
18 present those when needed. Is that all right?

19 **THE COURT:** Down the road I would like them if we
20 can give them to me in electronic format.

21 **MR. RAZI:** We can do that.

22 **THE COURT:** That's what I prefer. I'm happy with
23 that anytime y'all want to do it 'cause I've
24 got my computer going ---

25 **MR. RAZI:** Okay.



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1 **THE COURT:** --- right now so I'll pull up things
2 that way.

3 **MR. RAZI:** I guess the only other preliminary matter
4 we have and it's going to be addressed in
5 detail -- I think Mr. Akins will do it -- but
6 there was some back and fort in the Court's
7 Order and then the briefing about efficient
8 administration, and before we begin putting on
9 our proof we want to know is that a part of
10 this case or not?

11 **THE COURT:** For the life of me I can figure out why
12 y'all haven't so ...

13 **MR. GREEN:** For a number of reasons we have just
14 elected not to proceed with that theory, Your
15 Honor.

16 **THE COURT:** You know, under my theory I thought that
17 was one of their better arguments so I think
18 Amazon should turn and thank them for doing
19 that because I think they just made your case
20 a lot better.

21 **MR. RAZI:** Very well. Thank you.

22 **THE COURT:** All right. Opening statements?

23 **OPENING STATEMENT BY MR. RAZI:**

24 **MR. RAZI:** Good morning. Your Honor, Amazon and
25 it's subsidiary, Amazon Service, are good



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1 corporate actors. They play by the rules.
2 They fully comply with all sales tax laws and
3 rules including the South Carolina Sales and
4 Use Tax Act. In fact, over the last three
5 years Amazon has collected and paid more than
6 \$150,000,000 to the State of South Carolina in
7 sales tax. But understandably Amazon does not
8 pay taxes that it does not owe under the law or
9 taxes that are the responsibility of others.
10 And that's what this case is about. The
11 Department of Revenue in this case is seeking
12 to force a particular company, an Amazon
13 subsidiary called Amazon Services, to pay taxes
14 that the law says are owed by others. The
15 Department has argued that when a business or
16 individual goes on Amazon.com, an independent
17 third party unrelated to Amazon or Amazon
18 Services, goes on Amazon.com and sells products
19 to consumers that it is the operator of the
20 website, Amazon Services, and not that seller
21 that is actually the seller of the product.
22 Amazon Services has contested this case, as the
23 Court knows, from the beginning and for good
24 reason. This case is based, as we will show
25 over the next few days, on a misunderstanding



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1 of the facts and a misapplication of the
2 applicable law. And for those reasons the
3 Department's case -- the premise of it -- is
4 wrong. Now to be sure ---

5 **THE COURT:** Any case is based on a misunderstanding
6 of the facts and the misapplication of the law
7 is pretty well going to be wrong. But, go
8 ahead.

9 **MR. RAZI:** I would agree. Now to be sure, Amazon
10 Services does collect and remit sales taxes for
11 third party sales in certain states that have
12 passed so-called market place facilitator
13 legislation. And if South Carolina were to
14 pass such a law Amazon would fully comply with
15 it. But there current is no such law on the
16 books in South Carolina and there certainly
17 wasn't any in early 2016. Now -- then and now
18 there's a gap in South Carolina law relating to
19 the transactions at issue in this case. And
20 that's not just our view but that's been a view
21 expressed by the Department as the Court knows.
22 Now Amazon Services, as its name suggests,
23 provides services. It doesn't sell products to
24 anyone. That's what the evidence today,
25 tomorrow and so on will show. Your Honor, I'd



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1 like to introduce myself and our team briefly.
2 I'm Benjamin Razi. It's an honor to be here,
3 and I represent Amazon Services in this case
4 and I'm joined by Mr. Akins and Bryson Geer and
5 a number of Amazon team members who have been
6 working on this case.

7 **THE COURT:** And Mr. Von Lehe.

8 **MR. RAZI:** Yes, Your Honor. Yes, Your Honor. Thank
9 you. And Mr. Von Lehe. As Your Honor has
10 recognized in the Order last week the heart of
11 this case, as the Court said, is a disagreement
12 over whether Amazon Services is a retailer or
13 a seller in these third party sale
14 transactions. And so it's worth this morning
15 before we get started with the evidence
16 spending a few minutes discussing three topics.
17 What Amazon Services is and what it does, how
18 third parties sell products on Amazon.com, and
19 then briefly, because the Court is well
20 familiar with this, what constitutes a sale
21 under South Carolina law.

22 **THE COURT:** I hope I'm familiar with it.

23 **MR. RAZI:** Well ---

24 **THE COURT:** By now.

25 **MR. RAZI:** --- first, Amazon Services. Your Honor



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1 will learn during the course of this trial that
2 Amazon Services is the Company that operates
3 the Amazon.com website. And that website
4 enables millions of sellers, many of whom are
5 located in South Carolina, to themselves offer
6 and sell products to customers in the United
7 States and around the world. The evidence will
8 show that Amazon Services provides product
9 listing services. That is, is makes the
10 website available for third party sellers to
11 sell to customers and it also provides
12 advertising services to increase the likelihood
13 that third party seller products are identified
14 by sellers -- by customers and sold. Equally
15 important, Your Honor will learn -- and we'll
16 emphasize this during the course of the trial
17 -- what Amazon Services does not do. For
18 example, Amazon Services does not decide what
19 products any third party seller sells. Amazon
20 Services does not set the prices for third
21 party seller products. Amazon Services does
22 not determine how it is that third party
23 sellers get their products to customers. And
24 that's the fulfillment aspect of the case that
25 the Court has heard now. Now, Your Honor may



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1 have noticed that thus far I've been careful --
2 and I will be careful throughout the
3 proceedings -- to refer to Amazon Services not
4 generically to the word Amazon. And that's
5 important because although there will evidence
6 about other Amazon entities during the trial
7 there's one taxpayer that was issued a notice
8 of proposed assessment. There's one taxpayer
9 that received a determination, and there's one
10 taxpayer that's the Petitioner in this case and
11 that's Amazon Services LLC. And during the
12 course of the case the Department at times has
13 blurred the lines between Amazon Services and
14 other Amazon companies. Something that the law
15 does not permit. And so we will respectfully
16 ask the Court -- and the Department for that
17 matter -- during the course of the proceedings
18 ---

19 **THE COURT:** I recognize the distinction. I can go
20 ahead and tell you that.

21 **MR. RAZI:** Thank you, Your Honor. And in particular
22 we expect the Department to focus on two
23 companies, Amazon Payments, Inc. and Amazon
24 Fulfillment Services, Inc., that are relevant
25 to the case but that are not themselves parties



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1 to the proceeding. And as the Court has
2 indicated it recognizes, we're not here
3 litigating tax assessments against those
4 companies. But even if we were the evidence --
5 and there will be evidence about those
6 companies -- will show that those companies
7 don't sell products either. They provide
8 services to sellers, albeit different services
9 than those provided by Amazon Services. Now
10 third party sellers. Changing topics. There
11 will be extensive evidence about and from third
12 party sellers in this case. Witnesses will
13 explain who these third party sellers are. How
14 they are -- they range from individuals to
15 small companies to medium-sized companies to
16 big brand-named retailers that the company --
17 excuse me, that the Court and everyone else is
18 familiar with. There will be evidence about
19 the entrepreneurs that have created companies
20 and grown their business using Amazon.com. And
21 the Court will hear the precise steps that
22 third party sellers take to sell their
23 products. We will go through this in detail
24 and show that contrary to what's been suggested
25 in some of the briefing, the third party



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1 sellers are not limited in any significant way
2 in how they offer and sell their products to
3 customers. The evidence ---

4 **THE COURT:** You said they're not limited in any way.
5 You do require some limitations on price I
6 thought I'd read in some of the briefing,
7 that's not correct?

8 **MR. RAZI:** We -- and we look forward to presenting
9 the issues ---

10 **THE COURT:** Okay.

11 **MR. RAZI:** --- on that issue and the other issues
12 identified in the Court's Order and we're going
13 to do that this morning.

14 **THE COURT:** Okay.

15 **MR. RAZI:** And I'd be happy to take it and do it now
16 but I think it may be more persuasive coming
17 from someone who actually has first-hand
18 knowledge about ---

19 **THE COURT:** Okay.

20 **MR. RAZI:** --- the transactions work. We're -- but
21 the BSA is what it is and we're going to
22 explain to the Court how those are not
23 meaningful or significant limitations at all on
24 ---

25 **THE COURT:** Okay.



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1 **MR. RAZI:** --- third parties that do their business.

2 So all of that evidence of course will need to
3 be evaluated through the prism of the law, and
4 in particular as I alluded to, the definition
5 of the sale and this is of course an important
6 and hotly disputed topic in the case. A sale
7 is a transfer of personal property in exchange
8 for consideration. And the Department has said
9 repeatedly in manuals and other guidance of the
10 taxpayers that a sale requires the transfer of
11 title or possession and we'll put on evidence
12 about what they have said in that regard. And
13 we will prove our case of course as litigants
14 do by presenting witness testimony and
15 documents and also by entering into statements
16 some testimony by the Department's personnel.
17 Our first witness will be Chris Poad and he's
18 here this morning, not in the courtroom but
19 he's here. He's worked at Amazon since 2009.
20 He will recount for Your Honor how it is that
21 20 years ago third party sellers came to begin
22 selling on Amazon.com. He'll give us some
23 information about who some of those sellers are
24 and how it is that they do their business.
25 He'll explain that today about half of sales on



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1 Amazon.com are made by third party sellers, and
2 in particular small and medium-sized
3 businesses. And among other things he's going
4 to walk through the process in a pretty
5 methodical way of how it is that a third party
6 seller comes from being just a regular business
7 or a regular person to being enabled to sell on
8 the website and how they go about selling their
9 products. And what he'll show us all and the
10 Court is that the first thing they do is they
11 have to identify what they want to sell like
12 any business and then they have to get what it
13 is they want to sell and then they need to go
14 through a fairly detailed process of listing
15 the product, posting it on the website. Like
16 any sell they set their price, like any sell
17 they, not Amazon Services, manage their
18 inventory. They transfer their products to the
19 customers. They receive consideration. And
20 this is -- I want to pause on this last one
21 because this is an area where there's been some
22 confusion -- the third party sellers provide
23 product-related customer service. They
24 communicate extensively and meaningfully with
25 customers. That's what the evidence will show.



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1 After Mr. Poad at some point during our case
2 we're going to call a third party seller as I
3 alluded to. In particular it's a gentleman
4 named Matthew Revich. He's from California.
5 He's a part owner and a principal in a company
6 called Yedi Houseware, and Yedi Houseware makes
7 a variety -- makes themselves a variety of
8 products including appliances like the one
9 shown on the screen and other housewares. And
10 what he's going to explain is he's going to
11 back up what you've heard from Mr. Poad and
12 he's going to confirm that. And he's going to
13 say that he sells his products, and he's going
14 to unequivocally and in detail refute the
15 suggestion that Amazon Services is somehow the
16 true seller of his products. Now as Mr. Green
17 alluded to when we started, all this testimony
18 will be backed up by extensive exhibits which
19 will be made available to the Court and we'll
20 highlight to our best -- there are so many
21 documents we're going to do our best during the
22 course of the proceedings to show the Court
23 those parts which we think are most germane to
24 the case. Now while the evidence from Amazon
25 Services that I have just outlined we submit



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1 will be enough to show that Amazon Services is
2 not the seller of these third party sold
3 products, we will go further. We will present
4 sworn testimony from the Department's own
5 witnesses to the effect that the position being
6 advanced in this case are brand new. We asked
7 the witnesses about that in depositions and
8 these positions are brand new. They did not
9 exist in the first quarter of 2016. And, make
10 no mistake, the evidence will show as well that
11 this case is not about apply existing law to a
12 new business model. Instead, third parties
13 have been selling Amazon.com and on other
14 marketplaces for decades. This is not new.
15 Now the Department of course will also have an
16 opportunity to present evidence. They will not
17 present -- I submit or predict -- any witness
18 with first-hand knowledge of how sales and
19 purchases are made on the Amazon.com website.
20 There won't be any witness who refutes the
21 testimony of Amazon Services' witnesses who
22 have been working in this area for some time
23 and have made it their life's work. Nor will
24 there be documents supporting the claim that
25 Amazon Services is the seller of third party



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1 sellers' products. Instead, the Department
2 will focus on the contract that the Court has
3 alluded to and will attempt to highlight
4 promises made between third party sellers and
5 Amazon Services to one another. And the
6 Department will suggest and argue that that
7 contract reflects many limitations on third
8 party sellers and so much so that it converts
9 the service provider Amazon Services into a
10 seller but the evidence will be to the
11 contrary. The evidence will show that those
12 so-called limitations -- and this is what the
13 witnesses will explain -- aren't in fact
14 restrictions at all, they don't inhibit
15 anything. So our case, Amazon Services' case,
16 is going to be based on fact witnesses from
17 first-hand -- with first-hand knowledge.
18 Witnesses from Amazon Services, a third party
19 seller and some of the Department's statements
20 about the limitations of current law. And when
21 all the evidence is in we will as the Court to
22 rule in favor of Amazon Services. Amazon
23 Services vigorously disputes the Department's
24 case, the Department's position, no because it
25 is seeking to avoid its tax responsibility.



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1 No, we've contested this case from the
2 beginning because the Department is wrong on
3 the facts and wrong on the law. We look
4 forward to presenting our evidence. Thank you,
5 Your Honor.

6 **THE COURT:** Okay.

7 **OPENING STATEMENT BY MR. GREEN:**

8 **MR. GREEN:** Thank you, Your Honor. I'll be quite
9 brief. Tracey Green with Willoughby & Hoefer
10 representing the Department of Revenue. With
11 me today is John Roberts and Andrew Hand also
12 of my firm. Jason Luther is here from the
13 Department of Revenue and Lauren Acquavilla is
14 still -- can come back -- who's still working
15 with the Department on this matter and they're
16 with me here as well as a lot of people here
17 from our firm who I couldn't do any of this
18 without and have helped me a lot to this point.

19 **THE COURT:** I believe that you are the DOR phoenix.

20 **MS. ACQUAVIVA:** Yes, Your Honor.

21 **MR. GREEN:** We don't dispute that Amazon is -- it
22 provides economic benefits and economic
23 contributions. That's not what this case is
24 about. What this case is about is whether they
25 are -- if they fall within the meaning of the



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1 statute as we've extensively briefed to this
2 Court. The Department's position also has been
3 consistent since it came to the Department's
4 attention that they weren't paying sales tax on
5 sales by third parties -- attributed to third
6 parties by them on their website -- which is
7 that these are sales by Amazon, their goods or
8 the goods of others. We think that fits within
9 the statute and we've been consistent about
10 that. We have briefed that extensively, Your
11 Honor. It is based on -- as is very often the
12 case in taxpayer matters -- it is based upon
13 their document. It is based their business
14 model and it's based upon the transactions that
15 they conduct and we do intend to explore some
16 of the issues that we believe that they counter
17 that they -- on one hand they apply the BSA
18 strictly, on the other hand they argue not so
19 much. Part of our case will involve that, Your
20 Honor. The Department witnesses, their
21 characterization of those, aside from not being
22 appropriate or taken out of context, Your
23 Honor, we would frankly contend that those are
24 relevant or pertinent to the issues in this
25 case. Largely the reasons again that we've



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1 briefed to the Court. And so with that, Your
2 Honor, that's what I have to say for an
3 opening, and I thank you for your time.

4 **THE COURT:** All right. Call your first witness.

5 **MR. RAZI:** Thank you, Your Honor. Amazon Services
6 calls Chris Poad.

7 **CHRISTOPHER POAD,** having been duly sworn, testifies
8 as follows:

9 **MR. POAD - DIRECT EXAMINATION BY MR. RAZI:**

10 Q: Good morning, sir.

11 A: Good morning.

12 Q: Could you please introduce your self to the
13 Court?

14 A: My name is Chris Poad, and I'm from Amazon.com.

15 Q: Are you familiar with how third parties sell
16 products on the Amazon.com website?

17 A: Yes.

18 Q: Are you familiar with the services offered by
19 Amazon Services to third party sellers?

20 A: Yes.

21 Q: Without going into all your relevant experience
22 just yet, would you please explain to the Court
23 how it is that your familiar with those subject
24 matters?

25 A: I've worked for Amazon for over ten years.



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1 I've had four roles and each of those roles
2 I've had responsibility for our marketplace
3 business in both the UK and in the U.S.

4 Q: And tell the Court about the specific roles
5 that you've held that inform your understanding
6 of third party sales on Amazon.com.

7 A: I started in 2009 in January. I had
8 responsibility for the video games category in
9 the UK which included responsibility for our
10 third party marketplace sellers. I met many of
11 those sellers, dozens of sellers in that
12 category. After 18 months I moved role and I
13 had responsibility for the marketplace business
14 in the UK. I managed a team that helped
15 sellers be successful meeting hundred of
16 sellers and having some responsibility for
17 drafting global policies and developing
18 products. In August 2015 I moved to the U.S.
19 with my family to Seattle and I have
20 responsibility for fulfillment via Amazon for
21 North America -- that's Canada, U.S. and
22 Mexico. Again helping sellers be successful
23 with that service. And then more recently,
24 nearly two years ago, I moved into my current
25 role where I again have responsibility for our



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1 marketplace business. This time for a new
2 service for business customers vis-a-vis to the
3 website for international marketplaces.

4 Q: And you had the opportunity in those positions
5 to interact with third party sellers?

6 A: Yes.

7 Q: How so?

8 A: Through those roles I've met likely hundreds of
9 sellers. I've presented at conferences to
10 thousands of sellers, in fact tens of thousands
11 of sellers. I've visited sellers at their
12 current facilities, I've spoken with many
13 sellers on the telephone, email and so on.

14 Q: Did you have experience prior to joining Amazon
15 in 2009 relevant to these subject matters?

16 A: Yes.

17 Q: Well describe your experience, your relevant
18 professional experience prior to 2009.

19 A: Prior to working for Amazon I was the head of
20 e-commerce for a retailer, a German company,
21 although I had responsibility for their UK
22 subsidiary and prior to that I worked for an
23 internet search engine. And my first job out
24 of college I worked for a consulting company.
25 Most of the projects were with internet



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1 companies so my whole career I've been, you
2 know, either the internet or e-commerce areas.

3 Q: All right. Let's change topics away from you
4 into Amazon. Are you familiar with Amazon's
5 history as a company?

6 A: Yes.

7 Q: When was the company founded?

8 A: In 1994.

9 Q: Do you have an understanding of the company's
10 business model, of Amazon's business model, at
11 the time it was founded in 1994?

12 A: Yes.

13 Q: What's your understanding?

14 A: The company was founded in Bellevue,
15 Washington. Originally it was a retailer of
16 books, of physical books, to customers on the
17 internet.

18 Q: And are you familiar with how the company's
19 business has changed over time?

20 A: Yes.

21 Q: Describe that for the Court.

22 A: After the initial launch in 1995 I think the
23 website actually launched and the company
24 expanded beyond books into other product
25 categories like DVD's, music, into electronics



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1 as a retailer and then subsequently launched
2 new businesses like the marketplace and more
3 recently other diversified businesses.

4 Q: Approximately when was the marketplace
5 launched?

6 A: The first version of the marketplace in the
7 2000.

8 Q: So at the time of the founding of the company
9 who was the seller of products on Amazon.com?

10 A: At the beginning of the company and up until
11 around 2000 Amazon.com was the retailer of
12 products on the Amazon website. The company
13 would buy products from suppliers, own the
14 inventory, set the price and sell to customers.

15 Q: Do Amazon-owned companies continue to sell
16 products on Amazon.com?

17 A: Yes.

18 Q: Are those the only companies that sell products
19 on Amazon.com?

20 A: No.

21 Q: Who are the other sellers?

22 A: As well as Amazon.com itself selling on the
23 Amazon websites worldwide and in the U.S. there
24 are many third party companies who list and
25 sell their products to customers on the Amazon



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1 website.

2 Q: Explain for the Court if you will why it is
3 that Amazon decided to invite third parties to
4 sell products on its website?

5 A: From the beginning there was the belief that
6 customers desire a small number of fundamental
7 things when shopping and particularly when
8 shopping online. Those would be broad product
9 selection, low prices, for products to be
10 available and in stock, and fast and
11 convenience delivery. And so fairly early on
12 in the history of the company and then in 2000,
13 Amazon took a decision to invite third party
14 companies to bring their products to the Amazon
15 website. There was the realization that if
16 Amazon was the only seller it would be very
17 difficult to offer what the customers defined
18 rather on the website a broad product selection
19 and so by inviting other companies to bring
20 their products, customers would be able to find
21 a broader selection of products more quickly.
22 In addition, by having multiple companies
23 selling on the website, those companies compete
24 with each other and over time that drives
25 prices down for customers, and then finally if



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1 there are more companies products it's more
2 likely that a particular product may be in
3 stock and available for delivery. And so those
4 were some of the reasons why a decision was
5 taken to invite other companies to list and
6 sell their products on the Amazon website.

7 Q: Today do third party sellers in fact compete
8 with Amazon-owned companies for the sale of a
9 particular product?

10 A: Yes, indeed. The vast majority of products
11 offered by different companies on the Amazon
12 website have multiple sellers offering those
13 products. And so in some cases Amazon is a
14 seller with actually the minority of products
15 where Amazon is a seller, but where that's true
16 Amazon competes with all the other third
17 parties on price and on availability for the
18 products for the customers' purchase.

19 Q: This marketplace that you've begun to describe,
20 are there other companies that provide similar
21 marketplaces for sellers to sell their
22 products?

23 A: Yes, there are.

24 Q: Okay. and how do you know that?

25 A: Part of my responsibility is being aware of



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1 competitors and competition and so through that
2 I'm aware of other providers and marketplaces.

3 Q: And what are some of the other marketplace
4 providers that you're familiar with?

5 A: There are many. The best known is probably
6 eBay. eBay operates a marketplace. To the
7 best of my knowledge eBay is not a seller in
8 its marketplace. Wayfair is another company
9 specializing in home wares and furniture. I
10 believe Wal-Mart fairly recently launched a
11 marketplace. They are a seller on their own
12 website but they also have third parties
13 selling on the Wal-Mart website as well.

14 **MR. GREEN:** Objection, Your Honor. I'm not sure if
15 it's foundation with respect to other entities
16 and what they do in their business models and
17 the like.

18 **THE COURT:** You're not familiar with the foundation?

19 **MR. GREEN:** I'm not sure if his foundation is to
20 testify as to Wal-Mart does, what eBay does and
21 the like so I object to that testimony.

22 **THE COURT:** Well. I don't even know what affect
23 that would have on this case anyway, so do you
24 wish to respond, Mr. Razi?

25 **MR. RAZI:** Sure. His foundation is as an executive



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1 at Amazon he's aware and makes it his business
2 to know what competitors and others are doing
3 and this is his life's work. He knows it
4 better than anybody.

5 **MR. GREEN:** But he knows that as an executive of
6 Amazon, Your Honor. So his expertise is what
7 Amazon does.

8 **THE COURT:** I'll allow you to cross-examine him on
9 that, but I overrule the objection.

10 **MR. GREEN:** Okay. Thank you, Your Honor.

11 **THE COURT:** I will tell both of you I'm going to
12 make my decisions based on the facts of Amazon
13 and the law in this case. I don't have any
14 concern about other people.

15 **MR. GREEN:** Thank you, Your Honor. We're obviously
16 going to have a lot of testimony and argument
17 as -- from Amazon as to third parties and
18 characterizing them as sellers obviously. I
19 don't want to object every time that word is
20 said, I don't think that would be appropriate.
21 But I just -- obviously that is the issue in
22 dispute and the Department would characterize
23 them as a seller for purposes of the tax law
24 even if Amazon's view is different. So I just
25 want to reassure you -- I don't agree with that



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1 characterization, but I won't object every time
2 the word is -- third party seller is uttered,
3 so.

4 **THE COURT:** Nor do I want you to object.

5 **MR. GREEN:** I had a feeling that would be
6 appreciated. Thank you, Your Honor.

7 **THE COURT:** All right. Proceed.

8 **MR. RAZI:** Thank you, Your Honor.

9 Q: Are you familiar with the specific steps that
10 a third party seller takes to sell their
11 products on Amazon.com?

12 A: Yes.

13 Q: Now you work at Amazon, how is it that your
14 familiar with the process that a third party
15 seller would follow to sell on the website?

16 A: I've been in many reviews about process to get
17 feedback on its ease of use. I am actually a
18 seller myself, although I haven't sold many
19 products, so I've been through that process.
20 And I've managed teams that help sellers launch
21 on the marketplace and guide them through that
22 process.

23 Q: Let -- take a brief step back -- which company
24 operates the marketplace?

25 A: Amazon Services, LLC.



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1 Q: What is Amazon Services, LLC?

2 A: It's a subsidiary of Amazon.com, Inc. It
3 operates the Amazon.com website and it offers
4 a set of services to third party sellers.

5 Q: How many employees does it have?

6 A: I believe about 1,100 employees.

7 Q: In general what are the types of things that
8 those employees do?

9 A: There are general manager roles, product
10 management teams. I know Amazon Services has
11 about 200 people in Phoenix, Arizona there and
12 software engineers who build the tools and
13 services that are offered to third party
14 sellers.

15 Q: Do you have an understanding of what Amazon
16 Services' relationship is with third party
17 sellers?

18 A: Yes.

19 Q: What's your understanding of that relationship?

20 A: Well Amazon Services offers services to third
21 party sellers. It's the contracting party,
22 along with another Amazon company, with third
23 party sellers when they become when they become
24 a seller on Amazon and through that
25 relationship.



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1 Q: Let's pause for a minute on the services. What
2 specific services does Amazon Services provide
3 to third party sellers?

4 A: Amazon Services offers tools to help sellers
5 list their products, to set up an account and
6 then list a product. That includes the ability
7 for sellers to create a product title and
8 description, to upload images and video, to
9 manage prices of their products. Amazon
10 Services also offers tools to enable sellers to
11 advertise and market their products on the
12 Amazon website, and Amazon Services also
13 operates Seller Central which is a website that
14 sellers use to manage their business.

15 Q: And we'll get into some of that when we look at
16 the exhibits. I want to turn to some other
17 Amazon subsidiaries for a moment just to
18 identify the players. Are there other Amazon
19 subsidiaries that provide services to third
20 party sellers?

21 A: Yes.

22 Q: What is, for instance, Amazon Payments, Inc.?

23 A: Amazon Payments, Inc. provides payment
24 processing services to third party sellers.

25 Q: Is the same company or a different company than



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1 Amazon Services, LLC?

2 A: It's a different company.

3 Q: Does it have its own employees?

4 A: Yes.

5 Q: And are those people -- the employees of Amazon
6 Payments, Inc. -- the same employees of Amazon
7 Services, LLC or are they different people?

8 A: They're different people.

9 Q: Okay. And do you know generally what
10 activities the employees of Amazon Payments,
11 Inc. engage in?

12 A: Yes.

13 Q: In general what are some of those areas?

14 A: Amazon Payments also has software engineers to
15 build the tools and the software to process
16 payments for third party sellers and they
17 manage the relationship with external financial
18 services companies and credit card acquirers
19 and other companies to enable the processing of
20 transactions for sellers.

21 Q: Tell the Court, please, what Amazon Fulfillment
22 Services, Inc. is?

23 A: It's a subsidiary of Amazon. It operates the
24 fulfillment centers -- Amazon's warehouses we
25 call them fulfillment centers in the United



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1 States -- and it also performs the tasks for a
2 service offered to sellers called Fulfillment
3 By Amazon.

4 Q: Last question on this topic, is Amazon
5 Fulfillment Services, Inc. the same company as
6 Amazon Services, LLC or a different company?

7 A: It's a different company.

8 Q: Back to third parties. Approximately how many
9 third party sellers are there today on
10 Amazon.com?

11 A: There about two and a half million active third
12 party sellers.

13 Q: Who can become a seller on Amazon.com?

14 A: Anyone can sign up and become a seller from
15 individuals to well-known large corporations.

16 Q: And I understand your testimony that anybody
17 can do it. Do you know who the third party
18 sellers actually are? In other words, do they
19 include that universe that you've described?

20 A: Could you restate the question, please?

21 Q: Sure. What kinds of companies actually do --
22 what kinds of sellers actually do --
23 participate as third party sellers on
24 Amazon.com?

25 A: There are individuals who are seeking an



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1 additional income stream, medium-sized
2 entrepreneurial companies, large well-known
3 companies for whom selling on the Amazon
4 website is a relatively small part of their
5 business and who also sell through many other
6 sales channels, their own website, they may
7 have physical stores, and so on.

8 Q: Are you aware of any third party sellers that
9 -- where the business model is to buy items
10 from one place and then turn around and sell
11 them on Amazon.com or another marketplace?

12 A: Yes.

13 Q: Are there third party sellers in contrast that
14 make their own products and then sell them on
15 Amazon.com or another marketplace?

16 A: Yes.

17 Q: And do you in fact know whether third party
18 sellers on Amazon.com also sell products on
19 other marketplaces?

20 A: Yes.

21 Q: Do you know whether third party sellers on
22 Amazon.com some of them also sell products on
23 their own website?

24 A: Yes.

25 Q: Yes there are such third party sellers?



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1 A: Yes, correct.

2 Q: Okay. How about physical stores? Are there
3 any third party sellers on Amazon.com that
4 you're aware of that also sell products the old
5 fashioned way in their own physical stores?

6 A: Yes.

7 Q: Can you provide the Court with any examples of
8 companies that people may be familiar with that
9 are third party sellers on Amazon.com.

10 A: Yes.

11 Q: What are those examples -- or what are some
12 examples?

13 A: Many well-known companies also sell on
14 Amazon.com. If I were to pick a category like
15 outerwear, Orvis, Eddie Bauer. Both of those
16 companies have their own websites and have
17 their own physical stores. They're also
18 sellers on the Amazon website. It's one
19 additional sales channel for their businesses.

20 Q: Is there a portion or portions of the
21 Amazon.com website where one can learn about
22 third party selling?

23 A: Yes, there are many areas. Yes.

24 Q: And just in general where is it on the website
25 that one can find information about third party



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1 selling?

2 A: Well on every product detail page, that's the
3 page where an individual product is shown to
4 customers. The majority of those pages have
5 third party sellers and each page will have
6 link to that seller's details. There's
7 information in customer help sections about
8 third party sellers. There's also a section on
9 the website called Amazon Store Fronts which
10 allows sellers to tell their stories, whether
11 their entrepreneurs or veteran-owned
12 businesses, and to showcase their products to
13 customers.

14 Q: And are you able to show the Court how it is
15 that one could look at for instance that Amazon
16 Store Fronts page?

17 A: Yes.

18 Q: We have the assistance, Your Honor, of Dave
19 Brooks at the computer over there, so from time
20 to time we may ask him to put something on the
21 screen without any objection. Is that okay?

22 MR. GREEN: No objection. At least none at this
23 stage.

24 MR. RAZI: Thank you.

25 Q: Do you have a monitor in front of you, Mr.



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1 Poad?

2 A: Yes, I do.

3 Q: And all of the -- do you know ---

4 **THE COURT:** Everybody does.

5 **MR. RAZI:** Thank you, Your Honor.

6 Q: What are you looking at there on the screen?

7 A: I'm looking at a browser that contains the
8 homepage of Amazon.com. I notice that nobody
9 has signed in to the website because I can see
10 Hello, Sign in, and I can recognize it knows
11 we're in Columbia, South Carolina.

12 Q: And if you wanted to get to that Amazon Store
13 Fronts page, or pages, that you described a
14 moment ago, how would you do that?

15 A: Links to that page appear all over the website
16 although they appear in a dynamic way. The
17 easiest way for demonstration perhaps would be
18 simply to type in Amazon Store Fronts in the
19 search box at the top of the page. But there
20 are links that one would find across the
21 website.

22 **MR. POAD:** And so, Mr. Brooks, if you click on that
23 link.

24 Q: And if we just scroll down the page can you
25 just generally describe for the Court what it



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1 is that depicted here? And we can go all the
2 way down the pages.

3 A: This page highlights some of the sellers on
4 Amazon marketplace on the website. There's
5 videos, there's stories and here are some
6 different categories of sellers. You can see
7 businesses with products aimed at families,
8 artisans who make sort of handcrafted products,
9 innovative products, women-owned businesses and
10 there are some other categories. These
11 categories change I believe over time.

12 Q: Okay. And without clicking through it all
13 right now let me just ask a general question,
14 the companies that are depicted here, are these
15 companies owned by Amazon or are they
16 independent?

17 A: No, they're independent companies who've chosen
18 to sell their products on the Amazon website.

19 Q: All right. Let's change topics to the specific
20 steps that a third party seller goes through to
21 list and sell an item on the website, okay?

22 A: Yes.

23 Q: Have you prepared any documents that help
24 depict that process?

25 A: Yes.



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1 Q: Tell the Court what you've prepared.

2 A: I went to the Amazon website. I signed out of
3 my own accounts and I went through the process
4 of creating a new seller account which I called
5 ChrisPoadTest. I took screen shots of each
6 step in that process and I put them into a
7 PowerPoint presentation for demonstration.

8 Q: Thank you. Let's show the witness Exhibit 126
9 please? And we have a hard copy for the Court
10 I think. May I approach, Your Honor?

11 **THE COURT:** Yeah.

12 **MS. FAIR:** Do you a copy for the court reporter?

13 **MR. RAZI:** We do. We have multiple.

14 **MS. FAIR:** Okay.

15 **MR. RAZI:** Okay. Can I have another copy for the
16 court reporter? We'll be on this for a while.
17 And, Your Honor, this was one of the Exhibits
18 that was admitted on Mr. Green's motion.

19 Q: Tell the Court was is Exhibit 126?

20 **(Hearing Exhibit Number 126 was introduced into the**
21 **record at this time.)**

22 A: This is a screen shot from my computer. It's
23 the landing page that prospective sellers would
24 arrive at having clicked on a link on any page
25 on the Amazon website or on other links around



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1 the website. It's the first page of the
2 process of creating a seller account.

3 Q: And when did you prepare these screen shots?

4 A: I believe it was prior tot he deposition I gave
5 in this case which was early November so I
6 think it would have been September or October
7 of last year.

8 Q: And even though they were created more recently
9 do the screen shots that we're going to walk
10 through here in general accurately depict the
11 process that a third party seller would have
12 went through in the first quarter of 2016 to
13 list a product for sale on Amazon.com?

14 A: Yes.

15 Q: Okay. How did you find the very first page,
16 and I apologize if you said this, I just want
17 it to be clear.

18 A: I clicked on a link on the homepage of
19 Amazon.com which I believe says, sell your
20 products.

21 Q: All right. So in other words that page that we
22 just had on the screen a moment ago, one can on
23 there and click on something that says sell
24 your products and they can get here?

25 A: Yes.



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1 Q: Now is this page generally available to anyone
2 on the internet?

3 A: Yes.

4 Q: I see on the first page there a quotation at
5 the top of the screen, and I'm not going to ask
6 you about the quotation, but there's a
7 reference to a company called Hot Chocolate
8 Design, do you see that?

9 A: Yes.

10 Q: Do you know what that is?

11 A: Yes.

12 Q: What is it?

13 A: It's the name of the seller who provided the
14 quote. Over 40 percent of our products come
15 from selling on Amazon and you can see behind
16 the picture some shoes. They actually design
17 and make unusual shoes like the ones you can
18 see here.

19 Q: Is that an Amazon-owned company or is that an
20 independent third party seller?

21 A: No, it's an independent third party seller
22 founded by the gentleman's whose name is on the
23 screen.

24 Q: Walk through the details but just in general
25 describe for the Court how it is that one goes



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1 from this page to becoming able to then list
2 and sell products on the website?

3 A: There are eight or nine screens to go through.
4 A prospective seller would click on the link in
5 the middle of the page that says, start
6 selling. The next page they would enter their
7 legal name, their own name if they're an
8 individual, the name of the company if it's a
9 company selling. They would agree to the
10 business solutions agreement which is the
11 contract between Amazon Services, LLC, Amazon
12 Payments, Inc. and the seller. They would
13 enter their address, some tax details. They
14 would enter details of payment card to pay fees
15 to Amazon Services for the services offered to
16 the seller. They would provide details of a
17 bank account so that the proceeds of their
18 sales could be disbursed into their account,
19 and then they would arrive in Seller Central
20 which is a website where you can start listing
21 products.

22 Q: And that process that you just described, is it
23 fair to summarize that as registering to become
24 a seller?

25 A: Yes.



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1 Q: Okay. And is that process in general depicted
2 on slides 2 through 8 of Exhibit 126?

3 A: Yes.

4 Q: What appears on slide pages 9 and 10 of the
5 Exhibit?

6 A: This is page 9 on the screen. Once registering
7 for an account and entering the details I
8 mentioned, the first page that the seller would
9 see would be this page which is the homepage if
10 you like of Sellers Central where sellers
11 manage their business. And given I just
12 created this account, it's a new seller. Most
13 of the values about the orders and sales are
14 zero.

15 Q: Very well.

16 **MR. RAZI:** Your Honor, may I approach just so the
17 witness has a hard copy now?

18 **THE COURT:** Sure.

19 Q: Mr. Poad, feel free to use either the screen or
20 the paper, whatever's easier for you in
21 following along. So you said that this page
22 that's on the screen, this is Sellers Central,
23 right?

24 A: Yes.

25 Q: And this is your account, your homepage in



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1 Sellers Central, is that right?

2 A: This is the page that all sellers would see
3 when they log in to Sellers Central and they
4 create and account. In this case, this is the
5 screen for my account, the new account I set up
6 in preparation of this document.

7 Q: Okay. On the right side of the page there's a
8 heading that says Sales Summary, do you see
9 that?

10 A: Yes, I do.

11 Q: Okay. Whose sales are reflected there?

12 A: These are the sales of the seller, so in this
13 case, ChrisPoadTest is the new account I just
14 created. The sales that I would have made
15 would be listed here.

16 Q: Okay. Is it fair to say you know that because
17 it's -- the sales are zero dollars? In other
18 words how is it that you know that the sales
19 number there is ChrisPoadTest and not the sales
20 of Amazon.com?

21 A: When I took this screen shot I was logged in as
22 the seller account I just created and therefore
23 this page would show my sales as a seller. And
24 also I should say I have not listed any
25 products at this state so that why I haven't



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1 sold anything yet.

2 Q: And by the way, does Sellers Central or the
3 registration pages on 2 through 8 or anything
4 associated with this process use the term third
5 party supplier or anything like that?

6 A: No.

7 Q: Why not?

8 A: The companies or individuals selling on the
9 Amazon website are not suppliers in the sense
10 that they're supply other companies. They're
11 selling products to end consumers. So the word
12 supplier normally means a supplier somewhere in
13 a supply chain and these companies are selling
14 to consumers.

15 Q: All right. So we've gotten to the point where
16 you're registered as a third party seller.
17 Does Exhibit 126 also shoe the process by which
18 one can list a product for sale?

19 A: Yes, it does.

20 Q: And where does that process begin to appear in
21 the Exhibit?

22 A: I clicked on the button at the bottom of page
23 9 that says, Add a Product, and so that will be
24 the first stage of listing a new product.

25 Q: Okay. And what happens after that?



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1 A: The next stage would be to identify the
2 category in which the product should be listed.

3 Q: And does that appear on page 11 of the Exhibit?

4 A: Yes, it does.

5 **MR. RAZI:** Mr. Brooks, can you blow that up a little
6 bit?

7 Q: Why is it that the website asks a third party
8 seller to classify their product in one
9 category or another?

10 A: Sometimes customers may not know exactly what
11 they're looking for and so having products
12 classified by sellers makes it easier for
13 customers to find the products that sellers are
14 offering.

15 Q: And is this information, this category
16 information, something that is called upon when
17 a customer searches for a product on the
18 website?

19 A: Yes.

20 Q: What appears on slide 12, page 12?

21 A: I decided I would list and try to sell a
22 product, and I tried to sell my wallet. This
23 is my wallet. Simply because it was just close
24 to hand. So I typed in the word wallet and
25 likely categories popped up underneath and I



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1 selected the appropriate category which I think
2 was men's accessories/wallets.

3 Q: Uh-huh. And to be clear -- I think this is
4 clear -- when you did this for demonstration
5 purposes this attempted sale of the wallet,
6 correct?

7 A: Yes.

8 Q: All right. After the category is entered, the
9 product category is entered, what happens next?

10 A: The next stage is to create the product detail
11 page of the listing, and so on the next page --
12 on page 13 -- I typed in as the seller the
13 title of the product. I typed in the bar code
14 -- this is the manufacturers bar code or
15 Universal Product Code, UPC. The brand name is
16 Smythson which is a British manufacturer. The
17 color and some other details about the product
18 -- leather, the size and so on. There are many
19 fields that could be filled in by the seller to
20 describe that product.

21 Q: Is that process that you described the process
22 that all third party sellers follow in listing
23 a product for sale on the website?

24 A: Yes.

25 Q: After the third party seller has categorized



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1 and provided the basic identifying details
2 about the product what's the next step that
3 they go through?

4 A: The next step is to provide the product image
5 or multiple images or videos in fact.

6 Q: And is that also reflected in Exhibit 126?

7 A: Yes.

8 Q: Where is that?

9 A: It's on page -- starts on page 15.

10 Q: And did you in fact upload an image in this
11 example?

12 A: Yes.

13 Q: Okay. Let's go to the next page. All right.
14 So now you've said you're going to sell a
15 wallet, you've described it, you've provided an
16 image or images of it. What's the next step in
17 selling the product?

18 A: There are a few more things to do before the
19 product can be listed. The most important is
20 to set the price that the seller would want to
21 sell the product for. To indicate how many
22 units are available -- in my case just one --
23 and then choose how the product would be
24 fulfilled to the customer.

25 Q: Does Exhibit 126 depict the process of setting



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1 the price?

2 A: Yes.

3 Q: Where is that reflected?

4 A: Page 19 includes both the field for the price
5 and the quantity available and there's some
6 other options there for sellers.

7 Q: Okay. And in this example you set the price,
8 right?

9 A: Yes, I did.

10 Q: And in other third party sale transactions who
11 set the price, the third party seller or
12 somebody else?

13 A: In all cases the products offered by third
14 parties have their prices set by the seller.

15 Q: Can third party sellers change the price at any
16 point?

17 A: Yes.

18 Q: What are the limitations if any on that?

19 A: The seller can set any price they choose. They
20 can change that price as frequently as they
21 choose and many sellers in fact do change their
22 price multiple times in a day as the compete
23 with other sellers on their products.

24 Q: Is that data that the company -- or that you
25 and others at Amazon are aware of -- this is



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1 how frequently third party sellers adjust their
2 prices?

3 A: Yes.

4 Q: And in general what do you know about that
5 topic?

6 A: It varies significantly. Where there are
7 multiple sellers offering the same product
8 frequently sellers will change their price at
9 least once a day. Some sellers I know change
10 their price on an hourly basis as they compete
11 with other sellers. Last year I know that tens
12 of billions of price changes were made across
13 the different sellers selling on the Amazon
14 website.

15 Q: In this hypothetical transaction for
16 demonstrative purposes did you try to change
17 the price?

18 A: Yes, I did.

19 Q: And is that reflected in the Exhibit?

20 A: Yes, it is.

21 Q: And is on page 26?

22 A: Yes, that's right. On page 23 actually you can
23 see the product is live for \$100. This is live
24 on the website. This was actually for sale for
25 real. Nobody bought the product thankfully.



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1 And then on page 26 I went back into Sellers
2 Central, I changed the price to \$200. Then on
3 page 27 you can see the price has been updated
4 on the website to \$200. It took a few seconds
5 for that to happen.

6 Q: I want to sort of define a couple of terms that
7 you use. One is product detail page. What is
8 the product detail page in the context of
9 Amazon.com the website?

10 A: Every unique product has one page where
11 customers can read about the product and see an
12 image and buy the product. In this case this
13 is the product detail case for this product, my
14 wallet. On that product detail page there are
15 often -- in fact usually -- multiple sellers
16 offering that product. In this case given
17 there's only one of this, I'm the only seller.

18 Q: And are you familiar with something called the
19 offer listing page?

20 A: Yes.

21 Q: What is that?

22 A: The offer listing page is a page where
23 customers can see all the offers from all the
24 different sellers for a given product.

25 Q: And just for the record, which page is the



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1 product detail page in Exhibit 126?

2 A: The product detail page is on page 27 and page
3 23.

4 Q: And to be clear in this example that you've
5 described now, you didn't -- you weren't able
6 to go through this example -- well let me
7 withdraw that. Were you able to go through
8 these steps that you've just described because
9 you have some special access because you're
10 affiliated with Amazon?

11 A: No, I had logged out of my Amazon account, my
12 personal Amazon account prior to creating this
13 new account and I created it on the public
14 website that anybody can access.

15 Q: Okay. Just like any other third party seller
16 would do?

17 A: Correct.

18 **MR. RAZI:** We can take the Exhibit down.

19 Q: Some summary questions now about that process.
20 Who decides whether a third party seller will
21 offer products for sale on Amazon.com?

22 A: The third party seller determines whether they
23 want to sell products on the Amazon website.

24 Q: Who decides which products the third party
25 seller will offer for sale?



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1 A: The third party seller determines which
2 products they either source them from
3 suppliers or they manufacture them themselves
4 and pick which products they would like to
5 offer on the Amazon website.

6 Q: Who decides how many units -- or how many of a
7 particular item -- a third party seller is
8 going to offer for sale?

9 A: The third party seller.

10 Q: Who sets the price for the products offered for
11 sale by the third party seller?

12 A: The third party seller.

13 Q: Now to be clear, are there any rules at all
14 related to sales on Amazon.com?

15 A: Yes.

16 Q: Why?

17 A: As an operator of a marketplace it's necessary
18 to have some limited rules and policies to
19 create good customer experiences and to make
20 sure that there is a fair playing field between
21 all the different sellers competing on the
22 marketplace.

23 Q: Is there a rule, for instance, about what means
24 of payment can be used to buy something on
25 Amazon.com?



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1 A: There is. Customers can use most payment
2 cards, credit cards, debit cards, but not all
3 payment methods are supported.

4 Q: For instance is cash -- can someone buy
5 something for cash on Amazon.com?

6 A: No.

7 Q: Why not?

8 A: Most customers, I believe, have access to a
9 credit card or a debit card or even a prepaid
10 card and there are security logistics,
11 challenges with cash transactions and it's
12 simply something that isn't supported
13 currently.

14 Q: Uh-huh. Are there rules or guidelines about
15 communications between third party sellers and
16 customers?

17 A: Yes.

18 Q: How come?

19 A: One of the roles of a marketplace operation is
20 to create a safe environment and so there are
21 some policies around communication between the
22 sellers and customers. For example,
23 communication about the product typically would
24 go through a tool called buyer-seller
25 messaging, and it's simply a way to ensure the



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1 safety of both customers and sellers.

2 Q: In your experience have you ever encountered a
3 situation in which any of those rules around
4 communications were presented to you as
5 inhibitant or obstructing a third party
6 seller's ability to sell their product?

7 A: No, I've never had a seller -- or for that
8 matter a customer have a concern that using
9 buyer-seller messaging tool is a limitation.
10 In fact I think it's -- sellers told me that
11 it's very useful.

12 **MR. GREEN:** Objection. We're getting into a little
13 hearsay here.

14 **THE COURT:** Sustained. That one -- unless you ...

15 Q: Are there any rules at all or restrictions
16 about the content of the communications that
17 can be made on buyer-seller messaging?

18 A: Yes, there are some rules.

19 Q: And what do you have in mind?

20 A: One rule would be -- while generally there are
21 no restrictions in the messaging between
22 customers and sellers, sellers are not
23 permitted to ask customers to send payments
24 outside of Amazon Payments, and again that's a
25 safety issue to make sure that, you know, both



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1 sellers and customers are kept safe.

2 Q: And there is a -- the BSA does address pricing
3 of third party seller products, is that right?

4 A: Yes.

5 Q: And what's the rule in that context?

6 A: While sellers can set any price they want there
7 is a requirement that where sellers offer their
8 products across multiple sales channels --
9 perhaps eBay or their own website -- that they
10 offer their best price on the Amazon website.
11 That's really the only requirement I can think
12 of as regards pricing.

13 Q: And have you ever encountered a situation in
14 which that policy inhibited, or you learned
15 that it inhibited or obstructed, in any way a
16 third party seller's ability to sell their
17 product?

18 A: No, I haven't. Were sellers to offer for an
19 unfair price it's like they wouldn't sell
20 anything anyway so it's never been raised with
21 me as a limitation.

22 Q: Let's turn now to -- and we'll come back to
23 some of those areas -- but let's change topics
24 for the moment to the customers perspective on
25 the website, okay?



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1 A: Yes.

2 Q: Are you familiar with what visitors to
3 Amazon.com see and do when shopping for an
4 item?

5 A: Yes.

6 Q: And are you able to demonstrate for the Court
7 how it is that a customer would search for and
8 purchase a particular product on Amazon.com?

9 A: Yes.

10 Q: Are you yourself a customer?

11 A: Yes.

12 Q: And is there a recent order or orders that
13 you've made that we can use perhaps as an
14 example to show that process?

15 A: Yes.

16 Q: What do you suggest?

17 A: Well, if Mr. Brooks could call up my account.

18 **MR. POAD:** So, Mr. Brooks, if you'd sign into my
19 account. I trusted you with my password
20 temporarily.

21 A: This is the live -- this is actually my account
22 -- this is the live website. That I'm now
23 logged in you can see it says, Hello, Chris, it
24 recognizes me as a customer. If you click on
25 orders you'll be able to see my recent orders.



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1 Q: Okay. So which order should we use -- would
2 you like to use as an example.

3 A: So I think the best example would be whatever
4 last seller so that I have a young daughter so
5 these are some products for her, and if we
6 scroll down -- perhaps this one here. So then
7 this is a sneaker my wife bought and it got to
8 be returned and so we can click on that -- on
9 that product.

10 Q: All right. But let's go back. Let's assume we
11 were shopping for these Asics Women's Gel
12 Nimbus 20 running shoes. How would one go
13 about finding this. We sort of just backed
14 into it through your orders.

15 A: Right.

16 Q: Let's go to the website fresh and say, hey, I
17 want to find these Asics shoes. What do you
18 do?

19 A: Typically a customer would search for that
20 product. Let's say Mr. Brooks were to type in
21 Asics women's running shoe we should be able to
22 find it.

23 Q: To be clear now we're outside of your
24 transactions. We're just search around on
25 Amazon.com, right?



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1 A: That's correct.

2 Q: And we're looking at a number of Asics women's
3 running shoes, right?

4 A: Yes. And so if we could scroll down, I think
5 it was Nimbus 20 was the shoe so I'm trying to
6 find it now. No, I see it there now.

7 Q: All right.

8 A: And I think it was in gray, the first color.
9 I think that was the same.

10 Q: All right. So now tell the Court what we're
11 looking at here on the website.

12 A: So if Mr. Brooks could perhaps select a size.
13 I think it was 7.5, medium I think. Okay. So
14 this is the product detail page for this
15 running shoe. You can see the image, the
16 product title, description and so on.

17 Q: Okay. And can you tell whether there are other
18 sellers offering this product for sale?

19 A: I can. If we scroll down a little on the
20 right-hand side you can see other sellers on
21 Amazon. These are three other sellers offering
22 the same product. On the left there is a link
23 that says new brackets 21 from \$95 in the
24 middle of the page. And that would take us to
25 all the different sellers offering this running



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1 shoe.

2 **MR. RAZI:** Mr. Brooks, go to that link if you will.

3 Q: All right. Mr. Brooks has clicked on the other
4 sellers listing this product or other offers
5 and what now appears on the page?

6 A: This is the offer listing page. Here we can
7 see all the different sellers offering this
8 individual product.

9 Q: How many sellers are there?

10 A: There are -- I think it was 21. Perhaps you
11 would scroll up there, sir. It should say
12 somewhere and can't see it right now but I
13 think there were 21 listed. So if we scroll
14 down there are three pages of sellers so if we
15 can go to maybe the second page just to see
16 those. And so ---

17 Q: Are the -- are the sellers identified, Mr.
18 Poad?

19 A: Yes, they are.

20 Q: How are they identified?

21 A: For each seller of this product, this gray
22 running shoe is size 7.5, you can see the name
23 of the seller in the column marked seller
24 information. The first seller on this page,
25 which I think was the second page, is Back



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1 Country, the second is Roadrunner Sports and so
2 on. And you can see the details of each
3 seller's offer in each line of this list.

4 Q: Okay. I notice it says seller information and
5 no supplier information, right?

6 A: Right.

7 Q: And why is that?

8 A: These are sellers of this product to customers,
9 each individual sellers.

10 Q: Let's talk for a minute about the price. It
11 appears that for this exact same pair of shoes
12 there's 21 different offers and a number of
13 different prices offered for the same shoes, is
14 that right?

15 A: Yes, that's right.

16 Q: Well how could that be?

17 A: Each seller independently sets their own price
18 for this product. And as I said before, they
19 -- you change that price as they compete with
20 each other. Indeed this order, which I think
21 is ranked by price, would change. If we looked
22 in a few hours it may be different as sellers
23 change their price. Each seller has a
24 different price and if there was just one
25 seller then it would be the same price but



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1 there are different prices so Back Country
2 here, \$119, Roadrunner Sports, which I think is
3 a -- I've heard of them -- they're a physical
4 store, I think they have quite a well-known
5 company -- is a little more expensive. There
6 also using the fulfillment by Amazon service.
7 These different companies have different
8 prices, also different deliver promises and so
9 customers can choose from which seller they
10 would like to buy the product based on price,
11 availability, fulfillment and the reputation of
12 the seller.

13 Q: If Amazon were the seller for all these
14 different offers would they -- would Amazon
15 have different prices for each of the different
16 offers?

17 A: No. If there was just one seller, Amazon was
18 the seller, just the one seller, then there'd
19 just be one price.

20 Q: What about -- and let's take just a little step
21 back -- fulfillment. Tell the Court your
22 understanding of fulfillment because that's the
23 term that you use I know. What is it?

24 A: Fulfillment means the delivery of a product to
25 a customer.



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1 Q: Okay. And do these 21 different offers for
2 this product include different ways of
3 fulfilling the product to the customer?

4 A: Yes.

5 Q: What are some of the differences that are
6 reflected in these offers?

7 A: The first seller, Back Country, is fulfilling
8 this product to the customer through, likely
9 through a third party carrier.

10 Q: What do you mean by a third party carrier?

11 A: I mean the U.S. Postal Service or Fedex or UPS
12 or the many carriers that exist. Likely from
13 either their own facility, their own warehouse
14 or a third party warehouse that they are paying
15 storage for. They are promising to deliver
16 this by February the 6th to my address in
17 Seattle. The second seller, Roadrunner Sports,
18 they're using an optional service called
19 Fulfillment by Amazon which is one of the
20 services offered to sellers. So is the second
21 seller, Apple Tree, and then Rev Up Sports, are
22 not using that service, they're fulfilling with
23 their own carrier and they're promising a
24 deliver -- a later delivery of between the 12th
25 and 15th of February. They're all different.



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1 Q: Okay. And why is it that the shipping terms of
2 the offer are different in many cases?

3 A: The shipping terms are set by the seller and
4 the seller can choose to fulfill products
5 themselves directly with their own
6 relationships with carriers to the customer.
7 Optionally they can use Fulfillment by Amazon
8 and if they're fulfilling themselves they would
9 offer different times -- time of delivery based
10 on their own capability delivering products.

11 Q: Let's say the customer was interested in the
12 offer by Roadrunner Sports and wanted to learn
13 though before buying it, you know, who
14 Roadrunner Sports is. Is there anything they
15 can find out on the website?

16 A: Yes, with this page under each seller name
17 there are stars. Those are ratings from
18 customers of the seller, not the product but
19 the seller and so they can see that they've got
20 4 and a half stars, 61,000 ratings over the
21 past 12 months. But they could also click on
22 the name of the seller.

23 **MR. POAD:** So, Mr. Brooks, if you click on the name
24 of the seller.

25 A: this is the Store Front if you like of



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1 Roadrunner Sports. The customer can read about
2 this company. They say they're the world's
3 largest running and walking store. There's
4 some more details about the guaranty that the
5 seller chooses to offer their customers and
6 they contact. They can read reviews of the
7 seller. They can contact the seller by asking
8 a question or by calling the seller on the
9 number that the seller's provided.

10 Q: Let's pause on -- because I think it's clear
11 how one can read about Roadrunner Sports and
12 learn about it in that way -- but let's pause
13 on this question of communication. Tell the
14 Court how it is that one could go from this
15 page that we're looking at to actually
16 communication with Roadrunner Sports?

17 A: Well they could just call them. It's a -- it
18 looks like a free phone number here.

19 Q: Okay. Well it may sound obvious but if you
20 call that number are you calling Amazon or are
21 you calling Roadrunner Sports?

22 A: No, you're calling Roadrunner Sports. That's
23 the number that they've entered in Sellers
24 Central as their contact number for customers,
25 no Amazon.



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1 Q: Okay. And is there any restriction at all on
2 a customer dialing that phone number for
3 Roadrunner Sports and talking with them on the
4 phone about their products?

5 A: No.

6 Q: I see there's a box above that that says, ask
7 a question, right? Do you see that?

8 A: Yes.

9 Q: And it doesn't say have a question for Amazon
10 above that, it says have a question for
11 Roadrunner Sports, right?

12 A: Yes.

13 Q: Okay. And if you click on that box can you ask
14 a question?

15 A: Yes. The customer can type the question and
16 then it's -- can be read by Roadrunner Sports
17 and then that seller can respond to the
18 customer's question.

19 Q: Okay. And what is that feature that we're
20 looking at there, that ask a question box? How
21 -- what -- is there a term for that?

22 A: Yes, it's a tool provided by Amazon Services
23 called buyer-seller messaging.

24 Q: Okay. And in general how does buyer-seller
25 messaging work?



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1 A: Customers can ask sellers a question either
2 prior to placing the order or subsequently
3 having placed an order with a seller and those
4 messages are available to the seller and the
5 seller can respond and the customer will
6 receive a notification when they respond.

7 Q: Uh-huh. Is it difficult to ask a question
8 using buyer-seller messaging?

9 A: No.

10 Q: What -- just tell the Court what would be
11 required to do that?

12 A: The customer would have to click on this button
13 and type that question and press send.

14 Q: Anything else?

15 A: No, I don't think so.

16 Q: Okay. And that's available to anyone in the
17 world that's on the internet on this page,
18 right?

19 A: Correct.

20 Q: I notice on the screen here there's feedback
21 and then there's a bunch of stars listed and
22 some other statements which we won't get into
23 the statements but there's some other
24 information on the page, do you see that?

25 A: Yes, I do.



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1 Q: Okay. Now what is -- you alluded to this, but
2 what is the feedback that's reflected there?
3 Who's providing the feedback about whom?

4 A: Customers are providing feedback about
5 Roadrunner Sports, the seller, based on their
6 experience of buying a product from that
7 company.

8 Q: Okay.

9 **MR. RAZI:** Let's go back to the offer listing page
10 if we can, Mr. Brooks.

11 Q: And do you see next to each seller there's --
12 there are various numbers of stars?

13 A: Yes.

14 Q: Okay. Is there anything you can tell about
15 those stars -- and if we scroll down all the
16 way -- that suggest to you that customers are
17 reviewing the seller, not the product?

18 A: Yes. I mean, the rating is under the name of
19 the seller. When customers are invited to
20 provide feedback it's in the context of the
21 seller rather than the product. Yeah, that's
22 it.

23 Q: Okay. And do customers in fact as it appears
24 from the website provide ratings of these
25 sellers?



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1 A: Yes, they do. Many of these sellers as you can
2 see have thousands of ratings in the past 12
3 months.

4 Q: We're just looking of course here at one
5 product detail page and one offer listing page.
6 Are there pages like this about literally every
7 product that's listed for sale on the website?

8 A: Yes. Every product has a product detail page
9 and an offer listing page where customers can
10 see all the different sellers selling each
11 product. And as I explained, the list of
12 sellers and the prices change all of the time.
13 The sellers are competing with each other. The
14 order of sellers will change, the prices will
15 change. Roadrunner Sports might be on page 1
16 instead of page 2 because they've chosen to
17 drop their price. And so if there was -- if
18 there was just one seller that page wouldn't
19 even be required because there would just be
20 one price and one delivery promise, but given
21 for this product there are over 21 different
22 sellers and for the vast majority of products
23 on the Amazon website there are multiple
24 sellers. This is how customers choose which
25 seller they want to buy from for each product



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1 on the website.

2 Q: The offer listing page, does Amazon track
3 whether in fact customers visit the offer
4 listing page?

5 A: Yes.

6 Q: And do customers visit that?

7 A: Yes.

8 Q: How frequently?

9 A: I looked at the period in question which I
10 believe is the first quarter of 2016 and then
11 subsequent quarters. Most customers on the
12 Amazon website visited the offer listing page.

13 Q: Let's take the offer listing page sort of as a
14 whole and take a step back. How does this page
15 square in your view with the suggestion that
16 Amazon Services, LLC is the seller of all these
17 21 different offers for this product?

18 A: Well it's just now how the business works. The
19 whole idea of the marketplace is to bring
20 different sellers together to create price
21 competition and to give customers choice. And
22 so, I mean, clearly for this sneaker you can
23 see that there are different sellers, different
24 companies all competing with each other with
25 different prices that change as they change



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1 their prices. And so if there were just one
2 seller there would just be one price. There
3 wouldn't be multiple prices and multiple
4 shipping times and multiple ratings and
5 different phone numbers and different
6 feedbacks. So that's not how the business
7 works. The whole idea behind it -- this is
8 actually a great demonstration of the whole
9 concept of the business. This dynamic
10 competition between sellers on every product
11 all the time in real time drives prices down,
12 broadens selection and if there were just one
13 seller none of that would exist and it's not
14 how the business works.

15 Q: You mentioned earlier in your testimony that
16 there are circumstances in which among these
17 multiple sellers are Amazon-owned companies,
18 right?

19 A: Yes, correct.

20 Q: Okay. And in fact in the case of these shoes
21 that we're looking at, are there any Amazon
22 companies among the 21 that are listed?

23 A: There are.

24 Q: And if you need to look feel free to.

25 A: Well this has changed since I looked at this



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1 before so if we were to go back to page 1.

2 **MR. RAZI:** All right just -- yeah, just go over
3 there.

4 Q: And just scroll through them and tell us of the
5 names.

6 A: Right.

7 Q: Which if any are Amazon companies?

8 A: So these are independent companies of Amazon
9 with the exception of one, Zappos Retail is a
10 subsidiary of Amazon. It was a company that
11 was acquired by Amazon quite a few years ago.
12 And so Zappos Retail is a ---

13 Q: And what's the business of Zappos Retain, Inc.
14 just for the record?

15 A: They're a retailer of shoes.

16 Q: Okay. All right.

17 **MR. RAZI:** Keep going. Scroll down the rest of
18 them.

19 A: I didn't see any other Amazon companies selling
20 this particular shoe in this color.

21 Q: Okay.

22 **MR. RAZI:** Mr. Brooks, can you go to the top of this
23 page, just scroll up.

24 Q: I noticed that there are a number of companies
25 that offer a less expensive price than Zappos



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1 Retail, do you see that?

2 A: Yes.

3 Q: Is there any restriction on competing with an
4 Amazon-owned company on price or anything else?

5 A: No. In this case Zappos is a seller. In many
6 other cases we would be able to apply into an
7 Amazon.com itself as a seller. There's no
8 restriction on offering a lower price than
9 Amazon and if the seller does then they deserve
10 to get the customer's business.

11 Q: All right. Let's move forward. If a customer
12 wants to purchase the shoes, let's say from
13 Roadrunner Sports, tell the Court they would
14 have to do to do that.

15 A: They would click on Add to Cart, I think
16 they're on page 2.

17 Q: And I just picked that one at random so if you
18 want to pick another feel free to do that.

19 A: No, that's fine. Click on add to cart and that
20 product will go into my shopping cart -- the
21 website maintains a virtual cart so it's
22 things that the customer is interested in
23 buying. And then if you click on proceed to
24 checkout that's the beginning of completing
25 this order.



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1 Q: And I noticed that we're logged in as you in
2 this circumstance?

3 A: Yes, this is for real, yeah.

4 Q: Okay. And I noticed that there's a -- an
5 estimated tax to be collected listed there, do
6 you see that?

7 A: I do, yes, in the order summary section.

8 Q: Yeah. Do you know why that is?

9 A: I do. I'm a resident of Washington State. I
10 know that Washington has enacted legislation
11 requiring marketplace facilitators to collect
12 sales tax on behalf of or for -- for sellers.
13 And so I believe that that's Washington State
14 sales tax being collected from me for the sum.

15 **MR. RAZI:** We can take the website down for now.

16 Q: Back to fulfillment, and I -- some of this has
17 been alluded to but I just want to make sure
18 it's -- it is absolutely clear. How is it that
19 in 2016 third party sellers got their products
20 to customers?

21 A: Third party sellers are responsible for
22 delivering the products to customers. They
23 have a number of choices. They can either --
24 some sellers have their own delivery
25 capabilities, not many. Many sellers will use



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1 carriers like, as I said before, USPS, Fedex,
2 UPS. And then some sellers -- use a similar
3 service to the party service is available
4 called Fulfillment by Amazon which is an
5 optional service available to sellers.

6 Q: Who decides how it is that the third party
7 sellers orders are fulfilled?

8 A: The seller decides. They can do that for each
9 individual product. They don't have to use the
10 same fulfillment method for every product, and
11 they can change the fulfillment as they like.

12 Q: Okay. And I don't want to necessarily go back
13 and do this now with the Exhibit, but if we
14 went back and looked at Exhibit 126 -- your
15 screen shots -- would we find information in
16 there about fulfillment?

17 A: Yes. There are menus and links to allow the
18 seller -- in fact I think there's some pages
19 where the seller goes through the process of
20 using FBA, there's an option. The default is
21 the sellers to fulfill products themselves.

22 Q: I'm sorry, what is the default mode of
23 fulfillment?

24 A: To fulfill through a carrier that they're --
25 the seller has independently contracted with.



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1 FBA is an option -- Fulfillment By Amazon --
2 I'm sorry, we abbreviate to FBA -- is an option
3 that sellers can choose if they want.

4 Q: Okay. So that -- it sounds like that election
5 is made at the outset of registration as a
6 seller, is that right?

7 A: Yes, it is, but it's also available at any time
8 in the future. Sellers can use that service
9 for any or some or all or none of their
10 products.

11 Q: And is that an election that's made on a
12 product-by-product basis or a blanket basis?

13 A: From the sellers I've spoken to -- the many
14 hundreds of sellers that I've spoken to -- it
15 varies. Some sellers just choose to use one
16 method for everything, keep it simple. Some
17 sellers do an economic analysis and discover
18 that different fulfillment methods make more
19 sense for them and choose by product.

20 Q: Okay. Let's start with the situation in which
21 FBA is not involved, okay? That is the
22 situation in which the seller is fulfilling the
23 order itself as you say, are you with me?

24 A: Yes.

25 Q: Okay. In that circumstance how is it that --



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1 well take it back -- in that circumstance does
2 Amazon Services or any Amazon company ever
3 obtain the product?

4 A: No.

5 Q: Does it ever obtain possession, custody,
6 anything relating to the product?

7 A: I'm not sure what the word custody means, but
8 if it just means having it in one's hands, no.

9 Q: Okay. And who is it that -- how is it that the
10 product transfers in the situation in which a
11 seller is fulfilling its orders?

12 A: Well when the customer buys the product from
13 the seller, the seller will ship the product to
14 the customer and they'll, you know, transfer
15 ownership and possession of the product to the
16 customer. Now of course there's an
17 intermediary, a carrier or storage company and
18 a carrier in some cases ---

19 Q: Uh-huh.

20 A: --- but they would have responsibility for
21 getting that product to the customer on time.

22 Q: And in that scenario do you have an
23 understanding based on your experience in the
24 business of how it is that title transfer to
25 the product. Let's take for instance your



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1 sneakers that we just looked at.

2 A: Yes, my signing a title to product is -- and in
3 just plain English I think -- is ownership of
4 the product, and title transfers from the
5 seller to the customer at the point of
6 shipment.

7 Q: Okay. And is that ---

8 A: Selling the product.

9 Q: --- you mentioned that some sellers actually
10 themselves deliver the product to customers, is
11 that true?

12 A: Some do. Some have their own logistics
13 capability.

14 Q: Okay. So in that circumstance obviously the
15 product's being transferred directly from the
16 seller to the customer, right?

17 A: Yes.

18 Q: Okay. But what about in the situation in which
19 the seller uses a third party carrier like UPS
20 or the postal service or somebody like that, is
21 your explanation of how -- is your
22 understanding of how the title transfers the
23 same in that circumstance?

24 A: Yes. Title transfers to the customer when the
25 order's been placed and shipment's been



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1 created. Federal Express might show up with a
2 truck and physically deliver the product, but
3 the ownership of the product transfers to the
4 customer at ship generation.

5 **MR. GREEN:** Your Honor, he can obviously testify to
6 his understanding I think in the factual
7 matter, but we don't agree -- there's a legal
8 matter as to the title transfer and I just want
9 to lodge that objection for the record.

10 **THE COURT:** Well when you say you're lodging for the
11 record ---

12 **MR. GREEN:** Yes.

13 **THE COURT:** --- are you objecting to what he just
14 testified or is this ---

15 **MR. GREEN:** I am objecting ---

16 **THE COURT:** --- are you going to make it on purpose?

17 **MR. GREEN:** --- to the extent that he is trying to
18 testify as a legal matter as to when title
19 transfer, I object to that. If he is
20 testifying to sort of his view as to how things
21 were obviously I object to it but I understand
22 as a record matter the Court may wish to hear
23 his views on that subject.

24 **THE COURT:** Mr. Razi?

25 **MR. RAZI:** Yeah, we're not asking Mr. Poad to



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1 testify about the law, we're asking him to
2 testify about his understanding as a business
3 man about how these transactions work.

4 **THE COURT:** All right. So I will presume from now
5 on when he testifies regarding title his is not
6 making an affirmation about his views on the
7 law.

8 **MR. RAZI:** That is certainly true, Your Honor.

9 **MR. GREEN:** Thank you, Your Honor.

10 **THE COURT:** Okay. Okay. Caveat. We can proceed.

11 Q: We mentioned it a couple times but can you just
12 explain for the Court what is Fulfillment by
13 Amazon?

14 A: Fulfillment by Amazon is an optional service
15 provided by Amazon Services and operated by
16 another company, another entity of Amazon, and
17 it provides an option to store and deliver
18 products for sellers. In terms of how it
19 works, the seller would send their products to
20 an Amazon warehouse, they will be stored for
21 the seller and when a customer buys that
22 product from the seller an Amazon associate
23 would pick that product and Amazon, for the
24 seller, would deliver -- Amazon Fulfillment
25 Services I should say -- would deliver that



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1 product to the end customer.

2 Q: Are there any products of all the products on
3 Amazon.com are there any that a seller is
4 required to use Fulfillment by Amazon?

5 A: No.

6 Q: Do third party sellers who use the FBA service
7 relinquish control over their products after
8 they are sent to a fulfillment center?

9 A: No.

10 Q: Why do you say that?

11 A: Sellers still own the product. They can remove
12 the product at any time back to their own
13 facilities. They can have the product destroy
14 if it's of no value. They can of course still
15 change the price of the product at any time.
16 They can take the product off sale even if it's
17 being stored in an Amazon warehouse. They can
18 still change the product detail pages, we saw
19 this so that's why I gave an answer.

20 Q: Does Amazon Fulfillment Services keep track of
21 a particular third party seller's products
22 after they're sent to a fulfillment center?

23 A: Yes.

24 Q: You know, for instance if I listed those Asics
25 shoes that we looked at as a seller and I sent



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1 a couple hundred pairs of those to a
2 fulfillment center describe for the Court how
3 it is that Amazon Fulfillment Services would
4 keep track of those products?

5 A: The product would arrive at the fulfillment
6 center at a loading dock. They'd be off-
7 loaded. There would be labeling on the outside
8 of the boxes which identify the seller and the
9 product. The product would have bar codes on
10 them. They could be manufacturer bar codes
11 from Asics. They could be a seller-created
12 unique bar code. In the case where the
13 manufacturer bar code those products would be
14 scanned in, so counted. Each product would be
15 scanned with a bar code scanner. The products
16 go into a plastic tote, plastic tray. They
17 would move on conveyance or human beings with
18 trolleys to shelving. The products would be
19 stored on a shelf. Each shelf has a unique bar
20 code or number which is scanned when the
21 product is stored. And so the location of each
22 seller's product, each unit and each product,
23 is remembered by software that Amazon
24 Fulfillment Services uploads so that when the
25 customer buys that product you pick the right



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1 product from the right seller.

2 Q: And how is it that Amazon Fulfillment and
3 Amazon Services know to change the amount of my
4 inventory when a sale is made on the website?

5 A: When a sale is made to a customer from a seller
6 on the website the running total of inventory
7 for each unique product will be decremented by
8 one. That's stored in the inventory systems
9 that Amazon maintains.

10 Q: Uh-huh. You used the term decremented, do you
11 mean reduced?

12 A: I'm sorry, reduced by one.

13 Q: This Fulfillment by Amazon Service that you've
14 described to some extent, is this limited to
15 the Amazon.com website or is it available to
16 sellers using other channels?

17 A: No. Sellers can use Fulfillment by Amazon even
18 if they -- for products not for sale on Amazon
19 or for sale just not on the Amazon website.
20 It's often convenient for sellers to have their
21 own websites or sell on eBay to have Amazon
22 fulfill those products even when the sale is
23 not on the Amazon website.

24 Q: And do -- in your experience do some third
25 party sellers in fact take advantage of that



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1 offering, that is use FBA for their sales made
2 through channels other than Amazon.com?

3 A: Yes.

4 Q: Changing topics to payments. Can you explain
5 for the Court the process by which the customer
6 pays for and the seller in turn gets paid for
7 its product?

8 A: Yes.

9 Q: How does that process work?

10 A: When a customer buys an item from a seller
11 Amazon Payments, Inc. is the Amazon entity that
12 manages the payment processing. On placing of
13 the order or shortly thereafter Amazon Payments
14 would charge the customer's credit card or
15 payment card through several other entities --
16 the Visa Network, for example. The funds would
17 flow from the customers account to Amazon
18 Payments, Inc. The seller's sales proceeds so
19 that the funds would flow that way and then on
20 a regular cycle or on request those funds from
21 that sale would be disbursed to the seller's
22 nominated bank account less any fees that were
23 charged for that particular transaction which
24 are booked against Amazon Services, LLC.

25 Q: Thank you. There's a lot there to unpack in a



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1 little bit. So it sounds like all
2 transactions on -- the payment for all
3 transactions on Amazon.com are processed
4 through -- processed by Amazon Payments, Inc.,
5 is that right?

6 A: Yes. Amazon Payments, Inc. is the conduit
7 through which the funds from the customer get
8 to the seller.

9 Q: Okay. And in your experience does that service
10 provided by Amazon Payments, Inc. in any way
11 inhibit or limit third party sellers' ability
12 to sell their own products?

13 A: No seller has ever raised that as a limitation.

14 **MR. GREEN:** Objection, Your Honor. Hearsay.

15 **THE COURT:** He can testify to his personal knowledge
16 and I -- to the extent that that personal
17 knowledge is being for all of Amazon. I
18 recognize it's probably limited but it's up to
19 you, Mr. Razi, how you wish to proceed. He
20 can't testify in totality regarding that if
21 it's knowledge so I sustain that and just tell
22 you you can lay a foundation further if you
23 wish to proceed about that.

24 **MR. RAZI:** Okay. We'll stay away from
25 communications of third party sellers for a



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1 moment.

2 Q: You do understand Amazon Payments, Inc., right?

3 A: Yes.

4 Q: And you understand the services that Amazon
5 Payments, Inc. provides to sellers, right?

6 A: Yes.

7 Q: Okay. In your opinion does that service
8 inhibit or limit in any way third party sellers
9 ability to sell their customers -- sell their
10 products to customers?

11 A: No, in my opinion it enables sellers to focus
12 on running their business and not worry about
13 payment issues.

14 Q: All right. How is it that providing that
15 payment process service, as you say, enables
16 sellers to their products rather than
17 inhibiting or restricting?

18 A: In my opinion sellers don't have to create a
19 relationship with different payment providers.
20 Amazon Payment, Inc. protects seller against
21 customer fraud. It's part of the service. And
22 it's easy for customers to use their stored
23 payment cards if they have one, which likely
24 increases sales for customers. In my opinion
25 it's one of the benefits of selling on the



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1 Amazon website.

2 Q: Now you mention that Amazon Payments serves as
3 a conduit for the funds from customer to
4 seller, is that the term you used?

5 A: Yes.

6 Q: Okay. And does that role in any way in your
7 opinion inhibit or limit third party sellers in
8 doing what they're trying to do to sell their
9 products?

10 A: Not in my opinion.

11 Q: Okay. What about the time period during which
12 Amazon Payments is holding the funds as a
13 conduit, remind us again what is that time
14 period and how does that work?

15 A: After the funds have been received from the
16 customer the seller can request the
17 disbursement of funds at any time, and it
18 typically takes a couple of days for the funds
19 to actually hit their bank account. And there
20 is also an automated cycle every 14 days where
21 the funds are automatically disbursed to the
22 seller's nominated bank account.

23 Q: Uh-huh. All right. You mentioned that sellers
24 can request disbursement at any time. I've
25 seen the reference to Amazon Payments having



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1 some discretion as to how quickly to respond to
2 that request, are you familiar with that?

3 A: Yes, I am.

4 Q: Okay. And in your experience are there ever
5 situations in which Amazon Payments exercises
6 its discretion not to promptly get the money to
7 the seller that they requested?

8 A: Yes.

9 Q: And what -- tell the Court about those
10 circumstances.

11 A: With reference to a marketplace operator's
12 responsibility to keep everybody safe, if
13 there's a suspicion of fraud on the part of the
14 seller -- I've been involved in cases where
15 customers have complained or transaction were
16 suspicious -- temporarily a disbursement may be
17 delayed while an investigation takes place.
18 It's rare but that would be one example.

19 Q: Uh-huh. Now what's an example of the type of
20 -- you know, you used the term fraud but bring
21 it to life -- what's an example of what the
22 seller might be doing that would raise those
23 suspensions?

24 A: Across all marketplace -- well at least on the
25 Amazon marketplace and I suspect on other



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1 marketplaces -- a common method of seller fraud
2 would be a new seller listing an expensive item
3 with an extended delivery period taking up for
4 a competitive price. So let's say I list a TV,
5 it's worth \$1,000, I list it for 500 but I'm
6 promising it's going to be delivered in two
7 weeks. The seller would then get two weeks of
8 orders. By that time normally the seller would
9 have begun to receive their disbursements of
10 those sales but they haven't shipped the items
11 yet. And then the seller doesn't ship the
12 items and disappears. That's a very common
13 kind of modus operandi of fraud. And so in
14 cases like that where there's a suspicion there
15 may be a temporary hold placed prior to a
16 disbursement to protect customers. That would
17 be one example. But it's -- I mean, it's rare,
18 it's very unusual.

19 Q: Yeah, that's what I was going to ask. That's
20 not the typical case, right? That's highly
21 exceptional?

22 A: It's highly exceptional. I mean, there are
23 millions of sellers and it would be very rare.

24 Q: Okay. And I think there might be some
25 confusion too about this 14 day period, this



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1 default 14 day period. How does that work? Is
2 it 14 days from the sale or is it more like a
3 bimonthly disbursement date?

4 A: It's a bimonthly disbursement date.

5 Q: So depending upon when a particular sale is,
6 the sale might be two days before the
7 disbursement date those funds are not going to
8 take 14 days to get to the seller, right?

9 A: Right.

10 Q: These payment processing services that we've
11 been describing are they provided by Amazon
12 Services, LLC?

13 A: No.

14 Q: Are they provided by Amazon Payments, Inc.,
15 correct?

16 A: Correct.

17 Q: Okay. And are they offered to only to sellers
18 on Amazon.com or are the offered to other
19 sellers?

20 A: Amazon Payments, Inc. offers payment processing
21 services to companies and sellers outside of
22 Amazon.com.

23 Q: And is payment processing a line of business
24 that's unique to Amazon Payments, Inc. or not?

25 A: No, there are many companies providing similar



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1 services.

2 Q: And who is that third party sellers contract
3 with if you know for payment processing
4 services?

5 A: With Amazon Payments, Inc. through the business
6 solutions agreement.

7 Q: We touched on one kind of fraud. I want to
8 talk about another kind. Credit card fraud.
9 Which party in this third party seller
10 transaction we've been describing bears the
11 risk of credit card fraud?

12 A: Amazon Payments, Inc. bears the risk of
13 customer credit card fraud.

14 Q: Okay. And what does that mean as a practical
15 matter? Somebody goes on the website and
16 engages in a fraudulent transaction with
17 somebody else's credit card. What does it mean
18 that Amazon Payment bears the risk?

19 A: If a customer uses a stolen credit card, the
20 seller would not lose out if they fulfill that
21 product to the customer in good faith. It's
22 part of the service offered by Amazon Payments.

23 Q: Does that service of Amazon Payments being
24 responsible for those instances of customer
25 credit card fraud in your opinion and



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1 experience inhibit or limit in any way third
2 party sellers' ability to sell their products?

3 A: In my opinion it does not inhibit sellers, it
4 frees them from worrying about that issue and
5 allows them to run their business finding
6 products and manage prices and manage inventory
7 and so on.

8 Q: Which company is it -- strike that. Who's bank
9 accounts hold the funds during this period in
10 which the funds are being held as a conduit
11 passing between the customer and the seller?

12 A: Amazon Payments, Inc.

13 Q: I want to drill down a bit on this topic we've
14 been talking about generally and that is the
15 flow of funds from the customer to the seller.
16 Are you prepared to help us do that?

17 A: Yes.

18 Q: Okay. Let's take a look at Exhibit 122.

19 **(Hearing Exhibit Number 122 was introduced into the**
20 **record at this time.)**

21 **THE COURT:** Flow of funds from ...

22 **MR. RAZI:** Customer to seller. And for the record
23 this is one of the Exhibits that was introduced
24 by consent of the parties. Pardon me, Your
25 Honor.



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1 **THE COURT:** How much longer are you going to be with
2 this witness? The only reason I ask is if it's
3 going to be a while we could take a break here
4 since your transitioning or if it's going to be
5 finishing up soon we'll finish up and take a
6 break then.

7 **MR. RAZI:** Thank you. I think it's going to be just
8 a little while so it doesn't make sense to take
9 a break.

10 **THE COURT:** Well it's -- you said a little while you
11 mean in the pejorative sense.

12 **MR. RAZI:** I was going to take a while.

13 **THE COURT:** Yeah, okay. Well here, before we take a
14 break I want to address one quick issue. In
15 this case I did not recuse myself under the
16 principal of rule of necessity. Because as
17 y'all can all imagine about every judge or
18 member of the judge's family on the judge's
19 behalf probably purchases from Amazon. Now one
20 thing that just came up that adds a little bit
21 of twist to that, that under our rules of
22 ethics we're required to disclose anything to
23 the parties even if we believe that it would
24 not require recusal and I'm in that category
25 right now. And that is -- there is also



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1 another element of recusal -- and that is where
2 you have personal knowledge concerning disputed
3 evidentiary facts. Since I have purchased from
4 Amazon I have not drilled down into the third
5 party aspects of it. I have personal knowledge
6 of purchasing from Amazon but I don't believe
7 I have personal knowledge of any disputed
8 evidentiary facts. So, but I disclose that for
9 the record. If anybody wishes to make -- to
10 inquire further about that I will gladly ask
11 any questions to add -- to ask -- or gladly
12 answer any questions you wish to ask, okay?
13 Well then let's take a lunch break. 12:03.
14 1:00 might be pushing it for y'all, I don't
15 know. I see a nod over there, so 1:30? Would
16 that be okay?

17 **MR. RAZI:** Yes, Your Honor.

18 **THE COURT:** Anything else we need to address?

19 **MR. RAZI:** Well we were just wondering if we could
20 address the -- just the schedule for the day in
21 terms of when we're going to break for the day.
22 What's the Court's preference on that?

23 **THE COURT:** I normally just try to go until it's --
24 seems like a good breaking point. I probably
25 want to stop between 5:00 to 6:30. That's --



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1 I'm flexible in that area, but if I need to
2 push I -- I've had cases where I go to 11:00 at
3 night so ...

4 **MR. RAZI:** I don't think that'll be necessary here
5 but we appreciate that. So, yeah, we'll look
6 for some -- maybe some spot between 5:00 and
7 6:30 where there's a good breaking point.

8 **THE COURT:** Okay. And I'll also tell you the judges
9 in South Carolina are elected by the General
10 Assembly. I am up for reelection and -- which
11 I now don't have any opposition -- but so and
12 that vote will be on Wednesday so I'll be --
13 I'm going to break on that day about 11:00 and
14 come back after the election. I'll give myself
15 a two hour window. My wife wanted to go out to
16 eat and I told her that wasn't happening. So
17 that's one little -- if I don't come over there
18 for my reelection the General Assembly will
19 find that offensive, and I don't intend to
20 offend those who elect me. So, all right.
21 Thank you.

22 **MR. RAZI:** Thank you, Your Honor.

23 (Off the record from 12:02 p.m. until 1:30 p.m.)

24 **THE COURT:** All right.

25 **MR. RAZI:** Thank you, Your Honor. Before the break



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1 we were -- if you saw something over here it
2 because it's the next Exhibit was have marked
3 protected under the protective order. And over
4 the break we had determined that all the
5 protected information has been blacked out so
6 we're comfortable just presenting it here.

7 **THE COURT:** Okay. Good.

8 **MR. RAZI:** So that's where we are.

9 Q: All right. So just to orient us I want to go
10 and sort of do a deep dive on the flow of funds
11 on a particular transaction from -- the flow of
12 funds from customer to seller, okay?

13 A: Yes.

14 Q: And to do that let's use Exhibit 122. And I'll
15 approach and just hand you a hard copy as well
16 so you -- if that's better for you.

17 A: Thank you.

18 **THE COURT:** I like the fact that y'all have embraced
19 our technology. Now you've got to learn to
20 draw on the screen.

21 **MR. RAZI:** Don't get him started.

22 **THE COURT:** Yeah.

23 Q: In general do you know what the collection of
24 pages that's in Exhibit 122 is?

25 A: Yes.



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1 Q: Okay. Just in general at the highest level
2 what is this Exhibit?

3 A: They're examples of all the confirmation e-
4 mails following a purchase by a customer.
5 There are some details I believe from Sellers
6 Center of the orders placed and the proceeds to
7 the sellers and fees charged and so on.

8 Q: Turn to the Bates page that ends in 32 please.
9 Are you there, sir?

10 A: Yes.

11 Q: What is that page?

12 A: This is a record of a purchase placed in
13 February, 2016.

14 Q: Can you tell who the seller is?

15 A: Yes, I can.

16 Q: Who is the seller?

17 A: The seller is a company called Market Street
18 Supply.

19 Q: What is Market Street Supply?

20 A: They're a third party seller.

21 Q: Where are they based?

22 A: There based in South Carolina. They're just
23 south of Charlotte I believe.

24 Q: And is it -- is the reason you know about this
25 is this relates to a third party seller called



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1 Market Street Supply because it says sold by
2 Market Street Supply?

3 A: Yes.

4 Q: Does this page of Exhibit 122 related to a
5 particular order?

6 A: Yes.

7 Q: And which order does this related to?

8 A: There is an order number which is a unique
9 numeric number assigned to every order
10 beginning 102 and I can see the details of the
11 order below.

12 Q: Does each order on Amazon.com have a unique
13 order number?

14 A: Yes.

15 Q: Okay. And what's the purpose of have a
16 specific order number?

17 A: It helps customers track their orders, helps
18 sellers track their orders from customers.

19 Q: Okay. And are we also able to use that to
20 track the flow of funds related to that
21 particular order in the Amazon records?

22 A: Yes.

23 Q: What's the product that was sold here?

24 A: It was a set of metal collar extenders which
25 are little loops that you put on your top



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1 button on your shirt.

2 Q: Okay. And it looks like the price of the item
3 was \$11.95, right?

4 A: That was the item -- that was the price of the
5 item set by Market Street Supply, the seller.

6 Q: Okay. Do you see that there's an entry for tax
7 right above the shipment total?

8 A: Yes.

9 Q: Okay. And what does that represent?

10 A: That is the South Carolina sales tax collected
11 for the seller.

12 Q: Okay. And I think you said that this seller
13 was based in South Carolina?

14 A: Yes, they are.

15 Q: Okay. And how do you know that?

16 A: I, prior to this trial, I looked at their
17 details on the Amazon website, and I was able
18 to find their website and contact details and
19 I looked at their own website and it says where
20 they're located.

21 Q: And why does it say sold by Market Street
22 Supply as opposed to sold by some Amazon
23 entity?

24 A: This product was listed and sold by Market
25 Street Supply, not by Amazon Services or



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1 another Amazon entity and so therefore the
2 column that says sold by lists the name of the
3 seller which is Market Street Supply.

4 Q: Keeping in mind the order number which --
5 ending in 3048, turn to the prior page of the
6 Exhibit if you don't mind. It's the page 31,
7 the Bates number. Can you find that order on
8 that page? Take your time. It's not a rush.

9 A: Yes.

10 Q: Where is it? Can you direct Mr. Brooks to the
11 area on screen for us?

12 A: It's in the middle of the page. It's 1, 2, 3,
13 4, 5, 6, 7, 8, 9, 10 orders down.

14 Q: Okay. And what information -- well let me
15 take a step back -- what is this page? Page 31
16 that we're looking at of Exhibit 122?

17 A: This is a screen shot of Sellers Central, the
18 website used by sellers to manage their
19 business if viewed by Market Supply and it
20 details all the orders they've received. It
21 looks like they were all on February 25th of
22 2016.

23 Q: Okay. So on this page all of these orders were
24 for products sold by Market Street Supply, the
25 South Carolina third party seller?



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1 A: Yes.

2 Q: Describe for the Court all the information
3 that's provided with respect to this particular
4 order in Sellers Central.

5 A: On this screen the seller can see the date of
6 the order, the type of transaction -- in this
7 case it was a payment by the customer -- the
8 order ID ending 048 and an abridged version of
9 the product title. It's -- I think it's cut
10 off -- there are more characters than that.
11 And then under the column Total Product Charges
12 and that's the price set by the seller, paid by
13 the customer for this order. There's another
14 column with any promotional rebates that the
15 seller may have set. For example, free
16 shipping or other promotions. In this case the
17 seller had not set any promotional rebates.
18 The next column are the fees that were charged
19 by Amazon Services for the different services
20 associated with this order. The next column is
21 the sales tax that was charged to the customer
22 for the seller, and then the final is the value
23 of the disbursement that the seller would
24 receive. The proceeds of the sale. And so
25 that -- which is \$8.42 -- so the customer paid



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1 in total \$11.95 plus 84 cents -- I believe it
2 was free shipping in this case -- for a total
3 of, on the previous exhibit, \$12.79. Amazon
4 Payments when this order was shipped would have
5 booked \$4.37 against Amazon Services for the
6 different services for this order and the
7 seller will have received \$8.42 in the next
8 disbursement -- on their request or the next
9 automatic cycle.

10 Q: Let's pause for a minute on promotion rebates
11 because that's not something that we discussed
12 so far this morning. What promotional rebates
13 in this context?

14 A: Part of the service provided by Amazon Services
15 is the ability for sellers to offer promotions
16 on their products. They include things like
17 free shipping, sometimes a percentage discount,
18 three for two, those kinds of promotions can be
19 offered by sellers on their products. In this
20 case it doesn't look the seller has offered any
21 promotional rebates.

22 Q: For a third party seller's products who is it
23 that decides about whether there are going to
24 be promotional rebates offers? Is it the third
25 party seller or is it any Amazon entity?



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1 A: It's the third party seller, they control the
2 whole process.

3 Q: Turn to the page ending in 29. It's a couple
4 pages before that. Do you recognize this page,
5 sir?

6 A: Yes.

7 Q: And what is it?

8 A: The prior view was a statement view which lists
9 all the orders. This is a view of just this
10 one transactions with many of the same details
11 as we saw in the previous.

12 Q: Okay. So it's more of the same?

13 A: Yeah, this is just an individual transaction
14 view, an individual order view.

15 Q: Thank you. Let's go to the page ending in 56.
16 What's on page 56 of Exhibit 122?

17 A: This is another view from Sellers Central from
18 the point of view of this same seller, Market
19 Street Supply. It details the payment, the
20 disbursement that they would have received this
21 period with the breakdown of all the product
22 charges including this order for the collar
23 extenders, any rebates the seller chose to
24 apply, et cetera.

25 Q: Which period are we talking about here? What's



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1 the time period at issue for this disbursement?

2 A: This for February 13th through February 27th of
3 2016.

4 Q: Okay. And just so it's entirely clear, so the
5 order section at the top -- not at the top but
6 at the -- let's wait for Mr. Brooks to get
7 there -- see the order section?

8 A: I do.

9 **MR. RAZI:** Can we just blow that up, Mr. Brooks?
10 Orders. Right there.

11 Q: So am I reading this reading right that there
12 were a total of \$14,870 in product charges for
13 orders from Market Street Supply during the
14 period of -- that we're looking at? The second
15 half of February of 2016?

16 A: Yes. Market Street Supply sold \$14,870 worth
17 of products to customers.

18 Q: Right. So that includes that one little
19 transaction that we looked at and lots of other
20 similar transactions I assume?

21 A: Yes.

22 Q: Okay. And fees were charged by Amazon, right?

23 A: Yes.

24 Q: And -- let's minimize that and go to the fees
25 section -- and the question is, what is it that



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1 the fees were charged for?

2 A: Amazon Services charges for the different
3 services it offers to third party sellers. The
4 principal fee is a percentage fee of the
5 product charges which varies by category and
6 that is the fee for all the services Amazon
7 Services offers like listing a product, the
8 ability to upload images and so on.

9 Q: Uh-huh. And how do you know that the fees are
10 tied to those particular services?

11 A: Well I'm familiar with the software that
12 generates the fees that is calculated based on
13 the product charges, the sales the seller has
14 made, and I've personally been involved in
15 reviewing those fees myself.

16 **MR. RAZI:** May I approach for a minute and just grab
17 a copy of the Exhibit? I want to see 629. Let
18 me see the rest of the page. Thank you.

19 Q: Let's go to page 1630. We'll come back to 56
20 in a second. Take a look at the page that ends
21 in 30 and let me know when you've done so.

22 A: Okay.

23 Q: What is this?

24 A: This is back to the transaction we looked at
25 previously, it's the same transaction. I can



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1 tell by looking at the order number end 048,
2 and this breaks down in a bit more detail the
3 different fees that were charged and the
4 resulting change in the seller's balance.

5 Q: Okay. And what fees were charged on this
6 transaction?

7 A: Well if we go down the right hand side of the
8 page, again the \$11.95 is the seller's sale
9 value, if you like, the value of the order, 84
10 cents was collected in sales tax. So the total
11 sale was \$12.79. Now this seller was using the
12 FBA service and the FBA has a set of fees.
13 There is an order handling fee which is a fixed
14 fee per order received by the seller and that's
15 a dollar, that's the first negative dollar in
16 fees. And there is a picking and packing fee
17 which is \$1.06. There is a weight handling fee
18 which is a variable fee based on the weight and
19 dimensions of the product, which was 50 cents
20 and then there was the referral fee. That's
21 the percentage of the product sales value
22 charged by Amazon Services for listing and
23 selling products on the Amazon website which
24 was \$1.79 which is a percentage of the sales
25 value. And then finally this seller was using



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1 a service provided by Amazon Services to
2 collect sales tax for the seller and that was
3 just two cents. And so summing those columns,
4 summing \$12.79 and the fees and the seller's
5 balance would have been increased by \$8.42.

6 Q: And do those fees represent a sharing in the
7 profits from the sale or something else?

8 A: No the fees are charged for the services given
9 by Amazon Services. Effectively that's Amazon
10 Services' revenue or Amazon Services' sales.
11 The sales of the seller, Market Street Supply,
12 is \$12.79 from the sales tax they collected.
13 And then the fees, which is Amazon Services'
14 revenue, will their costs on that transaction.

15 Q: Uh-huh. Who is it that receives payment for
16 the product, that is the collar extender? Is
17 it the third party seller, Market Street
18 Supply, or is it Amazon Services or some other
19 Amazon entity?

20 A: Market Street Supply, the third party seller,
21 receives payment for that product. The payment
22 is processed by Amazon Payments, Inc. but the
23 sale is made by Market Street Supply and they
24 receive the proceeds for consideration of that
25 sale selling that product to the customer.



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1 Q: Does Amazon Services, LLC ever receive any
2 money on any of these transactions other than
3 fees for services?

4 A: No.

5 Q: Does Amazon Services ever have any claim at all
6 to any of the money that comes from customers
7 in third party sales other than with respect to
8 fees?

9 A: No. Amazon Services -- it's not Amazon
10 Services' product, it's Market Street Supply's
11 product. Amazon Services charges fees for the
12 services that Market Street Supply used to sell
13 it's product.

14 Q: We've just looked at the -- some of the aspects
15 of the flow of funds on one particular
16 transaction. Is what we've just done
17 representative of third party sales in general
18 or is it new?

19 A: No, this is representative of third party sales
20 in general.

21 Q: Change topics. Customer service. For third
22 party sold items who provides customer
23 service?

24 A: The third party seller provides customer
25 service for the products that they sell, not



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1 Amazon Services or any other Amazon entity
2 given it's not Amazon's product.

3 Q: And what are some -- you know, we use the term
4 customer service and I think everyone has some
5 understanding of it but let's bring it to life
6 a little bit more -- what is customer service
7 consist of in the context of the purchase of a
8 product from a third party seller on
9 Amazon.com?

10 A: Well I would include in customer service having
11 clear, easily understood product titles and
12 descriptions. Shipping things promptly.
13 Answering questions from customers ahead of a
14 purchase promptly and well. And then after a
15 purchase dealing with any questions about the
16 product, any warranty claims, any after sales
17 care that the customer might need.

18 Q: Let's focus for a minute on the after purchase
19 elements of customer service. Do you have
20 experience and understanding about how that
21 customer service is provided?

22 A: Yes.

23 Q: Okay. What are some examples of a situation in
24 which after a purchase of a third party sold
25 item a customer might need customer service?



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1 A: A customer may need help or instruction on how
2 to use a product.

3 Q: And who provides that help or instruction?

4 A: The seller of the product.

5 Q: Okay. Is there any circumstance in which
6 Amazon Services, LLC would provide guidance or
7 help to customers about how to use a product
8 that a third party seller sold?

9 A: No.

10 Q: Why not?

11 A: Amazon Services doesn't have any real knowledge
12 of the product. It was sourced by Amazon
13 Services or sold by Amazon Services. The
14 seller would be in the best position -- the
15 only real position -- to help with customer
16 questions like how do I use the product.

17 Q: Okay. And let's stick on that particular
18 scenario for a minute. How is it that the
19 customer would -- is able to get in touch with
20 the third party seller to raise that question?
21 For instance how do I put this product together
22 or how do I use it?

23 A: After the purchase is placed all the orders, as
24 we saw in my account earlier, are listed in the
25 customer's account and from there the seller



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1 from whom they bought is listed and also from
2 there they can initiate a question to a seller
3 through buyer-seller messaging or they can
4 navigate to the seller's Store Front where the
5 seller may have provided a contact telephone
6 number or an e-mail address in some cases.

7 Q: Okay. What about if the product that the
8 customer order from a third party seller is
9 missing a part? What happens in that
10 circumstance? Who provides the customer
11 service, the third party seller or Amazon
12 Services or some other Amazon entity?

13 A: The third party seller would provide support in
14 that case. It's a quite common case. So the
15 customer would contact the seller in the way
16 I've just described. The seller then has the
17 discretion to issue a refund or a partial
18 refund, or more common, send the replacement
19 part to the customer or missing part to the
20 customer. That's fairly common.

21 Q: And these aspects of customer service that have
22 been described, do you have first-hand personal
23 knowledge about how that works?

24 A: Yes.

25 Q: For an MFN transaction -- that, you know, the



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1 Merchant Fulfillment Network transaction -- who
2 provides customer service about shipping and
3 the like? Where is the product, when's it
4 going to get here, et cetera.

5 A: So just for clarity for the Court, MFN refers
6 to when the seller is delivering something to
7 the customer. The seller is responsible for
8 that. Now they may use intermediary carrier
9 but they have the responsibility of
10 communicating the status of where a package is.

11 Q: Okay. And you mentioned intermediaries, you're
12 referring there to the common carriers that you
13 mentioned earlier?

14 A: Right. The post office or Fedex or UPS or
15 something.

16 **THE COURT:** Can you repeat that again? I was making
17 a note of your meaning of MFN. I didn't catch
18 everything you said to the answer of the
19 question.

20 **MR. POAD:** Yes, Your Honor. MFN is a term used ---

21 **THE COURT:** I got that ---

22 **MR. POAD:** --- it stands for Merchant Fulfillment
23 Network and it refers to when the seller is
24 delivering a product to the customer without
25 using fulfillment by Amazon.



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1 **THE COURT:** Oh, that's what you said.

2 **MR. POAD:** So they have a contract with a carrier --

3 -

4 **THE COURT:** I didn't miss much. Go ahead.

5 **Q:** And in the circumstance in which a customer
6 contracts to use the Fulfillment by Amazon
7 Service to help it do its work, who is the
8 point of contact for customer service in that
9 circumstance relating to shipping?

10 **A:** So just relating to the status of where the
11 package is it's Amazon Services working with
12 the affiliate that manages the warehouses which
13 is Amazon Fulfillment Services.

14 **Q:** What is the A to Z guaranty? Or as you like to
15 call it the zed guaranty?

16 **A:** The A to Z guaranty is a backstop provided to
17 customers. If there is a dispute that cannot
18 be resolved between the customer and the
19 seller, for example, an item wasn't delivered
20 or it was as described and the customer cannot
21 resolve this directly with the seller, within
22 a limited period of time and for a limited
23 number of reasons, Amazon will make the
24 customer whole by providing a refund or some
25 other benefit. In the case of a refund it will



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1 be from the seller's balance.

2 Q: And what percentage of transactions is the A to
3 Z guaranty implicated?

4 A: Thankfully a very small number of transactions.

5 Q: Approximately how many?

6 A: I did review this fairly recently. It was less
7 than 0.1 percent of transactions.

8 Q: Does the A to Z guaranty limit or inhibit in
9 any way third party sellers' ability to sell
10 their products on Amazon.com?

11 A: In my opinion it doesn't limit sellers. If
12 anything, by reassuring customers that should
13 something go wrong there is a backstop. I
14 believe that increases the propensity of
15 customers that buy products ---

16 Q: Uh-huh.

17 A: --- and that benefits sellers, benefits Amazon
18 Services and benefits customers.

19 Q: All right. Take your opinion out of it for a
20 moment. Just as a matter of fact have you in
21 your 10-plus years at Amazon ever observed a
22 situation in which a third party seller was
23 being inhibited or obstructed or blocked in any
24 way from selling its products as a result of
25 this third party -- excuse me, as a result of



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1 this A to Z guaranty?

2 A: No.

3 Q: Just -- I think it's clear but just to close
4 the loop entirely, with respect to the products
5 that people buy from third parties, right? The
6 various items, the many different items that
7 people buy from third party sellers on
8 Amazon.com, who provides the customer service
9 relating to those products?

10 A: The third party seller.

11 Q: Is that true in all cases?

12 A: Yes. Amazon Services doesn't have the
13 information to provide customer service
14 regarding a product. It's not their product.

15 Q: A couple of questions about the business
16 solutions agreement. Are you familiar with
17 that agreement?

18 A: Yes.

19 Q: And you alluded in the first part of your
20 testimony or the earlier part of your testimony
21 that that's one of the things that's addressed
22 when a third party seller registers to sell
23 products on the site?

24 A: Yes, it's the contract between Amazon Services,
25 Amazon Payments, Inc. and the third party



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1 seller they agree to when they first create an
2 account.

3 Q: Okay. And the -- that service that's offered
4 by Amazon Services to third party sellers that
5 enables them to sell their products, is there
6 a name for that service?

7 A: Yes, it's described as Selling on Amazon is the
8 term.

9 Q: Let's take a look at Exhibit 3.

10 **(Hearing Exhibit Number 3 was introduced into the**
11 **record at this time.)**

12 Q: Do you recognize Joint Exhibit 3?

13 A: Yes.

14 Q: And what is it?

15 A: This is the first page of the business
16 solutions agreement.

17 Q: Okay. And does the business solutions
18 agreement address the Selling on Amazon service
19 that you've testified about?

20 A: Yes.

21 Q: Let's turn to the page ending in 50. And do
22 you see at the top where it says Selling on
23 Amazon service terms?

24 A: Yes.

25 Q: What's that section?



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1 A: This describes the Selling on Amazon service.

2 Q: And do you see where it says that the Selling
3 on Amazon service is a service that allows you
4 to offer certain products and services directly
5 on the Amazon site, do you see that?

6 A: Yes.

7 Q: Okay. And do you know who the you is referred
8 to -- is referring to in that sentence?

9 A: Yes, the you is the third party seller that's
10 agreeing to this contract.

11 Q: Now I know this is what the contract says but
12 in your 10-plus years of experience at the
13 company and working with the marketplace, is it
14 -- is what I just read there into the record is
15 that true as a matter of fact?

16 A: Yes, this is how the business works. Sellers
17 offer products directly on the Amazon -- their
18 products on the Amazon site.

19 Q: And Amazon Services as the document says and as
20 you've said in your testimony provide services.

21 A: That's correct.

22 Q: Does the business solutions agreement address
23 the relationship between third party sellers
24 and Amazon Services?

25 A: Yes.



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1 Q: Turn to page 41. Excuse me, yeah, that's
2 right. Okay, 41. Section 13. Do you see
3 where it said that subject to the transaction
4 processing services terms -- service terms, you
5 see that?

6 A: Yes.

7 Q: Okay. And then after that it says, after the
8 parenthetical, you and we are independent
9 contractors, do you see that?

10 A: Yes.

11 Q: All right. Let's just pause on that portion of
12 it for a minute. The you there that's again
13 the third party seller?

14 A: Yes.

15 Q: And the we is Amazon Services?

16 A: Yes.

17 Q: Okay. In your experience working in the
18 business, is it consistent with your experience
19 that Amazon Services, LLC and the third party
20 sellers are independent contractors. That is
21 independent of each other?

22 A: Yes.

23 Q: And what's the basis for -- why do you say
24 that?

25 A: Well there's no ---



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1 **MR. GREEN:** Just the same type of objection. He can
2 testify his view as a matter of fact and his
3 experience. We would object to any legal
4 conclusion to be derived from that as something
5 that belongs to the Court, Your Honor.

6 **THE COURT:** Well I think his question wasn't even
7 independent contractors it was independent,
8 wasn't it?

9 **MR. GREEN:** I heard independent contractors but I
10 may have heard something into it.

11 **THE COURT:** Okay. Well you rephrase the question
12 and let me just hear it again.

13 **MR. RAZI:** Sure. I can rephrase.

14 **Q:** And to be clear what I want to focus on is your
15 experience and I want you to draw upon is your
16 experience in your 10-plus years at Amazon,
17 okay?

18 **A:** Yes.

19 **Q:** Based on that experience is it accurate to say
20 that third party sellers and Amazon Services
21 are independent of one another?

22 **A:** Yes.

23 **Q:** Okay. Why do you say that?

24 **A:** The millions of third party sellers are
25 independent in my view of Amazon Services



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1 because there is no corporate ownership
2 relationship between -- the sellers
3 independently find the products to sell. The
4 sellers independently determine which products
5 to offer on the Amazon website. The sellers
6 independently set prices. The sellers
7 independently determine how many units to
8 stock. The sellers independently determine how
9 to fulfill the product to their customers. The
10 sellers independently deal with customer
11 service as it relates to their products, and
12 sellers are free to sell or not sell products
13 on the Amazon website. So they consume
14 services to help them run their business but
15 they -- whatever the contract says in reality
16 they act independently of Amazon Services or
17 other Amazon entities.

18 Q: Okay. Do you see where the sentence goes on to
19 say, nothing in this agreement will create any
20 partnership, joint venture, agency, franchise,
21 sales representative or employment relationship
22 between us, do you see that?

23 A: Yes.

24 Q: Okay. Now step back to your role at Amazon and
25 the 10-plus years that you've been there.



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1 During all that time have you learned of any
2 partnership between Amazon Services, LLC on the
3 one hand and third party sellers on the other
4 hand?

5 A: No.

6 Q: And what about -- take for instance employment
7 relationships -- is there any employment
8 relationship that you've ever become aware of
9 between third party sellers on the one hand and
10 Amazon Services, LLC on the other hand?

11 A: No.

12 Q: Now does the BSA identify which party is the
13 seller when a third party sale takes place?

14 A: Yes.

15 Q: Turn to page 51. Do you have that in front of
16 you?

17 A: Yes.

18 Q: Okay. And there's a lot of words there. I
19 just want to focus on a couple of the little
20 subclauses, but do you see at the top where it
21 says, other than as described -- and then it
22 identifies some other places -- you will -- and
23 I want to focus on H. You will ensure that you
24 are the seller of each of your products,
25 include an order-specific packing slip and if



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1 applicable any tax invoices within each
2 shipment of your products, do you see that?

3 A: Yes.

4 Q: And then it goes on to say, you will identify
5 yourself as the seller of each of your
6 products, do you see that?

7 A: Yes.

8 Q: Okay. And is that -- the you again we're
9 talking about the third party sellers, right?

10 A: Yes.

11 Q: And is it your understanding that in these
12 subparagraphs that I just read, the third party
13 sellers are agreeing that they're going to make
14 sure that if they offer something for sale on
15 the website they're actually the seller?

16 A: Yes.

17 Q: Okay. And then they're going to commit to
18 include an order-specific packing slip and
19 other information, right?

20 A: Yes.

21 Q: And they're going to in paragraph J identify
22 themselves as the seller, right?

23 A: Yes.

24 Q: Okay. Do these elements of the business
25 solutions agreement inhibit or limit in any way



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1 a third party sellers ability to sell their
2 products on Amazon.com?

3 A: No. In contrast, in my experience sellers are
4 keen to identify themselves as the seller.

5 Q: Okay. And what this provision requires is that
6 they in fact do so, right? That they are the
7 seller and that they say they're the seller,
8 right?

9 A: That's right.

10 Q: By the way, we didn't talk about this earlier
11 and we don't necessarily have to look at the
12 specific provision in the BSA, but is there any
13 time commitment when a seller signs up to
14 become a seller. In other words, once you're
15 in do you have to stay a seller for some period
16 of time?

17 A: No.

18 Q: How does that work? Let's say a seller signs
19 up and wants to be a seller but then later
20 decides that they don't want to be a seller?

21 A: Well the seller can either just not list any
22 products for sale or they can close their
23 account at any time.

24 Q: And those are decision that are made by the
25 third party seller and not Amazon Services?



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1 A: Yes.

2 Q: Okay. Changing topics to tax reporting.

3 **MR. RAZI:** You can put the Exhibit down.

4 Q: Are you aware of whether Amazon Services
5 reports information to the taxing authorities
6 about third party sales?

7 A: Yes.

8 Q: And are you aware that Amazon Services reports
9 information to third party sellers themselves
10 relating to their sales?

11 A: Yes.

12 Q: Do you know what -- just in general terms --
13 what a Form 1099K is?

14 A: Yes.

15 Q: What is that?

16 A: It's a report of sales and revenue that would
17 be included in an individual or a seller's tax
18 return.

19 Q: Okay. And does Amazon Services provide forms
20 1099K to the third party seller?

21 A: Yes. To be clear, the Form 1099K is in regard
22 to the seller's sales, not Amazon Services
23 sales.

24 Q: Let's take a look at -- put up Exhibit 13.

25 **(Hearing Exhibit Number 13 was introduced into the**



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1 **record at this time.)**

2 Q: And before we study the particular terms, what
3 is it that Amazon Services reports on Forms
4 1099K to third party sellers?

5 A: On a regular basis as per IRS regulations the
6 Form 1099K will report the total sales of the
7 seller in the period. So in the case of the
8 collar extender it will be -- it was \$11.79 and
9 I'm not sure whether it includes State sales
10 tax, but certainly the \$11.79 is the sales that
11 the seller has made.

12 Q: Okay. And do you recognize Exhibit 13?

13 A: Yes.

14 Q: And just in general what is it?

15 A: This is a page from the help section of Sellers
16 Central available to sellers.

17 Q: Okay. And what's this page about?

18 A: This describes that there are some IRS
19 regulations and that if a U.S. seller exceeds
20 a certain threshold in sales that -- or a
21 number of transactions -- this form will be
22 produced for them.

23 Q: Okay. So if we go back to the example that we
24 looked at earlier, that Market Street Supply,
25 do you remember that company?



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1 A: Yes, I do.

2 Q: Okay. And let's ballpark, let's say their
3 sales for that period were -- for that two week
4 period -- were about \$15,000. What would
5 Amazon Services -- what would be the amount of
6 sales that Amazon Service would report on the
7 Form 1099K for that seller?

8 A: I believe this is an annual report and so it
9 would include the \$14,000 of sales for that two
10 week period and sales in the remainder of the
11 year.

12 Q: Okay. Now we've talked about the income that's
13 reported for third party sellers, but how about
14 Amazon Services? How does Amazon Services
15 report its income with respect to fees charged
16 on third party sales?

17 A: Can I ask a clarification question?

18 Q: Yeah, go ahead.

19 A: Income sometimes means profit. I think you're
20 referring to sales revenue.

21 Q: Fair enough. Thank you for the correction.

22 A: Can you restate the question for me?

23 Q: Sure. How does Amazon Services report its
24 revenue with respect to any revenue that it
25 might receive on these -- on any of these third



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1 party sales transactions?

2 A: Amazon Services revenue is the sum of the fees
3 collected for the services sold or offered to
4 third party sellers. And so the case of Market
5 Street Supply and that one transaction -- I
6 believe it was \$4.17 for the listing fee, the
7 FBA fees, and so on.

8 Q: Okay.

9 A: That's Amazon Services' revenue and the \$12.79
10 or the \$14,000 for a two week period is Market
11 Street Supply's sales.

12 Q: Why doesn't Amazon Services, LLC report the
13 whole amount of the transaction as its revenue
14 for the sale?

15 A: Amazon Services didn't sell the product. They
16 provided services and they have fees in
17 exchange for their services. The seller sold
18 the product and so the \$12.79 for that one
19 product or the \$14,000 for the two week period
20 is the sales of the seller, and the fees
21 charged on those transactions is the sales of
22 Amazon Services.

23 Q: I'm going to take a step back for a minute and
24 ask you about some of the allegations that have
25 been made about Amazon Services in this case,



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1 okay?

2 A: Yes.

3 Q: And are you familiar with some of the
4 allegations that have been made about Amazon
5 Services?

6 A: Yes.

7 Q: Okay. Are you aware, for instance that there's
8 been an allegation that Amazon Services, and
9 I'm quoting, is the only point of contact for
10 the customer making a purchase on the website.
11 Are you familiar with that allegation?

12 A: Yes.

13 Q: Is that true or false?

14 A: It's false.

15 Q: Why?

16 A: Sellers provide information to the customers to
17 enable them to buy the product. That is
18 contact. Customers contact sellers if they
19 have a question about the product on the phone
20 or e-mail, through buyer-seller messaging.
21 Sellers are responsible for answering any
22 customers service questions after an order is
23 placed. And so to say that Amazon or Amazon
24 Services is the only point of contact is
25 clearly not true.



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1 Q: Those contacts and communications that you just
2 alluded to, do you consider those meaningful
3 contacts in the context of the transaction
4 involving the purchase of a consumer product?

5 A: Yes, they're meaningful and vital. Yes.

6 Q: I mean, are you aware of any other types of
7 communications in the context of a consumer
8 product that would be meaningful to the
9 transaction other than the ones that you've
10 identified? That is, what is item, what's the
11 price, what's the description, how does it
12 work, what happens if it's broken, what happens
13 if it's missing a part. I mean, are there any
14 other kinds of communication?

15 A: Sellers -- excuse me, customers leave sellers
16 feedback and sellers can respond to that
17 feedback. The seller has an opportunity to
18 respond to a feedback that negative
19 particularly. They can -- customers can give
20 a rating to the seller.

21 Q: Uh-huh.

22 A: Those were a couple more examples.

23 Q: Okay. Are there, you know, important areas
24 relating to the sale of a product by a third
25 party seller on Amazon.com that the sellers



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1 don't communicate with the customers about?

2 A: I -- I'm blanking so if you want to ask me
3 about something specific I can answer, but I
4 can't immediately think of something.

5 Q: Okay. Well neither can I, that's why I asked.
6 By the way, those various modes of
7 communication that you've testified about, are
8 they also reflected in little help items from
9 Sellers Central that, like the tax one that we
10 looked at?

11 A: Yes.

12 Q: For instance, there's one about buyer-seller
13 messaging, there's one about other kinds of
14 communications, right?

15 A: Yes.

16 Q: Okay. Do you remember ever hearing the
17 allegation that, the customer's interaction
18 with Amazon alone continues with respect to
19 customer service issues.

20 A: Yes.

21 Q: Okay. Is that true or false?

22 A: It's false.

23 Q: Okay. And why is that?

24 A: We showed examples of how customers can contact
25 sellers, and I know from my experience that



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1 tens of millions of customers do indeed contact
2 sellers. I've visited sellers' premises and
3 I've seen customer service teams. 20, 30, 40
4 people answering questions from Amazon
5 customers every day. So it's false.

6 Q: Changing topic slightly there's been some
7 allegations in the case about the featured
8 seller aspect of the website or the algorithm
9 that relates to the -- what someone you
10 referred to as the buy box, are you familiar
11 with that topic?

12 A: Yes.

13 Q: Okay. There's been an allegation that Amazon
14 Services, through its algorithm effectively
15 chooses which particular product the customer
16 will purchase. Are you familiar with that
17 allegation?

18 A: Yes.

19 Q: And is that true or false?

20 A: Would it be helpful to the Court to describe
21 what the featured merchant algorithm is?

22 Q: Yes, I believe so. Please do.

23 A: On the product detail page one of the sellers
24 -- the word merchant and seller is sometimes
25 used interchangeably -- one of the sellers can



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1 be featured in the top right hand side of the
2 page. It's sometimes called the buy box. And
3 customers of course can find all the other
4 sellers as we saw earlier. The seller that's
5 selected to be featured is selected by a
6 neutral algorithm or piece of software that
7 looks at each offer from each of the sellers.
8 It looks at the price, whether it's in stock,
9 the speed of delivery, the rating that
10 customers have given that seller and ranks the
11 offers for an individual product. And one of
12 those offers that the neutral piece of software
13 is best if featured. So the statement that you
14 read out was false because to say Amazon
15 chooses suggests that somebody is picking or
16 choosing the seller which is not true. It's a
17 neutral piece of software and the sellers of
18 course control the outcome because they control
19 the price that they offer and they control
20 whether they're in stock or not. And those
21 inputs to that piece of software are public.
22 Sometimes Amazon itself can be a merchant
23 that's feature but algorithm is ignorant of who
24 the seller is. It doesn't care. It just looks
25 at the price, availability and, you know, the



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1 speed of shipping and so on.

2 Q: Uh-huh. Well is there any way at all in which
3 Amazon Services chooses the particular product
4 that a customer will likely purchase?

5 A: Well the feature of the mentioned algorithm
6 chooses -- it doesn't choose but it selects the
7 offer from the rights from the seller have the
8 best overall offer. Whether that's Amazon or,
9 more often actually, the third party seller.
10 It doesn't choose a product. There's no
11 choosing of the product. It's selecting a
12 featured offer, generally the lowest price.

13 Q: Let's take a look at Exhibit 7. Are you
14 familiar with this Mr. Poad?

15 **(Hearing Exhibit Number 7 was introduced into the**
16 **record at this time.)**

17 A: Yes.

18 Q: What is Exhibit 7?

19 A: This is a page available to any seller in the
20 Help section, and it describes the criteria
21 that the piece of software I mentioned uses to
22 determine the best offer and colloquially it's
23 described as winning the buy box. The buy box
24 is the area to the top right-hand side of each
25 product detail page.



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1 Q: And does this document, Exhibit 7, identify the
2 -- those factors that relate to that buy box
3 algorithm?

4 A: Yes.

5 Q: Okay. And this information that we're looking
6 at in Exhibit 7, this isn't internal Amazon
7 information, this is information that's
8 available to the whole world, right?

9 A: Yeah, this is on the public website.

10 Q: Okay. So there's no mystery about what it
11 takes to be a feature itself, is there?

12 A: No. It's pretty simple. Low price and be in
13 stock.

14 Q: All right. Slightly different allegation.
15 Let's keep up Exhibit 7. I apologize. The
16 various factors that go into the buy box
17 algorithm, which of these factors if any does
18 Amazon Services control as it relates to third
19 party items?

20 A: Amazon Services doesn't control any of the
21 input. Sellers control their pricing. Third
22 party sellers control whether they're in stock
23 or not. Third party sellers choose how to
24 fulfill products to customers, and third party
25 sellers provide customer service and receive



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1 ratings from customers all which -- which the
2 algorithm consumes to rank the orders. So the
3 sellers control the process.

4 Q: Now there's a number of allegations in the case
5 that, for instance, related to payment
6 processing that Amazon processes the customer's
7 payments, is that an accurate statement to say
8 just generically Amazon processes the payments?

9 A: No.

10 Q: Which entity is it that does that?

11 A: Amazon Payments, Inc. is a subsidiary of
12 Amazon.com, Inc., the parent company. It's a
13 regulated company which processes payments for
14 services.

15 Q: Okay. And the Fulfillment by Amazon service
16 that you've testified about, which company is
17 that provided by?

18 A: The services offered by Amazon Services, LLC,
19 the operation of the FBA service, is performed
20 by Amazon Fulfillment Services. That's the
21 company that is the holding company for all the
22 different warehouses that we have kind of as an
23 inter-company agreement between those two
24 companies.

25 Q: Changing topics, going back to the money again?



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1 There's been an allegation in this case that,
2 Amazon, through their website, accepts
3 consideration from customers in exchange for an
4 object of value. Are you familiar with that
5 allegation?

6 A: Yes.

7 Q: Is it true or false?

8 A: It's false.

9 Q: Why?

10 A: Well let's go through the different entities.
11 Amazon Services does not receive consideration
12 from customers for any thing. Amazon Services
13 provides services to third party sellers and
14 does receive fees for those services. The
15 sellers receive consideration for the products
16 that they sell from customers. Now Amazon of
17 course is also a retailer of course. Amazon is
18 also a seller. Excuse me, Amazon.com, LLC is
19 a seller just to be clear, there's an entity
20 part of Amazon that is itself a seller. Just
21 like Zappos as we saw earlier is a subsidiary
22 of Amazon. Where Amazon.com, LLC is the seller
23 of course they receive consideration for the
24 products that they sell just like in 1994 but
25 with the books. But Amazon Services does not



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1 receive -- first of all the statement just says
2 Amazon so that's not clear -- but Amazon
3 Services does not receive consideration for
4 products. It doesn't sell products to
5 customers.

6 Q: I want to just tie up one loose end from this
7 morning.

8 MR. RAZI: Your Honor, may I approach the bench ---

9 THE COURT: Yeah.

10 MR. RAZI: --- and the court reporter and
11 everybody. We just have one more Exhibit.

12 Q: Mr. Poad, I've handed you what we've marked as
13 Hearing Exhibit 210 and before we publish it I
14 guess let's wait until it get it admitted
15 because this one hasn't formally been admitted.

16 (Hearing Exhibit Number 210 was introduced into the
17 record at this time.)

18 Q: Do you recognize it?

19 A: This looks like a print out of the offer
20 listing page of the product that we were
21 looking at earlier.

22 Q: Okay.

23 MR. RAZI: Your Honor, we offer Exhibit 210.

24 MR. GREEN: No objection, Your Honor.

25 THE COURT: It's admitted.



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1 (Hearing Exhibit Number 210 was admitted into
2 evidence.)

3 Q: And this is -- just to sort of amplify if you
4 will what you just said -- this is a printout
5 of the Asics women's sneaker of the listing
6 page that we went through this morning in some
7 detail on the record?

8 A: Yes.

9 Q: Okay. I want to take a step back and just
10 summarize the role of the players or have you
11 summarize the role of the players that we've
12 testified about. Remind us, and remind the
13 Court, what it is that third party sellers do
14 to sell a product.

15 A: Third party sellers source the product from a
16 manufacturer or they may manufacture
17 themselves, and they identify which products
18 they would like to offer for sale on the Amazon
19 website and those that they don't want to
20 offer. They create the product listing, the
21 title, the description, bullet points, key
22 words. Third party sellers upload images of
23 the product. Third party sellers set the price
24 and can change that price whenever they want
25 and often do. Third party sellers determine



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1 how many units to hold in stock, how much of
2 their working capital to invest in inventory to
3 remain in stock. Third party sellers transfer
4 ownership of the product to customers. Third
5 party sellers receive money in exchange for the
6 product, and third party sellers in all cases
7 manage customer services as relates to their
8 product and those are all the things that third
9 party sellers do.

10 Q: Okay. I want to pause on just one of those.
11 I think we've covered a number of them in some
12 detail, but transferring products to customers?
13 How is it that third party sellers transfer
14 their products to customers?

15 A: Well I would interpret that as transfer
16 ownership and also physically transfer it.
17 Sellers when they sell the product, the
18 ownership goes to the customer after the
19 customer's paid and the shipment's been
20 generated. Sellers transfer possession of the
21 product to the customer. Now in both cases
22 there are intermediaries. Federal Express,
23 UPS, the post office, FBA. Those are all
24 options, they're conduits through which the
25 seller transfers possession to the customer.



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1 I should just correct myself, I think I said in
2 both cases there's an intermediary. In the
3 case of the transfer of the ownership that's
4 not true. It goes straight from the seller to
5 the customer. I think I was thinking about
6 things.

7 Q: Thank you. Amazon Services, to summarize, what
8 is it that Amazon Services provides in the
9 context of third party sales transactions on
10 Amazon.com?

11 A: Amazon Services, LLC operates the website. It
12 provides tools and services to help sellers
13 list their products, upload their images and so
14 on. It also provides advertising services to
15 enable sellers to advertise and market their
16 products to customers on the Amazon website.

17 Q: Okay. And what about all the stuff that you
18 just identified that the third party sellers
19 do? Are those things done by the third party
20 sellers exclusively or does Amazon Services
21 also do some of that?

22 A: They're exclusively done by third parties and
23 not by Amazon Services.

24 **MR. RAZI:** If I could have the Court's indulgence
25 for just a moment?



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1 Q: Sir, based on your experience in business --
2 and we can put the slide down -- are you
3 familiar with consignment transactions?

4 A: Yes.

5 Q: In general what's your understanding of a
6 consignment transaction?

7 A: A consignment transaction in my experience is
8 where a retailer offers a product for sale.
9 The retailer selects the product and sets the
10 price but the consignor owns the inventory up
11 until the point of sale and then when the
12 product is sold -- in my experience anyway --
13 there's a flip of ownership from the consignor
14 to the retailer and then eventually to the
15 customer, but the retailer controls price,
16 controls what products to sell, controls
17 inventory in some cases at least in my
18 experience. But the supplier of that product
19 retains ownership up until the point of the
20 sale to the end consumer.

21 Q: Are these third party sale transactions on
22 Amazon.com that you've been testifying about
23 today consistent with your experience of a
24 consignment transaction?

25 MR. GREEN: Same objection that I made before. He



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1 can obviously testify to the fact, just I'm
2 objecting to ---

3 **THE COURT:** Well that's what he appears to be
4 testifying to.

5 **MR. GREEN:** Thank you.

6 **THE COURT:** I take it as such. He said it's in his
7 experience.

8 **MR. GREEN:** Thank you, Your Honor. Just wanted to
9 be clear.

10 A: No, they're completely different.

11 Q: Okay. And let me just lay a foundation. Do
12 you in fact have experience with consignment
13 transactions?

14 A: I do.

15 Q: Okay. Why is it that you say that the third
16 party sales on Amazon.com are completely
17 different from consignment transactions?

18 A: In a consignment transaction the retailer sets
19 the price, in a third party sale the seller
20 sets the price. In a consignment transaction
21 the retailer determines which products to sell,
22 in a third party transaction the seller, the
23 third party seller, decides which products to
24 sell. In a consignment transaction the
25 retailer is the seller of record, in third



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1 party sale the party is the seller of record to
2 the customer. In a consignment model -- based
3 on my understanding -- the retailer determines
4 how much cost -- how much inventory to carry,
5 even though it's still owned by the supplier,
6 in a third party sale the third party seller
7 determines how many units of a product to sell.
8 There may be some other differences but those
9 are the main ones I know.

10 Q: Just taking a step back. Are you aware of any
11 basis from your 10-plus years working with
12 these transactions, are you aware of any
13 factual basis that would support the notion
14 that Amazon Services is the seller of third
15 party sellers?

16 MR. GREEN: I object, Your Honor. That is such a
17 broad question and I don't -- it's getting to
18 the legal question at issue in this case. Your
19 Honor, I object to that.

20 THE COURT: I guess that's objection saying it calls
21 for a narrative?

22 MR. GREEN: Narrative would be, yes.

23 THE COURT: All right.

24 MR. RAZI: It's a yes or no question.

25 MR. GREEN: The problem is there's no foundation for



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1 it really. I mean, it's such a broad -- not
2 aware, what does that mean?

3 **THE COURT:** I sustained it as asked.

4 Q: Are you aware of any facts suggesting that
5 Amazon Services sells the products that are
6 listed as being offered for sale on Amazon.com
7 by third party sellers?

8 A: No, they do not.

9 **MR. RAZI:** I pass the witness.

10 **THE COURT:** Okay. Well, we're going to take a short
11 break.

12 **MR. GREEN:** Thank you, Your Honor.

13 **THE COURT:** About five minutes, I guess.

14 **MR. GREEN:** Thank you, Your Honor.

15 **(Off the Record)**

16 **THE COURT:** Proceed.

17 **MR. GREEN:** Thank you, Your Honor.

18 **MR. POAD - CROSS-EXAMINATION BY MR. GREEN:**

19 Q: Good afternoon, Mr. Poad.

20 A: Good afternoon.

21 Q: Good to see you again.

22 A: You too.

23 Q: We're talking about the Amazon.com website
24 today, correct?

25 A: Yes.



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1 Q: And Amazon Services operates that website,
2 correct?

3 A: Yes, that's correct.

4 Q: And we've also talked -- you talked with your
5 attorney today, or Amazon's attorney today,
6 about the business solutions agreement -- I
7 always want to call it business services -- but
8 business solutions agreement, correct?

9 A: Yes.

10 Q: And the business solutions agreement covers --
11 I think you've testified to -- but a third
12 party's relationship with placing goods for
13 sale on the Amazon.com website, correct?

14 A: It describes the selling on Amazon service
15 offered by Amazon Services to third party
16 sellers.

17 Q: Okay. Let's break that down. Back up -- we'll
18 come back to that. On the website Amazon ---

19 **MR. GREEN:** Pull up Exhibit 3. I think it's Exhibit
20 3, yeah, the BSA. And flip to page 20 of the
21 BSA which would be Bates number 55 I think.
22 Yes. And highlight that S-7 if you would?
23 Enlarge it a little bit if you can. There we
24 go.

25 Q: And are you -- you're familiar with the BSA I



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1 think you testified earlier, correct?

2 A: Yes.

3 Q: And when I use BSA you understand that the
4 business solutions agreement is what I'm
5 referring to, correct?

6 A: Yes.

7 Q: Okay. And are you familiar with this section
8 S dash 7, control of Amazon sites?

9 A: May I read the section?

10 Q: You may.

11 A: Okay.

12 Q: And that says we have the right. We refers to
13 Amazon entities, correct?

14 A: I believe the we in this contract and this
15 context is Amazon Services.

16 Q: Okay. And Amazon Services then determines the
17 content, appearance, design, functionality and
18 all other aspects of the Amazon site, correct?

19 A: Amazon Services operates the website. The
20 template of the different pages is designed by
21 Amazon Services or is operated by Amazon
22 Services -- in reality the way the business
23 works as we saw is that the sellers are
24 creating content for their products to be
25 displayed to customers.



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1 Q: Mr. Poad, I think you and I struggle with this
2 a little bit in your deposition. And I'm --
3 when I -- I'm trying to ask -- I'm thinking
4 maybe I'm not doing a very good job. I'm
5 trying to ask a yes or no question and you need
6 to answer to my question yes or no. Your
7 attorneys may give you time to explain or work
8 through -- and we may work through some
9 explanations -- but I think I needed a yes or
10 no answer to the question. I'll try to phrase
11 it as best I can to do that. If you don't
12 understand please let me know that you don't
13 understand because I can certainly craft a
14 question inartfully.

15 **THE COURT:** Or if you cannot provide a yes or no
16 answer just let us know.

17 **MR. POAD:** Thank you.

18 Q: So, okay. So now I think I understand being
19 your testimony is Amazon Services can determine
20 the content, appearance, design, functionality
21 and other aspects of the website, is that
22 correct?

23 A: Yes.

24 Q: Okay. And in fact including by redesigning,
25 modifying, removing or restricting access to



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1 any of them and by suspending, prohibiting,
2 removing any listing, is that correct?

3 A: Yes, that's what the contract states.

4 Q: Okay. Goods are sold on the website, correct?

5 A: Yes, goods are sold on the website.

6 Q: And the website -- doesn't Amazon consider --
7 doesn't the web -- doesn't Amazon consider the
8 website as a one-stop place to buy goods?

9 A: I've not heard Amazon or Amazon entities
10 describe Amazon in that way. I'm not sure what
11 one-stop shop means.

12 Q: Okay. Well let me ask you this way, isn't
13 Amazon's mission statement that our vision is
14 to be the Earth's most customer-centric
15 company. To build a place where people can
16 come to find and discovery anything they might
17 want to buy online?

18 A: Yes, I believe so.

19 Q: Okay. All right. And I think you've -- well
20 let me ask it this way, strike that -- it is
21 true, isn't it, that there are no substantive
22 differences really between the quarter one 2016
23 process that we're still stalking about today
24 and the procedures that are followed today on
25 the website, is that correct?



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1 A: Could you be more specific about which
2 processes?

3 Q: Well I'm talking about substantial differences.
4 I think you and I discussed in your deposition
5 whether there were any major changes that -- as
6 far as the process that involved with respect
7 to purchasing goods on the website, and I think
8 your testimony -- if you agree with me -- was
9 that there are no substantial differences -- I
10 said substantive, maybe I should have
11 substantial differences.

12 A: I think I testified in my deposition that that
13 was true. The process of buying an item from
14 third party sellers or from an Amazon affiliate
15 is largely the same today as it was in 2016.

16 Q: Okay. A third party can't become a seller --
17 to sign up for a sales account that you sent
18 through a little bit earlier, you have to agree
19 to the BSA, don't you?

20 A: Yes.

21 Q: A third party can't change those provisions,
22 can they?

23 A: Not to my knowledge, no.

24 Q: Okay. Now Amazon can change the provisions of
25 the BSA at its sole discretion, is that



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1 correct?

2 A: I don't know if that's true.

3 Q: Okay. Let's look at page 7 which is Bates
4 number 42.

5 **MR. GREEN:** And paragraph 16 there -- I think that's
6 the right page -- and highlight the 16 up there
7 -- or not highlight it but zoom into it just a
8 tad. Not quite that much.

9 **THE COURT:** That's more than a tad.

10 **MR. GREEN:** I want the top, sort of the first little
11 bit of 16. That should be good.

12 Q: Can you read that, Mr. Poad?

13 A: Yes, I can.

14 Q: And I'm talking about that first sentence
15 there. Let me know when you've read through
16 that.

17 A: Okay.

18 Q: And that first sentence says, we may amend any
19 of the terms and conditions contained in this
20 agreement at any time and in our sole
21 discretion. Is that correct?

22 A: Yes.

23 Q: And we refers to the applicable Amazon entity,
24 correct?

25 A: I believe in this context it would be Amazon



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1 Services.

2 Q: Okay. And then this is -- well let's -- we're
3 agreed that this agreement is the form
4 applicable in the first quarter of 2016,
5 correct?

6 A: I don't know what version of the BSA you're
7 showing me here.

8 Q: It is the one that I have -- we have agreed to
9 with your attorneys for admission into the
10 record as part of Hearing Exhibit 3, so it's
11 the one that we have agreed to with admission
12 into evidence.

13 A: Okay.

14 Q: In other words, I'm not picking a different one
15 to show you. I am showing you Hearing Exhibit
16 3.

17 A: Right.

18 Q: So with that caveat we're agreed that this is
19 the version of the BSA applicable for first
20 quarter 2016, correct?

21 A: I don't know if that's the case but I mean, I
22 can't confirm that's the case without looking
23 at the actual document but I'm willing to ---

24 Q: Is there something you could look at in
25 particular that would confirm that?



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1 A: There isn't. I mean, if there were a date or
2 if there were a version that had been checked
3 with Amazon, but I mean, I'm okay to --
4 certainly okay to speak about it. I've no
5 reason to think it's not the right version.

6 Q: And that was my next question, you have no
7 reason to think that it is not the as you sit
8 here right now?

9 A: I don't know.

10 Q: Okay. Well you don't know but you don't have
11 a reason to think that it's not the one, do
12 you?

13 A: No.

14 Q: Okay. Thank you. Let's look at page 9, Bates
15 44.

16 **MR. GREEN:** And that large paragraph at the top,
17 zoom in on the bottom of that, please? There
18 you go. I think that's good.

19 Q: I want to ask you about that last sentence in
20 that -- right above definitions, that last
21 sentence there, Mr. Poad. And let me know when
22 you're done.

23 A: Okay.

24 Q: Do you need to read the entire paragraph before
25 I ask you about it?



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1 A: I'd like to just read this paragraph if that's
2 okay so that ---

3 Q: Could you pull it down just a tad for him?

4 A: I'd like any context around it.

5 Q: Just pull -- yeah, there you go.

6 A: Okay.

7 Q: And that last sentence says that this agreement
8 represents the entire agreement between the
9 parties with respect to the services and
10 related subject matter and supercedes any
11 previous or contemporaneous oral or written
12 agreements and understandings, correct?

13 A: Yes.

14 Q: Okay.

15 **MR. GREEN:** And then page down a little bit for me,
16 Elizabeth?

17 Q: And the BSA references the Amazon contracting
18 party, correct?

19 A: Yes.

20 Q: And I think you've touched on that just a
21 little bit in your direct testimony if I
22 remember correctly?

23 A: Yes.

24 **MR. GREEN:** Page to the next page, page 10 of the
25 BSA. And highlight the United States. The



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1 last big block down at the bottom. And page up
2 just a tad. Just a tad. Other way. Sorry.

3 **THE COURT:** You meant page down.

4 **MR. GREEN:** Yes, go the other direction. I want to
5 be able to see that last little block -- there
6 you go.

7 Q: Okay. And so this is the provision for the
8 contracting party that would be applicable to
9 South Carolina sales, correct?

10 A: To sellers based in the United States I
11 believe.

12 Q: Fair enough. I'll take that answer. And the
13 Amazon contracting party that is listed there
14 depends on the described service that the third
15 party is using, correct?

16 A: Yes.

17 Q: And so for instance selling on Amazon, the
18 contract is with Amazon Services, LLC, correct?

19 A: Yes.

20 Q: Same for -- and the same for some of the one
21 that -- not selling on Amazon, that one's a
22 little different -- but Fulfillment by Amazon
23 and Amazon Webstore and Amazon Clicks, correct?

24 A: Yes.

25 Q: And the Fulfillment by Amazon that referenced



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1 as FBA, am I correct in that?

2 A: Yes.

3 Q: And that says Amazon Services, LLC, correct?

4 A: Correct.

5 Q: Okay. And then at the bottom is says
6 transaction processing services, correct?

7 A: Correct.

8 Q: And that says Amazon Payments, Inc., correct?

9 A: Yes.

10 Q: Except that provided to -- provided that you
11 registered for or use the service before June
12 30, 2014 then Amazon Services, LLC may in it's
13 discretion perform the transaction processing
14 services, did I read that correctly?

15 A: Yes.

16 Q: Okay. Thank you.

17 **MR. GREEN:** Elizabeth, go to page 8, Bates number
18 43. And zoom in about there on the middle
19 paragraphs. A little bit more if you can.
20 Okay.

21 Q: Mr. Poad, could you read that -- can you read
22 that paragraph not just to yourself, I want to
23 ask you a couple questions about it -- the you
24 may not assign this agreement paragraph there?

25 A: Yes.



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1 Q: Let me know when you're done.

2 A: Just the paragraph beginning you may not
3 assign?

4 Q: Correct. You don't have to read the next one,
5 at least not at this point in time. If you
6 need to I'll give you time for that.

7 A: Okay. I'm okay.

8 Q: And the third sentence in that paragraph that
9 I focused you on on page 8 of the BSA says, we
10 may perform any of our obligations or exercise
11 any of our rights under this agreement through
12 one or more of our affiliates, is that correct?

13 A: Yes.

14 **MR. GREEN:** And then go back to the next page,
15 Elizabeth, the page 9, Bates 44 and zoom in on
16 affiliate.

17 Q: And read that definition if you would please,
18 Mr. Poad? You read it yourself, I'll just ask
19 you a couple questions about it.

20 A: I've read it.

21 Q: Okay. And affiliate is defined as -- with
22 respect to any entity any other entity that
23 directly or indirectly controls, is controlled
24 by or is under common control with that entity,
25 did I read that correctly?



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1 A: You did.

2 Q: And is Amazon Payments, Inc. and affiliate of
3 Amazon Services, LLC?

4 A: I should just say that the paragraph I read on
5 the subsequent and this paragraph contains lots
6 of legal terminology that I'm not familiar
7 with. I'm not sure what the controls means or
8 control means in this context. I have, though,
9 heard of Amazon Payments, Inc. described as an
10 affiliate of Amazon Services, LLC.

11 Q: Okay.

12 A: And I know that both are subsidiaries of the
13 ultimate parent company, but I'm struggling a
14 bit with the language in these sections. I
15 just don't know the legal meaning of some of
16 the terms.

17 Q: Okay. And that's fine but for our purposes
18 Amazon Payments, Inc. and Amazon Services, LLC
19 is under common control with a parent entity,
20 is that correct?

21 A: I don't know if common control has a legal
22 definition that I'm not familiar with. I know
23 that both Amazon Services, LLC and Amazon
24 Payments, Inc. are subsidiaries of Amazon.com,
25 Inc.



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1 Q: And they're wholly owned subsidiaries, aren't
2 they?

3 A: Yes, I believe so.

4 Q: Okay. And then the same -- I think we talked
5 about a little bit -- I think you talked a
6 little bit about Amazon Fulfillment Services or
7 AFS didn't -- in your direct, is that correct?

8 A: Yes.

9 Q: And Amazon Fulfillment Services or AFS is also
10 wholly owned lawfully by a common parent with
11 Amazon Payments and Amazon Services, LLC, is
12 that correct?

13 A: Yes, all those three companies are ultimately
14 owned by Amazon.com, Inc. They're public
15 traded company.

16 Q: Okay. Thank you. Let's talk a little bit
17 about the website. You talked -- or you did
18 the purchasing on Amazon this morning.
19 Customers -- strike that -- people come to the
20 website to buy goods, correct?

21 A: Amongst many other things, yes, they do come to
22 buy products.

23 Q: Okay. But one of the things they do come buy
24 is goods, personal property?

25 A: I'm just stumbling over the words goods. They



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1 buy physical things, products, yes.

2 Q: Okay. And that's what I -- really what I'm
3 trying to do. The products, something that --
4 tangible, something I can touch. Just a book,
5 things like that?

6 A: Yes.

7 Q: Okay. And Amazon considers visitors to the
8 website its customers, doesn't it?

9 A: I can't answer that question directly yes or
10 no. Can I give a fuller explanation?

11 Q: Yes.

12 A: The word customer is used in many different
13 contexts. Sometimes it's used to refer to some
14 customer or someone who buys something from a
15 seller or from an Amazon company. Sometimes
16 just visitors to the website are referred to as
17 customers. So I think in the broadest context,
18 yes. Customer -- people visiting the Amazon
19 website are referred to as customers. But in
20 some other contexts if they haven't bought a
21 product from an Amazon affiliate, it's more
22 likely that they'd be described as a customer
23 of the seller if they've bought from a third
24 party seller.

25 Q: Well the -- we agreed the mission statement is



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1 that Amazon is -- their vision is to be Earth's
2 most customer-centric company. To build a
3 place where people can come to find and
4 discovery anything they might want to buy
5 online. So that would be people coming to the
6 website to buy things, wouldn't it?

7 A: Yes, I think the mission statement is a very
8 broad statement and intent and the use of the
9 word customer in a very broad context.

10 Q: Well and you expressed earlier Amazon has a
11 concern about customers using the website to
12 buy goods, correct?

13 A: Could you -- has a concern?

14 Q: Not concern in the sense that it's bad -- you
15 -- I think you testified -- if I remember
16 correctly, you testified that one of the
17 purposes of some of these provisions in the BSA
18 is customer safety, protection of the customer,
19 is that right?

20 A: Yes, that's right.

21 Q: Okay. And so again that's a concern for people
22 who are using Amazon's website, correct?
23 Protecting?

24 A: Yeah, sure.

25 Q: And so that would treat them as a customer,



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1 wouldn't it?

2 A: Yes. As I said the word customer's used in
3 different contexts. As it relates to a
4 particular transaction the customer would be
5 the person buying the product from a third
6 party seller or from an Amazon affiliate. But
7 the word customer is used broadly to refer to
8 people who consume Amazon services but
9 sometimes in different contexts.

10 Q: Okay. All right. Somebody that goes to the
11 website that wants to buy a product has to
12 create an Amazon account, is that correct?

13 A: Yes, that's correct.

14 Q: I can't order a good through the -- a product
15 -- we'll use your terminology -- I can't order
16 a product through the website without signing
17 up for an Amazon account, can I?

18 A: Not to my knowledge, no.

19 Q: Okay. And the -- my -- the account that I
20 create that's where I enter my contact
21 information, correct? My address, e-mail
22 address, shipping address and billing address,
23 wouldn't that be correct?

24 A: I don't know if all those things are entered at
25 the point an account is created necessarily.



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1 Certainly e-mail address is required. I don't
2 know if a shipping address is required at the
3 point of account creation. Maybe on your first
4 order that's required but that's the
5 information that customers provide.

6 Q: And fair enough, but if I'm going to order a
7 product from Amazon's website, before I can
8 order that product -- put aside from whom it's
9 coming from -- I've got to enter my billing
10 address, credit card information and shipping
11 address, correct?

12 A: You said before a customer orders a product
13 from Amazon's website, so I just stumbled over
14 that a little bit. They're not buying from a
15 website, they're buying from a seller.

16 Q: For our purposes let's use through the website
17 or using the website.

18 A: On the website, okay.

19 Q: Yes. Yes. Then I would have to enter my
20 shipping address, my billing address and my
21 credit card information, correct?

22 A: Yes.

23 Q: Okay. And Amazon offers also what's called a
24 Prime membership program, correct?

25 A: Yes.



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1 Q: And it has a large -- correct me if I'm wrong
2 -- I think I read recently you had over a
3 hundred million members in the Prime membership
4 program, is that correct in your knowledge?

5 A: I don't have personal knowledge of that. I did
6 see a press release from Amazon.com, Inc.
7 saying that worldwide there were over a hundred
8 million paid Prime members.

9 Q: Okay. And Amazon would consider members of its
10 Prime program it's customers, wouldn't it?

11 **MR. RAZI:** I would just object here for the vague
12 use of the term Amazon.

13 **THE COURT:** Any response or do you want to rephrase?

14 **MR. GREEN:** Well I can rephrase. I think a couple
15 times Mr. Razi did Amazon too but I can
16 rephrase.

17 Q: Let's talk about Amazon Services. Well, strike
18 that -- let me ask you this, who administers
19 the Prime membership program for Amazon? What
20 entity?

21 A: I'm not certain. I've not looked into the
22 details of which entity manages the Prime
23 program as part of this case. It hasn't really
24 come up so I'm not a hundred percent certain.

25 Q: Let me ask you this then, is it ultimately --



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1 we talked about the publicly traded entity --
2 is the -- to your knowledge is it -- the Prime
3 program provided as part of the services of the
4 publicly traded or it's subsidiaries?

5 A: Again I don't know for sure, but I think I can
6 say with confidence that one of the
7 subsidiaries of the ultimate parent company is
8 the operator of the Prime program. I'm just --
9 I'm not certain which one.

10 Q: Okay. Does Amazon Services provide the Prime
11 program?

12 A: I'm not certain.

13 Q: Okay. Okay. We're obviously talking about
14 third parties which are non-Amazon entities
15 using the website. Third parties don't have
16 access to the names and information of all the
17 registered users of the Amazon.com website, do
18 they?

19 A: Of all the registered users?

20 Q: Yes.

21 A: No.

22 Q: Okay. The third parties only knows that they
23 transact with directly, correct? Or found
24 independently of the website, one or the other?

25 A: I can think of another example. Customers can



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1 ask a question of the seller without having
2 bought from that seller and then the seller
3 would have some information about that customer
4 to be able to answer the question.

5 Q: But isn't that messaging about -- inquiring
6 about order -- isn't that addresses and the
7 like encrypted? E-mail addresses encrypted?

8 A: The e-mail address is encrypted. The customer
9 might choose to share some information with the
10 seller.

11 Q: But they might not?

12 A: That's true.

13 Q: Okay. And when a customer signs on to the
14 website to purchase products they just create
15 one account that they use for all their website
16 transactions, isn't that correct?

17 A: As far as I'm aware that's true today. I don't
18 know if that was true in 2016. There were some
19 different services offered to customers that
20 required different log-ins in the past. I
21 don't know whether that was true in 2016.
22 Today there is a common user name and password
23 across to my knowledge most of Amazon services
24 available to consumers.

25 Q: Okay. All right. And I guess more to the



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1 point, a customer or user of the website is not
2 required to create a different account for
3 different third parties placing goods on the
4 website or one for third parties and one for
5 Amazon, is it? All their purchases can go
6 through one customer account, correct?

7 A: Yes, that's correct.

8 Q: Okay.

9 **MR. GREEN:** Elizabeth, go to page 6 of the BSA,
10 Bates 41. Page 8. No wait a minute. Wait,
11 wait, sorry, sorry. That's my bad. Zoom in on
12 paragraph 14.

13 Q: If you want to take a moment and read that
14 paragraph, Mr. Poad. I'm going to ask you a
15 few questions about it.

16 A: Okay.

17 Q: And I think what I want to ask you about first
18 is C. And C prohibits a third party from
19 contacting a person that has ordered your
20 product with the intent to collect any amounts
21 in connection therewith or to influence that
22 person to make an alternative transaction,
23 correct?

24 A: Yes.

25 Q: And then E prohibits the third party from



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1 targeting communications of any kind on the
2 basis of the intended recipient being an Amazon
3 site user, correct?

4 A: Yes.

5 Q: And then the next sentence, in addition, you --
6 being the third party -- may only use tools and
7 methods that we designate to communicate with
8 Amazon site users regarding your transactions
9 including for the purpose of scheduling,
10 communicating, or canceling the fulfillment of
11 your products, correct?

12 A: Yes.

13 Q: And then the last sentence says that you can
14 use information you acquire without reference
15 to Amazon transactions for any purpose, but
16 then the last sentence restricts that to,
17 provided that you do not target communications
18 on the basis of the intended recipient being an
19 Amazon site user, correct?

20 A: I have one question. Amazon transaction
21 information looks like it's a defined term
22 somewhere else in the document. I'm not
23 certain what that refers to. I agree that's
24 what the document says. I just don't -- you
25 know, I haven't read the definition of that



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1 term.

2 Q: If you need to to give a complete answer then
3 let's turn to page 11, Bates 46, real quick and
4 the definition is toward the top.

5 **MR. GREEN:** If you could zoom in on that?

6 A: Okay.

7 Q: And so then now we flip back to page 6 and zoom
8 in on that. There you go. And then so again,
9 provided you don't target communications on the
10 basis of the intended recipient being an Amazon
11 site user, correct?

12 A: Yes.

13 Q: Okay. And isn't it true that -- and I think we
14 talked about this in your deposition -- but if
15 the seller -- if a third party is communicating
16 with a customer about an Amazon transaction and
17 that only interaction with that customer is
18 through the Amazon website, the third party's
19 required to use the buyer-seller messaging
20 rather than communicate directly, is that
21 accurate?

22 A: For e-mail communications the seller's required
23 -- and the customer's required -- to -- I
24 should say the seller's required to use the
25 buyer-seller messaging functionality. But



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1 sellers can and do publish customer service
2 telephone numbers as we saw earlier. And
3 that's, as I said, to keep both sides safe.

4 Q: Okay. Let's turn to page 17, Bates 52.

5 **MR. GREEN:** This is a rather long one -- actually go
6 to the bottom of page 16, Elizabeth. He's
7 going to need to read a few sentences. And
8 zoom in on that bottom paragraph for him. Page
9 up just a little. I think that's good.

10 Q: If you read that section S2.1 -- sorry -- and
11 then when you get to the bottom we'll flip over
12 too. Just let me know when you're done?

13 A: The whole thing?

14 Q: Yeah, don't read it out loud, just -- but I --
15 I just want to make sure you've got the
16 context.

17 A: Okay.

18 Q: Okay.

19 **MR. GREEN:** And then flip over to the next page at
20 the top. And go down just a little bit more.
21 Okay that's good.

22 Q: And just that top finishing paragraph.

23 A: Okay.

24 Q: And that prohibits third parties -- or strike
25 that -- that tells third parties that they may



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1 not send customers e-mails confirming orders of
2 fulfillment of your products, isn't that
3 correct?

4 A: That's correct. Those e-mails are sent
5 automatically by the Amazon website for
6 sellers, it's part of the service. So
7 customers will see -- in the way that we saw
8 earlier -- consistent, a consistent layout
9 which I think creates a better customer
10 experience. And customers don't like to
11 receive duplicate e-mails typically.

12 Q: Okay. But the agreement says it prohibits the
13 third party from sending customers confirmation
14 e-mails or fulfillment e-mails, correct?

15 A: Yes. I think it's one of the policies that
16 right at the beginning of today, as a
17 marketplace operator consistency and a great
18 customer experience is important and that's one
19 of the examples.

20 Q: Okay. But I'm not asking the reasons right
21 now, I'm just asking whether or not that's what
22 the agreement restricts the third parties to
23 do.

24 A: Okay.

25 Q: And it restricts them from not -- it restricts



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1 them from sending customers e-mails confirming
2 orders of fulfillment of "your products,"
3 correct?

4 A: Except where expressly permitted.

5 Q: Fair enough. Except where expressly permitted
6 by the BSA, right?

7 A: Yes.

8 Q: Okay. Let's -- while we're on that let's look
9 at Exhibit 122. We talked about that a littler
10 earlier today. Let's talk about that for a few
11 minutes.

12 A: Okay.

13 Q: I think you just acknowledged those e-mails
14 come from Amazon -- I guess Amazon Services,
15 right?

16 A: The -- yes, they come from the Amazon website
17 and that's operated by Amazon Services.

18 Q: Okay. On that e-mail there -- in the body of
19 that e-mail there's really no reference to any
20 entity other than an Amazon entity or
21 affiliate, is there?

22 A: It's visible if you click on your Manage Your
23 Order.

24 Q: Well but that wasn't my question. My questions
25 is whether on the e-mail it references any



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1 entity other than an Amazon company or
2 affiliate?

3 A: That's true, but I can give a clarification as
4 to why?

5 Q: You can -- I think Judge Anderson said you
6 could explain if you couldn't answer it yes or
7 no.

8 A: This is an e-mail sent when an order's been
9 placed. Orders can contain multiple items from
10 multiple sellers. Those items aren't listed on
11 this particular template. It says Oxxo Good
12 Grips, 8 piece dot, dot, dot, but there may be
13 other products from other sellers in this
14 order. So this particular template just
15 doesn't list out the products in the order.

16 Q: Okay.

17 A: And therefore it wouldn't make sense to list
18 the seller. If the customer clicks on the
19 order number on that button they'll be able to
20 see the details of the order with each of the
21 different sellers they may have bought from.

22 Q: Okay. Well let's flip over a couple Bates 614.
23 And that one also doesn't have any other entity
24 listed on there, does it?

25 A: Same reason. The shipment may contain products



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1 from multiple seller in the same box if it's
2 being fulfilled by Amazon.

3 Q: Let me ask you this, the e-mail wouldn't differ
4 if the customer ordered only one product, would
5 it?

6 A: I think the template is common whether there's
7 one or more products, I'm not certain of that.

8 Q: Okay. Are you aware of any different templates
9 as you sit here right now?

10 A: No, but there are many different templates used
11 on the website.

12 Q: But none of the ones we've looked at deviate
13 from that template, correct?

14 A: I'd have to go back through the exhibits.
15 There may have been one that we saw earlier
16 that was different. I'm not sure. Perhaps
17 not.

18 Q: If I handed you Exhibit 122 you could flip
19 through it, would that help you answer my
20 question?

21 A: Okay.

22 Q: All right. May I approach, Your Honor?

23 **THE COURT:** Yeah. In the future none of y'all have
24 to ask to approach the witness.

25 **MR. GREEN:** Okay. Thank you, Your Honor.



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1 **THE COURT:** You behave badly and then I will change
2 my mind.

3 **A:** I've gone through the Exhibit and it seems
4 there are some examples of order confirmation
5 and shipping confirmation e-mails and they have
6 common templates, don't detail the specific
7 products bought and from which seller they've
8 been bought.

9 **Q:** Okay. They just represent Amazon entity, is
10 that correct?

11 **A:** In the footer -- so Amazon.com is not an
12 entity, it's a brand. In the footer it talks
13 about how Amazon.com, LLC -- that's the entity
14 that sells products to customers -- will be
15 subject to sales tax, et cetera. It doesn't
16 refer to any other entities but I think that's
17 just saying that the customer's bought from
18 Amazon.com, LLC, they will be subject to sales
19 tax if they bought from a third party seller.
20 It depends on the choices the seller's made and
21 the obligations of that seller. I believe
22 that's what it says.

23 **Q:** Okay. And so I think the answer to my question
24 is no, there are no other entity other than an
25 Amazon entity or affiliate or brand name listed



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1 in that e-mail?

2 A: It says, if your order contains one or more
3 items from a seller other than Amazon.com, LLC.
4 It doesn't name them but it references other
5 sellers.

6 Q: Okay. It doesn't name any entity other than an
7 Amazon entity or Amazon affiliate, is that
8 correct?

9 A: That's correct.

10 Q: Okay. Thank you. I think I'm done. Thank
11 you. A customer buying a product on the
12 website can complete the sale without ever
13 using the messaging service to complete the
14 transaction, can't they?

15 A: Yes, they can. The messaging service isn't
16 really part of the sale process.

17 Q: Okay.

18 **THE COURT:** I didn't quite follow that? They can --
19 the customer can complete -- are you saying the
20 sale is different than the purchase?

21 **MR. POAD:** No, Your Honor.

22 **THE COURT:** Because you said it was part of the --
23 not part of the sales product purchase and I'm
24 ...

25 **MR. POAD:** I think when I just spoke I was thinking



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1 about the process of coming to the website,
2 finding a product and purchasing that product
3 from a third party seller. Many sellers do
4 contact sellers through the buyer-seller
5 messaging service prior to an order being place
6 or after an order's been placed. But to Mr.
7 Green's question, it's not a requirement to
8 place an order although customers are free to.
9 Or indeed call the seller on their phone and
10 they'll ...

11 Q: Okay. Look --

12 **MR. GREEN:** Bear with me, Your Honor. I'm sorry.
13 Let's pull up Exhibit 58, please, Elizabeth.
14 And zoom in sort of on the top part.

15 **(Hearing Exhibit Number 58 was introduced into the**
16 **record at this time.)**

17 Q: Do you recognize this document, Mr. Poad?

18 A: Yes, I think I've seen this before.

19 Q: Are you familiar with it?

20 A: I haven't memorized it but I've read it before
21 I think.

22 Q: And I won't administer a test -- a memory test.
23 What I was trying to ask though, is this --
24 does this document represent guidelines
25 published by I guess Amazon Services regarding



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1 buyer-seller -- the buyer-seller messaging
2 service?

3 A: Well it's overview of the buyer-seller
4 messaging service and I can see there are some
5 guidelines for contacting buyers.

6 Q: So the answer is yes?

7 A: I don't know if this is the complete set of
8 guidelines for the buyer-seller messaging
9 service. I can see it says guidelines for
10 contacting buyers, there may be other
11 guidelines somewhere else though or can't see.

12 Q: But this is a document published by Amazon
13 Services to your knowledge?

14 A: To my knowledge, yes.

15 Q: Okay. And I think there in that introductory
16 part it talks about using the encrypted e-mail
17 addresses, correct?

18 A: Yes.

19 Q: And then under guidelines for contacting
20 buyers, in general it says -- you with me -- in
21 general you can contact a buyer only to
22 complete an order or to respond to a customer
23 service question, correct?

24 A: Correct.

25 Q: And then it has a warning -- it says -- excuse



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1 me -- it prohibits contacting a buyer for
2 marketing or promotional purposes or initiating
3 contact with a buyer about a return containing
4 an FVA item designed as a gift, correct?

5 A: That's correct.

6 Q: And then below that it has a list of things
7 that a message -- strike that -- has a list of
8 things that cannot be included in a permitted
9 e-mail sent to an Amazon customer, correct?

10 A: To keep customers safe, yeah.

11 Q: Okay. But that wasn't my question. My
12 question was, it just has a list of things that
13 you can't include in the e-mail, correct?

14 A: That's correct.

15 Q: Okay. And one of those things is links to any
16 websites, correct?

17 A: Yes.

18 Q: One of the things is seller logos if they
19 contain or display a link to the seller's
20 website?

21 A: Yes.

22 Q: And marketing messages or promotions?

23 A: Yes.

24 Q: And I think there are two other things -- one
25 I skipped over there, is that correct?



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1 A: Yes.

2 Q: Okay. And then at the bottom it warns third
3 parties that responses to buyer-seller messages
4 are evaluated using contact response time
5 metrics, is that correct?

6 A: Oh, no, sorry.

7 Q: It all right, the very bottom. I'm sorry. I
8 apologize. If I need to repeat the question I
9 can.

10 A: I'm sorry. Could you repeat the question?

11 Q: Yes, I can. At the bottom under Contact
12 Response Time Metrics it says, responses to
13 buyer-seller messages are evaluated using
14 contact response time metrics, is that correct?

15 A: Yes, and I can see that a link.

16 Q: Okay. And are you familiar with what contact
17 response time metrics are?

18 A: Yes.

19 Q: And what are those?

20 A: When a customer initiates the contact through
21 buyer-seller messaging with a third party
22 seller, the sellers agree -- as well as the
23 policies of the Marketplace -- that they will
24 respond to customers within -- I think it's a
25 24 -- it says here 24 hours. I think in



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1 reality there's some having over weekends and
2 non-working days, but 24 hours. And then the
3 seller can see in their account the frequency
4 with which they've responded to questions from
5 customers within 24 hours and that helps them
6 manage their own customer service teams.

7 Q: Okay. All right.

8 **MR. GREEN:** Okay. Go back to Exhibit 3. Go to page
9 15, Bates 50. And go down just a tad. There
10 you go. That's good.

11 Q: I'm going to ask you a couple questions about
12 S dash 1 dot 1 so if you'd take a minute to
13 familiarize yourself with that.

14 A: Okay.

15 Q: And under that S dash 1 dot 1, product
16 information on the website must be provided in
17 the format required by I guess Amazon Services,
18 correct?

19 A: Yes. I can give a bit more detail if you'd
20 like it.

21 Q: If they want to follow up on that -- and I'm
22 going to ask you a little bit about some detail
23 too in a moment, but for right now that's what
24 I was trying to get at.

25 A: Okay.



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1 Q: And I -- let's talk about, you know, there are
2 limitations on what I can include in that
3 product information as well, is that correct?
4 So, for instance, if you read at the very
5 bottom I can't provide any URL marks for use or
6 request that any URL marks be used on any
7 Amazon site, is that what it says?

8 A: That's correct.

9 Q: And a URL mark is a website address, am I -- is
10 that correct?

11 A: I -- this may be defined somewhere else in the
12 document but I suspect it's the www., you know,
13 ChrisPoad.com. URL.

14 Q: Okay. And -- okay -- and then let's look over
15 to page 20 -- hang on a second I don't want to
16 send you on a wild goose chase. Okay. Let's
17 flip over to page 21, Bates 56.

18 **MR. GREEN:** And enlarge that Required Product
19 Information. Okay.

20 Q: And that's a fairly long paragraph. I'm going
21 to give you a moment to read that, Mr. Poad.

22 A: Okay. Ready.

23 Q: Okay. And all that are -- strike that -- all
24 those provisions in that Required Product
25 Information definition apply to a third party's



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1 listing of products on Amazon's site, correct?

2 A: Yes. They're not all mandatory but they apply
3 to the third party listing on an Amazon
4 website. An Amazon -- the website operated by
5 Amazon Services.

6 Q: Okay. And the definition does say required
7 product information, correct?

8 A: It does. I mean, practically some of these
9 fields don't apply to all products. So, for
10 example, an N for November, a delimited list of
11 technical specifications won't apply to every
12 product so ---

13 Q: Okay.

14 A: --- these are -- in the course of the -- our
15 normal business -- these are not all required
16 of every product.

17 Q: Okay. But if it is applicable to the product
18 the third party's listing they would have to
19 comply with this definition, correct?

20 A: Well, I mean, sellers upload the information
21 they have. I don't know if required product
22 information means that it's mandatory. I'm
23 just not sure if that's what it means.

24 Q: What is your definition of required?

25 A: I could interpret this as meaning required if



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1 the seller wants to display the information.
2 In practice Amazon Services or any other Amazon
3 entities don't enforce the provision of all of
4 these different fields even if they're
5 available. We -- I mean, Amazon Services
6 wouldn't know if a product had a -- there's
7 some technical specifications or, you know,
8 some products don't have a UPC. Most of the
9 others are kind of required just to sell
10 something. I mean, you need to have a price,
11 but some of these aren't -- can't be required.

12 Q: But it would be up to Amazon Services whether
13 to enforce those, wouldn't it?

14 A: I suppose so. I mean, practically speaking
15 some of those are not required.

16 Q: Okay. But it would be up to Amazon Services
17 whether to enforce them, correct?

18 A: As a marketplace operator there are certain
19 rules and policies and that could be added I
20 suppose ---

21 Q: Okay. So the answer ---

22 A: --- I mean obviously it's not.

23 Q: --- the answer to my question is yes, it would
24 be up to Amazon Services whether to enforce it
25 or not?



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1 A: It would be.

2 Q: Okay. Thank you. Go to Hearing Exhibit 39.

3 **(Hearing Exhibit Number 39 was introduced into the**
4 **record at this time.)**

5 **THE COURT:** Did you say 30 or 39?

6 **MR. GREEN:** 39.

7 **THE COURT:** Okay.

8 Q: I don't -- are you familiar with this document,
9 Mr. Poad?

10 A: I have not read this document recently.

11 Q: Okay.

12 A: I haven't ---

13 Q: I'm only going to talk about a few things but
14 if you need to read it to get the context let
15 me know and I'm happy to give you that time.
16 I'm just trying to -- I'm trying to expedite it
17 ---

18 A: Okay.

19 Q: --- but I also -- so let's try and see what we
20 can do. The first part is content-specific
21 policies, correct?

22 A: Yes.

23 Q: And above that it says, the following policies
24 have been established to ensure that each
25 product detail page represents a unique item in



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1 order to deliver a single page per product and
2 optimize the buying experience, correct?

3 A: I'm sorry, could you just help me out for just
4 -- I can't find that text.

5 Q: I'm sorry because it's kind of cut off.

6 **MR. GREEN:** Page down just a tad, Elizabeth. That's
7 my fault.

8 Q: I apologize to you. Look at the very top. I
9 mislead you, I'm sorry. That first intro
10 paragraph above Content-specific?

11 A: Okay. I've got it. Yes.

12 Q: Okay. Did I read that correctly or do I need
13 to read it again?

14 A: No, I think it was okay.

15 Q: Okay. And then below that is the content-
16 specific policies about what a listing must --
17 I think it says comply with, correct?

18 A: It refers to the need to comply with -- there
19 are different style guides for different
20 product pages and there's some links there.

21 Q: Okay.

22 A: But I think these are -- I'm sorry, I'm just
23 reading this quickly ---

24 Q: Sure.

25 A: --- I think these are ---



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1 Q: Take your time if you need to read it.

2 A: Yeah, please let me finish read it and then
3 respond.

4 Q: Go ahead and read that.

5 A: Otherwise it's going to be confusing.

6 Q: And I'll ask you a few questions about it.

7 A: Okay. Okay. And I've just read the Content-
8 specific Policy section.

9 Q: Okay. And -- all right -- and then there's a
10 list of things there in that Content-specific
11 Policy section that is prohibited, correct?

12 A: Yes.

13 Q: And the third bullet point I guess down
14 precludes listing availability, price,
15 condition, and alternative ordering
16 information, correct?

17 A: That's correct, but to be clear that's in the
18 -- preventing that information from being in
19 the product description which is a fixed block
20 of text -- that information is of course
21 available on the page but it's other technology
22 that provides that information from the seller
23 to the customer and you wouldn't want to write
24 the price in the product description because
25 then that will be fixed and the seller couldn't



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1 update it. It's displayed in a different part
2 of the page.

3 Q: Okay. And then there's a restriction on
4 product title link and the like below that,
5 correct?

6 A: That's correct.

7 Q: And then below that is detail page creation
8 policies. And we're going to page up and what
9 I want to ask you about is the third sentence
10 in that section.

11 A: Okay. I'll just read maybe above and below of
12 that section.

13 Q: Sure. Just let me know when you're done.

14 A: Okay.

15 Q: And that just says, the creation of product
16 detail pages is limited to products that do not
17 already exist within Amazon's catalogue,
18 correct?

19 A: Yes.

20 Q: Okay. Creating a product detail page for a
21 product already in the Amazon catalogue is
22 prohibited, correct?

23 A: Yes.

24 **MR. GREEN:** Let's go back to Exhibit 3. Page 15,
25 Bates 50. And go down -- highlight or enlarge



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1 S dash 1 dot 2.

2 Q: Let me know when you've read that, Mr. Poad.

3 A: Okay.

4 Q: And that first sentence says, we will enable
5 you to list your products on a particular
6 Amazon site and conduct merchandising and
7 promote your product as permitted by us,
8 correct?

9 A: Yes.

10 Q: And then below that the last full sentence, we
11 will provide order information to you for each
12 order of your products through the applicable
13 Amazon site, correct?

14 A: Yes.

15 Q: All right.

16 **MR. GREEN:** Flip over to the next page, section S-1
17 dot 4.

18 Q: And I think you testified that Amazon Payments
19 bears the risk of credit card fraud under the
20 BSF?

21 A: I believe so. Amazon Payments, Inc. is
22 certainly the contracting party as regards
23 transaction processing and I believe it's
24 Amazon Payments, Inc. that bears the risk of
25 credit card. I think that's true.



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1 Q: Okay. And in this section here about two-
2 thirds of the way down say, you will stop or
3 cancel orders of your products if we ask you to
4 do so, correct?

5 A: Oh, if there's fraud going on, yeah.

6 Q: Yes. But Amazon Services -- or Amazon Payments
7 I guess as the case may be -- has the
8 discretion whether to require that or not,
9 correct?

10 A: If it thinks there's fraud happening in real
11 time they'll notify the seller and request that
12 they don't ship the product.

13 Q: And then below that it says, you will use
14 commercially reasonable efforts to stop or
15 cancel delivery of that order, correct?

16 A: Yes.

17 Q: And in that instance when it's been transferred
18 to a carrier or shipper, correct? Read that
19 last sentence or next to the last sentence.

20 A: Could you restate the question?

21 Q: I can. And I'll just read this. If you have
22 already transferred your product to a
23 carrier/shipper when we ask you to stop or
24 cancel an order you will use commercially
25 reasonable efforts to stop or cancel deliver of



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1 that order, correct?

2 A: Yeah, in the case of credit card fraud.

3 Q: Okay. Let's look at ---

4 **THE COURT:** When it says we will bear the risk of
5 credit card fraud, who's the we?

6 **MR. POAD:** Your Honor, I said earlier just now
7 Amazon Payments, Inc. is the contracting party
8 of the transaction processing. I'm actually
9 not certain which entity bears that risk. I
10 believe it's Amazon Payments, Inc. that bears
11 the risk of any cost of customer credit card
12 fraud. I think it's Amazon Payments, Inc.

13 **THE COURT:** Is this a Amazon Services contract or
14 Amazon Payments contract?

15 **MR. POAD:** It's a contract which lists a number of
16 contracting parties for different services.
17 For selling on Amazon the contracting party is
18 Amazon Services, LLC and for payment
19 transactions is Amazon Payments, Inc. So my
20 understanding is it's the contract between two
21 Amazon entities and the seller.

22 **MR. GREEN:** Flip back to page 10, Elizabeth. Bates
23 45. Highlight that bottom block -- or not
24 highlight but zoom on it. And just to respond,
25 Your Honor, that was the discussion I had with



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1 him briefly about the contracting party in the
2 United States earlier for United States
3 transaction that defines who is the contracting
4 party that the third party is dealing with. I
5 just wanted to tie that back together for ...

6 **THE COURT:** Uh-huh.

7 **MR. GREEN:** So, okay. Go back to page 16, Bates 51.

8 And zoom in and get on 2 dot 1 -- yeah, 2 dot
9 1. And page down just a tad.

10 Q: If you would read that -- zooms in a little
11 bit, that 2 dot 1?

12 A: I think I read this section before.

13 Q: Okay. Okay. And again that's a -- we talked
14 about that before, you're right -- just to make
15 -- but just to tie it back up, that's a list of
16 requirements applicable to using -- to listing
17 things on Amazon, correct?

18 A: Yes. These are some of the rules the
19 marketplace has.

20 Q: Okay.

21 A: You said listing on Amazon. I notice here this
22 section about cancelling transactions, that's -
23 - would be after an order's placed.

24 Q: Okay.

25 A: Yeah, these are some of the policies that I



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1 referred to right at the beginning of today.

2 Q: All right. Fair enough. All right.

3 **MR. GREEN:** Flip over to the next page, Elizabeth?

4 And highlight 2 dot 2 -- or zoom in on 2 dot 2.

5 A: Should I read?

6 Q: Please.

7 A: Okay.

8 Q: Sorry.

9 A: Okay.

10 Q: And that first sentence says, it's just talking
11 about products not fulfilled using Fulfillment
12 by Amazon, correct?

13 A: Yes.

14 Q: The first sentence is? It says, you will
15 accept and process cancellations, returns,
16 refunds and adjustment in accordance with this
17 agreement and the Amazon refund policies for
18 the applicable Amazon site published at the
19 time of the applicable order, correct?

20 A: Yes, and I can give a little bit more if you'd
21 like it.

22 Q: Well not right -- not right now, thank you.
23 What I guess I want to ask you -- that's really
24 a -- this sort of is the very minimum that the
25 third parties must comply with for Amazon



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1 website transactions, is that correct?

2 A: That's correct. When sellers start selling on
3 Amazon there's a minimum returns policy that
4 they agree to adopt. They can offer a more
5 generous policy if they choose.

6 Q: But they must comply with this minimum policy?

7 A: There is a minimum policy that sellers must
8 adopt if they want to sell on the Amazon
9 website.

10 Q: Okay. Thank you. And then later on it says --
11 I think the sentence starting, except as
12 otherwise described in the program policies --
13 you will return and calculate the amount of all
14 refunds and adjustments including any taxes,
15 shipping, handling or other charges or other
16 amounts to be paid by you to customers in
17 connection with your transaction using
18 functionality we enable for your account,
19 correct?

20 A: Yes.

21 Q: And it says, this functionality may be modified
22 or discontinued by us at any time without
23 notice, correct?

24 A: Yes.

25 Q: And then it says, you will route all payments



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1 to customers in connection with your
2 transactions through Amazon, correct?

3 A: It -- yes, you're correct. I would have
4 written Amazon Payments, but I didn't write
5 this document.

6 Q: Okay. And it just says Amazon, correct?

7 A: That's right.

8 Q: Okay. Bear with me one moment.

9 **MR. GREEN:** Flip over to page 19. And zoom in on
10 that S-6.

11 Q: And are you familiar with this or do you need
12 a moment to read this?

13 A: I'd like to read briefly if I could.

14 Q: Please do.

15 A: Okay.

16 Q: Okay. And this says that -- we'll say Amazon
17 Services or is it Amazon Payments -- will remit
18 to you on a biweekly 14 day or at our option a
19 more frequent basis which may vary for each
20 elected contract. Any sales proceeds received
21 by us or our affiliates but not previously
22 remitted to you as of the date -- and then it
23 has a certain date right there, is that
24 correct?

25 A: Yes.



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1 Q: And then that amount is reduced by the referral
2 fees, the applicable variable closing fee, any
3 selling on Amazon subscriptions fees, and any
4 other applicable fees described in this
5 agreement, correct?

6 A: Yes.

7 Q: And then down below that it says, you will not
8 have the ability to initiate or cause payments
9 to be remitted to you, correct?

10 A: It does say that but of course the sellers can
11 request a payment be made outside of that 14
12 day cycle. So maybe there's some legal meaning
13 to initiate or cause payments. But sellers
14 certainly can and do request payments -- in
15 some cases every single day, and in some cases
16 they just wait for the 14 day cycle.

17 Q: As you read this S-6 there's nothing in there
18 authorizing that, is there?

19 A: There isn't but the reality is that sellers can
20 request payments every day if they want to.

21 Q: So the BSA doesn't authorize that Amazon could
22 withdraw the button at its discretion, could
23 it?

24 A: I don't know for sure. I'm not sure.

25 Q: Okay. And hasn't -- I think you described in



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1 your deposition there -- the seller account has
2 essentially a button that a third party can
3 press and request quicker payment than the 14
4 day cycle, is that right?

5 A: Yes.

6 Q: Hasn't that program changed over time as to how
7 fast you can get the funds distributed?

8 A: Do you mean the time from the point to when the
9 button is pressed to when the funds arrive in
10 their bank account or how frequently the button
11 can be pressed or ...

12 Q: No, how quickly you get the funds once you pres
13 the button?

14 A: Oh. It may have changed. I think that's
15 largely a function of the times it takes funds
16 just to flow through the seller's bank account
17 and other institutions between Amazon Payments
18 and the seller's bank account. I'm not
19 familiar with how that's changed over the
20 years.

21 Q: Okay.

22 A: I know it takes a couple of days on average
23 today. In some cases it may just take one
24 business day, but I think that's largely
25 dependent on who the bank -- who the seller's



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1 bank is with.

2 Q: And are you -- to your knowledge -- we've
3 looked at some of these exhibits regarding
4 product detail page rules and the like. Are
5 you aware of any similar document that advises
6 third parties about the request payment button?

7 A: I am not. It may exist but ---

8 Q: But you're not aware of it?

9 A: --- I'm not aware of it.

10 Q: Okay. That's what my question is. All right.
11 Thank you.

12 **MR. GREEN:** Let's go back to S-1 dot 2, page 16.

13 Q: I have one more question about that.

14 **MR. GREEN:** Please page down to -- that's enough,
15 yeah.

16 Q: I'm going to ask you about F there, Mr. Poad.
17 And that says, -- that requires a third party
18 to provide to Amazon information regarding the
19 fulfillment or the status and tracking to the
20 extent available in each case as requested by
21 us using the processes designated by us and we
22 may make that information publicly available,
23 correct?

24 A: Yes.

25 Q: And so a third party is required to report to



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1 Amazon fulfillment order status and tracking
2 information, is that correct?

3 A: The seller provides that to the customer using
4 the tools provided by Amazon Services.

5 Q: Okay. But that says provide to Amazon that
6 information, doesn't it?

7 A: It does. But I would characterize it in
8 reality as being the seller updating the
9 customer about where their product is using the
10 tools provided by Amazon Services.

11 Q: If the third party doesn't let Amazon Services
12 or Payments know that it has shipped the good
13 it doesn't get paid, does it?

14 A: That is correct. The customer's credit card or
15 payment card is charged at the point of ship
16 generation -- the point that the shipment is
17 created.

18 Q: Okay. But then that happens when Amazon
19 Payments or Services learns that the shipment
20 has occurred, correct?

21 A: If the seller is fulfilling the product to the
22 customer without using FBA ---

23 Q: Yes, ---

24 A: --- the seller informs Amazon Payments that
25 they have -- shipping or have shipped the



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1 product and that will trigger the customer's
2 card to be charged.

3 Q: Okay. So let me clear on that then -- so in
4 the case of a MFN product, not an FBA product,
5 then third party has to let Amazon Services or
6 Payments know that the product has been shipped
7 otherwise they will not get paid, is that
8 correct?

9 A: Well it's not so much they won't get paid as
10 that the customer will never be charged for the
11 order if the shipment has not been -- if it's
12 not been clarified that the shipment's
13 happened. That's the action that triggers the
14 customer to be charged for the product and then
15 disbursed to the seller.

16 Q: Okay. Thank you. That's what I was getting
17 at.

18 **THE COURT:** So I can understand -- the customer's
19 ultimately charged when the product is shipped?

20 **MR. POAD:** That's correct, Your Honor.

21 **THE COURT:** Is the card -- a temporary hold placed
22 on the card at any time before the product is
23 shipped?

24 **MR. POAD:** Yes, Your Honor. My understanding is
25 when the order is originally placed by the



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1 customer there is a pre-authorization. I don't
2 think it's a hold of fund, I think it's an
3 authorization that the fund are available. And
4 then at a point in time after the order's been
5 placed, when the order is ready to be shipped
6 either by seller to the customer or by Amazon
7 Fulfillment Services using through FBA for the
8 seller, it's at that point when the charge is
9 made to the customer's card and the fund begin
10 to flow.

11 **THE COURT:** But when the pre-authorization is made
12 the customer's card -- the credit limit is
13 restricted for that pre-authorization or not?

14 **MR. POAD:** I'm not certain, Your Honor. I know that
15 there is an authorization to establish that
16 funds are available. I don't know for sure if
17 a hold is placed on the customer's credit card
18 between the order being placed and the shipment
19 being created. It may be, I'm just not
20 certain.

21 **THE COURT:** All right. I'm sorry. I didn't mean to
22 interrupt you, I just ...

23 **MR. GREEN:** Your fine, Your Honor, and thank you.

24 Q: Let's look at Hearing Exhibit 8.

25 **(Hearing Exhibit Number 8 was introduced into the**



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1 record at this time.)

2 **THE COURT:** Is everybody okay? Are all y'all okay?
3 Just making sure we don't need a break. Is
4 everybody all right?

5 **MR. POAD:** Your Honor, I wouldn't mind a two minute
6 break if that's okay?

7 **THE COURT:** Okay. Well you would be the highest list
8 on everybody since you're the one -- well right
9 now you are. So, yeah, we'll take a five
10 minute break.

11 (Off the Record)

12 **THE COURT:** All right, ready?

13 **MR. GREEN:** Elizabeth, pull up Hearing Exhibit 16.

14 (Hearing Exhibit Number 16 was introduced into the
15 record at this time.)

16 Q: Are you familiar with this document, Mr. Poad?

17 A: Yes.

18 Q: And what does that document represent?

19 A: I believe this summarizes the Amazon fees that
20 Amazon Services charges, or charged rather, in
21 the first quarter of 2016.

22 Q: Okay. And let's look through those a little
23 bit. There's a monthly subscription fee
24 depending on your account, correct?

25 A: Yes.



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1 Q: The Professional Plan has \$39.99 per month,
2 correct?

3 A: Yes.

4 Q: And the individual has no monthly fee, correct?

5 A: Yes.

6 Q: And then there are selling fees, correct?

7 A: Yes.

8 Q: And then there are per item fees which
9 professional

10 sellers have none but individual sellers have
11 -- pay a 99 cent fee for each item sold,
12 correct?

13 A: Yes.

14 Q: And then there are referral fees, correct?

15 A: Yes.

16 Q: And that is a percentage of the sales price,
17 correct?

18 A: It is a percentage of the sales price subject
19 to a minimum fee per item in some categories.

20 Q: And the -- the applicable percentage depends
21 upon the nature of the good or product sold,
22 correct?

23 A: It depends on the category of the product.

24 Q: Okay. And flipping over to the next page that
25 lists the categories of the -- or is the



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1 beginning of the list of the categories of
2 products and the applicable referral fee
3 percentage, correct?

4 A: Yes.

5 Q: And that varies by category, correct?

6 A: Yes.

7 Q: And then flip over, I don't know two or three
8 more pages and at the bottom of the beginning
9 of the next page there is closing fees for
10 certain types of items, correct?

11 A: Yes.

12 Q: And that applies to media items?

13 A: It did in 2016, it no longer does.

14 Q: Okay. And then there is a high volume listing
15 fee, correct?

16 A: Yes.

17 Q: And then there's a refund administration fee,
18 correct?

19 A: Yes.

20 Q: And that would apply if there's a refund to the
21 customer, correct?

22 A: Yes.

23 Q: And so Amazon still keeps some of the money
24 even if the customer receives a refund,
25 correct?



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1 A: Well Amazon Payments would book the refund
2 administration fee against Amazon Services, LLC
3 in the case of a customer refund.

4 Q: And so, and I -- and to be fair it says, Amazon
5 will refund you the amount of the referral fee
6 you paid for the item minus the applicable
7 refund administration fee which is the lesser
8 of \$5.00 or twenty percent of the applicable
9 referral fee, correct?

10 A: Yes. I would have written this with a bit more
11 precision about the entities but that's what
12 the document says.

13 Q: And that's what the document says, and then
14 there's an example below that, correct?

15 A: Yes.

16 Q: Okay. And then let's look back at one --
17 Exhibit 122 the last page. Page 656.

18 **MR. GREEN:** And sort of highlight that center part,
19 page -- there you go.

20 Q: And you testified about this document on your
21 direct, isn't that correct?

22 A: Yes.

23 Q: And under orders it has product charges of
24 \$14,870.21, correct?

25 A: Yes, that's the seller's sales.



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1 Q: And the gross proceeds, correct?

2 A: The gross proceeds are the sales?

3 Q: Yes.

4 A: Yes.

5 Q: Okay. And then below that there's some other
6 items adjusting the product charges including
7 Amazon fees, correct?

8 A: Yes.

9 Q: And that shows I believe \$6,425.99, correct?

10 A: Yes.

11 Q: Does that represent the fees that we had
12 discuss -- we just discussed on Exhibit 16?

13 A: I think it also includes FBA transaction fees
14 which were not on our previous exhibit.

15 Q: Okay. Fair enough.

16 A: But it does include any fee that the seller may
17 have been charged from those that we just
18 looked at.

19 Q: Okay. All right. Thank you. And then below
20 that there are refunds -- certain refunds
21 listed out and then some Amazon fees pertaining
22 to those refunds, correct?

23 A: Yes. The product charge has a negative value
24 because the transaction with the customer is
25 reversed. The fees is a positive value.



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1 That's a credit back to the seller for the fees
2 that they had paid on that prior transaction
3 that's now been reversed less the refund -- the
4 small refund administration fee.

5 Q: Okay. All right. Let's flip to Exhibit 37.

6 **(Hearing Exhibit Number 37 was introduced into the**
7 **record at this time.)**

8 Q: Are you familiar with this document, Mr. Poad?

9 A: I have not read this document recently.

10 Q: If you want to skim through it or I can -- we
11 can see if a need to based on the questions I
12 ask. I just want to ask you a couple
13 questions. Would you like a moment to read
14 through it?

15 A: Yes, please.

16 Q: Okay. Let her know when you want to flip to
17 the next page.

18 **MR. POAD:** Okay.

19 Q: All right. And -- oh, I'm sorry. Sorry,
20 sorry.

21 A: Okay.

22 **MR. GREEN:** And flip back to the previous page now.

23 Q: And so sellers -- third parties who are putting
24 goods on Amazon's website are rated with a
25 series of performance metrics, isn't that



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1 correct?

2 A: I'm stumbling over the word rated. They're
3 able to see in Sellers Central their different
4 performance metrics which helps them manager
5 their business.

6 Q: Okay.

7 A: It's not a rating but public to customers.
8 Customers provide ratings for seller as we saw
9 earlier.

10 **MR. GREEN:** Okay. Flip to Hearing Exhibit 99.
11 **(Hearing Exhibit Number 99 was introduced into the**
12 **record at this time)**

13 Q: And are you familiar with this document, Mr.
14 Poad.

15 A: I haven't read this document recently but I'm
16 familiar with the context and ---

17 Q: Okay. I'm sorry, I didn't mean to talk over
18 you. What I want to ask you about is Seller
19 Performance Targets at the top.

20 A: Okay, I'll just read that section.

21 Q: That'd be fine.

22 A: Okay.

23 Q: And that says that seller should be working
24 toward achieving and maintaining a level of
25 customer service that meets the following



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1 seller performance targets. And then it list
2 in order of defect rate of less than one
3 percent. Pre-fulfillment cancel rate of 2.5
4 percent and a late shipment rate of less than
5 4 percent, correct?

6 A: Yes.

7 Q: And then it says failure to meet these targets
8 may result in the removing of your selling
9 privileges, correct?

10 A: Yes.

11 Q: And then -- if a -- if a third party is -- if
12 they lose their selling privileges they can
13 then appeal that decision by Amazon Services,
14 correct?

15 A: Yes, they can, but that wouldn't be the first
16 step in the process. They would have been --
17 they would be -- they can see these metrics in
18 their account whenever they want. If the
19 seller is struggling to perform well they'd
20 receive a notice of that by -- an automated
21 notice by e-mail. If the seller is
22 consistently creating bad customer experiences
23 it's the responsibility of any marketplace
24 operator like Amazon Services in the first
25 instance to try to help the seller improve. So



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1 what happens in reality is that they may be
2 contacted and best practice documents might be
3 shared to give advice on how to do a better
4 job. If the seller has any privileges
5 suspended they can appeal that.

6 Q: Okay. Okay. But Amazon Services can suspend
7 sellers if they don't meet these targets,
8 correct?

9 A: Amazon Services can but the strong preference
10 is to help sellers be successful.

11 Q: But the answer to my question as yes?

12 A: Yes, but, you know, the mind-set is to help
13 sellers be successful ---

14 Q: Okay.

15 A: --- rather than suspending privileges.

16 Q: Let's go back -- you've talked about this a
17 little bit in your direct. Let's talking about
18 Hearing Exhibit 7 for a moment. And let's talk
19 about that intro paragraph at the top. It
20 says, seller performance metric targets can
21 vary by category and are subject to change. We
22 do not disclose the specific targets for
23 becoming buy box eligible, correct?

24 A: Yes.

25 Q: And I think you testified that the buy box,



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1 winning the buy box is determined by an
2 algorithm, correct?

3 A: Yes, a neutral piece of software that looks at
4 the specs of each offer from each seller.

5 Q: All right. And that algorithm was created
6 either by or for Amazon Services, correct?

7 A: Yes.

8 Q: And it's precise terms were not publicly
9 disclosed, correct?

10 A: The inputs are here, the precise terms -- which
11 really is about the weighting between these
12 different components which does vary by
13 category over time. It's not publicly
14 available.

15 Q: And third parties like to win the buy box,
16 don't they?

17 A: Yes. To be featured on the product detail page
18 can lead to higher sales but the seller is told
19 here how to do that. Really it's about
20 lowering -- as long as everything else is good
21 and having the best price is likely to result
22 in being featured on a detail page.

23 Q: Don't most third party sales on the website --
24 strike that -- don't most purchases of third
25 party products on the website pick the box



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1 featured -- pick the product featured in the
2 buy box?

3 **MR. RAZI:** Objection.

4 **THE COURT:** Well if your objection is you don't
5 understand the question I think ---

6 **MR. RAZI:** The objection is it's vague and
7 ambiguous.

8 **THE COURT:** That'll be the first time I sustained an
9 objection like that but -- I have sustained an
10 objection that went on for -- where the
11 question went on for ten minutes and I told
12 this individual that he question ought to be
13 shot, but yours is not in that category.

14 **MR. GREEN:** Well that's good. Let me try it again.

15 **THE COURT:** It's obtuse.

16 **MR. GREEN:** Let me try again.

17 Q: Approximately what percent of sales on the
18 website are the winner of the buy box?

19 A: I don't know that number. I did look at the
20 number of customers that looked to the upper
21 listing page. I don't know the number or
22 percentage of sales in total across all of the
23 sellers on Amazon that come from winning or
24 being featured on the detail page or
25 colloquially winning the buy box.



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1 Q: Do you have any sense of a range that that
2 number is in or a percentage rate? In other
3 words, is it greater than 50 percent?

4 A: I don't know.

5 Q: You do not know.

6 A: No.

7 Q: Okay.

8 **THE COURT:** Mr. Poad, I just thought it interesting
9 that you're here for Amazon and you don't have
10 any idea of the range of the people who win the
11 buy box?

12 **MR. POAD:** Your Honor, I haven't see a report with
13 that date on it.

14 **THE COURT:** Excuse me, I said that wrong. I said
15 win the buy box. The people who purchase using
16 solely the buy box.

17 **MR. POAD:** Your Honor, that data is knowable. It
18 will exist within Amazon. I have not seen that
19 report recently and I'd be -- I actually don't
20 know whether it's 20 percent, 50 percent or 60
21 percent. My instinct is it's more than 50
22 percent but I just don't know so I don't want
23 to speculate.

24 **THE COURT:** Okay.

25 **MR. GREEN:** Pull back up Hearing Exhibit 3. Go to -



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1 - bear with me for a moment. Pull up Hearing
2 Exhibit 30.

3 **(Hearing Exhibit Number 30 was introduced into the**
4 **record at this time.)**

5 **MR. GREEN:** Page down just a tad.

6 Q: Are you familiar with this document, Mr. Poad?

7 A: I've not read it recently but have read it in
8 the past.

9 Q: Okay. Well let's -- if you need time let me
10 know but it may be easy enough to just work
11 through a few parts. There at the intro
12 paragraph, the last sentence. And this
13 document applies to FBA transactions, correct?

14 A: Transactions from third parties -- with third
15 party sellers where they're using FBA.

16 Q: Correct. And that's what I was asking. And
17 it says, Amazon's decisions to accept or
18 decline returns and our determinations of the
19 condition of returned items are final, correct?

20 A: Yes. When sellers opt to use FBA they agree
21 that the -- they agree to the consistent
22 returns and condition determination policy used
23 by FBA. That's -- I can probably restate that
24 if that's not clear.

25 Q: No, and my question wasn't -- it was just



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1 Amazon's decision to accept or decline the
2 returns, correct?

3 A: That's what the document says.

4 Q: Okay. And then under that in Refunds, it says,
5 a refund is a customer credit for all or part
6 the cost of a purchased item. In some cases we
7 issue customers a returnless refund, correct?

8 A: Yes. I can explain why. It's interesting.

9 Q: Maybe for your attorneys.

10 A: Okay.

11 Q: It's just ---

12 A: Apologies.

13 Q: No, no, thank you. Okay.

14 **MR. GREEN:** If it makes anybody feel any better I'm
15 getting rid of a few questions. Pull up
16 Hearing Exhibit 3, please, Elizabeth. And zoom
17 in a tad the top part. Oh, no, I'm sorry, go
18 to page 47. Sorry. Bates 82. Yeah, there you
19 go.

20 Q: And this document is the part of the BSA that
21 deals with payment processing, correct?

22 A: Yes.

23 Q: Okay. The third party is bound that this
24 provision of the agreement, correct?

25 A: Could you be more specific which provision?



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1 Q: Well they're required to pick Amazon Payments
2 as their payment processing entity for
3 transactions on the Amazon website, correct?

4 A: Would you be able to point out where it says
5 that the seller is required -- I mean, in
6 practice Amazon Payments is the payment
7 processing entity. I couldn't see quickly on
8 where it says ...

9 Q: I'm just asking you more generally about -- I
10 get -- and let me ask it this way, I can't pick
11 PayPal to process my terms -- my transactions
12 on the Amazon website, can I?

13 A: No.

14 Q: I can't pick Square D to process those
15 transactions either, can I?

16 A: I'm sorry, who?

17 Q: Square D is a -- as I understand it, it's a
18 type of independent payment processor that you
19 can use and swipe a card. I think something
20 like that. Anyway, strike that. I'll withdraw
21 it. If you're not familiar with it I'll
22 withdraw it.

23 A: I'm not.

24 Q: I can't pick anybody to process the payments on
25 the website other than Amazon Payments, isn't



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1 that correct?

2 A: When the seller agrees to selling on Amazon
3 with the Business Solutions Agreement they
4 agree that Amazon Payments, Inc. will be the
5 entity providing transaction processing
6 services or payment processing services.

7 Q: I understand that but that's not exactly my
8 question. My question is, I can't select
9 anyone else but Amazon Payments when I sign up
10 to sell on Amazon, correct?

11 A: No.

12 Q: Okay. Turn to -- go to -- hang on just one
13 second -- Exhibit 178.

14 **(Hearing Exhibit Number 178 was introduced into the**
15 **record at this time.)**

16 **MR. GREEN:** Flip to page -- sorry, I thought I had
17 written it down. I apologize. Flip to page
18 15.

19 Q: You and I talked about this in your deposition
20 briefly. And sort of highlight that paragraph
21 there. If you want to read that paragraph.

22 A: Could you remind me what document this is?

23 Q: This is the protest filed by Amazon against the
24 audit determination issue in the case.

25 A: Okay. Okay.



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1 Q: And that says that -- upon notification that a
2 product has been shipped Amazon Services
3 charges the credit card. This transaction is
4 processed by Amazon Payments, Inc. which is a
5 payment processing service provider with which
6 Amazon Services separately contract, did I read
7 that correctly?

8 A: You read it correctly. I don't think that's
9 correct. That's not my understanding of the
10 reality.

11 Q: Okay. And if I remember correctly you took
12 issue with Amazon Services charges the
13 customer's credit card, correct?

14 A: Right. My understanding is that Amazon
15 Payments, Inc. initiates the charge of the
16 customer's credit card with other external
17 financial institutions, receives the funds from
18 the customer and books the fee revenue against
19 Amazon Services for the services that Amazon
20 Services provide. I may be incorrect, I don't
21 think I am. I think that's just -- that's a
22 mistake on whoever wrote this document.

23 Q: Okay. But when a customer -- we talked a
24 little bit earlier -- when a customer submits
25 their credit card information to the website



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1 they do so through the Amazon.com website
2 maintained or operated by Amazon Services,
3 correct?

4 A: Yes, that's correct.

5 Q: And then the Amazon.com website is where the
6 customer initiates the payment process,
7 correct? They authorize -- they just select --
8 they purchase a product and authorize the
9 processing of their card, correct?

10 A: Customers place their order on the Amazon.com
11 website. I know that Amazon Payments, Inc.
12 initiates the charge to the customer's credit
13 card.

14 Q: Okay. But isn't me entering my credit card on
15 Amazon.com website, is that akin to me
16 tendering my credit card for any other vendor
17 processing or to submit it for processing?

18 A: I'm sorry. Can you -- I didn't understand the
19 question.

20 Q: Sure. And it was a little bit confusing I will
21 readily concede. Isn't submitting my credit
22 card -- let's back up. I'm a customer, I go on
23 the Amazon.com website, I want to purchase a
24 good that put there by a third party, okay?

25 A: Okay.



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1 Q: And when I elect to purchase that good I put it
2 in my cart, correct? I first put it in my
3 cart?

4 A: Yes, correct.

5 Q: And then I -- if I decide to checkout I will
6 press a button to check out, correct?

7 A: Yes.

8 Q: And when I check out isn't that akin to me
9 submitting a credit card to a vendor that I
10 wish for you to take my credit card in payment
11 for the product that I wish to receive? Not
12 that vendor processes the card but that the
13 vendor accepts the card and then sends it to
14 the processor?

15 A: I don't -- I'm sorry, I don't understand vendor
16 in this context.

17 Q: Seller.

18 A: Your question is, is it akin to providing your
19 credit card to the seller?

20 Q: Well let's talk about -- let me try this then,
21 and I realize I inartfully ask -- formulating
22 the question. So I go to say the restaurant
23 across the street and I want to buy a bagel and
24 I offer them my credit card and if they decide
25 it doesn't look bad they'll take it. They --



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1 then it swipes through a credit card processor
2 and somebody else processes that credit card,
3 do you agree with that?

4 A: Yes. The restaurant will have -- likely have
5 an agreement with a payment processing entity
6 like Chase Payment ---

7 Q: Right.

8 A: --- there are many of them.

9 Q: Right.

10 A: To process that payment and the funds would
11 flow from the customers bank account through
12 payment networks, ultimately into the
13 restaurant's bank account.

14 Q: Okay. But I present my credit card at the
15 restaurant, right?

16 A: Yes.

17 Q: But then somebody else processes that credit
18 card, correct?

19 A: Yes.

20 Q: Okay. Is it ---

21 A: I think. I mean, I'm not an expert in credit
22 card transactions.

23 Q: And we're just talking in general terms. Isn't
24 me giving my credit card on the Amazon website
25 to purchase a good that's in my cart -- product



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1 that's in my card, isn't that akin to me
2 handing my card to a seller, a merchant, a
3 vendor and then they turn around and send it to
4 a processor?

5 A: I'm struggling to answer the question. I think
6 it's a completely different -- it's a
7 completely different example. The third party
8 seller is listing the product. The third party
9 seller agrees with Amazon Payments, Inc. to
10 process the credit card. It's just -- it's a
11 different model than a single tenanted retailer
12 that was just one retailer. This is a multi-
13 tenanted marketplace. The website's operated
14 by Amazon Services. There are multiple sellers
15 that contract between the two parties, Amazon
16 Services for the services rendered and Amazon
17 Payments for the payment processing. I just --
18 it's tough for me to compare with the
19 restaurant to be honest. I'm not sure what the
20 answer is to your question.

21 Q: Okay. But you would agree that I put my -- I
22 submit my credit card information on the
23 Amazon.com website?

24 A: Yes. Customers put their credit card
25 information on -- in on the Amazon.com website.



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1 Q: And when I go to the payment page there's no
2 separate window to another website or anything
3 that pops up. That process is initiated by the
4 customer through Amazon.com, correct?

5 A: You mean when they complete their -- place
6 their order or ...

7 Q: When they place their order and authorize the
8 credit card to be charged.

9 A: They stay on the Amazon.com website.

10 Q: Okay.

11 **MR. GREEN:** Go back to the page -- the same Exhibit,
12 page 47. And go down to I think the next page
13 -- well go to the bottom and start there. Let
14 him read the first part. Just a little bit
15 more. Okay. And then flip to the next page,
16 the top of the next page. Page down just a
17 tad. No, that's good. Sorry. Sorry, that was
18 my fault.

19 A: Okay.

20 Q: And so when Amazon Payments receives proceeds
21 it combines -- it can combine those with other
22 third parties using the website, correct?

23 A: Yes. Funds from customers that are being held
24 temporarily before being disbursed to the
25 seller can be held in the same account.



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1 Obviously a record is kept of, you know, the
2 different balances that the sellers have.

3 Q: But they're put in the same account?

4 A: They can be. I don't know for sure that
5 there's just one account, but there isn't -- to
6 the best of my knowledge there isn't a separate
7 bank account for each seller.

8 Q: Okay. Thank you. And the third party doesn't
9 get any interest or earnings on the money while
10 Amazon Payments holds it, correct?

11 A: No.

12 Q: Let's look -- hang on one second.

13 **MR. GREEN:** And flip back to the bottom of the
14 previous, Elizabeth. P3.

15 Q: And -- so a third party's claim on those sales
16 proceeds is an unsecured claim against Amazon
17 Payments, is that correct?

18 A: I -- I mean, I can read the same text, that's
19 what it says. I am familiar in general terms
20 what a secured or unsecured -- like an -- like
21 a secured loan, I kind of know what that means.
22 I'm not certain exactly what that means.

23 Q: Okay. But I did read it accurately?

24 A: You did read it accurately.

25 Q: Okay.



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1 A: I know -- I mean, these funds or the sellers
2 funds are being held as part of the role that
3 Amazon Payments has as a conduit. It's not --
4 I mean, it says later on that it's not -- these
5 funds are not used for Amazon to build new
6 buildings or anything. It's the seller's
7 funds. You read that section accurately I'm
8 just -- I'm not a hundred percent sure what
9 unsecured claim means.

10 Q: Okay. And then the next sentence which laps
11 over, your sales proceeds are not insured by
12 the Federal Deposit Insurance Corporation, is
13 that correct?

14 A: That is my understanding based on this
15 document.

16 Q: Okay.

17 **MR. GREEN:** Elizabeth, go to Exhibit 23 and flip to
18 the next page.

19 **(Hearing Exhibit Number 23 was introduced into the**
20 **record at this time.)**

21 Q: Are you familiar with this document, Mr. Poad?

22 A: Yes, I've seen this before.

23 Q: Okay. And this talks about Amazon collecting
24 sales taxes for third parties, correct?

25 A: Yes.



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1 Q: Okay.

2 A: Could you remind me what document this page
3 comes from? I have seen it before I just can't
4 remember which document it's from.

5 Q: It is one of the exhibits in the case. I
6 believe that it is one of the Help modules.

7 **MR. GREEN:** Flip back to the first page.

8 Q: You may recognize it more based on that.

9 **MR. GREEN:** Zoom in on that just a little bit.

10 A: Okay, this -- okay. So.

11 Q: Does that help a little bit?

12 A: Sure. I think ---

13 Q: It looks like it says Help module to me, is
14 that so ...

15 A: Yeah, it's out of Help contents.

16 Q: So it would be an explanation to the third
17 party of what the tax collection involves?

18 A: Okay.

19 Q: Okay. All right.

20 **MR. GREEN:** Go back to the next page, Elizabeth.

21 Q: And then -- so Amazon -- let's just look at
22 Selling on Amazon. Amazon Services will charge
23 2.9 percent of all sales in use taxes and other
24 transaction-based charges we collect, correct?

25 A: When a seller opts into using this tax



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1 collection service 2.9 percent of the tax, not
2 of the product value but of the tax, is charged
3 as a fee.

4 Q: Okay. And then ---

5 **MR. GREEN:** page down just a tad.

6 Q: And it says, we will retain these fees in the
7 event of any refund or other related
8 transactions, correct?

9 A: Yes.

10 **MR. GREEN:** Then flip to the next page. Zoom in on
11 Remittance.

12 Q: And it says, -- read that paragraph very
13 quickly.

14 A: Okay.

15 Q: And so Amazon -- is this Amazon Services or
16 Amazon Payment collecting the tax?

17 A: Amazon Payments collects the tax from the
18 customer, charges a 2.9 percent fee against the
19 value of the tax and that I believe is booked
20 against Amazon Services. The service is one of
21 the services offered by Amazon Services I
22 believe.

23 Q: Okay. And so this would be -- the sales tax
24 amount though would be determined based on the
25 purchase price the customer -- for the product



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1 the customer selected on the Amazon.com
2 website, correct?

3 A: It's more than that. The seller -- I mean, the
4 seller has to determine whether they believe
5 they owe states sales tax is my understanding.
6 The seller provides the -- I think the rates or
7 certainly the product tax codes which I think
8 was on the prior page. As a service Amazon
9 Payments -- or Amazon Services will apply --
10 calculate the sales tax on the transaction like
11 we saw with Market Street Stores, a South
12 Carolina seller -- or the seller I -- my wife
13 bought the trainer from -- sorry, the sneaker
14 from in Washington. Amazon Payments will
15 collect that as part of the transaction from
16 the customer and it's remitted to the seller so
17 they can send it on to the state revenue
18 department less the fee that Amazon Services
19 charges.

20 Q: Okay. But Amazon Services or Amazon Payments
21 doesn't simply file a sales tax return for the
22 third party, correct?

23 A: I'm sorry, doesn't file ---

24 Q: Doesn't file a sales tax return for the third
25 party, correct?



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1 A: No.

2 Q: They send that money to the third party?

3 A: Yeah, because the seller is probably selling on
4 many other channels too. Not just on Amazon so
5 Amazon Services wouldn't have knowledge of
6 that. We can't -- I mean, we can't -- as far
7 as I know -- we can't file tax returns on
8 behalf of an independent entity. I say we, I
9 meant Amazon Services. I should be precise.

10 Q: Let's talk a little bit about Fulfilled by
11 Amazon or FBA. If I say FBA you understand
12 what I'm referencing?

13 A: Yes, sir.

14 Q: Okay.

15 **MR. GREEN:** Go back to Exhibit 3, Elizabeth. Page -
16 --

17 **THE COURT:** Before you go there -- so if Amazon
18 collects sales tax on behalf of a third party
19 seller and then you give the money to the third
20 party seller, then the third party seller may
21 never even give the money to the state for
22 which the sales tax was collected from you.
23 That's possible is what it sounds like to me.

24 **MR. POAD:** Your Honor, the seller contracted to have
25 Amazon Payments collect sales tax on relevant



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1 transactions, but you're correct that the value
2 of that sales tax is disbursed to the seller.
3 It's the seller's responsibility to remit that
4 to the relevant state together with any other
5 taxes they owe to that state. As I said, they
6 may have multiple sales channels, not just
7 selling on Amazon, and I'm not an expert in how
8 one remits taxes to -- state sales taxes to the
9 states but I would imagine they would file a
10 return periodically to include remittance of
11 all the sales taxes they've charged customers
12 -- only a portion of which may be from Amazon
13 Payments.

14 **THE COURT:** But would Amazon know if that is a
15 fraudulent act by the seller? In other words,
16 this is -- it sounds to me like this is
17 something that -- and I don't know if this is
18 relevant of this case at all anyway, but it
19 sounds like that creates a potential fraud that
20 a seller could have you collect the sales tax
21 through Amazon Services/Payments, receive the
22 money and then never give the -- whatever state
23 the money and pocket it and Amazon
24 Services/Payments would never know.

25 **MR. POAD:** Your Honor, I'm not an expert on our



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1 knowledge of how sellers file their own tax
2 returns. I believe though that Amazon Payments
3 or Amazon Services wouldn't necessarily see the
4 seller's tax returns to the respective states.
5 I mean, that the legal obligation of each of
6 the sellers.

7 **THE COURT:** All right.

8 **MR. POAD:** And they -- the sellers have asked Amazon
9 Services and Amazon Payments to collect those
10 taxes so that's the service that Amazon
11 Payments offer. But we're not completing a tax
12 return for the -- I mean, these are independent
13 companies ---

14 **THE COURT:** I understand.

15 **MR. POAD:** --- we're not submitting the taxes to the
16 states ourselves to the best of my knowledge.
17 I think -- maybe -- I think maybe, Your Honor,
18 an exception to that I know is some states --
19 some states have passed legislation to require
20 marketplaces facilitated to collect the tax
21 from other -- you know, for third party
22 transactions. I must say I'm not certain
23 whether it Amazon that remits that to the state
24 or the seller that still remits it to the
25 state. I'm not a hundred percent certain of



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1 that.

2 Q: One last question on the tax stuff. You can
3 only use the tax collection service if you are
4 a marketplace professional seller, correct?

5 **MR. GREEN:** Flip to Exhibit 23.

6 A: I'm not sure, I'd have to check.

7 Q: Okay. Sorry.

8 **MR. GREEN:** And page up one page. Under
9 Registration.

10 A: I can see it says if you're a marketplace
11 professional seller or Amazon Webstore seller
12 you may register for tax collection services by
13 providing to Amazon. So I think this is a
14 service for professional sellers and Webstore
15 sellers. Webstore is actually a service that
16 doesn't exist anymore. It existed briefly in
17 the time period in question but it's since been
18 -- it's not a service anymore -- it doesn't
19 exist anymore.

20 Q: So this is not available for individuals,
21 sellers with an individual account, correct?

22 A: That's my understanding based on this document.

23 Q: Okay. All right.

24 **MR. GREEN:** Let's go to Hearing Exhibit 3. And go
25 to page 33, Bates 68. And zoom in on that



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1 upper part or highlight or whatever. The intro
2 part above Fulfillment Services.

3 Q: If you want to take a minute to read that
4 couple paragraphs.

5 A: Okay.

6 Q: And this -- again, this is part of the BSA that
7 deals with FBA service terms, correct?

8 A: Yes.

9 Q: And at the end of that first paragraph it says,
10 you expressly agree that Amazon may engage it's
11 affiliates or a third party in order to
12 complete one or more of the fulfillment and
13 associated services outlined below, correct?

14 A: Yes.

15 Q: It just says Amazon, correct? Excuse me --
16 Amazon may engage it's affiliates or a third
17 party, correct?

18 A: I mean, the contracting party in this context
19 is Amazon Services, LLC. It's been written
20 here as Amazon but elsewhere I think, you know,
21 it defines who the contracting parties are, so
22 it should be read as, you expressly agree that
23 Amazon Services may engage its affiliates,
24 meaning other Amazon entities, I think or a
25 third party in order to complete their



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1 services.

2 Q: Okay. Thank you. To use FBA you have to
3 register your products, correct?

4 **MR. GREEN:** And let's look at F1 right there.
5 That's what I'm getting to.

6 A: I mean, in practice there isn't really a
7 registration process for FBA. The seller can
8 determine the channel through which products
9 are fulfilled in the Sellers Central portal
10 that we saw earlier. They check a box.

11 Q: So this provision is meaningless?

12 A: I'm not familiar with a registration or
13 application process for each product to FBA.

14 Q: Does a third -- I'm sorry, I didn't mean to
15 interrupt you.

16 A: Sellers can choose the FBA fulfillment option
17 for each of the products. There are some
18 products that cannot be fulfilled by FBA,
19 that's true and that's what's referred to
20 later.

21 Q: Okay. Can I just -- can a third party just
22 send any product, just simply ship it to a
23 fulfillment center?

24 A: There's nothing to stop the third party simply
25 shipping something to a fulfillment center.



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1 There are some products that can't be received
2 or handled by the FBA service so they would
3 probably be returned to the seller.

4 Q: All right. Well let's say I'm a third party
5 and I want to sell some second-hand books?

6 A: Uh-huh.

7 Q: And so I want to ship those to a fulfillment
8 center. I've elected FBA. I just ship the
9 books to a FBA and that's all I do?

10 A: You as the seller in Sellers Central would
11 identify the products that you would like to
12 use the FBA service for. You would create an
13 inbound shipment. You would specify which
14 products are in that inbound shipment and you
15 would be able to print out a shipping label and
16 you would ship those products to an Amazon
17 fulfillment center.

18 Q: Okay.

19 **MR. GREEN:** And page down just a little bit so we
20 can see F2.

21 Q: And then F2 says, you will in the course of
22 applicable program policies provide in the
23 format we require accurate and complete
24 information about your products registered to
25 FBA, correct?



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1 A: Yes.

2 Q: And then F3 talks about shipping.

3 **MR. GREEN:** Page down just a little bit.

4 Q: And F3 dot 1 says, you will ship units to us in
5 accordance with applicable program policies,
6 correct?

7 A: Yes.

8 Q: During first quarter of 2016 was participation
9 in FBA required in order for the product to be
10 eligible for Prime shipping?

11 A: The reason I'm pausing is that Amazon Services
12 offers a program called Seller Fulfillment
13 Prime where sellers who are able to ship
14 products very quickly can have a Prime badge
15 even though they're not using the FBA service.
16 I'm trying to remember when that service was
17 launched. I think it was prior to Q1 2016.

18 Q: Are you confident of that?

19 A: I'm not a hundred percent confident. I was
20 around -- it was around the time -- I moved to
21 the U.S. in 2015, it was launching around that
22 time. So today there is a program which
23 enables sellers to offer a Prime delivery
24 promise without using the FBA service. I'm
25 just not precise on when that was launched.



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1 Q: Okay. And then explain for the Court if you
2 will, what is Prime shipping?

3 A: Well Prime is a Amazon membership program which
4 includes as its benefits free Prime shipping
5 and Prim shipping is defined in the U.S. -- it
6 varies by country, but in the U.S. typically
7 it's free two day shipping. So products will
8 arrive on the second working day for free.
9 There are some -- there are lots of other
10 benefits. Sometimes it's one day shipping. It
11 kind of varies now, but typically Prime
12 shipping means free, quite quick delivery.

13 Q: Okay. And does eligibility for Prime help
14 third parties -- the sale of these third party
15 goods? In other words, do customers find goods
16 that are eligible for Prime shipping more
17 attractive to purchase?

18 A: Everything else being equal, price being equal
19 which is an important caveat, that's a product
20 for a Prime customer, that a product is Prime
21 eligible and has free Prime shipping, will
22 increase sales of that product. Actually, I'm
23 sorry, that's a forward looking statement. In
24 that past it has typically increased the sales
25 of the products.



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1 Q: Okay.

2 A: Whether it will or not in the future is
3 nobody's guess.

4 **MR. GREEN:** Flip to page 35, Bates 70.

5 Q: We're still talking about FBA. And zoom in on
6 F4. Do you need to read F4 briefly?

7 A: If I -- I am familiar with this part of it but
8 if I could maybe just -- I'll try and be quick.

9 Q: By all means.

10 A: Okay.

11 **THE COURT:** He said okay.

12 A: I'm sorry, I'm ready.

13 Q: That's okay. No, that's fine. I apologize.
14 And this provides if you look down, I don't
15 know, about the third sentence, we will not be
16 required to physically mark or segregate units
17 from other inventory units owned by us, our
18 affiliates or third parties any applicable
19 fulfillment centers, correct?

20 A: That's a correct reading. I explained in my
21 earlier testimony how Amazon Fulfillment
22 Services is an affiliate of Amazon Services, it
23 keeps track of each sellers products based on
24 its identifying bar code and its physical
25 location on the shelf.



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1 Q: Okay.

2 A: So it talks about co-mingling here but it's not
3 -- we talked about it our deposition -- it's
4 not just a big pile of products. The
5 provenance of which seller sent in which
6 product is kept.

7 Q: Okay. And then the next sentence, if we elect
8 to co-mingle units with such other inventories
9 both parties agree that our records will be
10 sufficient to identify which products or units,
11 correct?

12 A: That is what the document says. I think I
13 remember what -- units is a defined term. I
14 think units refers to the individual units.
15 Can we just check what units means?

16 Q: We can. Hang on just one second. Let me see
17 if I can right page for it.

18 A: I just want to make sure I understand every
19 word before ...

20 Q: Sure. Go to page 41, Bates 76.

21 A: Got it.

22 Q: You good?

23 A: Yes, sir.

24 Q: Okay. We're back to page 35, F4.

25 A: Would you repeat the question?



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1 Q: I will. And if the document says, if we elect
2 to co-mingle units with such other inventory
3 units both parties agree that our records will
4 be sufficient to identify which products or
5 units, correct?

6 A: Yes.

7 Q: And it says, we may move units among
8 facilities, correct?

9 A: Yes.

10 **MR. GREEN:** Page down to F5, just a little bit to
11 F5.

12 Q: You with me with F5?

13 A: Yes, sir.

14 Q: And it says, as part of our fulfillment
15 services we will ship units from our inventory
16 of your product to the shipping address that is
17 in the elected country included in valid
18 customer orders or submitted by you as part of
19 a fulfillment request, correct?

20 A: Yes. I stumble over the wording of this to be
21 honest. When it says our inventory of your
22 products. Just to be clear it's the seller's
23 products. I think our inventory which is not
24 a defined term refers to the inventory belongs
25 to third parties that happen to be in an Amazon



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1 building at the time just for the avoidance --
2 just to avoid no, you know, any confusion
3 that's it's not Amazon Services inventory, it's
4 your product, meaning the seller's product.

5 Q: Okay.

6 A: Like our inventory of your product assumes the
7 product -- your products that you've sent in
8 that we are -- that are on our shelves.

9 Q: Okay. Let's look at Hearing Exhibit 65.

10 **(Hearing Exhibit Number 65 was introduced into the**
11 **record at this time.)**

12 Q: Generally Amazon controls where a third parties
13 goods are stored, or products are stored,
14 correct? In other words, if a third party
15 sends them in to Amazon, Amazon will then
16 distribute them as it deems appropriate,
17 correct?

18 A: Amazon Fulfillment Services receives the
19 seller's inventory. The seller does have
20 control over optionally where those products
21 are sent and stored. There are some programs
22 that the seller can opt into to constrain where
23 a product is stored. Most sellers choose to
24 let Amazon Fulfillment Services distribute
25 their products so the customers who place



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1 orders with a seller will get their products
2 most quickly.

3 Q: But -- and let's look at it here in Exhibit 65
4 if we can. Have you -- are you familiar with
5 this document?

6 A: Again I have not read it recently but I have
7 read it in the past.

8 Q: Okay. And third paragraph down, take a minute
9 to read the third paragraph down. That's part
10 of what I'm going to ask you.

11 A: Okay.

12 Q: Is that the service you're referring to?

13 A: The inventory placement service, yes, it's an
14 option for sellers to constrain where their
15 inventory is stored.

16 Q: Okay. And it says, a per item service fee
17 applies for the inventory placement service,
18 correct?

19 A: Yes.

20 Q: Okay. And then the rest of that document talks
21 about the placement service fees for that.

22 **MR. GREEN:** Flip over a minute if you would.

23 Q: And that's just the placement service fees if
24 you opt into that service, is that correct?

25 A: Yeah, it's a pretty small charge. Most items



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1 sold on the Amazon website by sellers are in
2 the standard size category so it's tens of
3 cents if the seller wants to use that placement
4 service. Yeah.

5 Q: Okay. And does Amazon -- okay, so FBA still
6 we're talking about that. So Amazon picks and
7 packs the third party's goods to be shipped,
8 correct?

9 A: Amazon Fulfillment Service associates -- to be
10 precise in the entities, I'm sorry -- yes, when
11 a customer buys an items from the seller an
12 Amazon Fulfillment Service associate will pick
13 an item from the shelf, probably a different
14 one will pack it and it'll be shipped to the
15 customer for the seller.

16 Q: All right. I think you talked about this a
17 little on your direct -- go to page 37. Look
18 at F8 dash 2. Just let me know when you've
19 read that paragraph.

20 A: Okay.

21 Q: And so for FBA Amazon "is responsible for and
22 has sole discretion regarding all customer
23 service issues related to packaging, handling
24 and shipment and customer returns, refunds and
25 adjustment related to Amazon Fulfillment



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1 units," correct?

2 A: Part of the services that Amazon Services takes
3 responsibility for customer service but limited
4 only the items here. The delivery of the
5 product. The seller is still responsible for
6 any product customer service contact.

7 Q: But my question -- did I quote the phrase
8 accurately?

9 A: You did.

10 Q: Okay. So the question is -- I mean, the answer
11 to my question was yes?

12 A: Yeah, I'm just trying to provide a bit more
13 context.

14 Q: I understand but the answer to my question was
15 yes.

16 A: You read that correctly.

17 Q: Okay.

18 A: Yes.

19 Q: And then the -- Amazon Services follows a
20 standard return -- or, excuse me -- but then
21 your testimony would be is Amazon Fulfillment
22 Services follows a standard return for
23 placement policy that it's promulgating,
24 correct? And I'm just asking you that
25 generally, I don't know if says that there.



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1 A: Yes.

2 Q: Okay. And then Amazon -- I think it says there
3 -- Amazon, I guess, FAS or Amazon -- the
4 appropriate Amazon entity has the right to
5 determine whether a customer will receive a
6 refund, adjustment or replacement for any
7 Amazon fulfillment unit and to require you to
8 reimburse us where we determine you have
9 responsibility in accordance with the agreement
10 including these FBA service terms and the
11 program policies, correct?

12 A: Yes. Sellers sign up for that when they use
13 FBA.

14 Q: Okay. Okay.

15 **MR. GREEN:** And then flip over to F9 dot 2. Zoom in
16 on that.

17 Q: And just that first sentence.

18 A: The first sentence for shipping?

19 Q: Correct.

20 A: Okay.

21 Q: And that says, for an Amazon Fulfillment unit
22 we will determine the amounts charged to the
23 customer for shipping and gift wrap services
24 for the units that we fulfill through the FBA
25 program, correct?



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1 A: Yes.

2 Q: Bear with me a moment, please. You testified
3 in your direct -- excuse me -- you testified in
4 your direct about ratings of third parties on
5 the website, correct?

6 A: Yes.

7 Q: And once a transaction is completed doesn't the
8 third party often contact the customer to ask
9 for a rating?

10 A: The seller can use a range of tools provided
11 through Sellers Central to request a rating.
12 I -- you said often -- I don't know the rate at
13 which sellers do that but certainly they can
14 and I myself have seen those requests come
15 through.

16 Q: But you don't have any sense as to how often
17 that occurs?

18 A: I don't know how often that occurs.

19 Q: But a seller -- a third party -- the rating
20 weighs into their performance metrics, correct?

21 A: Yes, that's correct.

22 Q: So it would be in their interest to ask for
23 those -- ask for positive ratings, correct?

24 A: Well you can't ask for positive ratings. The
25 seller can ask for a rating.



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1 Q: Okay.

2 A: And the customer can give the rating they think
3 is fair.

4 Q: And you talked about third parties providing
5 customer service for the product, correct?

6 A: Yes.

7 Q: But that occurs when the sales transaction is
8 completed and the customer has received the
9 product, correct?

10 A: No, customers can contact sellers prior to
11 placing an order.

12 Q: Well that would be a product inquiry, would it
13 not?

14 A: I'm sorry. Maybe I misunderstood the question.

15 Q: And maybe I misphrased it inartfully, that is
16 not out of the question. No, what I'm asking
17 is -- what I meant to ask anyway is -- third
18 parties -- I think you testified third parties
19 provide product-related customer service.
20 Product-related.

21 A: In all cases the parties provide product-
22 related customer service. Where the seller is
23 not using FBA they will also let customers know
24 where their item is. If the seller is using
25 FBA then Amazon Services will let customers



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1 know where there items is in terms of its
2 delivery as the seller's ask Amazon Services to
3 do that. In reality, of course, if the
4 seller's fulfilling it they'll probably
5 redirect the customer to FedEx's website or
6 another third party's website. And ...

7 Q: Okay. But product-related relates to the
8 product that is actually sold and delivered to
9 the customer, correct?

10 A: Yes.

11 Q: And so the third parties provide product-
12 related customer service, correct?

13 A: Yes.

14 Q: Okay. And ---

15 **THE COURT:** Here's what I normally do. The first
16 person that the phone rings I don't take it.
17 After that I let everybody know if another
18 phone rings it's going to belong to the Court,
19 so check your's and anybody else check your
20 phones. You know, I do let you buy them back
21 from the Court.

22 **MS. KURTZ:** I'm so sorry.

23 **THE COURT:** That's fine. You're lucky that you're
24 the first.

25 Q: But that product-related customer service by --



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1 once there's a problem with once the product is
2 received, that's after the sale has been
3 completed and the product shipped, correct?

4 A: I mean, it could be while -- it could be any
5 time. It could be while the product is being
6 shipped. Typically it might be after the
7 product has been received, but as I said
8 customers can also ask questions themselves
9 prior to placing an order. You described it as
10 an inquiry.

11 Q: Right. Well, and so I think we talked a little
12 bit about it, so for instance there's the -- in
13 the protest that we talked about I think in
14 your deposition there's a model -- there's a
15 picture of a model of a Turkish Battleship.

16 A: Okay.

17 Q: So if I had bought that on the Amazon website
18 and I receive it and it's broken -- there's
19 something that is broken -- I would communicate
20 with the third party about that right?

21 A: Was this an FBA or a ---

22 Q: Let's assume it is a third party fulfillment.

23 A: Yes, you'd contact the seller.

24 Q: I'd contact the third party.

25 A: Sure.



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1 Q: And then -- but that's after the sales
2 transaction is complete I think is all of what
3 I'm getting to.

4 A: Okay. Yes.

5 Q: Okay. Excuse me, bear with me please, Your
6 Honor and Mr. Poad. Let's step back a minute
7 -- I don't think we need to pull it up -- at
8 least I hope not -- but you worked through
9 earlier sort of a purchase transaction related
10 to your -- I think your wife's purchase of
11 these running shoes?

12 A: Yes.

13 Q: On your account?

14 A: Yes.

15 Q: And I'm actually asking a little bit about a
16 page earlier than that. If I go on -- let's
17 say I go onto the website and I search for
18 Asics women's gel Nimbus shoes.

19 A: Yes.

20 Q: And I put that into the search bar that's on
21 the Amazon.com website.

22 A: Yes.

23 Q: Won't that return just a list of products that
24 match those search terms?

25 A: Yes.



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1 Q: Okay. It doesn't respond with a list of
2 sellers or third parties with those goods, it
3 responds with a list of the products that are
4 responsive to that search request, correct?

5 A: When a search result is returned to the
6 customer the list of products are products of
7 the left-hand navigation. The seller can
8 refine by the seller. They can choose the
9 products offered by specific sellers. So they
10 may choose, for example, Zappos, or they may
11 choose Roadrunner because they've heard of
12 Roadrunner and then that will alter the
13 returned list of products to only those
14 products offered by that seller. Additionally,
15 on each product -- in each product in that list
16 -- you can -- I think there's a link that says
17 how many sellers offer the product and then
18 when clicking through to that product page you
19 can see how many sellers and the short list of
20 sellers on the bottom right-hand side of the
21 page and then click through to the offer
22 listing page and see all the sellers. So you
23 can see on the circumstance page which -- a
24 list of which seller or sellers offer that --
25 offer all -- offer the products returned in the



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1 search query and you can choose particular
2 sellers if you happen to have a preference for
3 a particular seller at that stage.

4 Q: Right. Okay. And -- but if I just go onto
5 this website and type in Asics women's gel
6 Nimbus 20 running shoe I'm just going to get a
7 list of products offered that are responsible
8 to that search inquiry, correct? Without
9 further refinement that's what I'm going to
10 get?

11 A: That is correct.

12 Q: Okay.

13 A: With the option to refine by seller.

14 Q: Okay. Okay.

15 **MR. GREEN:** Bear with me a moment, Your Honor,
16 please. Elizabeth, go back to Exhibit 16,
17 please? And make sure your phone's off.
18 Sorry, I couldn't resist. Flip to the second
19 page.

20 Q: And you remember we talked about this document
21 just a little bit ago, Mr. Poad?

22 A: Yes.

23 Q: And we talked about referral fee percentages
24 are different, correct?

25 A: They differ by product category.



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1 Q: By product category?

2 A: Yeah.

3 Q: I believe -- let me ask it this way, don't the
4 different percentages -- aren't those
5 determined based on the expected gross margin
6 of that product?

7 A: Not directly. There are a number of -- first
8 of all, these fees are not changed regularly.
9 I think we talked about this in that deposition
10 last November.

11 Q: We did.

12 A: There are a number of inputs into the process
13 of determining the right fee. One would be to
14 look at competitive fees on other marketplace
15 provider websites like eBay and so on which
16 would be a common way of looking at, you know,
17 what a fair price or fair fee would be. Amazon
18 Services looks at the rate at which sellers are
19 adding new selection and whether the fee may be
20 a hindrance to that new selection being added.
21 Amazon Services may speak to sellers and get
22 feedback. The average margin and title by
23 category does differ. For example, clothing
24 tends to have a higher gross margin meaning the
25 difference between a cost price and the sales



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1 price to the end consumer than electronics for
2 example. Fashion sometimes has a gross margin
3 of 50 percent, electronics may have a gross
4 margin on average of 10 percent. And those are
5 averages across a category. Any one product
6 within that category may have a different
7 margin. So it's one of the inputs but it's not
8 -- there isn't a direct relationship between
9 the referral fee charged by Amazon Services and
10 the margin of a particular product.

11 Q: Okay.

12 **MR. GREEN:** Bear with me, Your Honor. Sorry, Your
13 Honor. Thank you.

14 Q: On these referral fees does Amazon periodically
15 change those referral fees?

16 A: Amazon Services does periodically change them.
17 It's infrequent.

18 **MR. GREEN:** Flip over to page 159, Bates number 159
19 on that -- I'm sorry, at Exhibit 16.

20 Q: And look at that double asterisks -- that's
21 hard to say -- underneath the box.

22 A: Okay.

23 Q: And so this is not exactly the fee structure
24 that was necessarily in place in the first
25 quarter of 2016, is it?



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1 A: I don't know for sure. I don't believe so.

2 Q: Okay. And then it says referral fees for
3 grocery gourmet items with a total price of 15
4 or less will be 8 percent instead of 15
5 percent, correct?

6 A: Yes.

7 Q: And so a referral fee is changed doesn't that
8 -- wouldn't that change the third party's
9 amount that they collect on the transaction?
10 In other words, if the referral is less doesn't
11 the third party either collect more money or
12 the sales cost is lowered?

13 A: Well there are two independent variables but
14 the fee charges by Amazon Services for selling
15 on Amazon, it looks like here did change from
16 this point in time, but prices on Amazon change
17 all the times. The sellers are changing prices
18 all the time to be competitive so we typically
19 can say when the proceeds for a particular
20 product would go up or down. There are two
21 things moving and they're not moving together
22 necessarily.

23 Q: Does Amazon ever change the third party's price
24 that they establish on the website? Does
25 Amazon Services on it's own reduce or change



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1 the price?

2 A: Does Amazon Services change the seller's price?

3 Q: Yes.

4 A: No.

5 Q: Okay. I think that's all I have.

6 **THE COURT:** Is the redirect going to be within 30
7 minutes?

8 **MR. RAZI:** Yes.

9 **THE COURT:** Okay.

10 **MR. POAD - REDIRECT EXAMINATION BY MR. RAZI:**

11 Q: Mr. Poad, good evening.

12 A: Good evening.

13 Q: You were just asked a lot of questions about
14 various detailed provisions of the BSA and
15 policies, and I want to return if we can to
16 actually sold the third party products in the
17 first quarter of 2016 into South Carolina,
18 okay?

19 A: Yes.

20 Q: In your testimony on direct examination, was
21 that based on a contract you read or was that
22 instead based on your 10-plus years of first
23 hand experience working with these third party
24 sale transactions?

25 A: It was based on my 10 years of experience



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1 working with sellers, working for Amazon and
2 trying to explain how the business actually
3 works.

4 Q: Okay. And during the course of those 10-plus
5 years have you had an opportunity to perform a
6 factual analysis of these third party sale
7 transactions?

8 A: Could you define factual analysis?

9 Q: I'll withdraw that. Do any of the details --
10 the provisions of the BSA that we that we --
11 that you were asked about -- and we'll get into
12 them in a moment -- but do any of them affect
13 the testimony that you offered on direct
14 examination about how third party sellers made
15 sales on products to South Carolina customers
16 in the first quarter of 2016?

17 A: No, I think I began my testimony this morning
18 by saying that any marketplace operator has
19 policies and rules and that sellers sign up to
20 enable good customer experiences and a fair
21 playing field to the sellers. And we've looked
22 at some of those today like having obscenity in
23 the product detail page which I think is fair
24 enough. It doesn't change, in my opinion, who
25 the seller is of the third party products.



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1 Q: Right. So for instance you were shown a
2 provision of the BSA that dealt with content
3 restrictions on what somebody could say about
4 their product, do you recall looking at that
5 provision?

6 A: Yes.

7 Q: And tell the Court is there in fact a
8 restriction on using obscenity or pornographic
9 material in your product description?

10 A: Well one would have to define pornographic, but
11 yes. Generally profanity is not permitted on
12 product detail pages.

13 Q: Okay. And does that effect at all your
14 understanding of who it is that sells the
15 product as between a third party seller and
16 Amazon Services?

17 A: No, it has no impact on who the seller of the
18 product is.

19 Q: What about the concept that there are certain
20 items that you just can't sell on the website,
21 isn't that true? There are some items that
22 you're just not allowed to sell, right?

23 A: Yes, that's true.

24 Q: For instance illegal narcotics, you're not
25 allowed to sell it on the website, right?



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1 A: Sellers are prohibited from selling illegal
2 narcotics, counterfeit products, there are some
3 restrictions on alcohol simple because the
4 legal jurisdiction in the United States is
5 quite complex with regard to alcohol sales.
6 And every marketplace operator that I know of
7 have similar kinds of policies. It doesn't
8 change who the seller of the product is.

9 Q: Right. In any event the things that you can't
10 sell -- I mean, by definition those are items
11 that were not sold, right? That's not the
12 sales that we're talking about?

13 MR. GREEN: Your Honor, he's leading slightly I
14 submit and I object.

15 MR. RAZI: I'll withdraw.

16 Q: Is it fair to say that the -- do the excluded
17 items or the items that aren't allowed to be
18 sold on the website, does that relate to sales
19 that were actually made?

20 A: No.

21 Q: Why not?

22 A: Products which are excluded from being listed
23 or prevent -- or restricted from being listed
24 do not get sold by any party because they're
25 not listed.



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1 Q: Let me ask you a hypothetical that I think was
2 suggested by some of the cross-examination.
3 Let's assume that Amazon Services were the real
4 seller of all these -- you know, was the seller
5 of these third party seller products. In that
6 circumstance would there be any need at all for
7 the Business Solutions Agreement?

8 A: No.

9 Q: Why not? I mean, in other words, is the
10 Business Solutions Agreement applicable to
11 items that Amazon itself sells?

12 A: No, there are different agreements with the
13 suppliers or the vendors of Amazon's retail
14 entity, Amazon.com LLC I think. The BSA
15 governs the relationship between Amazon
16 Services, Amazon Payments and the third party
17 seller so if Amazon Services was the seller of
18 all these products -- it's kind of a ridiculous
19 hypothetical but if it was -- there wouldn't be
20 a -- there wouldn't need to be that agreement.

21 Q: Okay. and how do the agreements with suppliers
22 that you've referenced between Amazon Services
23 and suppliers differ from the arrangement
24 between Amazon Services and third party
25 sellers?



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1 A: Well there are inter-company agreements between
2 Amazon Services and other entities but I'm not
3 -- there aren't really supplier relationships
4 that I'm aware of as a product merchandise
5 supply relationships with Amazon Services
6 because Amazon Services doesn't sell physical
7 products. It just sells services to sellers.

8 Q: Fair enough. For the Amazon entities that do
9 sell products ---

10 A: Uh-huh.

11 Q: --- how do their agreements with supplies
12 differ from the Business Solutions Agreement?

13 A: So Amazon.com, LLC which is the seller, the
14 Amazon seller on Amazon's website, Zappos
15 subsidiary that we saw earlier, they will have
16 vendor relationships with suppliers that, I
17 mean, they're completely different in their
18 structure. They're typically, you know, supply
19 relationships. They talk about the terms, the
20 purchase price of buying those products from
21 the suppliers that Amazon.com, LLC or Zappos
22 would own before selling to a customer.
23 That's, you know, a retail supplier
24 relationship is completely different from the
25 services relationship that Amazon Services has



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1 with third party sellers.

2 Q: Okay. Let's turn to the services. You recall
3 some questioning about whether certain services
4 were provided by Amazon Services on the one
5 hand or Amazon Payments ---

6 A: Yes.

7 Q: --- on the other hand. And in particular
8 questions about payment processing services?

9 A: Yes.

10 Q: Whichever entity provided those services are
11 they nevertheless services?

12 A: Yes. The services are listing products,
13 advertising, the provision of Sellers Central
14 and the processing of payments. Those are all
15 services. They're not -- none of them physical
16 tangible products.

17 Q: Okay.

18 **MR. RAZI:** Can we put up Exhibit 3, please? Page
19 10. And blow up the transaction processing
20 services box at the bottom.

21 Q: You recall questions from counsel about this?

22 A: Yes.

23 Q: Okay. Are you aware of any sales by third
24 parties into South Carolina in the first
25 quarter of 2016 by a seller that registered for



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1 or used the Selling on Amazon service prior to
2 June 30, 2014?

3 A: I'm sorry, could you restate ---

4 Q: I can unpack it, sure.

5 A: It's a little late in the day. Could you just
6 restate the question?

7 Q: Sure. And it's a long question, but basically
8 this provision suggests that -- and Mr. Green
9 pointed this out in questioning you -- that if
10 a seller registered for or used a service prior
11 to June 30, 2014, then in that circumstance
12 Amazon Services, LLC may in its discretion
13 perform the transaction processing services, do
14 you see that?

15 A: Yes.

16 Q: Okay. But in every circumstance other than
17 that one who was it that provided the payment
18 processing service?

19 A: Amazon Payments, Inc.

20 Q: And what I'm asking you is, are you aware that
21 that circumstance that was highlighted in your
22 cross-examination had any bearing at all on any
23 sales at issue in this case. Namely, any sales
24 made to South Carolina customers in the first
25 quarter of 2016?



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1 A: No.

2 Q: Let's go to Exhibit 122. And you'll recall the
3 questioning around the order confirmation e-
4 mail, do you remember that?

5 A: Yes.

6 Q: Okay. Does it surprise you -- or did it
7 surprise you -- to see that the names of third
8 party sellers were not listed in order
9 confirmation e-mails?

10 A: No.

11 Q: Why not?

12 A: As I tried to explain, this is an e-mail that
13 is sent to customers to say you've placed an
14 order. This template does not list the details
15 of the order, each product, and therefore does
16 not show each seller within this particular e-
17 mail template. Customers can of course click
18 on the link here and they'll see those details
19 on there -- on their account.

20 Q: Okay. And does this e-mail, this order
21 confirmation e-mail come before or after the
22 customer has placed the order?

23 A: After.

24 Q: Okay. And does it come before or after the
25 customer has reviewed the product detail page?



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1 A: After.

2 Q: Does it come before or after the customer has
3 viewed -- or had an opportunity to view -- the
4 offer listing page?

5 A: After.

6 Q: And are there other way in which the identity
7 of the third party seller is communicated to
8 the customer other than the couple that I just
9 identified?

10 A: Customers can refine by seller on the search
11 results page as I mentioned earlier in the
12 cross-examination. On the product detail page
13 they can see the name of the seller. On the
14 offer listing page they can see the names of
15 all the different sellers selling each product.
16 When the item is in the product cart they can
17 see the name of the seller. When they buy the
18 item the order will appear in their account and
19 they can see the name of the seller.

20 Q: Let's go to Exhibit 58. And you'll recall
21 being asked some questions about this?

22 A: Yes.

23 Q: Is there any prohibition in this document
24 against a third party seller identifying
25 himself or herself as the third party seller?



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1 A: No.

2 Q: And in fact do third party sellers so identify
3 themselves to the customer?

4 A: In buyer-seller messaging?

5 Q: Anywhere.

6 A: Yes. In my experience sellers are keen to do
7 that because they -- I mean, the Store Fronts
8 page we saw earlier in my testimony earlier,
9 the stories that the sellers have written, the
10 videos they've shot are all voluntary. The
11 sellers are keen to share their stories and
12 build their own businesses.

13 Q: Let's go back to Exhibit 3. Section S dash 1
14 point 1. Now counsel had asked you some
15 questions -- I think he asked you if he had
16 read a particular sentence of this provision
17 correctly or not, do you recall that?

18 A: Yes.

19 Q: And then you said if I could clarify or I could
20 provide some further information and he said
21 that we could wait until I got a turn to ask
22 you, do you remember that?

23 A: I do. You might actually remind me of which --
24 I think I said that several times so which
25 sentence ---



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1 Q: Sure ---

2 A: --- are you talking about?

3 Q: The ---

4 A: Is it excluded from it? Sorry.

5 Q: No, no, for instance the sentence that talks
6 about how you have to provide things in the
7 format ---

8 A: Oh.

9 Q: --- and the accurate and complete description
10 of it.

11 A: Got it.

12 Q: Is there any further information that you want
13 to provide about that?

14 A: In reality the way that that's ---

15 **MR. GREEN:** I object. That calls for a narrative
16 response.

17 **THE COURT:** Well he can ask a narrative ---

18 **MR. GREEN:** Is there any further information. I
19 mean, they ---

20 **THE COURT:** Of that?

21 **MR. GREEN:** Yes, sir.

22 **THE COURT:** I sustain that.

23 **MR. RAZI:** Okay.

24 Q: What was it that you -- what was the additional
25 information that you wanted to provide in



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1 response to Mr. Green's question about that
2 sentence that he suggested that you defer until
3 later?

4 A: The format referred to here is a reference to
5 the tools provided by Amazon Services that we
6 demonstrated in my direct testimony. The way
7 the descriptions are created, titles are
8 created and so on.

9 Q: All right.

10 **MR. RAZI:** And can we blow up, Mr. Brooks, the
11 second sentence?

12 Q: Do you see where it says, you will also ensure
13 that your materials -- your products including
14 packaging and your offer and any subsequent
15 sale of any of the same on the Amazon site
16 comply with all applicable laws, do you see
17 that?

18 A: Yes.

19 Q: Okay. Does that you tell you anything one way
20 or the other as to whether the third party
21 seller is the seller of the products, or on the
22 other hand, if Amazon Services is?

23 A: I inferred from this that the third party
24 seller is the seller because it refers to your
25 materials meaning product information and other



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1 materials -- your products and your offer and
2 subsequent sale. And the you're here refers to
3 the seller.

4 Q: And in your experience at the company for more
5 than 10 years is the requirement that any sales
6 comply with applicable laws. Is that a -- is
7 that something that inhibits or restricts the
8 third party seller's ability to sell products?

9 A: I don't think it inhibits or restricts sellers
10 from selling products.

11 Q: Why not?

12 A: I think everybody should obey the law. It's
13 not really negotiable I think.

14 Q: The Court had some questions about potential
15 tax fraud by sellers, do you recall those
16 questions?

17 A: Yes, I do.

18 Q: Okay. Does Amazon Services report to taxing
19 authorities on Forms 1099K the sales made by
20 third party sellers?

21 A: Yes.

22 Q: Okay. And do you have an understanding as to
23 why those reports are made?

24 A: I believe it's an IRS regulation.

25 Q: Okay. Let's go back to Exhibit 39, another



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1 document that was shown on cross. And this is
2 -- I think you testified this is something
3 available on Sellers Central relating to
4 product detail pages, is that right?

5 A: Yes.

6 Q: All right. And let's focus on the content-
7 specific policy. Is there anything about these
8 content-specific policies, for instance,
9 prohibiting pornographic, obscene or offensive
10 content or the related restrictions that in
11 your experience has inhibited or restricted
12 third party sellers in their ability to sell
13 stuff on Amazon.com?

14 A: No.

15 Q: And to be clear -- I think you were clear about
16 this but some of this restrictions pertain only
17 to the product detail page, is that right?

18 A: Yes. There are -- there are restrictions which
19 I think everybody would be -- would understand
20 like offensive content. There are then
21 restrictions about content that really should
22 be dynamic content, meaning it should be able
23 to be updated. I notice here, for example,
24 time-sensitive information such as dates of
25 promotional tours. Well that information will



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1 expire after the tour so then that explanation
2 shouldn't be in a product description because
3 it might be there after the tour is finished.
4 It might be there forever. You know, it's just
5 create good customer experiences. None of
6 these things restrict sales or restrict
7 services. It's just to, you know, make sure
8 the pages give good customer experiences.

9 Q: Do you recall being asked some questions about
10 -- and we don't necessarily need to put it up
11 -- but about cancellations and returns and
12 refunds?

13 A: Yes.

14 Q: Does any of that information in the BSA effect
15 your opinion that third party sellers are the
16 sellers of the products that they sold on
17 Amazon.com to South Carolina customers in the
18 first quarter of 2016?

19 A: Yes. That there are policies directed towards
20 third parties as regards the timely response to
21 customer service inquiries or the timely
22 shipping of products or the response to return
23 requests. Those things would only make sense
24 if the third party sellers were the seller --
25 were the sellers of products to South Carolina



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1 residents. If Amazon Services was the seller
2 of these products then none of these qualities
3 would need to exist.

4 Q: And would your answer be the same if I asked
5 you about, for instance, the FBA customer
6 returns policy that was Exhibit 30?

7 A: Yes.

8 Q: And by the way, you were -- in responding to a
9 question about Exhibit 30 there was a reference
10 to something called a returnless refund and you
11 said would you like me to explain. Can you
12 just tell us what a returnless refund is?

13 A: A returnless refund is a financial refund to
14 the customer without the customer having to
15 return the item and it's offered to the
16 customer when -- for very low value items --
17 when the cost of returning the item actually
18 exceeds the value of the item so it just
19 doesn't make any economic sense for anybody to
20 have the poor customer ship the item back. And
21 so we just say to the customer this is a policy
22 that sellers will opt into if they're a part of
23 FBA. Just keep it and you get your money back
24 because it's only a \$2 item or something. It
25 doesn't make any sense to return it.



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1 Q: All right. Just to be crystal clear is it --
2 you testified earlier that third party sellers
3 choose what products to sell and source their
4 products, do you recall that testimony?

5 A: Yes.

6 Q: Okay. And is that your opinion or is that
7 something you know as a matter of fact based on
8 your experience working with third party
9 sellers.

10 A: I know it as a matter of fact having worked
11 with hundreds if not thousands of sellers and
12 being familiar with the business models that
13 they have.

14 Q: Okay. What about your testimony that it's
15 third party sellers that create the product
16 listings for their products and upload the
17 images of their products onto Amazon.com, is
18 that your opinion or is that something that you
19 know as a matter of fact?

20 A: I know as a matter of fact.

21 Q: You've testified quite a bit today about
22 pricing. You've testified that third party
23 sellers set the prices for their products, is
24 that just an opinion you hold or is that
25 something that you actually know based on your



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1 first-hand experience as a matter of fact?

2 A: I know based on my first-hand experience and as
3 a matter of fact.

4 Q: You've testified that third party sellers
5 manage their inventory, is that something that
6 you know just that your surmise or that's an
7 opinion or do you actually know that from
8 first-hand experience as a matter of fact?

9 A: I know if from first-hand experience and a
10 matter of fact.

11 Q: You testified that third party sellers transfer
12 products to customers, do you recall that
13 testimony?

14 A: Yes.

15 Q: And is that just sort of an opinion that you've
16 come up with or is that something that you know
17 from your first-hand experience as a matter of
18 fact?

19 A: I know it as a matter of fact.

20 Q: You've testified that third party sellers ---

21 **THE COURT:** I think I'm going to shut it down now.
22 It seems like we're going to go past 30
23 minutes. I mean, how much longer are you ...

24 **MR. RAZI:** There's two more questions.

25 **THE COURT:** Okay. Go ahead.



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1 Q: You've testified that third party sellers
2 receive payment in exchange for the sale of
3 their products, do you recall that testimony?

4 A: Yes.

5 Q: And is that your opinion or is that something
6 that you know as a matter of fact based on your
7 experience working at Amazon since 2009?

8 A: It's a fact.

9 Q: Okay. And there's been testimony about
10 customer service. You've testified that
11 product-related customer service is provided by
12 third party sellers, right?

13 A: Yes.

14 Q: And is that your opinion or is that something
15 that you know as a matter of fact based on your
16 experience working with third party sellers
17 since 2009?

18 A: It's a fact.

19 **MR. RAZI:** That's all the questions I have.

20 **THE COURT:** Are you going to have any redirect?

21 **MR. GREEN:** No redirect, Your Honor.

22 **THE COURT:** All right. You may step down. What
23 time do we start tomorrow?

24 **MR. RAZI:** We're ready whenever the Court and the
25 Department of Revenue.



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1 MR. GREEN: Same here.

2 THE COURT: Would you want to start at 9:00?

3 MR. GREEN: We could start at 9:00 if you like.

4 THE COURT: Like 9:00, 9:30. I mean, I was just
5 going to try to keep it moving along.

6 MR. GREEN: How about 9:30, Your Honor?

7 THE COURT: Okay.

8 MR. GREEN: Does that work for y'all?

9 MR. RAZI: Sure.

10 THE COURT: 9:30, sold.

11 MR. GREEN: Thank you, Your Honor.

12 MR. RAZI: Thank you, Your Honor. Can he be release
13 or are you guys going to call him back?

14 MR. GREEN: I don't know. Let me think about it.
15 No, he can be released. We're fine. Thanks
16 for asking.

17 (DAY ONE of the hearing adjourned at 6:24 p.m.)

18 (DAY TWO - TUESDAY, FEBRUARY 5, 2019. The hearing
19 reconvened at 9:30 a.m.)

20 THE COURT: Mr. Razi?

21 MR. AKINS: Thank you, Your Honor.

22 THE COURT: Oh, pulled a fast one on me.

23 MR. AKINS: Amazon Services calls Matthew Revich.

24 THE COURT: Okay. Can you give me your name again?

25 MR. AKINS: Sean Akins.



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