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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 II of VII

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**RECORD ON APPEAL
VOLUME II of VI**

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1 THE COURT: Akins?

2 MR. AKINS: Akins.

3 THE COURT: Okay. Is this our California person
4 coming in?

5 MR. RAZI: It is.

6 THE COURT: All right.

7 MATTHEW REVICH, having been duly sworn, testifies as
8 follows:

9 **MR. REVICH - DIRECT EXAMINATION BY MR. AKINS:**

10 Q: Good morning. Could you please introduce
11 yourself to the Court?

12 A: My name is Matthew Revich. I am the owner and
13 founder of Yedi Houseware Appliances.

14 Q: And do mind if I just refer to Yedi Houseware
15 Appliances as Yedi as we go forward?

16 A: Sure.

17 Q: All right. And, Mr. Revich, is this your first
18 time testifying in courtroom like this?

19 A: Yes.

20 Q: Are you a little bit nervous this morning?

21 A: A little bit.

22 Q: A little bit? Yeah? Don't worry, me too. Are
23 you here today to provide testimony about how
24 Yedi sells products using the Amazon.com
25 marketplace?



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1 A: Yes.

2 Q: All right. Before you do that can you just
3 tell us a little bit about Yedi's background?

4 A: Yedi is a business I started and founded in
5 2014. Originally I was selling cables for
6 headphones. Eventually all headphones started
7 to become wireless so I had to find new
8 products to sell. My business partner, his dad
9 owned a houseware company. So naturally and
10 under his dad's guidance we started to sell
11 kitchen ware appliances. The first kitchen
12 ware appliance we sold was an electric pressure
13 cooker.

14 Q: All right. And you sell that electric pressure
15 cooker on Amazon.com?

16 A: Yes.

17 Q: Okay. Do you sell any other products on
18 Amazon.com?

19 A: Yes.

20 Q: How many?

21 A: About eight.

22 Q: Okay. And how long have you been selling on
23 Amazon.com?

24 A: Since 2014.

25 Q: Okay. And of those eight products that you



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1 currently sell on Amazon.com how many units
2 have you sold since -- in the time that you've
3 been selling on Amazon.com?

4 A: Thousands upon thousands.

5 Q: Thousands? Is it more than 10,000, less than
6 10,000?

7 A: More than 10,000.

8 Q: How about 100,000? More or less than 100,000?

9 A: Probably more than 100,000.

10 Q: Okay. Other than selling on Amazon.com do you
11 sell your products through any other sales
12 channels?

13 A: Yes.

14 Q: What are some of those sales channels that you
15 use?

16 A: I sell them through my own website, on eBay, on
17 the Walmart.com. I go to trade shows and I
18 wholesale them to mom and pop shops, to
19 supermarket chains. That's about it.

20 Q: Okay. And what are your -- for last year,
21 2018, what were your annual sales volumes for
22 all of your sales channels?

23 A: A little bit above 2,000,000.

24 Q: Okay. And how about this year? Do you have
25 any expectations for what your sales volumes



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1 are this year?

2 A: This year I expect it to be between 10,000,000
3 and 15,000,000.

4 Q: So that's quite the increase. What accounts
5 for that increase?

6 A: I've added more products, and I've purchased
7 more inventory.

8 Q: Who at Yedi is responsible for interacting with
9 the Amazon.com website?

10 A: I am.

11 Q: And how frequently would you say that you
12 interact with the Amazon.com website to sell
13 your products?

14 A: Every day.

15 Q: Once a day? More than once a day?

16 A: At least 10 times a day.

17 Q: All right. Do you know the name of the portal
18 that you use to interact with the Amazon.com
19 website?

20 A: It's called Stellar Central.

21 Q: So let's walk through your sales process if we
22 could. Just as a general matter how much
23 freedom would you say that you have to sell on
24 the Amazon.com website?

25 A: I have a lot of freedom, I pretty much control



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1 everything.

2 Q: Has Yedi recently started selling any new
3 products on Amazon.com?

4 A: Yes.

5 Q: What product is that?

6 A: It is a six in one grill.

7 Q: Okay. We'll ask Mr. Brooks if he can to pull
8 up Amazon.com. What would he search for if he
9 wanted to find that six in one grill?

10 A: He would search for my business name, Yedi
11 Houseware. And then grill, Yedi Houseware
12 grill. It's the first two images, either one.

13 Q: All right. So is this the new product that
14 you've started selling on Amazon.com?

15 A: Yes.

16 Q: Okay. How do you know that it's sold by you?

17 A: Because I'm the seller of this product.

18 Q: Does anything on the page indicate that you're
19 the seller of the product?

20 A: It says by Yedi Houseware. It says sold by
21 Yedi Houseware Appliances.

22 Q: All right. So let's talk about your process
23 for sourcing and selling this product, but
24 before we that have you prepared anything in
25 advance of your testimony today that describes



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1 or provides notes related to your process for
2 sourcing and selling products?

3 A: Yes, I wrote some notes.

4 Q: May I approach, Your Honor?

5 **THE COURT:** Yes.

6 Q: Mr. Revich, do you recognize the document
7 that's in front of you right now?

8 A: Yes.

9 Q: What is it?

10 A: It's a document I wrote about my process of
11 finding a product, sampling a product,
12 financing a product, writing all the manuals
13 and recipe books for a product, all that
14 logistics that goes into selling a product and
15 the marketing and the customer service.

16 Q: All right. When did you prepare this document?

17 A: I wrote it yesterday morning.

18 Q: And is it an accurate reflection of the process
19 that you engage in when you source and sell a
20 product on Amazon.com?

21 A: Yes.

22 Q: Your Honor, we'd ask that this be admitted into
23 evidence?

24 **MR. GREEN:** I don't have any objection, Your Honor.

25 **THE COURT:** Well then I'll admit it.



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1 (Hearing Exhibit 211 was admitted into evidence at
2 this time .)

3 Q: So let's walk through the outline if we could,
4 Mr. Revich. The first item that's here on the
5 screen talks about product research. What's
6 that refer to when it discussed product
7 research? What is that?

8 A: That refers to what product I want to sell. I
9 can sell any product I want to so I need to
10 determine what's the best product to sell. The
11 way I do that usually is I'll go onto Amazon.
12 I'll go into the home and kitchen category.
13 I'll look at the best selling products in the
14 home and kitchen category. There's a top 100
15 list. I'll look through the list and I'll see
16 are there any products that I believe I can
17 innovate or make better. For example, I came
18 across a grill similar to the product I'm
19 selling now. Then I will go to Google.
20 There's something called a keyword planner, and
21 I'll go to the Google keyword planner and I'll
22 type in key words that are related to the
23 product I plan to sell such as grill, griddler,
24 Panini press, waffle maker. And I'll look at
25 the results. If the results show me that



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1 there's over 100,000 unique people every month
2 looking on Google for the words Panini press,
3 grill or griddler I'll know this is a very
4 popular product and people are searching for
5 it.

6 Q: All right. So what's the -- once you've done
7 that research, the next item that's here talks
8 about sourcing. Once you decide, you know,
9 you've researched the product. What's the
10 sourcing process that you engage in?

11 A: I had a sourcing agent, his name is Vinay. He
12 works in Hong Kong. I will communicate to
13 Vinay that I'm interested in creating a grill
14 or a griddler. I'll say can you please find --
15 not warehouses -- factories in China that can
16 produce and manufacture this product? He will
17 then find me three to five options and then I
18 will discuss with him the factories, the
19 pricing, how fast they can get the products
20 done. And from there we'll move on to the ---

21 Q: Well let me ask you -- let's pause on sourcing
22 really quickly. Before you sourced any of
23 those products did you have to get permission
24 from Amazon company about what you would source
25 or how you would source your product?



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1 A: No.

2 Q: Did any Amazon company ever tell you how to
3 source your products?

4 A: No.

5 Q: Did any Amazon company even suggest to you how
6 to source your products?

7 A: No.

8 Q: What about product research? Has any Amazon
9 company told you how to research your product
10 -- what products to sell?

11 A: No.

12 Q: Okay. So let's go ahead and go on and talk
13 about sampling kind of briefly. What's that
14 process involve?

15 A: So once we're confident that we want to work
16 with a specific factory we will ask the factory
17 to send us sample of the product that we're
18 interested in, you know, producing. So they
19 send us a sample. I then usually test the
20 sample for about a week. I see if there's any
21 improvements I can make to it. I see should I
22 add certain accessories to make it a better
23 experience for my customers. And once I know
24 how I want to move forward with the product I
25 then communicate that to my sourcing agent and



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1 to the factory directly and they begin to
2 manufacture my product.

3 Q: So when you're sampling and testing and
4 innovating that product is any Amazon company
5 involved in that process?

6 A: No.

7 Q: Has any Amazon company ever told you how to
8 sample, test or innovate your products?

9 A: No.

10 Q: Has any Amazon company ever reviewed your
11 product for sampling or testing or innovating
12 purposes?

13 A: No.

14 Q: So after sampling the next item that you have
15 there, it says financing. What's that refer to
16 with respect to the products you sell?

17 A: So I need to pay for the inventory. I need to
18 finance it. I have one main investor right
19 now. I have a contract with him and he has the
20 right to finance any of the next three products
21 I create. So I have to offer it to him. If he
22 wants to do it he can finance the product. If
23 he doesn't want to do it, I have to either get
24 a credit line from a bank or I can use my own
25 money.



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1 Q: That investor that you mentioned are they in
2 any way related to any Amazon company?

3 A: No.

4 Q: Have you ever entered into a partnership or a
5 joint venture or other arrangement for Amazon
6 to finance any of your products?

7 **MR. GREEN:** Objection. There's some legal terms in
8 there, Your Honor.

9 **THE COURT:** Joint venture.

10 **MR. GREEN:** Partnership.

11 **THE COURT:** Partnership.

12 **MR. GREEN:** And to the extent he's ---

13 **THE COURT:** Well I mean, that can be a legal term
14 but it can also be a term -- generic term.

15 **MR. GREEN:** And then sort of the same objection I
16 had yesterday. Just to the extent it's a legal
17 -- I would object to any legal conclusions to
18 be drawn.

19 **MR. AKINS:** I can rephrase, Your Honor, that's fine.

20 **THE COURT:** You can if you wish.

21 **MR. AKINS:** All right.

22 Q: Mr. Revich, has any Amazon company ever helped
23 you finance any of your products?

24 A: No.

25 Q: The next heading that's on here refers to



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1 manuals and recipe books. What are you
2 referring to there in terms of your process to
3 sell a product?

4 A: So when I'm testing the product and this --
5 well actually after I've tested the product and
6 after I've confirmed that I want to move
7 forward with this product, I then write the
8 manuals myself because I want to understand the
9 product very well. I want to anticipate what
10 my customers might have questions about and
11 answer them already in the manual. I write the
12 recipes myself because it also helps me
13 understand the product and I actually have to
14 use the product again while writing recipes
15 because I'm cooking a bunch of stuff. I also
16 see should I create any one page inserts. For
17 example, with the grill I included a one page
18 insert about cooking chicken. I included
19 another one page insert about cooking meat, and
20 additionally a third one page insert about how
21 to cook vegetables.

22 Q: Why is it important for your customers to have
23 manuals that are written clearly?

24 A: It will improve their experience with my
25 products, and my customers are one of the most



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1 important parts of my business.

2 Q: Has any Amazon company ever helped you write
3 any of those manuals?

4 A: No.

5 Q: Okay. The next item that's here refers to
6 logistics. What are you referring to when you
7 talk about logistics in terms of the products
8 you sell?

9 A: Once the products are done being manufactured
10 in China we have to get them over here. So
11 that's logistics. The products come from China
12 to the Port of Long Beach in California. Once
13 they're in Long Beach they have to clear
14 customs which we pay for. Then we have to hire
15 a trucking company which brings the products
16 from the Port of Long Beach to our warehouse in
17 Vernon, California. Once they get to our
18 warehouse our workers break down the container
19 that the products come in and they palletize
20 the products so they can be stored in our
21 warehouse.

22 Q: And throughout that process, the logistics
23 process, does any Amazon company help you with
24 that logistics process?

25 A: No.



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1 Q: Okay. So you receive the products, they're now
2 in your warehouse, and so let's go back to the
3 product detail page that we had up previously
4 if we can. So you've got the products and now
5 you need to set up this listing. How do you go
6 about doing that?

7 A: About setting up this listing?

8 Q: Uh-huh. For the first time.

9 A: So I have photographer I work with. I send him
10 one of my products and he takes pictures for
11 me. I also usually ask him to create a video.
12 I then research similar products on Amazon or
13 Google or anywhere I can find them about how
14 they're described, and I try to make my
15 description better than my competition's. I
16 write all this information myself based on my
17 product and what I think a customer wants to
18 read. I choose what photos I want to put here.
19 These are all photos that I have chosen myself.
20 For example, this photo right here I actually
21 created with Photoshop. I put every one of
22 these pictures of the grill and it's position.
23 The photos underneath I selected and put there
24 as well. If you go to the next photo. In
25 Photoshop as well I wrote reversible plate



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1 grill, griddle. I want the customer to be able
2 to see the picture and understand that this
3 product comes with reversible plates. I want
4 that to be very clear. That's a big buying
5 point.

6 **MR. REVICH:** Can you go to the next picture, please?

7 **Q:** I wrote here where the waffle plates are
8 included too. That's a big seller because in
9 my initial research I saw that a lot of people
10 were search for waffle makers. And the fact
11 that this product comes with a waffle maker and
12 the reversible grill plates it's very unique.
13 So I'm controlling pretty much all this and I
14 put everything here.

15 **Q:** What about the price that's listed with respect
16 to the product? Is that automatically set for
17 you or do you set the price?

18 **A:** I set the price.

19 **Q:** There's also some reference there to shipping
20 terms. How -- who comes up with those?

21 **A:** Where?

22 **Q:** Well how the product is fulfilled, let me ask
23 it that way. How do you -- let me ask it this
24 way -- when this product ends up being
25 fulfilled, shipped to a customer who decides



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1 how it's going to be shipped to a customer?

2 A: I do and the customer.

3 Q: And when you're setting up the listing you
4 decide what those fulfillment terms are going
5 to be -- do you decide who -- let me rephrase.
6 When you set up the listing for the first time
7 do you decide what the fulfillment terms are or
8 does an Amazon company decide what the
9 fulfillment terms are?

10 A: I decide what the fulfillment terms are.

11 Q: Do you use any key words associated with this
12 product detail page to help customers find it?

13 A: Yes.

14 Q: Tell me about the process of setting up those
15 keywords.

16 A: So if you look at the title it says, grill,
17 waffle maker, griddle, Panini press. And
18 they're in that order based on my research with
19 Google Analytics that griddle is the most
20 popular keyword searched for, waffle maker is
21 the second most popular keyword searched for,
22 griddle is the third, Panini press is the
23 fourth.

24 Q: And when you put them in that order do you
25 control that or does an Amazon company control



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1 that?

2 A: I control that.

3 Q: Do you provide any warranties or guaranties for
4 your products?

5 A: On the majority of my products I provide a two
6 year warranty. On this specific I provide a
7 one year warranty.

8 Q: And who decided between a two year or a one
9 year guaranty you or an Amazon company?

10 A: I did.

11 Q: And why did you choose on a one year guaranty
12 for the product?

13 A: Because it's a new product and I want to see
14 how it performs and for now I believe a one
15 year warranty is reasonable.

16 Q: When you first set up this listing do you ever
17 engage in any advertising with respect to the
18 product?

19 A: Yes.

20 Q: What is that process that you -- what is that
21 advertising process?

22 A: I use something called a campaign manager where
23 I bid on specific keywords so if one of my
24 customers types in waffle maker, my main
25 product picture will show up and they can see



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1 it and have access to it.

2 Q: Is that a service that you receive from an
3 Amazon company?

4 A: No.

5 Q: Where do you receive that -- where do you
6 obtain that advertising service from?

7 A: It's -- can you repeat the question?

8 Q: Sure. So you just talked about advertising and
9 the process of advertising.

10 A: Uh-huh.

11 Q: Is that advertising on Amazon.com or is it
12 advertising for some other website?

13 A: I advertise in many ways.

14 Q: Okay.

15 A: I can advertise through my Sellers Central
16 account. It's called a campaign manager there,
17 and I can select any keywords I want. I get to
18 choose what they are. I control the budgets.
19 I also do it this through Google. I select the
20 keywords I want. I select the budgets I want.
21 I have a marketing company called PXP Media
22 which helps with this as well. I can also
23 advertise by running promotions through my
24 Sellers Central account, running coupons
25 through my Sellers Central account. Again I



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1 control all of this and I do it at my
2 discretion.

3 Q: Is there any other information on the product
4 detail page that you set up when you create
5 this offer that's important.

6 A: Yes.

7 Q: What is that?

8 A: It's called enhanced brand content.

9 Q: And can you direct Mr. Brooks to where that
10 might appear on this page?

11 A: Sure.

12 **MR. REVICH:** It's toward the bottom of the page.

13 Q: Just tell him when to stop.

14 **MR. REVICH:** Oh, you can go back up a little bit.
15 Right here.

16 Q: So what is enhanced brand content?

17 A: This is where I represent my brands and tell
18 customers about my business. You can see I put
19 the warranty here. It says, as seen on
20 Oprah's favorite things, Good Morning America,
21 The View. It makes the customer very
22 comfortable with me and have confidence when
23 buying from me and my business. If you scroll
24 a little bit down further towards the bottom I
25 also display my other total package products to



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1 show that, you know, this is what we specialize
2 in, this is what we sell and we are the seller
3 of these products as well.

4 Q: And so these other products that are listed
5 right here, these are also for sale? Are these
6 also for sale?

7 A: They are. Yes. I am the seller of these
8 products as well.

9 Q: What are some of those products that are right
10 there?

11 A: The second one is a total package air fryer.
12 The third one is a total package pressure
13 cooker. The fourth one is a total package sous
14 vide.

15 Q: So you've set up this offer now. It's live on
16 the website. Do you ever manage the offer that
17 you've already made after it's been established
18 for the first time?

19 A: Yes.

20 Q: Do you ever manage the descriptions that are
21 associated with the product?

22 A: Yes.

23 Q: Why do you do that?

24 A: I do it based on the feedback I get from
25 customers. So, for example, if a customer



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1 wants to know is your -- I get a lot of
2 questions about is the pot that comes with the
3 pressure cooker stainless steel, and I'll put
4 in the description comes with a stainless steel
5 pot. So I know a lot of people are wondering
6 that. I wanted to make it very clear to my
7 customers. Also, you know, I have the freedom
8 to change anything I want on this page at any
9 time. So based on what I'm hearing from
10 customers I put it here in my detail page.

11 Q: How are you learning about what customers think
12 about your products?

13 A: They tell me all the time.

14 Q: How do they tell you all the time what they
15 think about your products?

16 A: Through three main ways. They message me
17 through the Amazon messaging system. They e-
18 mail me directly through our info at Yedi
19 Houseware.com e-mail, and I get phone calls all
20 the time.

21 Q: How is it that customers find your phone number
22 or your e-mail address?

23 A: They go to Google and type in Yedi Houseware.
24 All our manuals come with our e-mail address in
25 it and it tells them to contact us if they have



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1 any issues or problems.

2 Q: When you're changing those descriptions does --
3 do any Amazon companies ever tell you how to
4 change those descriptions?

5 A: No, I've always had the freedom to write what
6 I want and write what I feel is appropriate.

7 Q: And do you have to obtain permission from any
8 Amazon companies before you change your
9 descriptions?

10 A: Never.

11 Q: Has any Amazon company ever told you to edit or
12 change your descriptions?

13 A: No.

14 Q: How about images, do you ever change the images
15 associated with your products?

16 A: Yes.

17 Q: Why?

18 A: Sometimes I think I can make improvements to
19 images. I get ideas. I think I can -- for
20 example, if you look at these four pictures on
21 the bottom right now they didn't always have
22 the food in them and I photoshopped the food in
23 because I thought it could help my customers
24 visualize using the products better.

25 Q: How frequently would you say that you change



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1 the images of your products?

2 A: Once a month or whenever I need to.

3 Q: Do any Amazon companies ever tell you what
4 images to use for your products?

5 A: No.

6 Q: Do you have to obtain permission from any
7 Amazon companies to change the images of your
8 products?

9 A: No.

10 Q: Has any Amazon company ever told you to remove
11 or change an image of your products?

12 A: No.

13 Q: You talked a little bit about advertising on
14 Amazon and that pay per click process. Why is
15 it that you use that? Why do you advertise?

16 A: I advertise to gain more exposure for my
17 products and to try to generate more sales for
18 myself.

19 Q: How frequently do you change that advertising
20 process?

21 A: Every day.

22 Q: When was the last time you looked at your
23 advertising process?

24 A: This morning around 7:45 a.m.

25 Q: Okay. Do any Amazon companies ever tell you



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1 how to advertise your products?

2 A: No.

3 Q: Do you ever have to obtain permission with any
4 Amazon companies before you advertise your
5 products?

6 A: No.

7 Q: Has any Amazon company ever told you to stop
8 advertising your products?

9 A: No.

10 Q: Has any Amazon company ever told you that you
11 have to advertise more?

12 A: No.

13 **MR. AKINS:** Mr. Brooks, can you go back up to the
14 top of the page?

15 Q: And I want to focus on the price of your
16 product. What's the price of this product
17 right now?

18 A: It is \$84.95.

19 Q: And you testified earlier that you're the one
20 that sets that price. What matters to you
21 about a product's price?

22 A: How much profit is in it and that it's a
23 competitive price.

24 Q: Okay. What information do you review in order
25 to help make determinations about how



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1 profitable your product will be and if it's
2 competitive?

3 A: Profit is based on the total cost per unit.
4 And then I look at all my competition on
5 Amazon, on Google, on Walmart, on eBay. All
6 similar products and what they're priced at.

7 Q: How frequently do you review that information?

8 A: Every day.

9 Q: More than one time a day?

10 A: Usually more than one time a day.

11 Q: Okay. How frequently do you adjust pricing?

12 A: It depends on the product. Some products I
13 will adjust pricing every couple weeks. Some
14 I won't adjust the price for over a year.

15 Q: When you adjust that pricing do any Amazon
16 companies ever tell you what to price your
17 product at?

18 A: No.

19 Q: Do you have to check with any Amazon or payment
20 permission from any Amazon companies before you
21 change your pricing?

22 A: No.

23 Q: Has any Amazon company ever told you to
24 increase your price for a product?

25 A: No.



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1 Q: And has any Amazon company ever told you to
2 lower your prices?

3 A: No.

4 Q: Let's talk about how you fulfill your products.
5 Do you fulfill your products directly, or do
6 you fulfill your products using services
7 provided by an Amazon company?

8 A: Both.

9 Q: Why do you use both?

10 A: I use both because I have a warehouse in
11 California and I can ship these products
12 myself, and when I ship them myself I do not
13 have to pay a shipping fee or a storage fee.

14 Q: Well why do you use -- why don't you just ship
15 everything from your warehouse?

16 A: I don't have enough space in my warehouse to
17 house all my inventory and products.

18 Q: When you fulfill products directly do you ever
19 change the shipping speed that's available to
20 customers?

21 A: Yes.

22 Q: Do you ever change any of the other shipping
23 terms?

24 A: Yes.

25 Q: When you do that do any Amazon companies ever



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1 tell you what you can or cannot do with respect
2 to shipping your products?

3 A: No.

4 Q: When you make those changes do you have obtain
5 the permission of any Amazon companies?

6 A: No.

7 Q: And has any Amazon company ever told you how to
8 fulfill your products?

9 A: No.

10 Q: All right. Let's talk about communicating with
11 the customers. How do you communicate with the
12 customers?

13 A: I communicate with them through the Amazon
14 messaging system, through my e-mail
15 EmployeeYediHouseware.com and by phone.

16 Q: How frequently would you say that you
17 communicate with your customers?

18 A: Too much. Every day. A lot.

19 Q: Give us a sense.

20 A: Before I came here this morning I had responded
21 to eight customers via the Amazon messaging
22 system and three customers from my e-mail.

23 Q: And those three customers through e-mail, were
24 those Amazon.com customers or customers from
25 other sales channels?



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1 A: They were my customers, and they purchased my
2 products on Amazon.com.

3 Q: When you talk about the Amazon messaging system
4 that you use do you ever find that as a
5 limitation to how you communicate with your
6 customers?

7 A: No.

8 Q: Why not?

9 A: I have the freedom to communicate with them
10 just how I need to, and I achieve everything I
11 need to with my customers through the Amazon
12 messaging system. I've never had any issues.

13 Q: When you use that system you're not able to see
14 your customers' actual e-mail address though,
15 correct?

16 A: Correct.

17 Q: Why isn't that a limitation?

18 A: It doesn't prevent me from communicating with
19 them in any way.

20 Q: Can you provide your actual e-mail address to
21 them after you've received that communication?

22 A: I believe so.

23 Q: Can you provide them with your phone number?

24 A: I believe so.

25 Q: Do you do that?



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1 A: Sometimes, yes.

2 Q: When you're communicating with customers do any
3 Amazon companies ever review the language that
4 you use in your communications?

5 A: No.

6 Q: Have any Amazon companies ever rejected the
7 language that you use in your communications?

8 A: No.

9 Q: Do you have to obtain the permission of any
10 Amazon companies before you communicate with
11 your customers?

12 A: No.

13 Q: And have any Amazon companies ever contacted
14 you about how you communicate with customers?

15 A: No.

16 Q: Let's talk about inventory management for a
17 little bit. How do you manage the inventory
18 for the products that you fulfill on your own
19 directly?

20 A: I look at the sales history, the history and I
21 see past sales of 20 units of this product a
22 month so I know that, you know, next month I'll
23 need to order another container or two
24 containers. It's usually based on the past
25 sales history.



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1 Q: And is that process the same for the products
2 that you fulfill using services provided by
3 Amazon companies?

4 A: Yes.

5 Q: How important is inventory management to your
6 business?

7 A: Extremely important.

8 Q: Why?

9 A: If I have no inventory I have no business. I
10 need a product to sell.

11 Q: How much time do you spend on inventory
12 management?

13 A: About 30 minutes to an hour a day.

14 Q: Do any Amazon companies ever tell you how to
15 manage your inventory?

16 A: No.

17 Q: Do you ever have to obtain the permission of
18 any Amazon companies when you manage your
19 inventory?

20 A: No.

21 Q: And has any Amazon company ever told you to
22 change how you manage your inventory?

23 A: No.

24 Q: After you send your products to a fulfillment
25 center when you're using a service provided by



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1 an Amazon company to fulfill your products do
2 you ever have occasions to have those products
3 removed from the fulfillment center?

4 A: Yes.

5 Q: Why do you have to do that?

6 A: One time I anticipated more sales would occur
7 and I sent too much inventory and I started
8 getting orders from other customers outside of
9 Amazon and I needed to bring back more
10 inventory to my warehouse so I could sell it in
11 other places.

12 Q: What'd you have to do to take care of that?

13 A: I signed into my Seller Central portal. I went
14 to the manage inventory tab. I clicked the box
15 next to the specific product that I wanted to
16 remove the inventory. I put in a number, I
17 think it was about 1,000 units I wanted to
18 bring back. Clicked another box, hit submit
19 and brought it home.

20 Q: Did any Amazon company tell you that you
21 couldn't do that?

22 A: No.

23 Q: Has any Amazon company ever told you that you
24 had to maintain a certain amount of inventory
25 in a fulfillment center?



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1 A: Never.

2 Q: And when you store products in a fulfillment
3 center are they your products or are they an
4 Amazon company's products?

5 A: They're my products.

6 Q: Why do you say that?

7 A: They're my products because they have my
8 business name on them. I'm the one doing all
9 the work to generate these sales, my sales, and
10 I control if they're there, if they're not
11 there and they're my products.

12 Q: Do you ever have to pay storage fees for your
13 products in the fulfillment centers?

14 A: Yes.

15 Q: Let's talk about how you receive orders. When
16 do you learn that you've received an order from
17 a sale on Amazon.com?

18 A: Can you repeat the question?

19 Q: Sure. How do you learn that you've received an
20 order on Amazon.com?

21 A: Every time I receive an order I receive an e-
22 mail.

23 Q: Is that the case for products that you fulfill
24 directly on your own as well as products that
25 you fulfill using a service provided by an



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1 Amazon company?

2 A: Yes.

3 Q: What do you after you receive that e-mail?

4 A: If I have to fulfill it myself I will sign into
5 my Seller Central account. I will generate a
6 shipping label. I will then send it to my
7 business partner, he'll give it to our
8 warehouse manager. They'll print out the
9 shipping label. They will then select the
10 unit, the specific product from our warehouse.
11 Put the shipping label on it. Put the package
12 in the front of the warehouse. Every day
13 around 3:30 Fedex comes by and picks up our
14 orders.

15 Q: Do you ever have to cancel orders after you've
16 received them?

17 A: Yes.

18 Q: And is that for orders on Amazon.com?

19 A: Yes.

20 Q: Why does that happen?

21 A: The customer changes their mind. They say I
22 bought this by accident. That's usually why.

23 Q: When you say that the customers tell you that
24 they changed their mind or they bought it by
25 accident how are they communicating that to



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1 you?

2 A: The either communicate to me through the Amazon
3 messaging system or through my e-mail
4 EmployeeYediHouseware.com or sometimes by
5 phone.

6 Q: Let's focus just for a minute on the orders
7 that you fulfill on your own directly. When a
8 customer wants to cancel an order for a product
9 that you fulfill directly what do you do?

10 A: I go into my Seller Central account. I look up
11 their order ID number and then hit the button
12 that says cancel and that's it.

13 Q: What about for products that you fulfill using
14 a service provided by an Amazon company? How
15 do you cancel one of those orders?

16 **THE COURT:** Now you just distinguished one for
17 Amazon and you just sounded like you -- he was
18 discussing Amazon.

19 **MR. AKINS:** I think so, so I mean, if I can try to
20 clarify it we'll see if we can -- yeah, okay.

21 Q: So there are two types of ways that you fulfill
22 orders if I understand your testimony -- and
23 you'll tell me if I'm wrong. Sometimes when
24 you receive an order you fulfill a product on
25 your own, you ship it from your warehouse,



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1 correct?

2 A: Correct.

3 Q: Okay. And for other orders that you receive on
4 Amazon.com you may use a service provided by an
5 Amazon company where they will ship a product
6 on your behalf.

7 A: Correct.

8 Q: Okay. And when you have to cancel an order for
9 the set -- the first type of products that you
10 fulfill was the description that you provided
11 related to those products that are fulfilled by
12 way?

13 A: Yes.

14 Q: Okay. And so if we turn to the second type --
15 for the second type of orders, those are the
16 ones where a customer has purchased a product
17 on Amazon.com and it's being fulfilled using
18 a service provided by an Amazon.com, correct?

19 A: Correct.

20 Q: Okay. And when you cancel one of those order
21 what do you have to do?

22 A: What I do is I get the order ID number from my
23 customer. I then create what's called a case
24 log in my Seller Central, and then I put the
25 order ID number in there and I say I need to



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1 cancel this order. That's it.

2 Q: All right. Just to be clear regardless of how
3 your products are fulfilled you are able to
4 cancel orders after you've received them?

5 A: Yes. I have the freedom to cancel any order.

6 Q: Let's focus on customer service for a minute.
7 What sort of customer service inquiries do you
8 receive related to the products that you sell
9 on Amazon.com?

10 A: I receive questions about why didn't my product
11 come with the waffle plates, for example.
12 Maybe it was missing in the package. So in
13 that case I get their best shipping address and
14 I send them the waffle plates. Going back to
15 the pressure cooker, sometimes the gloves are
16 missing for some reason. I'll send the
17 customer the gloves. I get questions about can
18 I return this product. I say sure. They
19 return the product. I have questions about can
20 I get a refund? Again I will refund them. I
21 got a very interesting question from a customer
22 the other day. It was about -- they said they
23 had a pet parrot and they wanted to know if it
24 was safe to use the pressure cooker in the same
25 room the pet parrot was. So I had to do a



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1 little research and I concluded it was.

2 Q: What do you mean you had to do some research?

3 A: I asked my factory that question. I asked my
4 sourcing agent that question. I went to
5 Google, looked up is it safe to use an electric
6 pressure cooker with a parrot in the room and
7 I concluded it was.

8 Q: Okay. So just so we're all clear it is safe to
9 use ---

10 A: It is safe.

11 Q: --- your pressure if you own a parrot.

12 A: It is safe to use an electric pressure cooker
13 with a parrot in the room.

14 Q: How are you receiving those customer service
15 inquiries?

16 A: I am receiving them through my -- through the
17 Amazon messaging system. Through my e-mail
18 EmployeeYediHouseware.com and by phone.

19 Q: So far you've talked a little bit about
20 customer service inquiries related to the
21 product itself.

22 A: Uh-huh.

23 Q: Parrots and otherwise. Do you ever receive
24 customer service inquiries related to the
25 shipment of the products?



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1 A: All the time.

2 Q: And is that only for products that you fulfill
3 on your own directly?

4 A: No.

5 Q: Is it also for products that you fulfill using
6 a service provided by an Amazon company?

7 A: Yes.

8 Q: Tell us about those customer service inquiries.

9 A: Usually my customer wants to know where's my
10 package. You know, if it's been four or five
11 days and it hasn't shown up they reach out to
12 me. They say what's going on, where's my
13 package, is it lost, and then what I do is I
14 have access to all the tracking numbers. I
15 take the tracking number, plug it into Fedex,
16 see where the package is. I'll reply, hey, it
17 says it's supposed to show up in two days, or
18 if there's been no action with the tracking
19 number I'll say, you know, unfortunately it
20 appears that it's lost. In that case what I'll
21 do is I will send them a brand new product
22 directly from my warehouse.

23 Q: Those are for products that your fulfilling
24 using a service provided by an Amazon company.
25 Why is it that you're responding to those



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1 customer service inquires?

2 A: Because they're my customers. They're reaching
3 out to me, and it's my responsibility to make
4 sure my customers are happy.

5 Q: Okay. Do any Amazon companies review any of
6 your customer service interactions?

7 A: No.

8 Q: Do any Amazon company ever tell you how to
9 manage customer service?

10 A: No.

11 Q: Do you ever have to obtain the permission of
12 any Amazon companies in order to provide
13 customer service?

14 A: No.

15 Q: And have any Amazon companies ever told you
16 that you need to change how you provide
17 customer service?

18 A: No.

19 Q: You mentioned earlier that you offer a warranty
20 on this product that we've go on the screen.
21 It's a one year warranty on the product. Who
22 is it that sets that warranty?

23 A: I do.

24 Q: Do any Amazon companies have any input into how
25 you set that policy?



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1 A: They have no input on that policy.

2 Q: Did they review it?

3 A: No.

4 Q: Has any Amazon company ever told you how to
5 manage your warranties?

6 A: No.

7 Q: And have you ever had to change those policies?

8 A: I've changed them.

9 Q: How often do you do that?

10 A: I've changed them maybe two, three times
11 regarding the warranty.

12 Q: Why do you change the warranties?

13 A: So on the pressure cooker, for example, I
14 changed it to a two year warranty to be more
15 competitive and offer my customers better
16 value.

17 Q: Let's talk about customer feedback. Do you
18 ever see feedback from customers that you sell
19 products to on Amazon.com?

20 A: Yes.

21 Q: What form does that feedback take?

22 A: It takes many forms. I mean, I get feedback on
23 my Amazon listing there -- on my product
24 listing. They say this is a great seller to
25 work with. You have great communication.



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1 Everything showed up on time. They helped me
2 out a lot. They refunded my product and sent
3 me a new product. I get feedback on the phone.
4 They say hey you guys have a great business.
5 I really enjoy working with you. I get e-mails
6 all the time, your product's wonderful. I love
7 it.

8 Q: Is any of that feedback every made publicly
9 available on the website?

10 A: Yes.

11 Q: Okay. How important is that feedback to your
12 business?

13 A: Very important.

14 Q: Why?

15 A: It's a representation of how we do business.
16 It makes the customer trust working with me and
17 buying from me.

18 Q: How do you manage the feedback that you
19 receive?

20 A: I use a service called Feedbackwhiz and what I
21 do is it's a service where I've set up three
22 automatic e-mails. The first e-mails goes out
23 after one of my customers has received their
24 product. The first e-mail says thank you for
25 purchasing from Yedi Houseware. We appreciate



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1 your business. If you have any issues please
2 let us know. Contact us at
3 Info@YediHouseware.com. The second e-mail goes
4 to the customer about 7 to 10 days later after
5 they received the product. It's another
6 follow-up saying hope everything's okay. If
7 it's not please let me know so I can take care
8 of it. Also, please leave a review if you
9 would like to. And then a similar e-mail goes
10 out about 14 days after they've received the
11 product.

12 Q: Do you ever receive responses to those e-mails
13 from customers?

14 A: Yes.

15 Q: And those e-mails that are being sent out are
16 being sent directly to your customers?

17 A: Yes.

18 Q: Who wrote the language that appears in those e-
19 mails that go to customers?

20 A: I did.

21 Q: And did any Amazon companies ever review the
22 communications that go to your customers?

23 A: No.

24 Q: Do any Amazon companies ever tell you what to
25 write in those e-mails?



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1 A: No.

2 Q: Do you have to check or obtain the permission
3 from any Amazon companies about what you write
4 in those e-mails?

5 A: No.

6 Q: And how -- you said that there's a service
7 that's sending out these e-mails. How did you
8 learn about it?

9 A: In my Seller Central portal there's a tab, I
10 believe it's called Apps or App Store and I
11 clicked on the tab and there's a whole bunch of
12 services and these were one of the services.

13 Q: Can you tell us about some of the other
14 services that are described in that Apps tab?

15 A: There were marketing services, logistic --
16 logistical services, feedback review services.

17 Q: When you sell products on Amazon.com do you
18 know whether you collect and remit sales taxes
19 in any jurisdictions?

20 A: Yes.

21 Q: Where do you collect and remit sales taxes?

22 A: In the State of California.

23 Q: Why do you collect and remit sales taxes there?

24 A: Because my warehouse is in Vernon, California
25 and my office where I work from is in



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1 California.

2 Q: Do you have any offices in South Carolina?

3 A: No.

4 Q: Do you have any warehouses in South Carolina?

5 A: No.

6 Q: Do you collect and remit sales taxes in South
7 Carolina?

8 A: No.

9 Q: Why not?

10 A: Because I don't have a warehouse or an office
11 in South Carolina.

12 Q: Do you expect that that might change -- do you
13 expect that you might have to start collecting
14 sales taxes in South Carolina some time soon?

15 A: I think the law is changing a little bit where
16 in April of 2019 I might have to pay sales tax
17 in South Carolina and other states as well.

18 Q: Okay. So let's talk about how you get paid.
19 You've listed this product for sale up on the
20 screen here ---

21 A: Uh-huh.

22 Q: --- and let's say that, you know, you've
23 managed that listing and you've received an
24 order, you've shipped the product, the
25 customer's been charged on your behalf. How do



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1 you receive that payment?

2 A: Every two weeks all of the sales from my sales,
3 my profit is distributed into my business bank
4 account.

5 Q: Are you able to request those funds more
6 frequently?

7 A: Yes.

8 Q: Do you ever do that?

9 A: No.

10 Q: Why not?

11 A: I've never needed to.

12 Q: While the funds are temporarily held by an
13 Amazon company. Do you view them as your
14 funds?

15 A: Absolutely.

16 Q: Why?

17 A: These are my products. I'm the seller of these
18 products. It's my money.

19 Q: Let's talk about fees a little bit. Are you
20 generally familiar with the fees that you pay
21 for the services you receive from Amazon
22 companies?

23 A: Yes.

24 Q: Can you describe those fees for us?

25 A: There's a storage fee, a shipping fee and a



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1 referral fee. And there's a \$39.99 fee every
2 month that I pay to sell.

3 Q: Let's talk about that referral fee that you
4 mentioned. Do you understand that fee to be
5 computed based on the sales price of your
6 product?

7 A: Can you repeat the question?

8 Q: Yeah. So the referral fee that you mentioned
9 ---

10 A: Uh-huh.

11 Q: --- do you know how that's computed?

12 A: No.

13 Q: Okay. Let me ask you a different question
14 then. Does Amazon Services know whether you're
15 actually making a profit from the sale of any
16 of your products?

17 A: No.

18 Q: Does that ever happen that you make a sale
19 where you don't earn a profit?

20 A: Yes.

21 Q: Do you ever take a loss on the sale?

22 A: Yes.

23 Q: When you take a loss on a sale are you still
24 charged a referral fee?

25 A: Yes.



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1 Q: In your view are any Amazon companies sharing
2 in your profits?

3 A: They just get their fees.

4 Q: Are any Amazon companies sharing in your
5 losses?

6 A: I wish. No.

7 Q: Has it ever happened that you didn't have
8 enough money in your Seller Central account to
9 cover all of the fees that you owed to Amazon?

10 A: Yes.

11 Q: What happens -- when that occurs what happens?

12 A: My credit card on file is charged.

13 Q: Are you aware of anything that -- well, strike
14 that. Do you know whether any Amazon companies
15 sell any products that compete with yours?

16 A: Yes.

17 Q: What are those products?

18 A: An instant pot.

19 Q: And when Amazon competes with you with respect
20 to the instant pot do you feel like they're
21 taking sales away from you?

22 A: Absolutely.

23 Q: And for those products and sales are you able
24 to direct Amazon not to compete with you?

25 A: No.



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1 Q: And for those products and sales has any Amazon
2 company ever told you not to compete with them?

3 A: No.

4 **MR. AKINS:** Mr. Brooks, can you scroll back down
5 towards the bottom to the brand -- yeah, right
6 there.

7 Q: So, Mr. Revich, Yedi is your brand, is it not?

8 A: Yes.

9 Q: It's your business?

10 A: Yes.

11 Q: Okay. And is it your understanding that this
12 case involves a sales tax dispute between South
13 Carolina and Amazon Company?

14 A: Yes.

15 Q: Okay. And are you aware that an allegation's
16 been made in this case that for the products
17 that you offer, like the six in one grill, that
18 it's an Amazon company that's really the seller
19 of that product?

20 A: Yes, I'm aware of it.

21 Q: And when you learned of that allegation what
22 was your reaction?

23 A: I was irritated.

24 Q: Why?

25 A: Because I've spent so much time, energy, effort



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1 and money into building my brand, running my
2 business, developing my products that I deserve
3 the credit. I am the seller of my products not
4 Amazon.

5 **MR. AKINS:** Subject to redirect. I'm sorry. One
6 second here. So, Mr. Brooks, can you go back
7 to the other Exhibit, the list?

8 **Q:** Mr. Revich, looking at this list which you had
9 testified earlier describes your process for
10 listing a product and sourcing a product that
11 you sell on Amazon.com. For any of these items
12 that are on this list do you ever have to
13 obtain the permission of any Amazon company to
14 engage in any of those activities?

15 **A:** No.

16 **Q:** Did you ever have to check with any Amazon
17 companies before you did any of those
18 activities?

19 **A:** No.

20 **Q:** Okay. And, Your Honor, you'd asked a question
21 earlier and we just want to make sure that it's
22 crystal clear what Mr. Revich was testifying
23 to. So, Mr. Revich, when you fulfill a product
24 on your own directly where you're shipping it
25 from your own warehouse when Fedex arrives at



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1 3:30 in the afternoon ---

2 A: Uh-huh.

3 Q: --- are those for sales that are your -- for
4 orders that you're receiving from Amazon.com?

5 A: Yes.

6 Q: Okay. So there are two ways that a product can
7 be fulfilled when you receive an order by
8 Amazon.com? One is to fill it directly on your
9 own using Fedex or a common carrier ---

10 A: Uh-huh.

11 Q: Correct?

12 A: Correct.

13 Q: Okay. And the other is to use services
14 provided by an Amazon company to help to
15 fulfill the product?

16 A: Correct.

17 Q: And I want to return to an exchange we had
18 earlier where we were talking about how you
19 finance some of your products which was, it
20 looks like bullet number 4 on that list there.
21 And we've talked about your investor and that
22 they were not involved in anything like Amazon,
23 and I asked you if you had ever engaged in a
24 partnership or joint venture with Amazon. Let
25 me ask that question again. Have you ever had



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1 a partnership or been engaged in a partnership
2 or joint venture with any Amazon company?

3 A: No.

4 Q: Have you ever signed any agreements that in
5 your mind establish any form of a partnership
6 or joint venture with any Amazon company?

7 A: No.

8 Q: Okay. And the last question for you. Does
9 your testimony here today, you've walked
10 through this entire process. You've answered
11 a lot of questions -- thank you -- about how
12 you sell products on Amazon.com. Is your
13 testimony here today about everything that you
14 do -- does it reflect the true nature of your
15 relationship with Amazon companies?

16 A: Yes.

17 Q: Okay. Subject to redirect, Your Honor. We
18 pass.

19 **MR. GREEN:** Your Honor, could we have a short break?
20 I think I had a little much coffee this morning
21 and ...

22 **THE COURT:** All right.

23 **MR. GREEN:** If you would not object, maybe a short
24 break?

25 **THE COURT:** All right. Take a five minute break.



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(Off the Record)

THE COURT: Mr. Green?

MR. GREEN: Thank you, Your Honor. And thank you
for the break.

MR. REVICH - CROSS-EXAMINATION BY MR. GREEN:

Q: Good morning, Mr. Revich. How are you this
morning?

A: Fine, thank you. How are you?

Q: I'm doing good. Thank you. How did -- how did
you come to be a witness for Amazon in this
case? Did you contact them?

A: No.

Q: Did they contact you?

A: Yes.

Q: Who contacted you from Amazon?

A: Lauren.

Q: And what's Lauren's last name?

A: Rothenberg.

Q: Okay. Did you have a prior relationship with
her?

A: No.

Q: Okay. Did you have a prior relationship with
anyone who was employed by or worked with
Amazon?

A: No.



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1 Q: And had you ever -- have you ever testified for
2 them before?

3 A: What was that?

4 Q: Apparently not. Have you ever testified Amazon
5 -- any of the Amazon entities before?

6 A: No.

7 Q: Have any of your business partners ever
8 testified for any of the Amazon entities
9 before?

10 A: No.

11 Q: And I think one of your business partners was
12 originally slated to testify in this matter, is
13 that your understanding?

14 A: No. I don't know.

15 Q: Wasn't Mr. -- are you -- is Mr. -- and I'm
16 going to mispronounce this name -- Mr.
17 Djaeaheri, D-J-A-E-A-H-E-R-I.

18 A: He's my business partner.

19 Q: Wasn't he originally slated to testify in this
20 matter?

21 A: I don't know.

22 Q: You do not know? All right. And you do not --
23 do you know -- I think I may have asked but let
24 me repeat. Has he ever testified for any of
25 the Amazon entities before?



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1 A: He has not.

2 **THE COURT:** How can you tell me that he -- whether
3 or not he's testified for Amazon before but you
4 don't even know whether he was slated to
5 testify here.

6 **MR. REVICH:** I grew up with him. I know him very
7 well. He's one of my best friends, and he's
8 never mentioned anything about testifying for
9 Amazon or testifying in any trial or court case
10 or legal issue to me.

11 **THE COURT:** He's your best friend?

12 **MR. REVICH:** He's one of my best friends.

13 **THE COURT:** All right. But you don't know whether
14 he was slated to testify here or not.

15 **MR. REVICH:** What does slated to testify here mean?

16 **THE COURT:** I'll just drop that.

17 Q: Okay. Did -- are you being compensated for
18 your travel costs to South Carolina?

19 A: What do you mean compensated?

20 Q: Paid for. Reimbursed.

21 A: I am being reimbursed.

22 Q: For your travel costs?

23 A: Yes.

24 Q: And has anyone -- any family members of you or
25 your business partner work for Amazon -- any of



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1 the Amazon entities?

2 A: No.

3 Q: Okay. I think you testified -- let me just
4 make sure I understand my notes. Sometimes I
5 can't even read my own writing. I think in
6 2018 you said you were expecting sales volumes
7 greater than 2,000,000, is that right?

8 A: I said in 2018 I had sales volume greater than
9 2,000,000.

10 Q: Excuse me my year was off. And is that
11 2,000,000 in units or 2,000,000 in dollars?

12 A: Dollars.

13 Q: Okay. And do you know what -- how much of that
14 comes from Amazon sales approximately?

15 A: About 80 percent.

16 Q: So that'd be roughly 1.6 million if my math is
17 right. Just approximately. Do you know what
18 approximately what percentage of that 1.6
19 million you pay to Amazon in fees?

20 A: I don't know.

21 Q: 30 percent?

22 A: I don't know.

23 Q: You have no idea?

24 A: I don't know. I have no idea.

25 Q: You testified earlier that you spend a good bit



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1 of time managing your business as far as seller
2 -- I mean, customer contacts, inventory and
3 things like that. Did I understand your
4 testimony correctly?

5 A: Yes.

6 Q: Do you manage the finances of your business?
7 And let me -- let me be more clear about what
8 I mean by that. Recording revenues, gross
9 receipts and that recording expenses and things
10 like that?

11 A: No, I have an accountant and a bookkeeper.

12 Q: Do they work for you or did you just hire
13 outside professionals to do that?

14 A: The bookkeeper works for me, the accountant is
15 outside.

16 Q: Does she provide you regular financial reports?

17 A: Who is she?

18 Q: The bookkeeper.

19 A: No.

20 Q: Does she provide you any financial-based
21 reports of how your business is performing?

22 A: She works in the warehouse where my business
23 partner, Bobby, works and she works underneath
24 him. She does not send me any financial
25 reports. I believe she sends him financial



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1 reports.

2 Q: Okay. What is your role with the company?

3 A: I pick the products we sell. I products we
4 manufacture. I control all the photos we
5 choose to put up. I decide all the marketing
6 tactics we choose to execute. I help raise
7 money through investors. I am the one who's
8 showing the Seller Central, Amazon Seller
9 Central, I do everything there. I communicate
10 with customers. I mean, I do everything except
11 I don't do financial stuff.

12 Q: And you don't deal with any financial matters
13 for the company?

14 A: I help get investors. I help with investors.

15 Q: If you do not know how the company is
16 performing financially how do you know that you
17 need investors?

18 A: Because I like to expand my business, get more
19 products and I don't want to use my own money.
20 I'd rather use an investor's money.

21 Q: Now you said you regularly log onto Seller
22 Central, correct?

23 A: Yes.

24 Q: And Seller Central has reports of revenues
25 received from sales through the Amazon.com



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1 website, correct?

2 A: Would you repeat the question?

3 Q: Seller Central has reports of revenues received
4 from sales through Amazon.com website, doesn't
5 it?

6 A: Yes.

7 Q: But you don't check that part of the Seller
8 Central?

9 A: Any reports I usually send to my accountant at
10 the end of the year and I check the money that
11 has been disbursed into my account every two
12 weeks.

13 Q: And do you ever compare that amount that is
14 disbursed into your account, which would be net
15 a fee -- do you ever compare that to the gross
16 amount received from sales through Amazon.com?

17 A: I don't understand the question.

18 Q: Would you agree with me that Amazon.com charges
19 fees for transactions to its website, correct?

20 A: They charge a referral fee, a shipping fee and
21 a storage fee.

22 Q: So they -- the answer to my question is yes,
23 they charge fees for transactions through the
24 website?

25 A: I don't know anything about transactions



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1 through their website.

2 Q: Sales? Customer purchases. However you want
3 to phrase it. They charge fees on those
4 transactions, correct?

5 A: I don't know. They charge storage fees,
6 warehousing fees and referral fees. It doesn't
7 say transaction fees.

8 Q: I'm not asking for transaction fees. They
9 charge fees on the transactions. They charge
10 a storage fee, a referral fee and a selling
11 fee. They charge -- those are fees, correct?

12 A: Yes.

13 Q: Okay. And they're charged based on
14 transactions occurring through the website,
15 correct?

16 **MR. AKINS:** Objection, Your Honor. Asked and
17 answered at this point.

18 **MR. GREEN:** It has not yet been ---

19 **THE COURT:** I'll overrule that.

20 **MR. GREEN:** Yes, it has not been answered. Thank
21 you, Your Honor.

22 **THE COURT:** Well you don't need -- that's fine.

23 A: I was charged a storage fee regardless if
24 there's a transaction.

25 Q: Okay. Fair enough. But a referral fee is



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1 charged on a sale or a transaction occurring
2 through the website, correct?

3 A: It is a referral if I sell my product.

4 Q: Right. And that is charged -- if you sell your
5 product through the website the referral fee is
6 charged, correct?

7 A: Yes.

8 Q: Okay. And that is charged based on the total
9 sales price, correct?

10 A: Yes.

11 Q: And that is review -- then the total amount
12 received for those sales the fees are taken
13 from that and the net amount is distributed to
14 you in your bank account, correct?

15 A: Yes.

16 Q: Okay. And do you ever compare the amount
17 that's distributed or placed into your bank
18 account versus the total amount of sales for
19 that two week period?

20 A: No.

21 Q: Okay. What -- Who at your company opened the
22 Seller Central account with Amazon?

23 A: I believe it was my partner, Bobby.

24 Q: It was not you?

25 A: I believe -- or we did it together but it was



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1 five years ago. I don't really remember what
2 happened five years ago on that day it was
3 opened.

4 Q: But you don't remember doing it yourself?

5 A: I don't remember doing it myself or not doing
6 it myself.

7 Q: Okay. You understand that transactions
8 occurring -- seller transactions you've signed
9 up for who Seller Central account that those
10 are subject to what's called Amazon's Basic --
11 excuse me, Business Solutions Agreement, don't
12 you?

13 A: No.

14 Q: You do not?

15 A: No.

16 Q: And you understand that transactions occurring
17 through the Seller Central on the Amazon.com
18 website are subject to Amazon's published
19 policies and requirements, don't you?

20 A: I don't know what you're referring to.

21 Q: You're not aware there are any published and
22 procedures and requirements for people offering
23 goods or placing goods on the Amazon.com
24 website?

25 A: I'm not familiar with what you're talking



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1 about.

2 Q: What software program do you use to track your
3 inventory for your business?

4 A: We have a warehouse manager who tracks all our
5 inventory for my business.

6 Q: Does he report to you?

7 A: He reports to Bobby and Bobby communicates it
8 with me.

9 Q: Do you know what the software program is?

10 A: It's a human being. The way that we -- we'll
11 check the inventory that has left the factory
12 and the inventory that is still currently in
13 the factory. Not a software program.

14 Q: Okay. I'm sorry I didn't mean to talk over
15 you.

16 A: That's all right. So it's not -- it's not a
17 software program.

18 Q: So you don't use any software program to track
19 your business inventory?

20 A: I look at my inventory every day in my Seller
21 Central. I communicate with my business
22 partner, our warehouse manager. Just the day
23 -- I have too much inventory. I had to rent a
24 container to get more space. We rented a
25 parking lot to put a container of inventory in



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1 it. I'm dealing with inventory issues all the
2 time.

3 Q: Okay. Let's break that down now. So if I
4 understand you correctly, you've got inventory
5 that is stored in an Amazon fulfillment center
6 but you also have inventory in your own
7 warehouse, is that correct?

8 A: Correct.

9 Q: For the inventory that's stored in your own
10 warehouse, how do you track that inventory? If
11 I understand you correctly you just look at it.

12 A: We know all inventory that comes in and we know
13 all inventory that goes out. So we just -- he
14 keeps track of it.

15 Q: Does he keep written records of that inventory?

16 A: I don't know.

17 Q: Bills of lading?

18 A: I don't know.

19 Q: Inventory count sheets?

20 A: I don't know.

21 Q: How many people are employed by your business?
22 You may have testified to that but I don't
23 recall.

24 A: Three.

25 Q: And then you've got how many business partners?



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1 Just one?

2 A: One.

3 Q: And of the -- who are the three people that
4 work for you? There's a -- I think you said an
5 inventory manager.

6 A: There's a warehouse manager, Rabino is his
7 name. A worker, Rodrigo, and a bookkeeper --
8 I don't know -- her name's not coming to my
9 mind.

10 Q: Okay. And that's fine. I was asking for
11 position anyway. And none of those report to
12 you, correct?

13 A: No, they work in the warehouse and report to
14 Bobby who works in the warehouse. I have an
15 office.

16 Q: Okay. And you said you don't really use
17 records and information to track your inventory
18 or -- the inventory the warehouse manager does
19 not. When you are -- list your identifying
20 items for sale on the Amazon.com website. You
21 have to input certain information about those
22 products, is that correct? Product
23 description, product number. Don't you have to
24 input things like that?

25 A: You mean when I'm listing a product?



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1 Q: Yes, for Seller Central on the website?

2 A: Yes.

3 Q: Yeah. Were do you obtain that information?

4 A: We create the UPC number. We have it printed
5 on our boxes in China so they come already with
6 the UPC numbers on them that we chose and I
7 then put the number in Amazon in my Seller
8 Central.

9 Q: Okay. And I think you testified that you use
10 the FBA service, correct? Fulfilled by Amazon
11 service? Sorry.

12 A: Yes.

13 Q: And do you know where Amazon has stored your
14 goods pursuant to that service?

15 A: No.

16 Q: Do you know if any of them are stored in South
17 Carolina?

18 A: No.

19 Q: As I understand it there's a optional service
20 that you can pay to direct Amazon where to
21 store your goods. Have you paid to keep any
22 goods out of South Carolina?

23 A: I'm not familiar with that service, so no.

24 Q: I think you testified that Yedi has its own
25 website, correct?



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1 A: Yes.

2 Q: What is the web address for that website? www.

3 ...

4 A: YediHousewareAppliances.com.

5 Q: Okay. www.YediHousewareAppliances.com.

6 A: Yes.

7 Q: Okay. And let's talk a little bit about
8 purchases on your own website. Is it correct
9 that customers can buy goods directly from your
10 -- from Yedi's own website?

11 A: Yes.

12 Q: And how do they pay for those goods?

13 A: Usually by credit card.

14 Q: Okay. Do they use PayPal?

15 A: I don't know.

16 Q: You don't know. Is it fair to say you don't
17 operate -- or, strike that. Is it fair to say
18 you don't manage the website?

19 A: No, I manage the website.

20 Q: But you don't know whether they can use PayPal
21 on the website?

22 A: That is correct.

23 Q: I think I saw on the screen ---

24 **MR. GREEN:** I hate to ask, can y'all pull up the
25 page with his product listing on it? If you



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1 don't mind. Sorry. Maybe that's just easier
2 than us trying to find it. And Elizabeth's
3 phone might go off if she did. She's going to
4 sabotage me now. Page down just a tad.

5 Q: Bear with me one moment.

6 **THE COURT:** You've got a four year and a five year
7 protection plan listed on that website? Who
8 provides that?

9 **MR. REVICH:** I don't know.

10 Q: Strike that. Thank you. Thank you. I don't
11 ... Do you know if the Amazon referral fee has
12 changed over time since 2014?

13 A: I don't know.

14 Q: And I think we've -- I think I asked you if you
15 were being compensated for your travel costs or
16 reimbursed for your travel costs here. Are you
17 getting compensated for your testimony here
18 today in addition to being reimbursed for your
19 travel costs?

20 A: No.

21 Q: Okay.

22 **MR. GREEN:** Thank you, Your Honor. I have no
23 further questions.

24 **MR. AKINS:** Just a few questions, Your Honor.

25 **MR. REVICH - REDIRECT EXAMINATION BY MR. AKINS:**



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1 Q: Mr. Revich, Mr. Green asked you a couple of
2 questions about whether you were slated to
3 testify -- or, I'm sorry, whether your partner,
4 your business partner, Bobby, was slated to
5 testify in this trial. In advance of this
6 trial did you review a witness list of any
7 sort?

8 A: No.

9 Q: Did you have any conversations with your
10 business partner about this case in advance of
11 testifying?

12 A: Yes.

13 Q: And based on those conversations did you ever
14 come away with the impression that your
15 business partner was slated to testify in this
16 case?

17 A: No.

18 Q: You were asked a couple questions about the
19 fees that are charged on Amazon.com. And you
20 mentioned that there are three fees that you're
21 charged. You mentioned a storage fee, a
22 shipping fee and a referral fee. What is the
23 storage fee that you're charged by Amazon.com?
24 What's it for?

25 A: It's for my products that are in fulfilled by



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1 Amazon warehouses.

2 Q: Do you know the basis upon which it's charged,
3 the monthly basis or anything like that?

4 A: I don't know.

5 Q: Okay. Why don't you review that information?

6 A: It's extremely minimal I think and I'm very
7 business running -- operating my business.
8 It's not a priority to me.

9 Q: Okay. The second fee was a shipping fee. Do
10 you know what that relates to?

11 A: Yes.

12 Q: Okay. and do you know how it's computed?

13 A: No.

14 Q: Okay. Why haven't you looked into that?

15 A: It's not even near the top of my list. There
16 is so much going on running my business,
17 expanding my business. It isn't important to
18 me.

19 Q: All right, well does Yedi pay for the warehouse
20 where it stores its own products? The ones
21 that are not going to be fulfilled by Amazon?

22 A: Yes.

23 Q: Okay. Do you know exactly what those charges
24 are that you're paying for that warehouse?

25 A: About \$10,000 a month.



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1 Q: Okay. So you know that but you don't know the
2 other fee from Amazon?

3 A: Correct.

4 Q: And then the last fee is a referral fee that
5 you had mentioned on Amazon, correct?

6 A: Yes.

7 Q: And do you know why you're being charged that
8 fee?

9 A: I don't know.

10 Q: Okay. When all those fees are bundled together
11 ---

12 A: Uh-huh.

13 Q: --- and you're earning money from your website
14 you're eventually going to be paid something,
15 correct?

16 A: Yes.

17 Q: Okay. What matters at the end of the day to
18 you? Is it the fees or what you're being paid?

19 A: What I'm being paid.

20 Q: The fact that these fees are being charged to
21 you, do any of the fees that are being charged
22 change how you sell your products?

23 A: No.

24 Q: Do they change how you price your products?

25 A: No.



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1 Q: What matters to you when you price your
2 products?

3 A: I have a competitive price and hopefully I'm
4 making money.

5 Q: How do you know if you're making money?

6 A: I know the cost per unit. I know how much a
7 unit costs me.

8 Q: And do you know how much your getting paid?

9 A: I know how much I'm getting paid.

10 Q: Have you ever read the Business Solutions
11 Agreement that Mr. Green referred to?

12 A: No.

13 Q: Why not?

14 A: I never had a need to.

15 Q: When you list a product on Amazon.com is there
16 a requirement that you read the Business
17 Solutions Agreement each time you list a
18 product?

19 A: No.

20 Q: When you change anything about the product that
21 you've offered for sale on Amazon.com is there
22 a requirement that you refer to the Business
23 Solutions Agreement?

24 A: No.

25 Q: Mr. Green also referred to some policies and



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1 guidelines that are the Amazon.com website.
2 When you list a product for sale is there a
3 requirement that you consult with those policies
4 and guidelines?

5 A: No, I do what I want to do.

6 Q: Okay. Do you know where to look to find those
7 policies and guidelines?

8 A: No.

9 Q: Are you aware -- well, strike that. Has anyone
10 ever from any -- has anyone from Amazon company
11 ever told you that you need to frequently
12 review the policies and guidelines on the
13 website?

14 A: Never.

15 Q: Okay. And has anybody from the Amazon -- from
16 any Amazon company ever told you to review the
17 Business Solutions Agreement?

18 A: No.

19 Q: And when you offer products for sale on
20 Amazon.com, I think you testified earlier that
21 you've never been contacted by anyone from
22 Amazon.com about those offers that you've made,
23 is that right?

24 A: That's right.

25 Q: Okay. Is there a place in Seller Central that



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1 you can go to see whether you're in compliance
2 with any terms or guidelines or policies?

3 A: Yes.

4 Q: What is that?

5 A: It's called Account Help.

6 Q: And what does Account Help tell you?

7 A: It tells me if I'm violating any rules or
8 policies or if anything's wrong with my
9 account.

10 Q: And do you check that?

11 A: Yes.

12 Q: How often do you check it?

13 A: Almost every day.

14 Q: Okay. And based on your review of the Account
15 Help section of Seller Central do you feel
16 confident that you're in compliance with any
17 terms and obligations and policies that Amazon
18 has -- any Amazon companies have?

19 A: Yes.

20 Q: You also talked about inventory a little bit on
21 cross-examination. Is there a place in Seller
22 Central where you can track the inventory
23 that's stored in Amazon fulfillment centers?

24 A: Yes.

25 Q: Do you ever check that?



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1 A: Yes.

2 Q: So you're familiar with the inventory that you
3 keep for products that are being sold on
4 Amazon.com?

5 A: Yes.

6 Q: Okay. But I think you told Mr. Green that you
7 don't track the inventory that you keep in your
8 warehouse all that much, is that right?

9 A: Correct, I don't.

10 Q: Okay. Why is it that you don't check the
11 inventory in your own warehouse but you do
12 check the inventory that you have with the --
13 stored with any Amazon company?

14 A: Very easy for me so I just sign into my Seller
15 Central and click on a button and I can see
16 everything.

17 Q: Do you have employees that handle managing
18 inventory in your own warehouse?

19 A: Yes.

20 Q: Do you trust those employees?

21 A: Yes.

22 Q: And I think you testified that your business
23 partner, Bobby, handles a lot of the stuff that
24 takes place in the warehouse?

25 A: Yes.



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1 Q: Do you trust him?

2 A: Yes.

3 Q: You also talked about your own website. Mr.
4 Green asked you a couple questions about that
5 and how people were making payments on your own
6 website. Can you just talk to us a little bit
7 about your own website and -- do you post
8 listings on your website, for example, of the
9 products?

10 A: Yes. I post all the listings, the pictures,
11 the descriptions. I set the price. I
12 communicate with customers.

13 Q: Okay. And how do you do that? Are you -- I
14 mean, it's a website. Are you coding the
15 website? Are you a coder?

16 A: I know how to code a little bit, but that's not
17 how I do it.

18 Q: What is it?

19 A: It pretty much mirrors the Seller Central
20 platform and it's the same thing, just writing
21 whatever I want. Upload whatever photos I
22 want. Make the title whatever I want. Put the
23 price whatever I want. They're extremely
24 similar.

25 Q: Is that a service that you're obtaining from



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1 somewhere?

2 A: Yes.

3 Q: What's it called?

4 A: It's called a Squarespace.

5 Q: Can you tell us a little bit about Squarespace?

6 A: Squarespace is a service which hosts my
7 website, and I built my website on their
8 service very similar to Amazon. I pay them a
9 monthly fee and ...

10 Q: Does Squarespace handle payments that you're
11 receiving for products that are purchased on
12 your own website?

13 A: There's something called Strike that is
14 integrated into Squarespace and that handles
15 the payments that I receive.

16 Q: And so somebody would go onto your website and
17 if they wanted to order a product what would
18 they have to do with respect to payment?

19 A: They would put in their billing address, their
20 credit card information, place an order and
21 then I guess the payment would be processed by
22 Strike in Squarespace.

23 Q: Do you pay fees for the services that you
24 receive with respect to Squarespace?

25 A: I know I pay Strike a fee. I do not know about



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1 Squarespace except I pay the monthly fee, so
2 yes.

3 Q: Do you know exactly what the fees are that
4 you're paying to Strike for those payment
5 services?

6 A: No.

7 Q: Mr. Revich, I think the only other question
8 I've got is, when you are offering products for
9 sale on the Amazon.com website, would you say
10 that you are a supplier of those products or a
11 seller of those products?

12 A: I am the seller. They're my products. It's my
13 business.

14 Q: Okay.

15 A: I have all the control and freedom to do what
16 I want to do, and I'm the seller.

17 Q: No further questions, Your Honor.

18 **THE COURT:** Re-cross on new matter?

19 **MR. GREEN:** Just one moment, Your Honor. Excuse me,
20 Your Honor. Just one moment.

21 **THE COURT:** I'm fine.

22 **MR. GREEN:** Sorry, Your Honor. Just a few re-cross
23 questions.

24 **MR. REVICH - RECROSS-EXAMINATION BY MR. GREEN:**

25 Q: I think you've testified in response to one of



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1 Mr. -- or several of Mr. Akins' questions about
2 using Seller Central to track your inventory on
3 the website, correct? As far as transactions
4 from Amazon.com, correct?

5 A: Can you repeat the question?

6 Q: Yeah. You testified in response to some of Mr.
7 Akins' questions that you used features on
8 Seller Central to track your inventory that
9 you've placed with Amazon for transactions
10 through the Amazon.com website, correct?

11 A: One more time.

12 Q: All right. Let me try to -- Seller Central has
13 a feature I think you testified to that allows
14 you to track your inventory that have placed
15 with Amazon using the FBA service, correct?

16 A: Correct.

17 Q: Okay. And you testified that you use that
18 feature, correct?

19 A: Yes.

20 Q: Okay. And you testified that you keep track
21 using that of how many units you've sold
22 through Amazon, correct? Amazon.com?

23 A: Can you repeat that?

24 Q: Do you use Seller Central to track the items
25 that you sell through Amazon.com?



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1 A: Yes.

2 Q: Okay. And you track your inventory to be more
3 precise using Seller Central, correct?

4 A: Yes.

5 Q: Okay. And you testified earlier in that
6 context about selling -- those grills that we
7 looked at on the screen -- you testified that
8 you'd been selling those through Amazon,
9 correct? Amazon.com?

10 A: Yes.

11 Q: And how long have you been selling those grills
12 through the Amazon.com website?

13 A: About four weeks.

14 Q: Okay. And is that an Amazon Choice item?

15 A: I don't know what you mean.

16 Q: You do not know if it's been designated as an
17 Amazon Choice?

18 A: I don't know.

19 Q: Okay. Okay. No further questions. Thank you.

20 A: Thank you.

21 **MR. REVICH - CLARIFICATION BY THE COURT:**

22 **THE COURT:** I've got a few questions for you. Do
23 you communicate with other sellers on Amazon?

24 A: I never have.

25 **THE COURT:** So you wouldn't know if their experience



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1 is the same as yours?

2 A: I have communicated with other Amazon sellers
3 in real life, like talking to them, but not on
4 ---

5 **THE COURT:** Well that's what I'm asking.

6 A: Oh. Their experiences are very similar to
7 mine.

8 **THE COURT:** Well how many have you communicated
9 with? And I guess when you say experiences I
10 don't know -- I need to know what you mean by
11 experiences.

12 A: Their communications with customers, the way
13 the list products, the way they get the photos,
14 the pricing.

15 **THE COURT:** All right. And who have you
16 communicated with?

17 A: There's a gentleman who lives in the same
18 building as my business partner, Bobby. I've
19 talked to him about it. There's -- I went to
20 a trade show in China and there's -- Lonjo,
21 China to be exact -- and there was two guys
22 around my age and they were Amazon sellers as
23 well and we were just talking about, you know,
24 our products and when we sell.

25 **THE COURT:** So four people -- three people.



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1 A: So, three.

2 **THE COURT:** All right. Who do you believe is
3 responsible for paying the sales tax for the
4 products that you sell that go to South
5 Carolina?

6 A: Can you repeat the question, Your Honor?

7 **THE COURT:** Who do you believe is responsible to pay
8 the sales tax for the products that you sell
9 that are delivered to South Carolina?

10 A: I don't know. Currently?

11 **THE COURT:** Yeah.

12 A: I don't know.

13 **THE COURT:** Well do you believe you are?

14 A: I know that I am the seller of my products. I
15 do not know if I am supposed to sales tax in
16 South Carolina right now.

17 **THE COURT:** Well do you believe that Amazon should
18 do it?

19 A: No.

20 **THE COURT:** All right. Any follow-up questions on
21 the ones I've asked?

22 **MR. AKINS:** No, Your Honor.

23 **MR. GREEN:** None from me, Your Honor.

24 **THE COURT:** All right. Thank you. You may step
25 down.



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1 A: Thank you.

2 **THE COURT:** All right. Where are we going? It's
3 11:22. Do you want to take a lunch break or do
4 you want to proceed down the road?

5 **MR. AKINS:** I think now is -- we have, you know,
6 another Amazon witness that will probably be a
7 pretty substantial examination. It'll probably
8 go to, you know, if we did it straight through,
9 you know, 1:00 o'clock or a little bit
10 thereafter.

11 **THE COURT:** Okay.

12 **MR. AKINS:** I'd be fine taking a lunch break now,
13 but whatever suits the Court and the group.

14 **THE COURT:** I have no preference. I'd rather do it
15 whatever y'all think is best in presenting the
16 case.

17 **MR. GREEN:** Yeah, I'm good now or we can wait, it's
18 up to you.

19 **THE COURT:** You just tell me as far as presenting
20 your case, I'm ...

21 **MR. AKINS:** Sure. I'd prefer to present him, you
22 know, straight through, so ...

23 **THE COURT:** Okay. Let's take a break then.

24 **MR. AKINS:** Thank you, Your Honor.

25 **THE COURT:** Well we're going to come back -- let's



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1 see, quarter after 12? An hour and a half
2 lunch?

3 **MR. AKINS:** Yeah, quarter after 1 you mean.

4 **THE COURT:** I meant one. Yeah.

5 **MR. AKINS:** Perfect.

6 **MR. GREEN:** Okay.

7 **MR. AKINS:** Thank you.

8 **(Off the record from 11:40 a.m. until 1:15 p.m.)**

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

10 **MR. RAZI:** Thank you, Your Honor. Amazon Services
11 calls Tobin Weldele. W-E-L-D-E-L-E.

12 **TOBIN WELDELE,** having been duly sworn, testifies as
13 follows:

14 **MR. WELDELE - DIRECT EXAMINATION BY MR. RAZI:**

15 Q: Good afternoon.

16 A: Good afternoon.

17 Q: Would you please introduce yourself to the
18 Court?

19 A: Sure. My name is Tobin Weldele. I'm the Vice
20 President of Amazon Fulfillment Services.

21 Q: What is Amazon, or what are the Amazon group of
22 businesses?

23 A: It's a bunch of different things. You've got
24 Amazon Web Services. You've got Amazon Retail.
25 You've got digital business. You've got the



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1 video businesses. It's a bunch of different
2 businesses.

3 Q: How long have you worked at Amazon?

4 A: It will be 14 years come November.

5 Q: And tell the Court if you will in general about
6 the positions you've held during your 14 years
7 ---

8 A: Sure.

9 Q: --- with the company.

10 A: I started out working for Amazon in the retail
11 capacity buying things from vendors, selling
12 them to customers. And then I transitioned
13 over to building services for third party
14 sellers.

15 Q: Okay.

16 A: So managing technology teams to build the
17 services that we offer.

18 Q: So you have experience both in the aspect of
19 the business where Amazon-owned companies sell
20 their own products, right?

21 A: Yes. I have experience where we buy from
22 vendors and sell to customers as well as
23 building services for sellers to do the same.

24 Q: And your current role I think you said was Vice
25 President Fulfillment Services?



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1 A: That's correct.

2 Q: What are your responsibilities in that role?

3 A: My responsibilities are to build services for
4 third party sellers to directly fulfill to the
5 customers or indirectly through Fulfillment by
6 Amazon as well as crafting solutions to help
7 them sell to customers.

8 Q: Okay. And are there Amazon employees that
9 report to you or that sit under you in the
10 organization structure?

11 A: Yes.

12 Q: Approximately how many?

13 A: 1,200.

14 Q: And in general what are the types of tasks that
15 those -- the types of roles and
16 responsibilities that those 1,200 or so people
17 are engaged in?

18 A: Sure. The largest part of our organization are
19 engineers. So those who build the software
20 that facilitates the services that we do.
21 There's also a number of product development
22 folks who actually define the services so the
23 engineers can build them.

24 Q: And to whom do you report?

25 A: I report to Dave Clark, the Senior Vice



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1 President of Worldwide Operations.

2 Q: And then who's above Mr. Clark in the
3 hierarchy?

4 A: So there's a series of SVP's and then there's
5 Jeff Bezos.

6 Q: Getting back to the sort of downward looking
7 part of the org chart if you will, employees
8 and the functions that are under you, explain
9 for the Court which aspects of Amazon
10 Fulfillment Services are your responsibility?

11 A: Sure. So as I mentioned in the Ohio review,
12 I'm responsible for tools for sellers to
13 directly fulfill. So if they go to Seller
14 Central for an order that they've received and
15 they print out a shipping label, tools make
16 that process easier for them. There's tools
17 that allow them to have us act like third party
18 logistics provider fulfillment by Amazon or
19 they can send their inventory to us and we'll
20 do the pick, pack, shipment on their behalf.
21 And then as I mentioned, there are cross-
22 boarder tools. The easiest example is allowing
23 them to export outside of the U.S.

24 Q: Are you familiar with a company called Amazon
25 Payments, Inc.?



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1 A: Yes.

2 Q: Is that something that -- is that a company
3 that you're responsible for?

4 A: No, that's another company within the
5 organization.

6 Q: For how long during your tenure at Amazon have
7 you had exposure to the third party seller
8 marketplace?

9 A: I've been part of that building services for
10 approximately 10 years.

11 Q: Okay. And have you had occasion during those
12 10 years to become familiar with how it is that
13 third parties sell products on Amazon.com and
14 get them to customers?

15 A: Yes.

16 Q: Okay. Have you had the opportunity to interact
17 with third party sellers?

18 A: Absolutely.

19 Q: Okay. And have you in fact supervised the
20 people that design some of the software leading
21 to the services that are provided by Amazon
22 Fulfillment Services to third party sellers?

23 A: Yes.

24 Q: In what context have you interacted with third
25 party sellers, whether it's in person, via on



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1 the telephone or electronically?

2 A: Many ways. I've had direct conversations.
3 I've exchanged e-mails, phone calls. I've
4 presented at conferences. Had many, many
5 discussions. Probably too many to count.

6 Q: Okay. And approximately how many third party
7 sellers have you had the opportunity to
8 interact with during the course of your career?

9 A: Again, given the format I've been involved with
10 thousands.

11 Q: Okay. And in what product lines have the third
12 party sellers -- strike that. The thousands or
13 so of third party sellers that you've
14 interacted with, what types of products do they
15 sell?

16 A: It spans the spectrum from electronics to
17 clothing to grocery, sporting goods, home.
18 Really anything that you can buy as a consumer
19 via commerce. I've interacted with sellers
20 that either are buying and selling or they're
21 maybe a direct brand owner.

22 Q: So are you knowledgeable about just how one of
23 those types of sellers sells products on
24 Amazon.com or are you -- do you believe that
25 you have knowledge about sellers across



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1 categories and how it is that they do their
2 business selling products on Amazon.com and
3 getting them to customers?

4 A: I think I would have a good understanding of
5 across the spectrum given that we've tried to
6 build tools that work for most customers.

7 Q: Okay. Are you aware of any partnership between
8 Amazon Services, LLC or Amazon Fulfillment or
9 any other Amazon entity and any third party
10 seller?

11 A: No.

12 Q: Did you go to business school?

13 A: I did.

14 Q: And I take it -- do you have some understanding
15 of what a joint venture is based on your
16 experience in business?

17 A: I think so.

18 Q: Okay. Are you aware of any joint ventures
19 between Amazon Services, LLC, Amazon
20 Fulfillment, any other Amazon entity on the one
21 hand and any third party seller on the other
22 hand?

23 A: No. I think we build services that are
24 transactional in nature versus a joint venture
25 which I would see it as a joint investment in



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1 building a collective business and then both
2 reaping benefit.

3 Q: I want to direct your attention now to the
4 first quarter of 2016, okay? Are you familiar
5 with how third party sales on Amazon.com were
6 fulfilled in the first quarter of 2016?

7 A: Yes.

8 Q: Okay. And by fulfilled in this context I mean
9 to refer to how it is that the third party
10 sellers got their products to customers that
11 bought them, okay?

12 A: That's how I took the question.

13 Q: Okay, and that's how you understand the
14 company?

15 A: Yes.

16 Q: All right. What options were available to
17 third party sellers in the first quarter of
18 2016 to fulfill their orders to customers?

19 A: They would have the choice to fulfill directly
20 to the customer. So they could pick the item
21 from their own fulfillment center or their
22 warehouse or their home. Package it. Ship it
23 with a carrier. They could instead use a third
24 party logistics provider to do that for them.
25 The could use -- in a similar capacity they



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1 could use FBA for having us putting their
2 inventory in Amazon FCs, paying the storage
3 fees and having us pick, pack and fill --
4 fulfill.

5 Q: And who determined in the first quarter of
6 2016, for instance, how any particular third
7 party seller fulfilled their order to
8 customers? Was it the third party seller or
9 was it Amazon Services or another Amazon
10 entity?

11 A: The third party seller.

12 Q: How do you know that?

13 A: From my interactions with sellers, from the way
14 the tools work unless they specifically tell --
15 she'd make a choice. We wouldn't know about
16 it.

17 Q: What do you mean by the way the tools work?
18 What tools are you talking about?

19 A: Within Seller Central the seller can make the
20 choice to fulfill themselves and therefore set
21 the promise they wish to make to customers.
22 The shipping fee. Or they could choose to have
23 the item fulfilled by Amazon in which case they
24 would then need to go and create an inbound
25 shipment if they wanted to participate in FBA.



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1 Q: Did Amazon Services in the first quarter of
2 2016 dictate how it is that a third party
3 seller would fulfill it's customer orders?

4 A: No.

5 Q: Did Amazon Services as far as you know in the
6 first quarter of 2016 exert any control over
7 how it is that a third party chose to fulfill
8 its orders?

9 A: No.

10 Q: To be clear, though, are there any rules or
11 were there any rules at all about how it is
12 that third party sellers would fulfill their
13 orders?

14 A: Yes. We do have policies that ensure that
15 third party sellers live up to the promises
16 they make to customers. So if they say they're
17 going to ship it at a certain speed or they
18 going to have a specific price and they
19 continually either misrepresent or don't
20 provide a good customer experience we may take
21 action.

22 Q: Do you know whether in the process of
23 conducting a transaction on Amazon.com a
24 customer is informed of the mode of fulfillment
25 that the third party seller chose?



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1 A: Yes.

2 Q: In other words, there not sort of -- there's
3 some complicated jargon there I guess, but in
4 other words -- do -- let me try it another way.
5 Do customers -- do you believe that customers
6 are informed by the website how it is that
7 their product is going to be -- get to them?

8 A: Yes.

9 Q: And how are customers or visitors to the
10 website informed of that information?

11 A: It's expressly stated when they -- when they're
12 choosing which item to buy. It says sold and
13 shipped by and we make very clear not only that
14 who is the seller but also the method of
15 transportation, the method of shipment.

16 Q: All right. Let's assume that a customer has
17 viewed a product on Amazon.com and clicks on
18 the button there that says order now. Walk us
19 through the fulfillment process from there as
20 it existed in the first quarter of 2016 and as
21 you understand it.

22 A: And for clarification this is when the seller
23 is directly fulfilling?

24 Q: Sure. For a start we can start with that, yes.

25 A: Okay. In the event that they are directly



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1 fulfilling the customer would click that
2 button. They would be sent an e-mail as well
3 as that information being presented in Seller
4 Central where they could go to the my orders
5 page and find out to where the item is to be
6 shipped. Based upon the offer that they
7 created the ships need the shipping
8 configurations that they set and then they
9 could choose to fulfill that or cancel it if
10 necessary.

11 Q: During that process that you just described
12 does Amazon Services or any Amazon entity ever
13 have ownership of the product that has been
14 ordered?

15 A: No.

16 Q: Does anyone from Amazon in that process that
17 you just described ever even physically see the
18 product?

19 A: No.

20 Q: So all of that process that we've heard some
21 about is packing and labeling and shipping.
22 And this MFN framework that you're describing,
23 that's all done by the third party seller?

24 A: That's correct.

25 Q: How is it that in the framework in which the



1 third party seller is fulfilling their orders
2 directly, how is it in the first quarter of
3 2016 that as a practical matter they did that?
4 How did they get their customers?

5 A: So when they were directly fulfilling how did
6 they get the customer?

7 Q: Uh-huh.

8 A: It would vary. They could deliver it
9 themselves. They could use a third party
10 logistics provider. They could just pick it
11 and hand it off to the postal service or to
12 UPS. There are many ways they could have done
13 it.

14 Q: Okay. And did Amazon Services or any other
15 Amazon entity control any of those decisions?

16 A: No.

17 Q: Let's look at the BSA, and before we put it up
18 are you familiar with the Business Solutions
19 Agreement?

20 A: I am.

21 Q: Okay. I'm going to ask you to take a look at
22 what's been marked as Exhibit 3 I believe. And
23 I want to direct your attention to page 16 of
24 the document. Paragraph S-1-3. If I could ask
25 Mr. Brooks to blow it up. Do you see that



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1 provision there that says shipping and handling
2 charges?

3 A: Yes.

4 Q: Okay. And are you familiar in general with
5 this provision?

6 A: In general, yes.

7 Q: Okay. And do you see where it says for your
8 products ordered by customers on or through an
9 Amazon site that are not fulfilled using
10 Fulfillment by Amazon, do you see that?

11 A: I do. It's highlighted.

12 Q: Okay. And do you understand that to mean that
13 these are the orders that are going to be
14 fulfilled directly by the seller?

15 A: Yes.

16 Q: Okay. So in that circumstance do you where the
17 agreement says, "you will determine the
18 shipping and handling charges." Do you see
19 that?

20 A: I do.

21 Q: And the you in that sentence is the third party
22 seller, right?

23 A: Correct.

24 Q: Okay. And then it goes on to say, "subject to
25 our program policies and standard



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1 functionality, parenthetical, including any
2 category based shipping and handling charges we
3 determine such as for products offered by
4 sellers on the individual selling plan and BMVD
5 products generally." Do you see that?

6 A: I do.

7 Q: Do you have an understanding of what that last
8 set of language that I just read means?

9 A: I believe so.

10 Q: Okay. What's your understanding?

11 A: I believe for books, music and DVD there's a
12 sort of a standard like US or UPS or USPS has
13 I believe what's called media mail which is a
14 standard flat rate for shipments of these
15 types. So this policy may have been to
16 indicate that that is the best method to use.

17 Q: Okay. And does this provision affect the
18 testimony that you offered a moment ago that
19 third party sellers control how it is that
20 their orders are fulfilled?

21 A: No, they still have the choice. I think the --
22 there are some policies that we have set to
23 make sure that on the margins sellers are
24 behaving in a way that's good for customers.
25 And so if they had egregious pricing that was



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1 abusive like millions of dollars for shipping
2 or something like that, I think these policies
3 are designed for outlying behavior, and so
4 that's -- it's not on a transactional level.
5 It would be for sort of continued bad acting
6 behavior.

7 Q: Changing topic slightly. Do -- to
8 communications. Do third party sellers
9 communicate with customers after orders are
10 placed but before the products are shipped?

11 A: They can, yes.

12 Q: Okay. And why would that happen? What does
13 that happen?

14 A: Many reasons. It could be that the seller
15 doesn't actually have the item they thought
16 they had. It could be that there's a substitute
17 that the customer would actually be happy with.
18 It could be the other way around where they
19 want to inform the customer about how to use
20 the product. There's many different reasons
21 that a seller may want to contact a customer.

22 Q: Okay. When third party sellers fulfilled the
23 orders on their own in the first quarter of
24 2016 who was it that was responsible for
25 processing cancellations, returns and refunds?



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1 A: And this is for the seller direct fulfillment?

2 Q: Yes, sir.

3 A: That would be the seller. Third party seller.

4 Q: Okay. And how do you know that?

5 A: From experience I guess both as a customer and
6 as well as someone familiar with the tools that
7 -- the services that we have created. And by
8 tools, to clarify, I mean, the interfaces that
9 they use with the services.

10 Q: Let's take a look at ---

11 **THE COURT:** Do you have a policy regarding that?
12 You said with tools and -- you said third party
13 sellers were responsible for cancellations and
14 refunds. Is that as a matter of practice from
15 what you observed or is there something that
16 required it?

17 **MR. WELDELE:** We wouldn't require it but if the
18 seller, like if you were the seller and I
19 bought something from you and you didn't have
20 it you would go to Seller Central and say, hey,
21 I'm sorry I don't have this. And you can
22 create a communication to the customer letting
23 him know that you're cancelling the order. You
24 could say, hey, I have a red one but not a blue
25 one. I know you ordered a blue one but that



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1 would be you're way to sort of offer customer
2 service on the transaction.

3 **THE COURT:** Okay.

4 Q: And let's go back to the BSA, Exhibit 3, and in
5 particular paragraph S dash 2.2. And do you
6 see the first sentence where again we're
7 talking about products that are not fulfilled
8 using Fulfillment by Amazon. Do you see that
9 first clause?

10 A: I do.

11 Q: And the provision goes on to say that you, the
12 third party seller, will accept and process
13 cancellations, returns, refunds and adjustments
14 in accordance with this agreement and the
15 Amazon refund policies for the applicable
16 Amazon site, do you see that?

17 A: I do.

18 Q: Okay. And do you have an understanding of what
19 that provisions means in practice?

20 A: Yes. I think it's what I just described.

21 Q: When third party sellers fulfill orders on
22 their own who is it that's responsible for
23 addressing non-conformities, recalls and
24 delivery errors? Is it the third party's or is
25 it Amazon Services or some other Amazon entity?



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1 A: It is the third party seller.

2 Q: Okay. And do you know that based on your
3 experience working with the company?

4 A: Both as a customer and as working at the
5 company, yes.

6 Q: Okay. And would it surprise you to know that
7 that's also reflected in the BSA?

8 A: No, it would not surprise me.

9 Q: Okay. Let's go to paragraph S dash 3.1. Do
10 you see where the document states, you, meaning
11 the third party seller, are solely responsible
12 for any non-performance, non-delivery, mis-
13 delivery, theft or other mistake or act in
14 connection with the fulfillment of your
15 products, do you see that?

16 A: Yes.

17 Q: And then it goes on and there are some
18 exceptions?

19 A: I see that, yes.

20 Q: Okay. And is that sentence that I read
21 consistent with your experience of who bears
22 the responsibility under this contractual
23 arrangement between third party sellers and
24 Amazon Services for delivery errors, non-
25 conformities, and recalls?



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1 A: Yes.

2 Q: Okay. How is it that third party sellers
3 handle non-conformities, recalls or delivery
4 errors? And if you need to take them one by
5 one you can.

6 A: It -- I'll take them as sort of the process is
7 very similar. Should they recognize that there
8 is an issue with an item that they are about to
9 ship or have shipped and they wanted to change
10 that it's their obligation to work with the
11 customer to resolve the issue. So the customer
12 sends the blue shirt not the red shirt it's
13 their obligation to send them the correct color
14 and accept the return if -- I assume that they
15 want the wrong color back. If it's a product
16 recall they're on the -- it's their obligation
17 to help the customer understand that they need
18 to recall the product. All of that is their
19 choice to do.

20 Q: All right. Let's turn to Fulfillment by
21 Amazon. Which Amazon entity in the first
22 quarter of 2016 contracted with third party
23 sellers to provide the Fulfillment by Amazon
24 services?

25 A: I believe it was Amazon Services.



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1 Q: Okay. And let's take a look again at the BSA,
2 Exhibit 3.

3 **MR. RAZI:** And in particular page 10, Mr. Brooks.

4 Q: And do you see in the BSA where the Fulfillment
5 by Amazon service is addressed?

6 A: I do, yes.

7 Q: Okay. And who is the Amazon contracting party
8 for that service?

9 A: Amazon Services.

10 Q: Okay. Provide for the Court if you will a
11 brief overview of the FBA service.

12 A: Sure. So if the seller would like to
13 indirectly fulfill -- sort of analogous to the
14 third party logistic model that I referenced
15 earlier -- they can choose Fulfillment by
16 Amazon. In that service they would choose at
17 the item level whether or not they wanted to
18 participate. They would then choose how much
19 of the particular item to send to us. They
20 would create an inbound shipment. We would
21 receive the inventory and place it within the
22 Amazon fulfillment center and when the seller
23 received orders we would pick, pack and ship
24 the item on their behalf. Similar to the
25 directly fulfilled model, you know, they'll



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1 receive e-mails about an order or they can see
2 that in Seller Central. If they have an issue
3 that they want to address -- say they made a
4 pricing error and they want to cancel -- they
5 can choose to cancel the order. And then for
6 inventory that resides in our fulfillment
7 centers we charge storage fees.

8 Q: Let's start with the initial election to use
9 FBA. When is that decision first made whether
10 or not to use FBA by a third party seller?

11 A: It can be done at any time, but they could go
12 within Seller Central and make that election
13 basically at any time and say I would like this
14 to be fulfilled by Amazon and then they would
15 take the steps that I just discussed to send
16 their inventory to Amazon.

17 Q: And is the decision whether to use FBA or not
18 for a third party seller made on a company-wide
19 basis or some other basis?

20 A: They can choose to do it at the item level and
21 they can actually choose to do both. If they
22 wanted to have us fulfill some of their orders
23 and fulfill some of their orders directly on
24 the same item they can do that.

25 Q: And is Amazon Fulfillment or Amazon Service



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1 exert any control over that decision?

2 A: No.

3 Q: And once the decision is made to use FBA or not
4 use FBA for a particular product is -- has the
5 decision been made for all time or can it be
6 changed?

7 A: They can enroll or un-enroll at any time. And
8 they can request to have their inventory
9 removed at any time.

10 Q: Does Amazon Fulfillment or Amazon Services
11 exert any control over the decision whether to
12 change their election of whether or not to use
13 FBA?

14 A: No.

15 Q: And let's say I was registered to be a third
16 party seller and I had one product and I didn't
17 give any instruction to any Amazon company as
18 to how my orders would be fulfilled, what would
19 happen? In other words, am I required to make
20 that election?

21 A: I don't think we couldn't -- I don't think we
22 can represent that offer to a customer. We
23 wouldn't know -- unless the third party seller
24 said I want to use FBA or here's my shipping
25 settings so that we know what they want to



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1 charge for shipping to where they're able to
2 ship. I don't think we could render the offer
3 on their behalf so I think we would -- we'd
4 need that information.

5 Q: Are the FBA services that you've described
6 available only to third party sellers who list
7 to third party sellers who list products on
8 Amazon.com?

9 A: No, there is a service called Multi-channel
10 Fulfillment and this would allow a third party
11 seller to have inventory and an Amazon FC for
12 fulfillment for orders placed on their own
13 website or another marketplace.

14 Q: And do sellers in fact use the Fulfillment by
15 Amazon service to fulfill orders that they've
16 received from customers through sales channels
17 other than Amazon.com?

18 A: Yes.

19 Q: All right. Let's assume for a particular
20 product for a certain quantity the third party
21 seller registers to use the FBA service.
22 What's the next step then they have to take to
23 get their products fulfilled using FBA?

24 A: Forgive me if I repeat myself. Once they've
25 elected to use Fulfillment by Amazon they would



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1 then create an inbound shipment. So they would
2 tell us here's the amount of inventory that I
3 want to send to you and we would then receive
4 those goods at the fulfillment center and at
5 that point in time their offer would be
6 presented to customers.

7 Q: Do third party sellers have any ability to
8 decide where at Amazon or which Amazon
9 fulfillment center their products go to?

10 A: Yes. So as they create that inbound shipment
11 we would request that they send it often to
12 multiple places, and we try to put things
13 closest to customers in the country their
14 sending inventory to. If they prefer to send
15 it to a single destination there's a service
16 that they can opt into which allows them to
17 send to a single address versus multiple
18 locations.

19 Q: Do third party sellers continue to have control
20 over their products after they're in an Amazon
21 fulfillment center?

22 A: Yes. As I said they own the inventory, they
23 can create a removal order. We charge them
24 storage fees, it is their's.

25 Q: Okay. Who owns the products that third party



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1 sellers send to Amazon fulfillment centers?

2 A: The third party seller.

3 Q: How do you know that?

4 A: Well what I -- clearly in my Amazon career I
5 worked for Amazon in a retail capacity where we
6 would buy inventory from vendors. We would
7 price the inventory. We owned the inventory
8 and sold it to consumers. When I moved over
9 to the third party services organization the
10 model is very different. We don't make those
11 decisions. The third party seller makes all
12 the decision. They own the inventory. They
13 price it. Again, they pay the storage fees on
14 it. It's theirs not our.

15 Q: Does Amazon Fulfillment Services track third
16 party sellers products that are sent to an FC?

17 A: Yes.

18 Q: How so?

19 A: In two ways. One, there's a service that they
20 can elect or opt into where they've, you know,
21 we or they affix a sticker to the physical unit
22 that clearly identifies that physical as
23 theirs, and we also virtually track in a
24 particular location in the fulfillment center
25 who contributed that piece of merchandise.



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1 Q: And have you been to Amazon fulfillment
2 centers?

3 A: Yes.

4 Q: And do you know how in general they operate?

5 A: They're a bit different around the world, but
6 yes.

7 Q: Is it ever the case that in your experience
8 third party seller's products are jumbled
9 together with someone else's products such that
10 Amazon Fulfillment Services doesn't know whose
11 products are whose?

12 A: No, they're not jumbled together. They're
13 stowed in a bin that our systems know where
14 that inventory is and we can trace that back to
15 the inbound shipments as to who sent the unit
16 in, so, no we don't.

17 Q: Okay. All right. So let's assume that the
18 third party seller's products are now at an FC
19 and a customer has placed an order for one of
20 those products?

21 A: Uh-huh.

22 Q: What happens next?

23 A: The order would be sent to the fulfillment
24 center with -- predicated on the conditions of
25 the offer -- how fast it should be shipped and



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1 the order would be picked, packed and shipped
2 and sent to the customer.

3 Q: Are there particular features or elements of
4 the FBA services that are optional?

5 A: Many. I described the inbound placement
6 service. I described the stickering service.
7 If you have -- let's say you were selling
8 shampoo or something and the bottle itself was
9 fragile, there's services to wrap bubble wrap
10 on them so that they're ready for e-commerce
11 shipment. There are many services that we
12 offer.

13 Q: Let's take a look at Exhibit 31 that's been
14 admitted into evidence. It says at the top,
15 FBA Features and Fees. Do you recognize this
16 document?

17 **(Hearing Exhibit Number 31 was introduced into the**
18 **record at this time.)**

19 A: I believe it's the features and fees from
20 Seller Central.

21 Q: There's a reference in here which is something
22 called the FBA label service, do you see that?

23 A: I do.

24 Q: Okay. What's the FBA label service?

25 A: That was the service I described a moment ago



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1 where the seller could opt in to have us affix
2 labels to their products upon receipt.

3 Q: And then the next service is referenced as
4 something called the FBA prep service, do you
5 see that?

6 A: I do.

7 Q: And what is that?

8 A: Again at the risk of repeating myself, this is
9 the -- if you have a fragile product that you
10 wanted to have bubble wrapped for e-commerce
11 shipment such that it didn't break we offer an
12 optional service.

13 Q: Okay. Below that there are two additional
14 services. One's called the FBA repackaging
15 service, right?

16 A: Uh-huh.

17 Q: And then the other is called the inventory
18 placement service, right?

19 A: Yes.

20 Q: And you've alluded to those in your earlier
21 testimony, right?

22 A: I alluded ---

23 Q: At least the inventory placement? Sorry.

24 A: Quickly the repackaging services upon a
25 services upon a customer return if the item is



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1 in sellable condition but the packaging that it
2 was returned in isn't suitable to be re-shipped
3 they can often do a service where we would make
4 it -- put it back in a box that's acceptable
5 for re-shipping to a customer.

6 Q: Is Amazon Fulfillment Services compensated at
7 all for these services?

8 A: Yes.

9 Q: How so?

10 A: There's a per unit fee for virtually all
11 inventory.

12 Q: And are those fees also referenced in Exhibit
13 31 under the heading FBA Fees?

14 A: I believe so.

15 **MR. RAZI:** Mr. Brooks, can you just pull up the
16 second page?

17 Q: And do you see a variety of different service
18 fees, FBA service fees listed on the screen?

19 A: I do.

20 Q: Okay. Do any of those fees represent in any
21 way any kind of profit sharing arrangement with
22 a third party seller?

23 A: No.

24 Q: Why not?

25 A: These are transactional. These occur when the



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1 seller chooses to procure a service that we
2 provide.

3 Q: And are there actual people or machines at
4 Amazon Fulfillment Services that actually have
5 to perform the the tasks for which fees are
6 charged?

7 A: Absolutely. All of these require technology
8 services to operate and then for things that
9 require physical movement of goods or physical
10 preparation of goods we people.

11 Q: Does Amazon Fulfillment Services or any Amazon
12 entity ever own any of the third party seller
13 products that are in it's -- any of it's
14 fulfillment centers?

15 A: No.

16 Q: How do you know that?

17 A: Well they pay storage fees. They can request
18 removals. It is the seller's inventory, not
19 ours.

20 Q: Okay. And are you familiar based on your
21 experience in business with how it is that
22 title transfers in a e-commerce transaction?

23 A: I am.

24 Q: Okay. How is it that -- well let me -- before
25 I ask you that question, what experiences have



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1 you had in your career that have informed your
2 understanding of how it is that title or
3 ownership of a product transfers in the context
4 of an e-commerce sale from the seller to a
5 customer?

6 A: Sure. A couple of -- the most relevant is I
7 mentioned earlier that the seller on an FBA
8 transaction can request to cancel the order.
9 There have been instances where -- maybe the
10 best example is where the seller uses an
11 integrator who prices all of their items and if
12 the -- in the past the integrator has made an
13 error and so many of their items were mispriced
14 and the seller requested that we cancel all of
15 those orders that were based upon the pricing
16 unit and we stopped everything that was in the
17 FCs but we couldn't once the door had been shut
18 on the transportation provider's door -- as my
19 investigation at the time revealed -- the
20 ownership transfer had gone to the customer
21 from the third party seller and we could no
22 longer cancel the order.

23 Q: Okay. So and based on that just -- how --
24 what's your understanding of how it is that
25 ownership or title transfers in an e-commerce



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1 transaction involving a third party seller on
2 Amazon.com?

3 A: So when then item is picked, packed, shipped
4 and boxed. When that box is handed off to the
5 transportation provider and the door shuts --
6 I believe it's when the door shuts -- that's
7 when the ownership transfer goes from the third
8 party seller to the customer.

9 Q: Okay. Back on the fees for a minute. Am I
10 right that if a third party seller has a
11 problem with any of those fees or doesn't want
12 to pay any of them they don't need to elect to
13 have Amazon Fulfillment perform any of those
14 services, right?

15 A: No, they are all optional.

16 Q: Okay. It's the third party's election whether
17 to use them, right? Have you ever seen on
18 Amazon.com products where warranties are
19 offered?

20 A: Yes.

21 Q: Have you ever seen products -- I don't if you'd
22 call them insurance products or not -- but
23 there's sort of extended guaranties relating to
24 products?

25 A: Like an extended warranty? Yes.



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1 Q: Okay. Have you heard of a company called
2 Squaretrade?

3 A: Yes.

4 Q: What is Squaretrade basically?

5 A: I'm not super familiar with them but as I
6 understand it they are a essentially a warranty
7 or insurance provider.

8 **MR. RAZI:** And if we could put up the Amazon website
9 on that.

10 Q: And just for the record in general what appears
11 on the -- on everybody's screen at the moment?

12 A: That looks to be an Amazon detail page.

13 Q: Okay. And this is a page ---

14 **THE COURT:** What did you call it?

15 **MR. WELDELE:** Detail page. Like the details of the
16 item.

17 **THE COURT:** Okay. Good.

18 Q: And this is not the home page but this is a
19 page relating to one particular product, right?

20 A: Correct.

21 Q: And are there other pages on the Amazon.com
22 website relating to other products?

23 A: Yes. Quite a few.

24 Q: Okay. If you look on the right-hand side of
25 the page there is a portion of it that says



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1 added protection plan, do you see that?

2 A: I do.

3 Q: And first is a four year protection for \$5.36,
4 do you see that?

5 A: I do.

6 Q: And then there's a three year protection option
7 for \$5.07, do you see that?

8 A: I do.

9 Q: Do you know who is it -- who is it that offered
10 those protection plans?

11 A: I don't.

12 Q: If one wanted to find out how -- do you think
13 they could do that?

14 A: I -- if I were the customer I would click on
15 it.

16 Q: You said you would click on it. Okay, we've
17 now clicked on it and what can you tell from
18 this about who offers -- and based on what you
19 know about how the website works -- who offers
20 this four year small appliance protection plan?

21 A: It appears if you pull down it's Squaretrade.

22 Q: And how about under the -- where it says four
23 year protection plan in big, bold black letters
24 what does it say?

25 A: Oh, from Squaretrade.



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1 Q: Okay. And does that look like a hyperlink?

2 A: I don't know. The learn more does though.

3 Q: Okay. Let's click learn more. Okay. Does
4 based on what you know about how the website
5 works and what we've now just reviewed do you
6 have an understanding of who it is that offers
7 the Squaretrade four year small appliance
8 protection plan?

9 A: Yeah, it looks like a third party -- in this
10 case Squaretrade is an Allstate company -- is
11 offering -- is the third party provider of this
12 warranty service.

13 Q: What relationship if any is there between
14 Squaretrade and the Petitioner in this case,
15 Amazon Services, LLC?

16 A: I don't know.

17 Q: Well is Squaretrade an Amazon company?

18 A: No.

19 Q: Are you aware of any relationship between
20 Squaretrade and Amazon Fulfillment?

21 A: No.

22 Q: Is there any relationship that you're aware of
23 between -- when you said Amazon has number of
24 diverse businesses, is the Allstate company
25 part of any of Amazon's diverse businesses?



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1 A: I don't believe so.

2 Q: Okay. And if we go back to the product detail
3 page just for a minute I know you're at Amazon
4 Fulfillment but are you familiar in general
5 with product detail pages and how they get set
6 up?

7 A: Reasonably familiar, yes.

8 Q: Okay. Who is it that -- what's your
9 understanding of who is it that provides all
10 the information about the products on a product
11 detail page?

12 A: Generally speaking the seller would.

13 Q: Okay. And is your understanding and the
14 process that you've described this afternoon in
15 your direct testimony of how it is that third
16 party sellers present their products on the
17 website and fulfill their orders, is that
18 information applicable to all third party
19 sellers or just some sub-group of them?

20 A: To all of them. That's how the business works.

21 Q: Okay. And how do you know that the business
22 works generally in the same way across all of
23 the third party sellers?

24 A: The services are optional services that these
25 sellers choose to engage with and the way they



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1 opt into it is the same for all sellers.

2 **MR. RAZI:** The Court's indulgence for just a moment.

3 **THE COURT:** To follow up on your answer so I can
4 understand, from what you're telling me is the
5 way you know it applies to all of them. Is the
6 BSA and the policies applied to all of them and
7 all of them follow those policies or am I
8 missing something when I said that?

9 **MR. WELDELE:** More so that the services are all
10 optional and the steps and the process that
11 described ---

12 **THE COURT:** Yeah.

13 **MR. WELDELE:** --- that sellers go through is the
14 same. So the seller is in control of every
15 step that I described.

16 **THE COURT:** So there's uniformity among BSA policies
17 and then what you provide on the website
18 pursuant to those criteria?

19 **MR. WELDELE:** In large part, yes. I think I
20 described to you earlier that there are some --
21 within the BSA there are some policies that are
22 sort of at the margins to make sure that a bad
23 actor can't provide a really bad customer
24 experience.

25 **THE COURT:** I wasn't going to ask you about that,



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1 but ---

2 **MR. WELDELE:** Yeah.

3 **THE COURT:** I get you're ---

4 **MR. WELDELE:** Okay.

5 **THE COURT:** --- make that point, but okay.

6 Q: And to be clear, you know, all the various
7 provisions of the BSA don't apply to each and
8 every transaction, right? Sometimes certain
9 things just don't happen and therefore a
10 particular provision is not implicated, is that
11 fair?

12 A: Yes.

13 Q: I think you referred to the detail page before
14 as an Amazon detail page?

15 A: Uh-huh.

16 Q: What did you mean by that?

17 A: I just meant it's the detail page where the
18 product information is rendered as when the
19 seller provides that, that's where they get
20 services.

21 Q: Just one more second. A couple more things on
22 the BSA while -- now that it's on my mind. We
23 talked about a number of provisions. I want to
24 direct your attention to S dash 2.1. And in
25 particular the paragraph -- the subparagraphs



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1 beginning with H as in Henry. Do you see where
2 this provision states that the seller will,
3 among other things, quote ensure that they are
4 the seller of each of their products?

5 A: Yes.

6 Q: And then it goes on to say that they will
7 include an order-specific packing slip and if
8 applicable any tax invoices with any shipment
9 of their products?

10 A: Yes.

11 Q: Right, and it goes on to say that they will
12 identify themselves as the seller of each of
13 their products?

14 A: Yes.

15 Q: Okay. And is this a requirement that every has
16 presented an issue during the course of your
17 career at Amazon?

18 A: No.

19 Q: Why not?

20 A: Forgive me, but this just seems like an obvious
21 -- if you're selling something this seems like
22 the obvious components of an e-commerce
23 transaction so you would want to provide this.

24 Q: What about the -- something called the A to Z
25 Guaranty, are you familiar with that?



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1 A: I am.

2 Q: Okay. And then just in general what is that?

3 A: It's sort of a backstop in the event, you know,
4 if a seller wasn't providing a great customer
5 experience and the customer and the seller
6 tried to work things out and fit the pattern of
7 behavior that is bad, to protect other sellers
8 in the marketplace we may backstop the
9 transaction and so it's designed for those
10 cases.

11 Q: I think you said and a -- well let me ask you
12 -- who sets the price of products sold by third
13 parties on Amazon.com?

14 A: The third party seller.

15 Q: Okay. I apologize. I'll come back to that.
16 On the A to Z Guaranty do you have an
17 understanding of how frequently if at all the
18 guaranty is implicated in third party sale
19 transaction on Amazon.com?

20 A: I don't have the exact number but infrequently.

21 Q: Okay. Do you have any ballpark sense of how
22 infrequently that is?

23 A: I guess anecdotally I've been a customer for
24 many years and I've never encountered it.

25 Q: Okay. Back to pricing. Third party sellers



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1 set their prices, right?

2 A: Yes.

3 Q: But are there any rules at all in the BSA or
4 elsewhere about the prices that can be charged?

5 A: Yes. I think specifically there's a policy
6 that suggests that the seller should provide
7 competitive price on Amazon. So, for example,
8 if they had a lower price on their own website
9 or a lower price on another marketplace it
10 would be to less competitive prices for Amazon
11 customers and so if a seller repeatedly chose
12 to price higher on Amazon that wouldn't be good
13 for Amazon customers or other sellers because
14 we -- it would look more expensive and so there
15 is that policy.

16 Q: Have you ever encountered a circumstance in
17 your entire career at Amazon in which that
18 pricing rule that you just identified has
19 impacted in any way a third party seller's
20 pricing?

21 A: I -- once or twice.

22 Q: Okay. And do you believe that it imposes a
23 significant restriction on a third party
24 seller's ability to price their product?

25 A: No.



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1 Q: Why not?

2 A: The main driver price on Amazon due to the fact
3 that there are many sellers selling upon most
4 of the items so if you look at the offer
5 listings page there's generally many, many
6 sellers competing on one dimension of the
7 competitions on the price of the item.

8 Q: Your Honor asked if there was -- I think the
9 term he used -- the Court used was uniformity
10 between the BSA and how things work in
11 practice, do you recall that?

12 A: I do.

13 Q: Okay. Is it fair to say that the BSA has a
14 number of provisions but in practice many of
15 the provisions are rarely if ever implicated?

16 A: I think that's right.

17 Q: Thank you, sir.

18 **MR. WELDELE - CROSS-EXAMINATION BY MR. ROBERTS:**

19 Q: Good afternoon, Mr. Weldele.

20 A: Afternoon.

21 Q: My name is John Roberts. I don't think we've
22 had the pleasure of meeting yet. I'm an
23 attorney, and I'm representing the Department
24 of Revenue in this case. I ought to be
25 relatively brief I think. All of the issues



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1 you've talked about and gone over extensively
2 already but just to be clear you work for
3 Amazon Fulfillment Services, correct?

4 A: Yes.

5 Q: All right. And if I refer to them as AFS do
6 you know who I'm referring to?

7 A: Sure

8 Q: Okay. Have you ever worked for Amazon
9 Services, LLC?

10 A: I may have. I don't recall with certainty.

11 Q: Okay. All right. You addressed this a little
12 on your direct, I'm just unclear. Amazon
13 Fulfillment Services, AFS, it doesn't have any
14 contractual relationship with the third
15 parties, correct?

16 A: I don't believe so.

17 Q: The contract is between Amazon Services, LLC
18 and the third party, is that correct?

19 A: I believe that's correct.

20 Q: All right. And then there's just a contract
21 between Amazon Services and Amazon or AFS that
22 would relate to transactions involving the
23 third parties, correct?

24 A: I would have to make an assumption, I don't
25 know.



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1 Q: Okay.

2 **MR. ROBERTS:** Let's take a look -- if you pull up
3 Exhibit 5 please? If you could zoom into that
4 top preamble paragraph? There we go.

5 **(Hearing Exhibit Number 5 was introduced into the**
6 **record at this time.)**

7 Q: All right. So this is a Wholesale Distribution
8 Sales and Fulfillment Services Agreement, is
9 that correct?

10 A: Yes. Yes.

11 Q: And the parties to the agreement are Amazon
12 Services, LLC and Amazon Fulfillment Services,
13 Inc., correct?

14 A: Yes.

15 Q: Have you ever seen this agreement before?

16 A: I can't say that I have seen this before.

17 Q: Do you know if there is any agreement between
18 Amazon Services, LLC and AFS that would mainly
19 related to third party transactions on the
20 Amazon.com website?

21 A: Given the nature of Amazon and the number of
22 entities, you have Whole Foods, my supposition
23 is that there are many different entities that
24 help perform the services so I assume that this
25 is explaining that structure, but I'm not



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1 intimately familiar.

2 Q: Okay. Amazon Services is the contracting party
3 under the BSA for Fulfillment by Amazon with
4 the third parties, correct?

5 A: I believe so.

6 Q: Okay. I guess I'm trying to be clear that
7 there has been an agreement since Amazon
8 Fulfillment -- my understanding is -- provides
9 some of those services. They run the
10 fulfillment centers. And I just want to make
11 sure -- is there a contractual agreement Amazon
12 Services, LLC with Amazon Fulfillment Services,
13 Inc. so that Fulfillment can provide those
14 services?

15 A: You'll to forgive me. What you describes
16 sounds logical. I just don't know with
17 certainty that that is how it is structured.

18 Q: Okay. All right. Speaking of the BSA, I mean,
19 is your understanding that Amazon Services
20 applies the terms and conditions of that BSA
21 consistently to all third parties?

22 A: I think it's fair to say that we're consistent
23 in our applications.

24 Q: Okay. And there's no selective enforcement of
25 any of those provisions?



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1 A: That I think I would debate. I think the
2 provisions are just designed as I sort of
3 described. If there's a behavior that is
4 repeated like late shipping where it's
5 providing a very poor customer experience, if
6 that behavior is conducted over a long period
7 of time the contract would be there to make
8 sure that we can enforce the customer
9 experience, but I don't think we would enforce
10 it on an instance. That's not the purpose of
11 it.

12 Q: Let's say all things being equal you have two
13 third parties and both are in breach of a
14 provision but one is a -- I guess has more
15 product transactions.

16 A: Uh-huh.

17 Q: You wouldn't say we're going to forgive the one
18 with the more product transactions but enforce
19 the provisions against the other one who has
20 less product transactions, would you?

21 A: Hard to say in a hypothetical like that. I
22 think that in percentage terms, you know, you
23 might look at if there was a very high
24 percentage of defects that may trigger
25 inspection of hey, is this providing a bad



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1 customer experience and you theoretically could
2 have that investigation on a lower conduction
3 volume seller but I think the intent of the way
4 the business operates is that we only enforce
5 if it's really an egregious poor customer
6 experience.

7 Q: When there's product at a fulfillment center
8 there are some restrictions placed on when that
9 third party can get that product back if they
10 want, correct?

11 A: If you mean subject to labor capacity -- our
12 ability to remove it? Yes.

13 MR. ROBERTS: Pull up Exhibit 88, please?

14 (Hearing Exhibit Number 88 was introduced into the
15 record at this time.)

16 Q: Have you ever seen this document before, Mr.
17 Weldele?

18 A: Yes.

19 Q: Are you familiar with this document?

20 A: I think it's part of the FBA -- or maybe the
21 policy page.

22 MR. ROBERTS: If we could zoom in to the top portion
23 please?

24 Q: Amazon charges a per item fee for removal,
25 correct?



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1 A: Correct.

2 Q: All right. And can sometimes according to this
3 document take up to 30 days for a third party
4 to receive their goods back, correct?

5 A: Correct.

6 Q: And then it also states fulfillable inventory
7 is available for purchase until we remove it,
8 correct?

9 A: I'm sorry, where are you on the page?

10 Q: If you say to about three lines up. It starts
11 with fulfillable.

12 A: Yep.

13 Q: And it says, fulfillable inventory is available
14 for purchase until we remove it? Who is the
15 we?

16 A: I think what this is describing is when we --
17 in this case I would assume it means Amazon
18 puts it on a vehicle to send back -- send the
19 seller back their inventory.

20 Q: So the we is Amazon?

21 A: I assume. It's poorly written in my opinion.
22 It should say when your inventory is removed.

23 **MR. ROBERTS:** Let's switch to Exhibit 3, please?
24 And let's go to page 34 of that document. Zoom
25 in on F 3.2, please.



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1 Q: Just to be clear, Mr. Weldele, this is the BSA
2 again.

3 A: Uh-huh.

4 Q: And Amazon may refuse to accept fulfillment
5 center -- their fulfillment center any items it
6 determines are unsellable, correct?

7 A: That's not what it says. It says unsuitable.

8 Q: Okay. Fair enough. So if Amazon determines if
9 an item -- and it describes it as unsuitable --
10 it can reject it, correct?

11 A: I think this is designed for things like if a
12 ---

13 Q: Can you just answer my question first, please?

14 A: If we cannot fulfill it, yes, we would not
15 allow it.

16 Q: If you cannot fulfill it? What does that mean?

17 A: If it's radioactive. If it's a house -- if
18 it's something that we don't have the
19 capabilities to fulfill.

20 **THE COURT:** If it's a house? Meaning somebody ships
21 you a house you're not going to store it,
22 right?

23 **MR. WELDELE:** There are a lot things that are
24 created on Amazon. We have a lot of
25 fulfillment capabilities but I don't think --



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1 I think we would fail on that front.

2 **THE COURT:** Okay. Has anybody ever sold a house on
3 Amazon?

4 **MR. WELDELE:** Good question. I think we have sold
5 cars but I don't know about a house.

6 **MR. ROBERTS:** If we could then go to page 42 of that
7 document? Zoom in on top there.

8 Q: Is this then the definition of an unsuitable
9 unit?

10 A: Yes.

11 Q: Paraphrase -- tell me if I'm paraphrasing or
12 not, but it says an unsuitable unit and if we
13 skip down to the it means a unit that Amazon
14 determines is unsellable or unfillable, is that
15 correct?

16 A: Unfulfillable, correct.

17 Q: Unfulfillable, that's correct. An unsuitable
18 unit is a unit that Amazon determines is
19 otherwise unsuitable, correct?

20 A: Yes.

21 Q: When orders are fulfilled in the FBA process
22 Amazon may ship a third party's products
23 together with products from another third
24 party, correct? In one box?

25 A: Yes.



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1 Q: Okay.

2 **MR. ROBERTS:** Okay, page 37. And zoom in on F-8.2,
3 please?

4 Q: And that first sentence there if you'd read
5 that please and tell me when you're done?

6 A: F, we will be ---

7 Q: F-8.2, yeah.

8 A: Yeah, okay. I've read it.

9 Q: And that relates to Fulfillment by Amazon
10 Services, correct?

11 A: I believe so, yes.

12 Q: And in those instances Amazon Services is
13 responsible for and has sole discretion
14 regarding all customer service issues relating
15 to packaging, handling and shipping and
16 customer returns, refund and adjustments
17 related to the products.

18 A: Yes. If we screw up the shipping we resolve
19 it.

20 Q: It doesn't say if we screw up the shipping we
21 are responsible, correct?

22 A: No, but as a practical matter that's what is
23 correct.

24 **MR. ROBERTS:** Exhibit 97, please?

25 **(Hearing Exhibit Number 97 was introduced into the**



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1 **record at this time.)**

2 Q: And you said you're familiar with the process
3 when a third party directly ships out the
4 product, right? Correct?

5 A: Yes.

6 Q: All right.

7 **MR. ROBERTS:** Zoom into the very top please. Scroll
8 down a little bit. And I apologize. Can you
9 go to page 2 of that document?

10 Q: All right. Yeah, zoom into the Fulfillment
11 Terms. And that first bullet point under
12 fulfillment says always ship your items within
13 two business days of order notification, this
14 is a requirement, correct?

15 A: It does say that, yes.

16 Q: And is that a requirement imposed by Amazon
17 Services?

18 A: What do you mean by imposed?

19 Q: Who set that requirement that a third party has
20 to ship within two business days?

21 A: Who -- we would have written this.

22 Q: Okay.

23 **THE COURT:** When it says to understand shipping
24 rights visit our shipping resources page does
25 that set parameters for how much they can



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1 charge for shipping or not? They being the
2 third party seller?

3 **MR. WELDELE:** The third party seller would set their
4 shipping rates in the -- there's a shipping
5 template where they could put the values in.

6 **MR. ROBERTS:** If I could have one second, Your
7 Honor. Can you get Exhibit 46, please?

8 **(Hearing Exhibit Number 46 was introduced into the**
9 **record at this time.)**

10 Q: Mr. Weldele, are you familiar with this
11 document?

12 A: Not super-familiar.

13 Q: Have you seen it before?

14 A: I don't know that I have.

15 Q: Let's go to the very first paragraph. It says,
16 when you ship an order you will receive a
17 standardized shipping credit, correct?

18 A: For individual selling accounts.

19 Q: Explain to me what a standardized shipping
20 credit is.

21 A: I think this is what I referred to earlier when
22 I -- with the like -- when there -- where there
23 are categories where there's a standard ship
24 method like books, music and DVD's where it's
25 an industry standard. It's a flat rate. I



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1 believe that's what this is.

2 Q: That's all I have at this time. Thank you.

3 **THE COURT:** All right.

4 **MR. RAZI:** Thank you.

5 **MR. WELDELE - REDIRECT EXAMINATION BY MR. RAZI:**

6 **MR. RAZI:** Can we keep up Exhibit 46, please? Okay.

7 Q: Do third party sellers include in addition to
8 businesses, individual people?

9 A: You could -- third party sellers consistent
10 individual people?

11 Q: No. Are some of the third party sellers are
12 not even companies, they're just people like
13 Ben Razi or Tobin Weldele?

14 A: Yes.

15 Q: Okay. This document that's been put in front
16 of you, Exhibit 46, does this relate to
17 companies that sell on Amazon.com or does this
18 relate to just individual people?

19 A: Individuals.

20 Q: Okay. And so we know that because at the top
21 there's a note right under the heading that
22 says, note: this help page does not apply to
23 the sellers with professional selling plan?

24 A: Yes, and there's a -- I also noted there's a
25 dedicated individual seller.



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1 Q: Okay. And tell the Court do you know if most
2 of the third party sold items on Amazon.com
3 sold by companies, that is businesses, or if
4 instead most of them are just sold by, you
5 know, people?

6 A: Most of them are by businesses or professional
7 sellers.

8 Q: Do you have a send of the ballpark percentage
9 of how many third party sellers ...

10 A: Business is a very high percentage. I don't
11 know the exact balance.

12 Q: Okay. And in fact ---

13 **THE COURT:** Well what is -- y'all keep using these
14 terms very high percentage.

15 **MR. WELDELE:** Yeah.

16 **THE COURT:** That's somewhat meaningless to me
17 because that's in the eye of the beholder. Can
18 you give me a little more evaluation?

19 **MR. WELDELE:** Going on memory -- and it's many years
20 since I've measured the difference ---

21 **THE COURT:** Well you've already impeached yourself
22 now.

23 **MR. WELDELE:** Yeah. It forced to give a number I
24 would say it's above 90 percent ---

25 **THE COURT:** Okay.



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1 **MR. WELDELE:** --- but I don't know.

2 **Q:** And that's above 90 percent?

3 **A:** Are professional.

4 **Q:** And let me just get the question straight so
5 it's clear on the record. Your believe -- your
6 testimony is that above 90 percent of the
7 products sold by third party sellers on
8 Amazon.com are sold by businesses and companies
9 not individuals, right?

10 **A:** Correct.

11 **Q:** And it's your belief that Exhibit 46 and any
12 other document that just pertains to individual
13 sellers doesn't pertain to those 90 percent of
14 sales on Amazon.com by third party sellers,
15 right?

16 **A:** Correct.

17 **Q:** Okay. In any case Exhibit 46, this doesn't --
18 this is actually about a credit that's given to
19 individual sellers, right?

20 **A:** Correct.

21 **Q:** Okay. Do you -- tell the Court what a credit
22 is in this context?

23 **A:** It is to offset the cost of shipping.

24 **Q:** Okay. In other words, this is money that --
25 this is actually incoming funds to a third



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1 party seller, right?

2 A: Correct.

3 Q: Okay. This isn't something that they're
4 charged, right?

5 A: No.

6 Q: Okay. And to be clear this relates just to
7 individuals and then it just relates to certain
8 media profits, right?

9 A: I believe so.

10 Q: Okay. And before I think we looked at a
11 provision of the BSA that had a acronym for
12 these kind of media products, do you remember
13 that?

14 A: BMVD I believe.

15 Q: Okay. Does Amazon Fulfillment Services, Amazon
16 Services or any other Amazon entity dictate
17 third party sellers' shipping rates?

18 A: I don't believe so.

19 **MR. RAZI:** Let's look at Exhibit 3 again. Paragraph
20 F dash 3.2.

21 **MR. BROOKS:** You said S-3.2?

22 **MR. RAZI:** No, F as in fulfillment.

23 Q: Here we are. Up at the top. There -- no
24 that's 3.4. 3.2. And we just had this up on
25 the other side of the room on the cross-



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1 examination. And this is the provision that
2 relates to third party sellers' ability to
3 deliver unsuitable units or a unit that created
4 a safety, health or liability risk to Amazon
5 and the like, right?

6 A: Correct.

7 Q: Okay. How often in your 14 years or so at
8 Amazon have you observed that the Section F
9 dash 3.2 of the BSA relating to unsuitable or
10 unsafe or health hazard units being sent to an
11 FC? How often has that been implicated?

12 A: Very rarely.

13 Q: And in what circumstances?

14 A: The only one that comes to mind is say a
15 hazardous material that is not supported. We
16 don't have the fulfillment capabilities for it.

17 Q: Okay. And do you consider these provisions of
18 paragraph F dash 3.2 to be a significant
19 restriction on the third party sellers' ability
20 to do their business? In other words, the rule
21 that they can't tell you something that's
22 unsafe or might propose a health risk or that
23 is otherwise unsuitable?

24 A: No. I think this is sort of a common sense you
25 shouldn't be selling those things to customers.



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1 Q: Okay. What about Exhibit 88? Does Amazon
2 Fulfillment Services make every effort to
3 remove inventory promptly when requested to do
4 so in your experience?

5 A: Yes.

6 Q: Okay. Well why is it that -- or why does the
7 document say that property can be sold until
8 removed?

9 A: Because it's the seller's inventory. They --
10 if they have a listing that is in front of
11 customers that they have kept on we keep it on
12 until they have removed the inventory.

13 Q: Okay. And do you consider any of these
14 provisions that you were shown by Mr. Roberts
15 on cross-examination, Exhibit 88, to impose any
16 meaningful restriction on third party sellers
17 ability to sell their own products?

18 A: No. This would be, I assume, very similar to
19 any third party logistics provider.

20 Q: Okay. And does -- as far as you know -- Amazon
21 Services in your experience or any other Amazon
22 entity aggressively enforce each and every
23 little misstep that a third party seller might
24 make under BSA?

25 A: No. I think if we did we wouldn't have very



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1 many sellers.

2 Q: Okay. How instead would you describe the --
3 there was a reference to selective enforcement.
4 How would you describe the approach of Amazon
5 Services and Amazon to the -- these rules in
6 the BSA?

7 A: Forgive me if I haven't said this before, but
8 I think it sets the boundaries for the margin
9 such that we can ensure a great marketplace for
10 all sellers and sort of ensure that the margins
11 that we provide customers.

12 Q: Is it fair to say that most of the provisions
13 you've been show today are barely if ever
14 implicated on third party sales?

15 A: I think that's accurate.

16 Q: Thanks.

17 **THE COURT:** Re-cross on new matter raised?

18 **MR. ROBERTS:** Nothing, Your Honor. Thank you.

19 **THE COURT:** You may step down. You need a break or
20 are you ready to go?

21 **MR. RAZI:** We are ready to go, but I would suggest a
22 break because we're going delve into some
23 deposition material that ---

24 **THE COURT:** Oh, fun.

25 **MR. RAZI:** --- would be useful to talk to my



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1 colleagues about.

2 **THE COURT:** Okay. So are we going to be putting
3 depositions up on the screen?

4 **MR. RAZI:** We are. First we're going to read some
5 and then we're going to put one on the screen.

6 **THE COURT:** Oh, okay.

7 **(Off the Record)**

8 **THE COURT:** I thought about it and to add to my
9 entertainment I would like y'all to upload the
10 depositions on an Apple product and have Siri
11 read it to me. Just kidding. You looked like
12 you thought I was serious. Just like your mind
13 was going okay.

14 **MR. RAZI:** That could be done.

15 **THE COURT:** Okay.

16 **MR. RAZI:** We're ready?

17 **MS. GEER:** Your Honor, we would like to call someone
18 to the stand to read the witness testimony?

19 **THE COURT:** Well that's how I used to do it.

20 **MS. GEER:** Okay. And we're going to start with
21 Ricky Taylor.

22 **THE COURT:** Okay. I was telling them my old trial
23 lawyer days that's what I always did.

24 **MS. GREER:** So for the record this is the -- taken
25 from the deposition of Ricky L. Taylor. It was



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1 taken in Columbia, South Carolina on October
2 17th at 1:00 p.m.

3 **THE COURT:** And I assume this is not Ricky Taylor?

4 **MS. GEER:** This is not Ricky Taylor.

5 **THE COURT:** Okay.

6 **MS. GEER:** So after Mr. Taylor was sworn in he
7 began.

8 **PUBLICATION OF THE DEPOSITION OF RICKY TAYLOR:**

9 **(Publication of deposition testimony.)**

10 Q: Mr. Taylor, you understand you're here
11 today for a deposition?

12 A: Yes.

13 Q: All right. And until recently you were
14 employed with the Department of Revenue?

15 A: Correct.

16 Q: From when to when?

17 A: February 17th, 1985 to the end of March
18 2018.

19 Q: And your last position you were -- I think
20 it was called an audit administrator?

21 A: Technically my last position was appeals
22 administrator. At the time this case was
23 created I was the audit administrator.
24 They decided to hire my replacement
25 knowing that my time frame was ending.



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1 They decided to hire my replacement and
2 then I was starting up in appeals section
3 that had not previously existed.

4 Q: Got it. During what time period were you
5 audit administrator.

6 A: Oh, gosh.

7 Q: You know, just roughly.

8 A: May 2006 to sometime about mid-2017.

9 Q: And is the audit administrator sort of the
10 top person in the audit department?

11 A: Yes.

12 Q: Was the agreement between Amazon Services
13 and third party sellers relevant in any
14 way to your analysis of who's responsible
15 for collecting sales tax on sales by third
16 parties on Amazon.com?

17 A: No, sir.

18 Q: And you said you didn't look at it in
19 detail?

20 A: Correct.

21 Q: Did you ever like read the whole document?

22 A: No, sir.

23 Q: I'm asking whether it's important to you
24 in your analysis of whether Amazon
25 Services, LLC owes sales tax on a



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1 particular transaction, whether Amazon
2 Services, LLC ever possessed the item that
3 was sold?

4 A: No, it's not.

5 Q: It's not important to the analysis?

6 A: No, sir.

7 Q: So ownership's not important? No?

8 A: No, sir.

9 Q: Possession is not important?

10 A: Not for me.

11 Q: Who lists the product that's not
12 important?

13 A: Not for me.

14 Q: Who sets the price of the item, is that
15 important or not?

16 A: Not for me.

17 Q: What is it again that is important for you
18 in determining who owes the tax?

19 A: Retailer is responsible for collecting of
20 the transactions for property they own or
21 property owned by others.

22 Q: Well they've got to actually sell the
23 property though, right?

24 A: It's the Department's position that Amazon
25 Services was the seller.



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1 Q: Okay. What's the basis of that position
2 as least as you understand it? I
3 understand you're not perhaps speaking for
4 the whole Department -- maybe you are --
5 but what's the basis for your
6 understanding?

7 A: The basis of my understanding and position
8 -- and I speak solely for me -- a buyer
9 went looking for a particular item on
10 Amazon.com but that it was properly owned
11 by Amazon.com, LLC or Amazon Services by
12 agreement with a third party that Amazon
13 Services would be as responsible as
14 Amazon.com, LLC for collecting and
15 remitting that tax.

16 Q: You would agree with me though that you
17 didn't have any longstanding practice as
18 of 2016 with respect to how to apply the
19 sales tax law to items sold by third
20 parties on Amazon.com?

21 A: I would agree with that because at that
22 time, again, I don't share ignorance. And
23 being completely uneducated about the
24 structure and even understanding that
25 Amazon website also carried items



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1 supposedly owned by third parties.

2 Q: As far as you know is it the Department's
3 position that similarly situated tax
4 payers should be treated in a similar
5 manner?

6 A: Yes, sir.

7 Q: For any particular transaction is it your
8 position that there can only be one seller
9 or one retailer for that transaction or
10 could multiple parties be the seller or
11 retailer?

12 A: I guess I'm only responding to this and my
13 position is there's one seller.

14 **(Publication of deposition testimony concluded.)**

15 **MS. GEER:** All right that's it for Mr. Taylor. All
16 right, we're going to do a role change. You're
17 now John McCormack. All right. This
18 deposition of John McCormack was taken in
19 Columbia, South Carolina on October 19th at
20 9:09 a.m.

21 **PUBLICATION OF THE DEPOSITION OF JOHN MCCORMACK:**

22 **(Publication of deposition testimony.)**

23 Q: Mr. McCormack, good morning.

24 A: Morning.

25 Q: Can you tell me where your current



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1 employment is?

2 A: At the South Carolina Department of
3 Revenue.

4 Q: And how long have you been there?

5 A: 38 maybe and a half years.

6 Q: All right. And can you walk me through
7 the positions that you've held during the
8 course of your employment at the
9 Department?

10 A: First started with the Department in 1980.
11 I was what was referred to as a licensed
12 tax agent. We handled things in the field
13 with respect to what we -- what some folks
14 call miscellaneous taxes. The old soft
15 drink tax, the emissions tax, cigarette
16 tax, tobacco taxes and various like taxes
17 like that. Then about a year and a half
18 after that -- a little over year and a
19 half -- I was promoted to a licensed tax
20 auditor and moved to Columbia. I was in
21 that position until approximately 1985,
22 probably late 1985. And that's when there
23 was a reorganization of the department
24 along function lines and I went to work
25 with what was know as the field service



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1 division, and what they had set up within
2 that division was an appeals section. I
3 stayed in the appeals section until
4 probably 1987 when I came into policy.
5 Policy has had various names over the
6 years but I work in policy and started off
7 as what I would -- not the official title
8 but what I would call is a tax analyst.
9 The -- and then I've been a manager within
10 policy. I was also the deputy director of
11 policy for a short time period. Then
12 there was a little bit more reorganization
13 at that time. And I've been the -- in
14 charge of policy since then. And then
15 probably since I'll be retiring soon I'll
16 be moving into more of an advisory role
17 the last couple of months.

18 Q: So you've been in the policy division
19 since 1987 so a little bit over 21 years?

20 A: 31.

21 Q: So do you understand, Mr. McCormack, that
22 you're here testifying on behalf of the
23 Department as a 30(b)(6) witness?

24 A: I understand that.

25 Q: Okay. And the topic that are referenced



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1 -- it might not be that page, it may be
2 the exhibit at the back of -- there you
3 go.

4 A: Okay. Yes.

5 Q: Do you understand of those I think 18
6 topics that are there that you are serving
7 as a 30(b)(6) witness for topics under 2
8 through 18?

9 A: I believe so, yes.

10 Q: Are you aware prior to the enactment of
11 that guidance of any other description of
12 marketplaces or definitions of
13 marketplaces in any authority?

14 A: Not of the -- that I can think of the term
15 marketplace on -- like I said, the Revenue
16 Ruling you referenced on remote sellers,
17 you know, does provide a definition there,
18 yes.

19 Q: And there's also been some legislation I
20 understand the Department has proposed to
21 the legislature that if adopted would
22 define a marketplace facilitator. Are you
23 aware of the term every having arisen in
24 any other authority that the Department's
25 promulgated in the past?



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1 A: Prior to the suggested legislation that
2 you're talking about? Nothing. Nothing
3 that I can think of.

4 Q: The proposed notice of adjustment that was
5 issued to Amazon in this case also makes
6 reference to transactions in Amazon's
7 marketplace as virtual consignments. Are
8 you aware of that term ever having arising
9 before in anything the Department has
10 promulgated or issues?

11 A: Not that term, no.

12 Q: Under South Carolina law is the sales tax
13 remittance obligation imposed only on the
14 party selling the property? Yes or no?

15 A: You have to be a -- you have to sell the
16 property. But again like I mentioned you
17 have the efficient administration section
18 that, you know, we can essentially move a
19 retail sale back to the wholesale
20 provision if necessary.

21 Q: But the Department hasn't taken that
22 position in this case?

23 A: Not that I'm aware of.

24 Q: Is it the Department's position that
25 similarly situated tax payers should be



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1 taxed in a similar manner.

2 A: If a -- if someone's operating a
3 marketplace that's doing similar things as
4 Amazon then they should be treated exactly
5 the same, yes.

6 Q: Thank you.

7 **(Publication of deposition testimony concluded.)**

8 **MS. GEER:** That concludes the two depositions. Does
9 that Court need her copy since we read it all
10 into the record? Okay.

11 **THE COURT:** That wasn't painful.

12 **MR. RAZI:** At this time, Your Honor, we would call
13 by video deposition the Director of the
14 Department of Revenue, Hartley Powell.

15 **MR. GREEN:** And, Your Honor, we object to most of
16 those deposition designations. I mean, it's to
17 the Court how the Court will handle that
18 objection. Obviously because of the deposition
19 I do know what he's going to say so I feel like
20 I need to lodge it at this point in time but I
21 also know -- I understand what the Court's
22 suggesting about in limine and the nature of
23 that as well.

24 **THE COURT:** Well I think given the nature of the
25 deposition we probably need to address the



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1 issues now at least for the record. I mean,
2 we could just stop at any time and get that but
3 then you've got to find a way to skip to the
4 next section.

5 **MR. GREEN:** And frankly most of the deposition
6 pertains to the legislation and it's two huge
7 segments. They're two minor parts that we
8 really don't object to but the major amount of
9 the designations we think pertain to the
10 proposed legislation and we think is
11 objectionable.

12 **THE COURT:** Can I just go ahead and looking at your
13 motion in limine can I ahead and just tell you
14 looking at it how I perceive it and then let's
15 just go down the path from there because I'm
16 looking at -- I'm going through your motion in
17 limine regarding the issue -- let's see --
18 yeah, I've already looked through all or most
19 of this issue. You gave four categories of why
20 the admissions are relevant because before I
21 could even get to the rules of hearsay I first
22 have to get past the rules of evidence -- of
23 relevancy. The first thing I would start with
24 is that I do not believe that there is a long-
25 standing administrative interpretation in this



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1 case. Therefore, if that is my viewpoint then
2 anything that is offered for that purpose or to
3 impeach that purpose is not necessary. So if
4 -- and that takes me to if there isn't a need
5 to look at long-standing administrative
6 interpretation then your offering to reflect
7 the Department's interpretation of the tax act,
8 which I have allowed that -- I've allowed in
9 the past the Department to explain its
10 interpretation but I've always limited it --
11 unless y'all were going to correct me because
12 you said there was a previous case, right? But
13 I believe I've always limited it to only for
14 the purpose of what the Department did. It
15 doesn't -- I can tell you anything -- their
16 interpretation is not pertinent for my
17 decision. The Court makes the decision about
18 whether the interpretation of statutes and as
19 a matter of fact the Court makes the
20 interpretation -- or the decision about whether
21 there's ambiguity and move to the
22 interpretation of the statute. So I don't
23 perceive the Department's interpretation of the
24 tax act to be significant unless you're trying
25 to tell me -- show me a background why they did



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1 what they did but it's not going to affect my
2 interpretation of the statute. So then we move
3 on to the third rule which answers a central
4 question by confirming that third party
5 sellers, not Amazon Services, are sellers of
6 their products and thus hold the resulting
7 sales and use tax. Again, that is a -- to the
8 extent that that's a statutory interpretation I
9 don't need someone else telling me that. And
10 then the fourth one I've already answered
11 about the ambiguity. So I tell you that -- so
12 I don't perceive the need -- and I've read all
13 the -- did y'all have it in bullet points or I
14 had it converted into bullet points on that ---

15 **MR. AKINS:** You had it converted into bullet points.

16 **THE COURT:** Huh? Who said that?

17 **MR. AKINS:** I think you may have converted them to
18 bullet points.

19 **THE COURT:** Oh, okay, well I did.

20 **MR. AKINS:** Oh, yeah.

21 **THE COURT:** Well I had the admissions by the
22 Department that Amazon seeks to admit are as
23 follows and I just put ---

24 **MR. AKINS:** Those are bullet points, yeah.

25 **THE COURT:** Okay, well I ---



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1 **MR. AKINS:** Yeah.

2 **THE COURT:** All right. So I've gone through those.

3 So with that said let me hear you.

4 **MR. AKINS:** Sure. So starting with the first point
5 of relevancy reflecting the current historical
6 practice of the Department we do think that the
7 statements that have been offered by the
8 Department's Director and other are reflective
9 on why they've done what they've done.

10 **THE COURT:** Okay.

11 **MR. AKINS:** The Department says -- it relates to the
12 posed nature of the legislation and it being
13 prospective in nature and also how they would
14 be able to find something retroactively here.
15 And so there's a question in this particular
16 case.

17 **THE COURT:** Now what would they -- they aren't even
18 retroactive that I perceived was it and
19 efficient administration which I thought that
20 one was questionable about whether they could
21 retroactively apply that. I wanted to ---

22 **MR. AKINS:** Uh-huh.

23 **THE COURT:** --- to delve into that that they will
24 close that issue so -- but moving forward with
25 something that was different but it -- so we're



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1 not there now because that's been kiboshed so
2 ...

3 **MR. AKINS:** Well there's one other ruling to suggest
4 which is there was an October 23rd hearing in
5 front of the legislature in which Director
6 Powell in discussing the legislation that the
7 Department was recommending said that the
8 legislation would apply prospectively to all
9 tax payers except that for Amazon Services
10 there would be retroactive application of a tax
11 in light of this litigation. And so trying to
12 divine why it is that they are retroactively
13 seeking to impose a tax on Amazon Services and
14 it goes to explain why the Department's doing
15 what it's doing in that statement.

16 **THE COURT:** So your seeking to impeach the
17 Department's motives in bringing this case?

18 **MR. AKINS:** Not impeach their motives.

19 **THE COURT:** Well then ---

20 **MR. AKINS:** Absolutely not.

21 **THE COURT:** --- well then what's the purpose?

22 **MR. AKINS:** Sure. So in a couple -- of both in Mr.
23 McCormack's and Mr. Taylor's deposition
24 designations both testified that similarly
25 situated tax payers have to be treated in a



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1 similar manner. And what the Department
2 Director's statement ---

3 **THE COURT:** And that's a matter of law. See I don't
4 ---

5 **MR. AKINS:** Absolutely.

6 **THE COURT:** --- I don't need to get in to how --
7 even if the Department came in here and I've
8 got cases that up on appeal and I got upheld on
9 that. If a -- I don't care what the Department
10 does. If they don't treat similarly situated
11 taxpayers similarly ---

12 **MR. AKINS:** Uh-huh.

13 **THE COURT:** --- then that's just a matter of law and
14 I wouldn't -- so the only ---

15 **MR. AKINS:** And ---

16 **THE COURT:** --- so I -- the only other purpose I
17 could think to offer that would be to impeach
18 their motives.

19 **MR. AKINS:** The statement proves that in fact they
20 are doing precisely that. In other words,
21 seeking to impose retroactively a tax on Amazon
22 Services. That they are not seeking to impose,
23 not treat current law as it stands now against
24 any other market, online marketplaces. The
25 Director's statement says they will be taxed



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1 prospectively whereas Amazon Services in light
2 of the litigation ---

3 **THE COURT:** That's the legislation? Not -- I'm
4 asking. This is a ---

5 **MR. AKINS:** Yeah, he's explaining the proposed
6 legislation and he's asked by a Senator. That
7 marketplace facilitator legislation, that would
8 be prospective, right? And Director Powell
9 says, yes, absolutely it would only be
10 prospective but these online marketplaces would
11 be subject to a tax. However, the existing
12 litigation against that one company -- and he
13 doesn't say Amazon Services name except
14 somebody in the background say Amazon Services
15 I think ---

16 **THE COURT:** Yeah.

17 **MR. AKINS:** --- it would apply retroactively in
18 light of the litigation ---

19 **THE COURT:** Oh, in light of the litigation.

20 **MR. AKINS:** --- to Amazon Services. So it's a
21 recognition that current law doesn't actually
22 support the Department's case and that they're
23 intending to subject Amazon Services
24 retroactively to a tax that would only be
25 imposed by the proposed legislation. So it's



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1 explaining why they're doing what they're
2 doing.

3 **THE COURT:** And what again is the purpose for that?

4 **MR. AKINS:** Well you yourself said that if the
5 Department was trying to apply a law against
6 one tax payer and not against similarly
7 situated taxpayers they're trying to apply the
8 current law only against Amazon Services ---

9 **THE COURT:** That would be -- that would be a
10 Constitutional violation of which I would not
11 support.

12 **MR. AKINS:** And we think that the Director's
13 statement proves that they are in fact doing
14 that and it's therefore relevant.

15 **THE COURT:** I may listen to that. I'll hear what
16 you've got to say. I don't think it -- I'm
17 listening to the words and I don't think that's
18 the case because he's talking about legislation
19 and he's talking about the practicality of it
20 and then we're going to have to move to whether
21 it's an admission of a party upon it or what
22 other pool of hearsay that you're going to get
23 that under so let's move to that. Under what
24 -- what is it that allows that to come in?

25 **MR. AKINS:** So it is a party admission.



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1 **THE COURT:** Okay.

2 **MR. AKINS:** It is a statement against interest by
3 the Director of the Department of Revenue while
4 he was under oath testifying in front of the
5 legislature.

6 **THE COURT:** It is an admission against interest in
7 what way?

8 **MR. AKINS:** If the Department has articulated that
9 they are engaging in what would be an
10 unconstitutional violation of Amazon Services'
11 rights that's a statement against interest.

12 **THE COURT:** Okay. Let's move on. And I may
13 consider that one. Move on to the next.

14 **MR. AKINS:** The next statement?

15 **THE COURT:** Yeah.

16 **MR. AKINS:** All right.

17 **THE COURT:** Even about -- I may hear that. I don't
18 know what probative it carries because I would
19 decide the case based on the case before me and
20 I -- you would have to show me where there have
21 been similarly situated taxpayers that would --
22 that have not been treated the same in the
23 past. Now you're seeking a prospective
24 application of that and I don't -- I'm not so
25 sure about probative value of that but let's



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1 just move on.

2 **MR. AKINS:** All right. So if you are reading
3 through the bullet points ---

4 **THE COURT:** Yes.

5 **MR. AKINS:** --- that we've submitted the very first
6 statement that was made in fact repeatedly is
7 that there is no law related to taxation of
8 sale on online marketplaces.

9 **THE COURT:** I think we could all agree on that can
10 we not? There is no specific law dealing with
11 online marketplaces.

12 **MR. AKINS:** I think you're absolutely right. We can
13 all agree on that and I think that the
14 Department's witnesses have all agreed to that
15 as well in their depositions. However, the
16 statement that there is no law related to the
17 taxation of third party sales when taken in the
18 context of what follows that statement, which
19 is an extensive alteration of the tax act to
20 include marketplace facilitators, and the
21 definition of a retailer or a seller suggests
22 that the law needs to be changed in order to
23 bring in marketplace facilitators into the
24 definition of a retailer and seller and
25 therefore those parties that are subject to



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1 taxation under the tax act.

2 **THE COURT:** All right. At this point in time can I
3 hear your response to that?

4 **MR. GREEN:** We -- in general what he's saying or
5 that one in particular?

6 **THE COURT:** That one -- well, I'll tell you what,
7 let's just take the first two.

8 **MR. GREEN:** And are you working down the bullet
9 points?

10 **THE COURT:** Yes, sir.

11 **MR. GREEN:** My response to all of those is his
12 explanations indicate -- every explanation he
13 gave you talked about the proposed legislation.
14 Director Powell was talking about the proposed
15 legislation. Strictly speaking that's right.
16 There isn't any current legislation or whatever
17 about online marketplace. The statute doesn't
18 say that. He's talking to legislators. What
19 they're interested in. Having dealt with --
20 they want to know whether -- what's like that
21 on the books. That's strict language. Are
22 they amending language that says the same thing
23 and moving it around. That's what he's talking
24 about. He is -- and the retroactive -- again
25 comes in -- I don't remember the exact context



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1 -- it comes in the nature of explaining that
2 the legislation and what they're looking for
3 and they're talking about all kinds of online
4 marketplaces not just Amazon. His point is
5 that Amazon tends to be -- our argument is
6 they're covered under the law as the Department
7 is advancing in this litigation. Again it all
8 relates to proposed legislation. They're
9 trying to create to me almost a reverse
10 legislative history for a statute that's not
11 yet been enacted and then have that apply here.
12 That doesn't clean up a record. It doesn't
13 help a record. It doesn't help determine
14 what's going on in this case under the current
15 statute and as it is written today.

16 **THE COURT:** How long is this -- will this be and
17 we'll listen to it?

18 **MR. AKINS:** It may be helpful. It's only 22 minutes
19 and then it would be helpful to make a
20 decision.

21 **THE COURT:** I think I'll listen to it. All right.

22 **MR. AKINS:** If I could offer just one response.

23 **THE COURT:** Honestly, I don't think it's got a whole
24 lot of on probative value but I ---

25 **MR. AKINS:** Yeah.



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1 **THE COURT:** --- if y'all want to spend your time
2 doing that.

3 **MR. AKINS:** And if I can just respond really quickly
4 to Mr. Green's point which I think is important
5 because the Court's raised the CFRE case which
6 is the case that says unenacted legislation
7 cannot be used to divine the intent of a prior
8 legislative body with respect to current law.
9 That case is distinguishable insofar as we're
10 not suggesting that the Court should look at
11 the legislation that hasn't yet been enacted
12 and then try to divine what current law means.
13 The Director's statements relate to current law
14 or imply exactly what current law is or isn't.
15 And not only that, but we're not suggesting
16 that the case should say the law ---

17 **THE COURT:** Could the Director -- number one's
18 testifying -- someone could come in and testify
19 this is why the Department did what it did.
20 I'm going to allow the Director to come in and
21 tell me this is how you should interpret the
22 law as testimony. So -- but you're just trying
23 to backdoor that in -- it appears to me right
24 now you're trying to backdoor that in that this
25 is how he interprets the law and I should hold



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1 it against him for interpreting the law
2 incorrectly. And I don't hold it one way or
3 the other. I -- this is -- I feel like the
4 legislature put me here to decide what the law
5 is and if I make a mistake they put the Supreme
6 Court up there to correct me when I'm wrong.

7 **MR. AKINS:** And if you watch the 22 minute video we
8 think it'll make it clear that ---

9 **THE COURT:** Okay.

10 **MR. AKINS:** --- what he's really referring to ---

11 **THE COURT:** I want to watch it. And then we'll --
12 if you want to make arguments afterwards. And
13 I can decide whether it's admission afterwards
14 but. So away we go.

15 **(The video was played.)**

16 **THE COURT:** Can you stop it right now? Could you
17 pick it right up where you left off?

18 **MR. AKINS:** Yes, sir.

19 **THE COURT:** Okay. So this is a report prepared by
20 legislative oversight that you were
21 referencing?

22 **MR. AKINS:** Actually it's not. It's a report that
23 was prepared by the Department of Revenue

24 **THE COURT:** Okay. I wanted to be clear.

25 **MR. AKINS:** --- and if you continue watching the



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1 Director ---

2 **THE COURT:** When he said prepared by them ---

3 **MR. AKINS:** He amends his statement later.

4 **THE COURT:** Oh, okay.

5 **(The video was played.)**

6 **THE COURT:** That's it?

7 **MR. AKINS:** That's it because the video of the
8 deposition ---

9 **THE COURT:** Okay.

10 **MR. AKINS:** --- they're other exhibits and videos as
11 well that we've identified as material to be
12 admitted that the Department ---

13 **THE COURT:** Got it.

14 **MR. AKINS:** --- obviously reserved an objection on.
15 And our intent was to run this video as it
16 highlights a lot of the documents that would
17 come in. There's another short snippet of a
18 document where he -- or video-- where he
19 discusses the actual retroactive issue that we
20 could play. It's maybe, I don't know, 30
21 second to a minute really, if that.

22 **THE COURT:** This what I just saw -- what do you want
23 from me? I mean, it your ---

24 **MR. AKINS:** So, if ---

25 **THE COURT:** You keep saying, okay, the summary of



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1 the document is that there's no law on it. And
2 that's his comment and like I said it's my job
3 to determine the law.

4 **MR. AKINS:** Absolutely.

5 **THE COURT:** So what -- but -- so what do I get out
6 of it?

7 **MR. AKINS:** What you get out of it is that the
8 Department of Revenue which is tasked with
9 enforcing the tax act has reached the
10 conclusion based on numerous statements and
11 sworn testimony over and over that new
12 legislation is needed to ensure that Amazon
13 Services was responsible for collecting a tax
14 and that without it only some third party
15 sellers are responsible for collecting the tax.
16 That under current law -- not the future law --
17 but under current law the Department of Revenue
18 does not have the ability to tax Amazon
19 Services for third party transactions on online
20 marketplaces. And if the Department of
21 Revenue, the administrative agency tasked with
22 enforcing the tax act reaches that conclusion
23 then there must be some inherent ambiguity or
24 latent ambiguity in the statute.

25 **THE COURT:** I could mention there must be -- the tax



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1 law is not clear. I can see that. I guess
2 we're going to have to interpret one way or the
3 other and y'all are going to make very good
4 arguments about that interpretation and I
5 assume -- no, well I keep thinking they brought
6 their best argument so I would hope they would
7 make good interpretations about what's left,
8 but ---

9 **MR. AKINS:** I hear what you're saying.

10 **THE COURT:** --- but ---

11 **MR. AKINS:** To the extent the law is not clear the
12 Alltel case clearly indicates that it has to be
13 construed in Amazon Services' favor.

14 **THE COURT:** Yeah. We can talk about that later on.
15 That area of the law is interesting and I'd
16 like to hear your arguments on that. Because
17 it says substantial ambiguity. Not ambiguity
18 but substantial ambiguity throughout the case
19 law. What's a substantial ambiguity?

20 **MR. AKINS:** A substantial ambiguity would be the
21 Department of Revenue -- the agency tasked with
22 enforcing the statute -- saying that ---

23 **THE COURT:** No, y'all are going to have the burden
24 of showing the substantial ambiguity not the
25 Department.



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1 **MR. AKINS:** Sure. But's it's evidence of that
2 substantial ambiguity ---

3 **THE COURT:** Oh, okay.

4 **MR. AKINS:** --- that they've reached the conclusion
5 that only third party sellers are responsible
6 for the tax.

7 **THE COURT:** Now, there ---

8 **MR. AKINS:** Under current law.

9 **THE COURT:** I can consider that maybe. I have to
10 think about that. I mean, the Director is
11 simply -- there are many Directors. That's his
12 interpretation and obviously it must have been
13 -- the Department of Revenue is advancing
14 another interpretation here so -- and that's
15 not ---

16 **MR. AKINS:** It -- and that's why it's an admission.

17 **THE COURT:** Yeah.

18 **MR. AKINS:** It's a statement against interest.
19 That's precisely the point. That the
20 Department is in this litigation advancing an
21 argument that is absolutely contrary --
22 contradictory to the position they've taken in
23 this case in these other statements.

24 **THE COURT:** And where I think I agree with you to
25 the many aspects of that that can be construed



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1 to be contradictory, but where I keep
2 struggling with you on is so what? Because
3 ultimately I've got to decide it. They can take
4 -- it's no unusual -- I've been practicing in
5 this area a long time and I am not shocked in
6 the least that the Department comes in and
7 presents -- or that you're able to come in and
8 present -- a position that a department has
9 taken different view points because that just
10 happens.

11 **MR. AKINS:** Yeah, I know that. So if -- two points
12 ---

13 **THE COURT:** Okay. Y'all -- if y'all need to talk I
14 won't ...

15 **MR. AKINS:** Oh, no we're good. Let's put it this --
16 I'll offer two points. The first one is if
17 Amazon, for example, in its 10K statement had
18 inserted a statement that Amazon Services was
19 responsible for the collection and remittance
20 of these taxes and not the third party sellers,
21 Mr. Green's short opening statement would have
22 been very different.

23 **THE COURT:** Yeah.

24 **MR. AKINS:** The very first thing he would have said
25 was, Your Honor, look at the 10K statement.



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1 They admit that they owe the tax. This is just
2 different. It's the Department admitting that
3 under current law Amazon Services doesn't owe
4 the tax and it's the third party sellers that
5 do and that would be admissible.

6 **THE COURT:** Probably would be ---

7 **MR. AKINS:** Now the second ---

8 **THE COURT:** --- it'd be admissible but you could
9 come in and argue that that was a 10K statement
10 but it doesn't change the law. And so I'm in
11 the same position.

12 **MR. AKINS:** And we're not suggesting that it does
13 change the law.

14 **THE COURT:** Okay.

15 **MR. AKINS:** The law just is what it is.

16 **THE COURT:** Yeah.

17 **MR. AKINS:** But it's their interpretation of the law
18 and that is admissible and the Kennedy versus
19 South Carolina Retirement case that was in the
20 appellate court handles this exact issue, by
21 the way. Precisely on point. It says that the
22 Director's statements cannot be admissible to
23 interpret what the legislative intent ---

24 **THE COURT:** Yeah, I read that case.

25 **MR. AKINS:** --- but they are admissible with respect



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1 to the Agency's intent of its law.

2 **THE COURT:** Okay.

3 **MR. AKINS:** I was going to say the second point that
4 I was going to raise -- there's another case
5 that they've actually cited that's also very on
6 point. They cite the -- well they cite Justice
7 Thomas actually in a concurring opinion in Bank
8 of America versus ---

9 **THE COURT:** Are we talking Paul Thomas or Clarence
10 Thomas?

11 **MR. AKINS:** I believe we're talking Clarence Thomas.
12 It's a U.S. Supreme Court.

13 **THE COURT:** That would be Clarence, yeah.

14 **MR. AKINS:** Okay. And he says ---

15 **THE COURT:** Paul is here.

16 **MR. AKINS:** --- he says a mere disagreement among
17 litigants over the meaning of a statute does
18 not prove ambiguity. And I think that that's
19 what you were referring to there. That it's
20 not surprising that there's a disagreement
21 between the two parties here.

22 **THE COURT:** Well I thought ---

23 **MR. AKINS:** There's not this much disagreement of
24 either statement.

25 **THE COURT:** I don't want to cut you off.



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1 **MR. AKINS:** Sure.

2 **THE COURT:** I -- what I was saying is I've been
3 practicing in this area long enough as a judge
4 that it's not shocking to me that you come in
5 here and say the Department's got one
6 interpretation one day and another
7 interpretation the next. I've had to try to
8 come and argue agency deference against a -- I
9 remember I had one case where they had an
10 individual -- it was OCRN that had been
11 practicing in that or working in that area of
12 20-something years and somebody comes in that's
13 been working in there for three months and
14 wanted deference for their interpretation. I
15 mean, I've seen many of this and so what I'm
16 getting at is the probative value of it just
17 kind of washes off me a little bit because I've
18 seen enough of it to ignore the Department even
19 taking the position. I just follow the law.

20 **MR. AKINS:** Sure. And I guess the point is to the
21 extent that you're seeing a little bit of
22 relevancy, ---

23 **THE COURT:** Yeah.

24 **MR. AKINS:** --- right? That it needs to be in the
25 record for us to be able to ---



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1 **THE COURT:** For what it's worth -- okay, but ...

2 **MR. GREEN:** My only response to that -- I think that
3 we've made our argument clear and I think that
4 the Court understands it. It's clear he's
5 talking through this entire process about
6 proposed legislation. Moreover he's talking
7 about proposed legislation that applies to more
8 than just Amazon.

9 **THE COURT:** I'm going to cut you off a little bit on
10 there. Because he is talking about proposed
11 legislation, but -- and if it was on -- they
12 didn't -- they haven't highlighted the
13 legislation to their credit because I don't buy
14 the legislative aspect of it. But they've
15 highlighted his viewpoint concerning the law as
16 it exists now. So let's ignore the -- it was
17 made in the context of proposed legislation but
18 it was comments about the laws that exist now,
19 am I not right on that?

20 **MR. AKINS:** Absolutely. And we would ask you not to
21 look at a lot of the aspects of the legislation
22 itself.

23 **THE COURT:** Yeah.

24 **MR. GREEN:** Let me just make one more point. But it
25 is in the context of proposed legislation that



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1 talks about entities other than Amazon and I
2 think that's an important point. He's not
3 talking about the litigation really. He's not
4 talking -- he's just talking about the proposed
5 legislation to legislator. That's our argument
6 against allowing it into the record.

7 **THE COURT:** I mean, if you make an admission
8 regarding something while talking about another
9 subject it doesn't matter what subject you're
10 talking about. It matters what the admission
11 is.

12 **MR. GREEN:** Okay.

13 **THE COURT:** Contextually. The admission is
14 admission. You could be speaking to a prayer
15 group on religion and made an admission about
16 what you've done as a pastor and you will
17 equally go to jail even though it was made in
18 a religious context.

19 **MR. GREEN:** Understood, Your Honor, but in context
20 he is talking about proposed legislation and so
21 it tends to take that as an admission out of
22 context and therefore really make it not an
23 admission about anything to do with the current
24 statute or the -- or the current statute or the
25 litigation.



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1 **THE COURT:** I think I can discern all that.

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

3 **THE COURT:** I'm going to let it in.

4 **MR. AKINS:** On that same grounds I'm assuming the
5 other documents that we've stipulated with
6 respect to authenticity and everything else
7 about would come in as well?

8 **MR. GREEN:** Hang on a second. I think that's right.
9 Hang on a second. Yes.

10 **MR. AKINS:** Okay.

11 **MR. GREEN:** Subject to our objection, of course, the
12 running objection to the record to the
13 admissibility of this type of evidence. I
14 otherwise agree to the admission of those
15 documents?

16 **MR. AKINS:** Okay.

17 **MR. GREEN:** Does that make sense?

18 **THE COURT:** It make sense to me.

19 **MR. GREEN:** I want to maintain my objection for the
20 appellate record.

21 **MR. AKINS:** Understood.

22 **MR. GREEN:** But otherwise I -- that is consistent
23 with the terms that we discussed before. I'm
24 not objecting to the foundation or any of that
25 kind of stuff.



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1 **MR. AKINS:** Sure. Okay. And I believe those are
2 Exhibits 191 through 210.

3 **THE COURT:** So that I will be clear on my ruling I'm
4 letting in for the purposes of reflecting the
5 Department's taking a disparate position
6 concerning the law -- the current law.

7 **MR. AKINS:** Uh-huh. Understood.

8 **THE COURT:** All right.

9 **MR. GREEN:** Yes, sir.

10 **MR. RAZI:** We have two more short ---

11 **THE COURT:** I was starting to wonder if your seat
12 was uncomfortable or you are ready to move on.

13 **MR. RAZI:** No, I'm trying to find ---

14 **THE COURT:** Well I've been told my hand is gone up.
15 All right. So I can be clear now on the
16 numbers, it's 192 to ---

17 **MR. RAZI:** I don't have the Exhibit list in front of
18 me.

19 **MR. GREEN:** Actually, I'm not sure I have a complete
20 one. It is 192 to 209 I think. The last one
21 that he made.

22 **THE COURT:** All right. So 192 to 209 are admitted
23 under the caveat of relevancy that I have
24 enunciated subject to the object that you have
25 entered.



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1 (Hearing Exhibit Numbers 192 through 209 were
2 admitted into the record.)

3 MR. GREEN: Thank you, Your Honor.

4 THE COURT: Good?

5 MR. RAZI: Understood.

6 THE COURT: All right.

7 MR. RAZI: Your Honor, we have two more short
8 admissions to present to the Court. If we
9 could have a five minute break we'll do it,
10 it'll take five minutes.

11 THE COURT: Especially if it's going to cut back on
12 the time.

13 MR. RAZI: Exactly. We're paring it back.

14 THE COURT: Okay.

15 (Off the Record)

16 THE COURT: We have another one?

17 MR. RAZI: We do, Your Honor, and these two are just
18 seconds long.

19 THE COURT: Well, good.

20 MR. RAZI: And the first is -- we'll do the
21 PowerPoint slides first if we can. And what
22 we've done is prepared an excerpt from
23 testimony that the full transcript's in the
24 record from the October 23rd, 2018 Senate Joint
25 Finance and Education Study Committee and



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1 that's Exhibit 194 and the exchange is there on
2 the Court and what we -- what happened at the
3 hearing with Senator Talley -- he asked when we
4 talk about that marketplace legislation that
5 would only be prospective though, right? And
6 the Director answered, absolutely. It would
7 not be retroactive. We're losing money now.
8 But the lawsuit, that's going to bring up some
9 retroactivity. And then Senator Talley said,
10 right. Specific to -- and Director Powell said
11 specific to that one company. I haven't said
12 their name. So that's an excerpt from Exhibit
13 194 and what we'd like to do before we close
14 our case is just put a new hearing exhibit
15 number on that excerpt and mark that and get
16 that into the record. And then we've got
17 another clip from Exhibit 194 that's about 15
18 seconds that we want to play for the Court.
19 And this again October 23rd, just a few months
20 ago, about this issue.

21 **(The video was played.)**

22 **MR. RAZI:** And for the record those were at 6:02 to
23 6:15 and 8:40 to 8:50 were the time stamps on
24 Director Powell's testimony on October 23rd,
25 2018 before the Joint Education and Finance



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1 Study Committee.

2 **MR. AKINS:** Your Honor, before we call our next
3 witness who is Erik Doerring, he's expected to
4 provide expert testimony related to the absence
5 of a long-standing practice or policy of the
6 Department related to the positions that have
7 been taken by the Department in this case, we
8 understood your statements to be that you're of
9 the view that there is no long-standing
10 practice and policy that they've had with
11 respect to these transactions. If the
12 Department is willing to agree and concede that
13 they're not entitled to deference with respect
14 to their interpretation of the statute based on
15 ---

16 **THE COURT:** They don't even have to concede that.
17 All they have to do is tell me that they're not
18 seeking their ---

19 **MR. AKINS:** If they are willing to make that
20 statement then we don't need to call Mr.
21 Doerring.

22 **THE COURT:** Y'all decide that.

23 **MR. GREEN:** Can we have a few minutes to confer
24 about that?

25 **THE COURT:** You can cogitate.



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1 **MR. GREEN:** Let me talk to Mr. -- to my client.

2 **THE COURT:** Okay. Y'all want to just step out.

3 **MR. GREEN:** May we?

4 **(Off the Record)**

5 **MR. GREEN:** Your Honor, we -- I'm not sure the
6 breadth of the narrowness of what they're
7 seeking in a long-standing precedent we're
8 talking about. If we're talking about long-
9 standing precedent with respect to online
10 marketplace facilitators as they describe
11 themselves the Department agrees there is no
12 long-standing precedent in that regard. If
13 we're talking about there's no long-standing
14 precedent with respect to the application of
15 the statute to one party selling goods owned by
16 or possessed by another there would be at least
17 arguably some long-standing ---

18 **THE COURT:** All right.

19 **MR. GREEN:** --- precedent in that regard.

20 **THE COURT:** I was talking about the narrowness of
21 this case I think and I -- at least I perceived
22 that's what they were talking about.

23 **MR. GREEN:** And if they're talking about that then
24 we're agreeable to that.

25 **MR. AKINS:** I'm sorry. I don't think I quite



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1 understand. I think Mr. Doerring's testimony
2 would be that the position set forth in the
3 Department's determination and the other
4 positions that the Department has articulated
5 in this case are unsupported by a long-standing
6 policy in practice at the Department.

7 **MR. GREEN:** Well -- and I'm not -- because we're all
8 on opposite sides we're going to talk to cross-
9 purposes I guess. To the extent there is no
10 long-standing precedent or policy about online
11 marketplaces as Amazon ---

12 **THE COURT:** Long-standing interpretation?

13 **MR. GREEN:** Yes. We agree with that. We don't
14 agree that there are at least some long-
15 standing administrative precedents for other
16 types of sales. Maybe it's applicable, maybe
17 it's not.

18 **MR. AKINS:** We may be able to -- to solve this more
19 easily. If the Department is not seeking
20 deference with respect to its interpretation of
21 the tax act in this case then the question as
22 I understand of whether there's a uniform long-
23 standing practice at the Department is
24 irrelevant. That that only become relevant,
25 one, if the ---



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1 **THE COURT:** Well you can say deference on many
2 different issues. I think what they're saying
3 is they may seek deference concerning
4 interpretations they've taken in the past
5 unrelated to the specific facts of this case.
6 This concerns the law in general but not any
7 interpretation regarding online sellers.

8 **MR. AKINS:** Sure. And if it's not related to this
9 case then I struggle to see the relevance.

10 **MR. GREEN:** And that's an argument. To me that is a
11 different argument than the one here. The
12 Department's been accused of being
13 inconsistent. Well it has done things with
14 respect -- we would argue with respect other
15 types of transactions. Again, selling by over
16 the other. We would argue that those are -- or
17 might argue that those are applicable. Again,
18 we're not saying there's any precedent with
19 respect to online marketplaces like Amazon. I
20 mean, that's about as narrow as I can concede.
21 Or as much as I can concede.

22 **MR. AKINS:** Yeah, I mean, it's fine. We're happy to
23 call Mr. Doerring if that's -- if, you know ---

24 **THE COURT:** It's up to y'all now. That's what he
25 stipulated to. If you don't like the



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1 stipulation.

2 **MR. AKINS:** We'll just call him.

3 **THE COURT:** Okay.

4 **MR. AKINS:** Your Honor, Amazon Services calls Erik
5 Doerring.

6 **ERIK DOERRING,** having been duly sworn, testifies as
7 follows:

8 **MR. DOERRING - DIRECT EXAMINATION BY MR. AKINS:**

9 Q: Are you ready, Mr. Doerring?

10 A: Yes, sir.

11 Q: All right. Mr. Doerring, can you please
12 introduce yourself to the Court, please?

13 A: Yes, sir. My name is Erik Doerring. I'm a tax
14 attorney and -- do you want my background?

15 Q: No, have you come to Court today prepared to
16 offer an opinion or opinions regarding the
17 South Carolina Department's practices and
18 policies as they related to South Carolina
19 sales and use taxes?

20 A: I have.

21 Q: All right. What qualifies you to give an
22 opinion on that topic?

23 A: As I said I'm a tax attorney. My undergraduate
24 degree is from Michigan State University where
25 I received a bachelors in administration in



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1 1981. My law degree from the University of
2 South Carolina, Juris Doctor in 1985. I
3 graduated from law school and my first job was
4 as an attorney for the IRS and the Office of
5 Chief Counsel, a position I held from 1985 to
6 1988. I was a trial attorney representing the
7 IRS in the United States Tax Court proceedings.
8 I was also responsible for advising IRS agents
9 and staff on federal tax law and procedural
10 issues. I held that position from 1985 to 1988
11 and in 1988 I was appointed an Assistant United
12 States Attorney with the United States
13 Department of Justice in the tax division where
14 I represented the United States government,
15 particularly the IRS, in federal, civil and
16 criminal tax proceedings. I held that position
17 from 1988 to 1992 and then after government
18 service in transitioning to private practice I
19 attended New York University, NYU, where I
20 obtained my masters in tax law in May of 1992.
21 And then -- excuse me, May of 1993, and then in
22 June of 1993 I accepted a position with the
23 McNair Law Firm here in Columbia as an
24 attorney. A position I've held for a quarter
25 of century since 1993. I guess I'm stuck in



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1 one place. And I joined as an attorney. I
2 became a shareholder and eventually became the
3 leader of the firm's statewide tax practice.
4 McNair Law Firm recently merged with another
5 law firm, which I had to say. January 1st, and
6 we became -- we merged with Burr Forman and as
7 of January 1st we are now Burr Forman McNair in
8 South Carolina where I'm a partner in the tax
9 practice. The group leader for the entire law
10 firm. In terms of general background, I am a
11 guest lecturer at the University of South
12 Carolina School of Law and the state -- income
13 state local tax class. I'm a federally court
14 appointed mediator in the United States
15 District Court tax cases here in South Carolina
16 -- in our district here in South Carolina. I'm
17 asked to speak by the South Carolina Bar
18 Association, the South Carolina Association of
19 Certified Public Accountants, the South
20 Carolina Association of Enrolled Agents, the
21 South Carolina Bankruptcy Association and
22 others on state and local tax issues and I do
23 speak and I prepare articles and scholarly
24 publications. I'm editor and author of a
25 number of publications and blogs and articles,



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1 and I've received awards and accolades
2 consistent with 30 years of practice in the
3 area. Particularly applicable to these
4 proceedings I have a quarter of a century of
5 practice and while I started in the federal
6 sphere as I transitioned to private practice my
7 practice became demonstrably South Carolina
8 oriented. And over the last 20 years and in
9 preparation of my testimony today I went back
10 and did my best to look at 25 years of cases
11 and client representation that I was involved
12 in and they approached 200 specifically in
13 South Carolina in sale and use tax engagements
14 and in addition dozens of others where I have
15 been asked to advise other lawyers and their
16 clients in my law firm. And then interestingly
17 that followed and I've been asked to represent
18 and advise other lawyers from other law firms
19 and CPA's and professionals and it goes on and
20 on, and probably hundreds of engagements over
21 the last 25 years on a wide range of South
22 Carolina sales and use tax cases and it gives
23 me I think a level of empirical background.
24 I've been through every Director I think that
25 the Department of Revenue since it was



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1 established. And in addition to representing
2 and advising clients specifically on the tax
3 aspects of their transactions, economic
4 development aspects, I represent and advise
5 clients literally in every aspect of the
6 administrative process. On appeals, advisory
7 ruling opinions, legislative matters, civil
8 litigation, even criminal tax defense. And the
9 wide broad -- breadth of administrative of the
10 Department of Revenue of this 25 years that's
11 my background.

12 **MR. AKINS:** May I approach, Your Honor?

13 **THE COURT:** Did you work with Brooke Wells?

14 **MR. DOERRING:** Pardon, sir?

15 **THE COURT:** Did you work with Brooke Well?

16 **MR. DOERRING:** No, sir, I did not.

17 Q: Mr. Doerring, do you recognize the document I
18 put in front of you?

19 A: Yes, I do, sir. It is a copy of what appears
20 to be a current CV of mine.

21 Q: And this is an accurate copy of your CV?

22 A: It is.

23 Q: Your Honor, we asked that this be admitted into
24 evidence?

25 **THE COURT:** Any objections?



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1 **MR. GREEN:** Subject to a voir dire once he is done
2 with is questioning of the witness.

3 **THE COURT:** Well that wouldn't be an objection.
4 That would just be voir diring.

5 **MR. GREEN:** Well I just don't want to agree to
6 anything in case my voir dire is successful.

7 **THE COURT:** Well, okay, I'll go with that.

8 **MR. GREEN:** Subject to that limitation.

9 **(Hearing Exhibit Number 212 was admitted into**
10 **evidence.)**

11 **Q:** Mr. Doerring, is there anything on your CV in
12 addition to what you've just described that you
13 feel qualified to give an opinion with respect
14 to the South Carolina Department of Revenue's
15 practices and policies as they relate to sales
16 and use taxes?

17 **A:** Other than what I've stated the information
18 I've reviewed in connection with preparing for
19 my opinion today which are not stated in there,
20 other than that, no.

21 **MR. AKINS:** Your Honor, Amazon Services tenders Mr.
22 Doerring to the Court as an expert in the south
23 Carolina Department of Revenue's policies and
24 practices related to sales and use taxes.

25 **MR. GREEN:** Voir dire, Your Honor?



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1 THE COURT: Yes, sir.

2 MR. GREEN: Thank you.

3 MR. DOERRING - VOIR DIRE BY MR. GREEN:

4 Q: Good afternoon, Mr. Doerring.

5 A: Yes, sir.

6 Q: You never worked for the Department of Revenue,
7 correct?

8 A: Correct.

9 Q: And you have never testified as an expert in
10 sales or use tax matters, correct?

11 A: Correct, sir.

12 Q: And the sales tax -- I believe we talked in
13 your deposition as I understood it the sales
14 and use tax cases that you've worked on in your
15 private practice pertain to online companies
16 dealt primarily with Nexus issues, is that
17 correct?

18 A: No, that's not correct?

19 Q: What type -- that is how I understood your
20 deposition testimony. Issues dealing with
21 seller internet sales referred to as Nexus?

22 A: I believe in my deposition, sir, you asked me
23 among other things did that involve areas where
24 I've represented bias clients, and yes, it does
25 include Nexus. It includes online sellers as



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1 well.

2 Q: Okay. All right. In your deposition you
3 stated that were essentially giving three
4 opinions all of which related to the existence
5 of a law of standard administrative pause, is
6 that right?

7 A: That's a correct statement, sir.

8 Q: And is that still consistent today?

9 A: No, sir. I'm probably going to offer more
10 opinions than I did in my deposition because
11 subsequent to the deposition I was provided
12 what I understand to be a motion and memoranda
13 filed by the Department of Revenue in this
14 case. And I read that motion for summary
15 judgment and Judge Anderson's related Order
16 dated January 29th, which in my view raised new
17 issues and I am going to be adding opinions
18 related to issues that have been raised in that
19 memoranda, sir.

20 Q: And are you aware was the Department ever
21 informed of those new or additional opinions?

22 A: I was never informed of those. I mean -- oh,
23 at the time of the deposition, sir?

24 Q: Well afterwards. Have you given -- has -- did
25 you work with Amazon's counsel to provide



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1 notice to the Department that you had
2 additional opinions?

3 A: No, sir.

4 Q: Okay. Well let's talk about what you did talk
5 with me about in your deposition.

6 A: Yes, sir.

7 Q: First you said you were giving an opinion for
8 the Department determination in this case is
9 consistent with a long-standing administrative
10 policy of the Department, correct?

11 A: I did.

12 Q: You still planning to provide an opinion on
13 that today?

14 A: I do.

15 Q: You also stated you're giving an opinion as to
16 whether the positions the Department has taken
17 in recent revenue rulings in regard to the
18 taxation online marketplaces is consistent of
19 the Department's long-standing administrative
20 practice and procedure, is that correct?

21 A: I do to that the Court considers relevant.

22 Q: And do you still plan to issue an opinion on
23 that today?

24 A: As I said.

25 Q: Okay. Third, you stated you had an opinion as



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1 to whether the proposed marketplace facilitator
2 legislation is consistent with the long-
3 standing administrative policy of the
4 Department, correct?

5 A: Correct.

6 Q: And do you still have -- do you still plan to
7 provide an opinion on that today?

8 A: I do. Again, to the extent the Court considers
9 it relevant.

10 Q: And you have no knowledge -- you have no
11 knowledge of the facts of this case, do you?

12 A: Not broadly, sir, beyond the Department
13 determination no and that's intentional. And
14 except I might add now I've read the memoranda
15 of both sides and their motions for summary
16 judgment. So to the extent it adds to it I
17 have added that and I've read Judge Anderson's
18 Order dated January 29th.

19 Q: Okay.

20 A: There are some additional facts that have come
21 in.

22 Q: But -- is it fair to say then that the facts
23 that you have acquired have been through
24 reading documents prepared by other parties?

25 A: Correct.



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1 Q: Okay. And I think you testified you would not
2 be offering an opinion on what constitutes a
3 consignment, correct?

4 A: I'm not offering any opinion or offering any
5 opinion legally as to what constitutes a
6 consignment for purposes of this case, correct.

7 Q: And you also stated you wouldn't be offering
8 any opinion regarding whether transactions take
9 place in the Amazon marketplace or are not
10 consignment transactions?

11 A: I don't give any opinion -- I will not give any
12 opinion on that, sir.

13 Q: And what are new opinions, briefly, that you
14 expect to testify to today?

15 A: Briefly, the Department filed its motion for
16 summary judgment and filed respondent's
17 memorandum in support of the motion for summary
18 judgement which I assume is part of the record
19 of this case and it has raised a number of what
20 I would consider new issues. Particularly the
21 Department has raised generally what it says
22 are its position dealing with the taxation of
23 the transactions which begins that its position
24 that Amazon is liable for sales on the
25 marketplace because it is both a seller making



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1 retail sales and is engaged in the business of
2 selling tangible personal property at retail.
3 And the Department takes the position that
4 Amazon is a seller of tangible personal
5 property pursuant to the act because it accepts
6 money through the websites and customers in
7 exchange for goods and references 12-36-100 and
8 quote, because it involves a transfer, exchange
9 or barter conditional or otherwise of tangible
10 personal property for a consideration and that
11 Amazon is the owner and operator of the website
12 it thus a quote person selling tangible
13 personal property unquote. Pages -- that's
14 page 19 of the memorandum, sir. The Department
15 continues by saying notably there is no
16 requirement in the act that a person must hold
17 title to or have physical possession of an item
18 in order to sell it.

19 **MR. GREEN:** Your Honor, I asked for a brief summary
20 of his opinion not a recitation of the entire
21 basis leading to that opinion. If you qualify
22 him he's going to obviously testify to that as
23 he sees fit, but I would ask that you ask the
24 witness to just render a summary of what his
25 opinion would be in that respect.



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1 **THE COURT:** All right. Can you summarize it more?

2 **MR. DOERRING:** I will, sir.

3 **THE COURT:** All right.

4 A: Beyond that the Department of Revenue raises a
5 -- what I would call a point of contact
6 approach which is beyond anything that is
7 raised in the Department determination, that
8 the point of contact party should be
9 responsible for collecting the tax. Collecting
10 and remitting the tax. And the Department
11 raises notably for the first time -- excuse me
12 -- that it is asserting that Amazon is
13 independently liable under the efficient
14 administration provisions of 12-36-70 and
15 because it is clearly in the best position to
16 collect the sales and use tax with respect to
17 the sales taking place on its website. Neither
18 of those positions were remotely articulated in
19 the Department determination.

20 Q: Okay. And you -- well, never mind.

21 **MR. GREEN:** Your Honor, I would move to strike Mr.
22 Doerring as an expert witness in this matter.
23 He is talking about opining on the Department's
24 application or the existence of the
25 Department's long-standing administrative



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1 policy. We would tender, Your Honor, that that
2 is expert testimony on a matter of law which is
3 inadmissible. It either relates to the
4 existence of the Department's long-standing
5 administrative policy or it pertains to the
6 arguments in the memorandum which are
7 applications of law to fact which again pertain
8 to the Court's area of expertise and decision
9 making. I'd point to Kirkland versus People's
10 Gas Company expert testimony interpreting
11 Department regulations constitute questions of
12 law reserved to the provenance of the Court.
13 Interpreting what he identifies as the
14 Department's administrative policy is also a
15 matter of law committed to the provenance of
16 the Court. And so for those reasons, Your
17 Honor, we would move to strike Mr. Doerring as
18 an expert.

19 **THE COURT:** I agree with you in part and disagree
20 with you in part so let me respond to that and
21 hear what you've got to say.

22 **MR. GREEN:** Okay.

23 **THE COURT:** And you get more comfortable because
24 right now you're winning. All right. And that
25 is he cannot give an opinion as to whether or



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1 not it is legally a long-standing
2 interpretation by the Department but he can
3 give me a factual background based upon the
4 previous interpretations that the Department
5 has rendered so that to educate me as to
6 whether or not there is a long-standing
7 administrative interpretation. So that would
8 be my interpretation of what I've heard so far.

9 **MR. GREEN:** Okay. And when -- okay and when you say
10 factual you mean factual as in the existence in
11 his experience or knowledge of such a long-
12 standing precedent.

13 **THE COURT:** Yes. He can take me through it and
14 start from his historical analysis of what the
15 Department has done in the past.

16 **MR. GREEN:** Based on his experience and knowledge?
17 Okay. All right. Thank you, Your Honor.

18 **THE COURT:** All right. Now are you seeking more
19 than that which I limited it?

20 **MR. AKINS:** We are absolutely not, Your Honor.

21 **THE COURT:** Do you understand that?

22 **MR. DOERRING:** I do, Your Honor. I do and agree.

23 **THE COURT:** Good.

24 Q: Mr. Doerring you stated that you are prepared
25 to offer a ---



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1 MR. AKINS: first just to confirm, is our tender
2 accepted of Mr. Doerring as an expert?

3 THE COURT: Yes.

4 MR. AKINS: Thank you.

5 MR. DOERRING - DIRECT EXAMINATION BY MR. AKINS
6 (CONT.):

7 Q: Mr. Doerring, you've stated that you are
8 prepared to offer an opinion or opinions
9 regarding the South Carolina Department of
10 Revenue's practices and policies as they relate
11 to South Carolina sales and use taxes. Can you
12 summarize for us what those opinions are?

13 A: Specifically, I referenced initially the
14 Department determination. And the Department
15 determination references three positions with
16 the ---

17 THE COURT: Can I stop you? The one thing we don't
18 need to go into is the independent ---

19 MR. DOERRING: Efficient administration?

20 THE COURT: Yeah. You may not know but that's no
21 longer an issue here.

22 MR. DOERRING: Oh, it's not. Well then I will not
23 address it at all. Thank you.

24 THE COURT: Yeah.

25 A: Not addressing that. Then the remaining issues



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1 are in the Department determination. The
2 Department determination is structured by the
3 Department's positions and they are structured
4 by Roman numeral, I, II and III. Roman numeral
5 I and II I'm going to address here. Roman
6 numeral III addresses what I call
7 Constitutional issues and internet text freedom
8 act issues which I give no opinion whatsoever
9 on. The only issues I'm addressing are the
10 Department's positions and the Department's
11 articles or sections Roman numeral I and II.
12 In sections I and II the Department takes the
13 positions that the -- Amazon is a person in the
14 business of selling tangible personal property
15 at retail and is subject to tax, sales and use
16 tax, through sales conducted over the Amazon
17 marketplace through the offer period which is
18 January through December of 2016 I recall.
19 March of '16. And in connection with that
20 position the Department takes -- articulates
21 that Amazon is a person in the business of
22 transferring tangible personal property to it's
23 user or consumer in South Carolina for a
24 consideration regardless of whether that person
25 owns or physically possesses such property



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1 quote unquote from the Department
2 determination. The Department continues that
3 the primary issue is whether Amazon itself
4 sells tangible personal property on the website
5 and that whether it is in the business of
6 selling that property. Now that position that
7 it has taken in the Department determination
8 also that the gross proceeds of sale in Section
9 II, the Department properly included the gross
10 proceeds of sale from the online marketplace in
11 Amazon's tax base should be subject to tax for
12 the reasons articulated there. Both of those
13 positions are not supported by uniform
14 consistent and long-term practice and
15 procedure. In addition, and as I indicated
16 during my discussion with Mr. Green, the
17 Department has filed a motion for summary
18 judgment. In its memorandum in support the
19 Department now takes what I call two different
20 positions and I am not going to address the
21 efficient administration position but it take a
22 -- what I would call a point of contact
23 position now that sales tax, the incident of
24 sales tax should be facially on the party that
25 is the point of contact that apparently



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1 transfer of title, transfer of possession are
2 all irrelevant constructs now under our South
3 Carolina code and it's just facially who the
4 party is, who the point of contact is now
5 should determine the incidence of sales
6 taxation. That position is also similarly not
7 supported by uniform consistent and long-term
8 administrative practice and procedure.

9 Q: Mr. Doerring, with respect to those opinions
10 that you articulated what have you relied upon
11 in order to form those opinions?

12 A: In preparation for my testimony I've of course
13 reviewed the South Carolina code of laws,
14 particularly Title 12, Chapter 36, pertaining
15 to sales taxes which a hard copy of which I
16 brought in front of me and it's next to me in
17 the courtroom today. I've also reviewed the
18 South Carolina Tax regulations and I have
19 actually before I came over today I went on the
20 government website and printed a hard copy
21 which are approximately 137 pages included the
22 sales tax regulations which are specifically in
23 117 dash or dot 300. That series of specific
24 sales tax regulations. I have read what we
25 call published advisory opinions from the



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1 Department of Revenue. And these are very
2 specific. Advisory opinions are defined indeed
3 by the Department of Revenue as its published
4 and final revenue rulings, revenue procedures
5 and private letter rulings. I've also read a
6 great deal of what I call below that
7 administrative informal administrative
8 guidance. Posts on the website, rulings, draft
9 rulings, draft letter rulings or draft revenue
10 rulings that are posted or released by the
11 Department of Revenue and then withdrawn or
12 terminated. I've read sales tax manual,
13 economic development guides. A plethora of
14 information, thousand of things that the
15 Department of Revenue literally is posting on
16 a daily basis and now for 25 years in the sales
17 tax area. I consider that informal written
18 guidance. In addition, and probably most
19 importantly, ---

20 **THE COURT:** Can I stop you?

21 **MR. DOERRING:** Yeah.

22 **THE COURT:** I don't want to you lose your place.

23 **MR. DOERRING:** Yes, sir.

24 **THE COURT:** 'Cause you sound like your on a roll,
25 but the -- you reference -- it wasn't revenue



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1 rulings but things that have been drafted and
2 withdrawn.

3 **MR. DOERRING:** Yes, sir.

4 **THE COURT:** Why would that be something that -- that
5 couldn't be the Department taking a position
6 because they withdrew it.

7 **MR. DOERRING:** Well it's interesting, Your Honor.
8 The Department uses the term -- first of all --
9 I view this in tiers and this is your
10 responsibility of what level you look at it,
11 honestly.

12 **THE COURT:** Yeah.

13 **MR. DOERRING:** It's the judge's determination of
14 course to determine the law. It's your
15 determination to determine what deference if
16 any the Department has for administrative
17 positions ---

18 **THE COURT:** Uh-huh.

19 **MR. DOERRING:** --- and it's your determination
20 although they have a long-standing position
21 factually for that matter. But in looking at
22 whether they have a long-standing practice or
23 procedure what do you look at? And that's the
24 inquiry here. For instance -- and the
25 decisions are not at all uniform -- the



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1 decisions of this Court, the decision of our
2 court of appeals -- of our Supreme Court. Do
3 you just limit your inquiry to regulations? If
4 it's in the regulations that's all you look at.
5 Do you take it one step below? Do you look at
6 published advisory opinions? The final
7 opinions and decisions published by the
8 Department of Revenue which are limited to
9 final revenue rulings, revenue procedures and
10 private letter rulings.

11 **THE COURT:** I would gather that Justice Kittredge
12 would say we start -- he with the regs and
13 that's it and we don't ---

14 **MR. DOERRING:** Yes, sir. And the -- that's the
15 first level ---

16 **THE COURT:** I assume.

17 **MR. DOERRING:** --- the first level of regulations.

18 **THE COURT:** Yeah.

19 **MR. DOERRING:** The second regulations is kind of you
20 fall down another level and add, you know, add
21 the private rulings and the revenue rulings are
22 interestingly because they are actually go
23 through a very formal detailed vetting process
24 at the policy division.

25 **THE COURT:** Uh-huh.



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1 **MR. DOERRING:** It used to be Rick Handel for many
2 years, now a professor at the school and now it
3 was just recently and then John McCormack his
4 predecessor who just retired. They were
5 responsible with vetting these very thoroughly
6 and then they were ultimately up to the
7 Director. I mean, our private -- our revenue
8 rulings have the Director's signature on them.
9 And that level is below regulations. Below
10 those two things you kind of get into the wild
11 west because below that it's everything out
12 there that's called informal written guidance
13 and these can be things, and, you know, the
14 Department of Revenue has the internet too.
15 They have a website. It crashes periodically
16 like all of them do but they post things, they
17 take them down. They put them up, they revised
18 them. The are constantly putting things up and
19 changing them and it's the nature of the
20 informality that allows them to do that. Their
21 information releases, their data inputs and
22 it's all going through an informal process.
23 They have a broad base of what they call
24 Frequently Asked Question, FAQ's, that they'll
25 post up. They'll change it, they'll add



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1 things, they'll put in -- it's an informality
2 that allows them to at least push some level
3 advice out to the taxpayers which is good but
4 the problem is it changes and it changes over
5 time. It changes by administration. It
6 changes according to who that man or woman is
7 that's Director at the time. They have
8 different views. And then ---

9 **THE COURT:** So you're saying that Hartley Powell may
10 have a different view than a previous
11 administrator?

12 **MR. DOERRING:** Yes, sir. I certainly think Mr.
13 Powell and Mr. Reames, Mr. Stevens formerly of
14 this bench, they all have different views of
15 things. It's a -- the Department of Revenue is
16 not just a tax agency, Your Honor. It's an
17 agency of people. People make our
18 administrative rules not just some law.

19 **THE COURT:** Okay.

20 **MR. DOERRING:** Below that then is the fourth level
21 which is what they do in practice. Not the
22 stuff that just gets released, not the stuff
23 that gets informally released but to this
24 agency of people the Director's -- I mean, he's
25 appointed by the Governor with the advice and



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1 consent of the Senate. It's his responsibility
2 to administer that agency.

3 **THE COURT:** Well I -- if I could ahead and just tell
4 you this is how I rule in this case is I think
5 you add a lot of fertilizer. It sets forth --
6 are you familiar with that -- well, you may not
7 be?

8 **MR. DOERRING:** I am, Your Honor.

9 **THE COURT:** Well it sets forth kind of the theory
10 under which agency deference exists and it
11 establishes the long-standing set forth agency
12 deference was to allow when there was a long-
13 standing administrative interpretation that has
14 been uniform over many years so that the
15 legislation had to acquiesce to the
16 interpretation. Now if I follow that theory
17 the only way the legislature could acquiesce to
18 interpretation would be that which was
19 sufficiently relevant for the legislature to
20 know about it. So I would follow that theory
21 and say that in view of your testimony I think
22 it would be pertinent as to that which was
23 sufficiently known to be in the public sphere.

24 **MR. DOERRING:** Thank you, Your Honor, for that
25 direction. And in that instance it may only be



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1 regulations.

2 **THE COURT:** Yeah. Revenue rulings would be in the
3 public sphere ---

4 **MR. DOERRING:** It could be ---

5 **THE COURT:** --- and even private -- and I'm not sure
6 -- I'm not familiar with all the Revenue act is
7 -- or how they administer their websites, but
8 whatever's in the public sphere I'd be
9 interested in.

10 **MR. DOERRING:** All right. Well then regulations
11 certainly are, Your Honor. Advisory opinions
12 certainly are and they're the published revenue
13 rulings, revenue procedures and private letter
14 rulings. They are all published. Again there
15 are other things that are in the public sphere
16 which I consider informal guidance beyond
17 regulations which the Department is bound by.
18 Also revenue rulings notably. If the
19 Department issues a revenue ruling it is bound
20 by that.

21 **THE COURT:** Yeah.

22 **MR. DOERRING:** If it issues a private letter ruling
23 which is actually issued to a specific party
24 that requests the ruling it is bound by that as
25 to that party. Everything else below



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1 regulation and those advisory opinions it
2 technically is not bound by it.

3 **THE COURT:** That would not instruct public or --
4 unless ---

5 **MR. DOERRING:** Exactly. It's not instructed because
6 it's not bound by it and can change it
7 mercurially or as -- and it does. But again
8 you don't want to punish the Department because
9 it response informally to public advice request
10 for information. But on the same time it's not
11 formal enough.

12 **THE COURT:** Let's proceed down that with that
13 caveat.

14 Q: And, Mr. Doerring, with the caveat in mind,
15 could you explain for us the basis for your
16 opinions?

17 A: Yes. As I was kind of going down this path ---

18 **THE COURT:** When I interrupted you. I'm sorry.

19 **MR. DOERRING:** No, Your Honor. I certainly
20 understand.

21 A: But things that I relied upon, statute
22 regulations, rulings, formal advice, I have
23 read obviously here -- I've read the Department
24 determination -- I've -- as we talked about the
25 memoranda in support of the motions for summary



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1 judgment, Your Honor's Order. I do say I also
2 read there was a prior Order of this Court on
3 a motion for an injunction and I read this
4 Court's Order on that. But otherwise I've kept
5 a very limited focus. I have not read
6 deposition testimony. I've not been in this
7 Court today. I mean, I'm giving the facts as
8 the Department kind of gives them to me. And
9 then basing upon -- I really want to be -- to
10 base it on how I see the Department issuing
11 this guidance in relation to the positions
12 they've taken in the Department determination
13 and now this point of contact approach and
14 going back 25 years and looking at this body of
15 regulations, rulings, informal guidance and
16 some of it includes things like this, Your
17 Honor, they may issue draft revenue rulings,
18 they put them on the website and then they take
19 them down. If you don't know they're up there
20 you don't see them. If you go back later to
21 search for it they're gone. I mean, part of
22 the aspect of the draft revenue rulings and not
23 giving them any level is they go up, they wait
24 for public comment. They're drafts and they
25 take them down. Then a final ruling comes up.



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1 A final ruling is their final ruling. That's
2 approved and signed by the Director. The
3 drafts are not. The drafts are not. And so
4 that's an example of an informal level of
5 guidance that has been published that should
6 not represent a long-standing practice because
7 it changes. Indeed it changed from the draft
8 to the final in many instances.

9 Q: And, Mr. Doerring, just so we can get to it
10 quickly, you've gone back those 25 years,
11 you've looked at the regulations and the other
12 publicly available information. What did you
13 in fact conclude about the Department's
14 position?

15 A: I've looked back and I've concluded that the
16 positions taken by the Department again in the
17 Department determinations and the new, what I
18 call point of contact position, are simply not
19 supported by any level of long-term practice or
20 procedure consistent or otherwise including
21 regulations, including rulings, including
22 informal in practice and finally including
23 informal administrative practice. That in fact
24 they don't do it that way. Over my personal
25 experience -- and the reason I offer that it's



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1 empirical.

2 **MR. GREEN:** Your Honor, I object. That's more of a
3 legal conclusion about the policies rather than
4 the existence of policies or anything like.
5 He's applying it to this case and saying it's
6 inconsistent. He's not talking about whether
7 those policies exist or don't exist and that's
8 now I understood the Court's ruling earlier.

9 **MR. AKINS:** And, Your Honor, I don't think he said
10 that the Department's practice and policy was
11 inconsistent in any way with what's being
12 articulated here. He said it was not supported
13 in any way.

14 **MR. GREEN:** He said unsupported.

15 **THE COURT:** I take that as his viewpoint of the
16 prior rulings but not taking -- because he made
17 it clear he wasn't going to take a -- offer a
18 specific opinion about the legal aspect long-
19 standing interpretation so ---

20 **MR. GREEN:** Okay.

21 **THE COURT:** --- I'm going to take that referring to
22 factual analysis.

23 **MR. DOERRING:** Yes, Your Honor. And my -- and if
24 need be and need to be corrected, the
25 Department's positions is their practice and



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1 procedures don't support it.

2 **THE COURT:** Yeah.

3 **MR. DOERRING:** That's what's it limited to. Your
4 Honor, I'm not opining as to whether
5 something's a consignment. I'm not opining as
6 to whether something's a legal transaction.
7 That's your clear field, not mine.

8 **THE COURT:** Okay.

9 **MR. AKINS:** Subject to redirect.

10 **MR. GREEN:** Bear with me one moment, Your Honor.
11 I'm sorry, Your Honor, just indulge me a
12 moment, please? No questions, Your Honor.
13 Thank you.

14 **THE COURT:** Mr. Doerring, are you disappointed you
15 didn't get cross-examined or not?

16 **MR. GREEN:** Your Honor, we probably should disclose
17 for the Court I worked for Mr. Doerring about
18 20 years ago.

19 **THE COURT:** Well you could cross-examine him.

20 **MR. GREEN:** When I first came out -- well a year out
21 of law school I started working for Mr.
22 Doerring. That's how I started my legal
23 career.

24 **THE COURT:** You may step down, sir.

25 **MR. DOERRING:** Thank you, Your Honor.



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1 **MR. AKINS:** Your Honor, I believe we're in a
2 position where -- or at least about to be in a
3 position to rest our case. What we would
4 request though if the Court would indulge us to
5 have the evening to go back and review our
6 materials and see if there aren't some exhibits
7 that ---

8 **THE COURT:** Okay, that's fine.

9 **MR. AKINS:** --- we need to get in or if there's one
10 more little bit of evidence that we need to get
11 in before we rest and then we'll quickly
12 proceed to the Department's case.

13 **THE COURT:** I assume you don't object to that?

14 **MR. GREEN:** I don't object to that, Your Honor.

15 **THE COURT:** All right. Well then what time do you
16 want to start tomorrow?

17 **MR. GREEN:** 9:30? Does that work?

18 **MR. AKINS:** That works.

19 **THE COURT:** All right. Remember I'm going to break
20 around 11:00.

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

22 **MR. AKINS:** Thank you.

23 (DAY TWO of the hearing adjourned at 5:06 p.m.)

24 (DAY THREE - WEDNESDAY, FEBRUARY 6, 2019. The
25 hearing reconvened at 9:31 a.m.)



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1 **THE COURT:** Good morning, y'all. Y'all can be
2 seated. Thank you. Mr. Razi.

3 **MR. RAZI:** Thank you, Your Honor. This first order
4 of business, I noticed a couple of witnesses
5 that joined us in the courtroom for the first
6 time and we would just ask for -- to invoke the
7 rule and have witnesses sequestered until
8 they're called.

9 **THE COURT:** And that's a -- invoke the rule?

10 **MR. RAZI:** Yeah. The rule on witnesses.

11 **THE COURT:** Yeah. Is there a rule?

12 **MR. GREEN:** Well, they don't get to a right to that.
13 That's -- I think that's absolutely right.
14 They had mentioned to me ---

15 **THE COURT:** Well, maybe it is in different states.
16 I don't know. That's why I'm just asking ---

17 **MR. GREEN:** I don't know.

18 **MR. RAZI:** It's sort of -- it's sort of a routine
19 that witnesses are not allowed -- fact
20 witnesses are not allowed to be in the
21 courtroom ---

22 **THE COURT:** Well, not necessarily here.

23 **MR. GREEN:** Not necessarily.

24 **THE COURT:** But -- but that -- but you could make a
25 motion for ---



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1 **MR. RAZI:** Okay. Well, I -- I've made that motion.

2 **THE COURT:** Okay.

3 **MR. GREEN:** We oppose that motion. They did ask --
4 they want to make a motion I think pertinent to
5 some of these witnesses in our case. I'm happy
6 for the witness to step out while the Court
7 addresses the arguments in that motion. But I
8 don't see any basis for excluding the witnesses
9 chronically from this case. A number of Amazon
10 people have been in here. So, I -- I would
11 oppose that motion as a general matter.

12 **THE COURT:** If I'm gonna -- any of Amazon's
13 witnesses weren't in here before ---

14 **MR. GREEN:** Oh, they were not. My mistake. I
15 apologize.

16 **THE COURT:** Am I correct on that?

17 **MR. RAZI:** You are correct. We took care that they
18 were not here ---

19 **MR. GREEN:** Okay.

20 **MR. RAZI:** --- to hear each other's testimony and
21 then, just paired with the other ones then.

22 **THE COURT:** I think I'm just gonna -- but if you
23 have someone who is under the -- the rules of
24 evidence, that's there's -- the natural party
25 cannot be sequestered. And then there's the



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1 other two categories of a representative and a
2 person who has examine -- essential for the
3 presentation of the case. Which I assume if
4 they were essential for the presentation of the
5 case, they would have been here earlier. So,
6 that -- that's out. So, now we're down to the
7 -- the other one under the rules of evidence,
8 so.

9 **MR. GREEN:** And I -- and if that is the Court's
10 ruling, we respect it and we accept it. I
11 don't -- I personally don't see a basis -- a
12 need for it, but if that is the Court's ruling,
13 we accept that.

14 **THE COURT:** I want to just follow that just ---

15 **MR. GREEN:** That's fine.

16 **THE COURT:** --- out of an abundance of caution.

17 **MR. GREEN:** No. No. No. That's -- that's okay,
18 Your Honor. I understand that. And then --
19 but now ---

20 **THE COURT:** So, that motion is granted.

21 **MR. GREEN:** Okay. That motion is granted. Now, the
22 only two witnesses that I have based on what
23 you and I ---

24 **MR. RAZI:** Can -- can I hang on -- can we finish our
25 case and then, get to this stuff?



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1 MR. GREEN: Fair enough. Fair enough.

2 MR. RAZI: Thank you.

3 THE COURT: All right.

4 MR. RAZI: With the motion having been granted, I
5 assume the witnesses will depart.

6 THE COURT: I would hope so.

7 MR. RAZI: Thank you, Your Honor.

8 MR. GREEN: And may I ask him a question just?

9 THE COURT: Yes, sir.

10 MR. RAZI: Okay. Okay. So, just so the records
11 clear. There was one deposition witness who --
12 who is not gonna be called into trial and since
13 he's not gonna be a witness at trial, he ---

14 MR. GREEN: He -- he is not gonna be at witness at
15 trial. That's my understanding based on your
16 -- our discussions of what you plan to do, so
17 yes, that's correct.

18 THE COURT: I wasn't listening to y'all.

19 MR. GREEN: I think we're in agreement on who can
20 stay and who can go, Your Honor.

21 THE COURT: Oh, okay. Almost sounds like a song.
22 Okay.

23 MR. RAZI: Sure. And just for the record, that's
24 Dr. Shingleton. Your Honor, I mentioned that
25 we might have a few housekeeping items that we



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1 ---

2 **THE COURT:** Yeah.

3 **MR. RAZI:** --- want to take care of this morning.

4 The first is to move into evidence formally
5 Exhibit -- Exhibits 213 and 214, which were the
6 excerpted testimony that we played last
7 afternoon. The first from Hartley Powell in
8 deposition and the second from Hartley Powell
9 in an October 23rd, 2018 hearing. So we move

10 ---

11 **THE COURT:** Subject to your other objection.

12 **MR. GREEN:** Subject to my other objection. Yes,
13 sir, Your Honor.

14 **THE COURT:** They're admitted.

15 **(Hearing Exhibit Number 213 and 214 were admitted**
16 **into evidence.)**

17 **MR. RAZI:** Thank you. And then, one more. We have
18 one more document.

19 **THE COURT:** Wow. Big one.

20 **MR. RAZI:** It's the South Carolina Sales and Use Tax
21 Manual that was in effect at the time of this
22 case. It's been marked as Hearing Exhibit 215.
23 It's the 2015 Edition. We'd also move that
24 into evidence.

25 **MR. GREEN:** No objection, Your Honor.



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1 THE COURT: It's admitted.

2 (Hearing Exhibit Number 215 was admitted into
3 evidence.)

4 MR. RAZI: May I had those up?

5 THE COURT: All of those were admitted.

6 MR. RAZI: Thank you, Your Honor. And then, also
7 for the Court, we've put all the exhibits that
8 have been admitted including these three. We
9 went ahead and put them on a flash drive for
10 the Court that's ---

11 THE COURT: Okay.

12 MR. RAZI: --- password protected.

13 MR. GREEN: Now, with respect like to the videos and
14 stuff that were identified, that included the
15 whole video that is identifying the Exhibit,
16 right? Not just excerpts of it.

17 MR. RAZI: Exactly.

18 MR. GREEN: Okay. Thank you.

19 MR. RAZI: Exactly right. I mean, it's password
20 protected and there's a letter in there to the
21 Court that says what the password is.

22 THE COURT: Okay. Thank you.

23 MR. RAZI: May I hand all that up?

24 THE COURT: Yes.

25 MR. RAZI: Thank you. And with that, Your Honor,



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1 Amazon Services rests.

2 **THE COURT:** All right.

3 **MR. GREEN:** All right. I think we're prepared to
4 call our first witness.

5 **MS. ACQUAVIVA:** The Department would call Ms. Logan
6 Mitchell to the stand.

7 **THE COURT:** Just for a second there I though you
8 were gonna call Ms. Acquaviva.

9 **MR. RAZI:** And -- and before -- before Ms. Mitchell
10 testifies, can I just lodge an objection ---

11 **THE COURT:** Yes.

12 **MR. RAZI:** --- regarding her testimony. I -- I took
13 Ms. Mitchell's deposition. She's the -- and
14 the objection is relevance. She's the line
15 auditor that handled this matter. And it was
16 clear in the deposition that she doesn't have
17 any first-hand knowledge of how third parties
18 sell items on Amazon.com. She doesn't have any
19 first-hand knowledge of any services provided
20 by Amazon Services. She doesn't even have any
21 second-hand knowledge about that because she
22 hasn't talked to anyone -- any third party
23 sellers about that or with Amazon.com about
24 that even, though that would probably be
25 hearsay in any event depending upon the



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1 statement. So, we submit that -- I don't know
2 what the testimony is that could possibly be
3 offered that would be relevant to an
4 understanding of third party sales on
5 Amazon.com from a witness who -- without
6 faulting her, but that's not the point. The
7 point is she doesn't have information about the
8 topic that's before the Court.

9 **THE COURT:** Okay. Response?

10 **MS. ACQUAVIVA:** Thank you, Your Honor. I would
11 submit first to briefly summarize what Ms.
12 Mitchell's testimony will be, she is going to
13 explain essentially how we got here today, how
14 the audit came about and the steps the
15 Department went through. Different entities
16 were initially audited and then, Amazon
17 Services came into the picture. So, for the
18 Court to understand how the Department did what
19 it did, why it did what it did. Additionally,
20 we think that the Court needs to hear from the
21 people who actually were participating in the
22 audit to determine if the Department is owed
23 any deference. And finally, the Court got to
24 hear from the Director, who was not at the
25 Department at the time this audit was conducted



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1 and completed, so if that testimony was
2 relevant, I think testimony from the people at
3 the Department who participated in the audit
4 and made the decisions that they did are
5 relevant for the Court to hear.

6 **THE COURT:** Okay.

7 **MR. RAZI:** Could I just respond briefly, Your Honor?
8 There's no dispute how we got here. There was
9 an audit, a Notice of Propose Assessment and a
10 determination saying that Amazon Services owes
11 these tax ---

12 **THE COURT:** Well, I normally let this evidence in as
13 background evidence and background evidence is
14 normally admissible, even though functionally
15 it probably doesn't -- or probatively would be
16 a better word. It doesn't service a
17 significant purpose, but it -- I'm going to
18 allow it in. Now that's on the background
19 aspect. On the deference, I mean, I -- you can
20 keep pursuing that line and I'll hear what
21 y'all have got in your argument.

22 **MS. ACQUAVIVA:** And -- and just to ---

23 **THE COURT:** Y'all have got an uphill climb on me on
24 that.

25 **MS. ACQUAVIVA:** Sure.



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1 **THE COURT:** Right.

2 **MS. ACQUAVIVA:** And to Mr. Razi's point that Ms.
3 Mitchell doesn't know anything about the
4 transactions that took place, she did have
5 several conversations and meetings with Amazon
6 personnel and she can testify to what she
7 learned from Amazon about their transactions,
8 which then led to the proposed assessment.

9 **THE COURT:** Well, that even makes it a more
10 significant subject. You may call your
11 witness.

12 **MS. ACQUAVIVA:** Thank you.

13 **MR. RAZI:** We'll wait for that, but that sounds like
14 hearsay.

15 **THE COURT:** Yeah. You were correct that it sounds
16 like hearsay.

17 **LOGAN MITCHELL,** having been duly sworn, testifies as
18 follows:

19 **MS. MITCHELL - DIRECT EXAMINATION BY MS. ACQUAVIVA:**

20 Q: Morning, Ms. Mitchell.

21 A: Good morning.

22 Q: Would you please introduce yourself to the
23 Court?

24 A: My name is Logan Mitchell and I am currently
25 the Audit Supervisor at the South Carolina



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1 Department of Revenue.

2 Q: How long have you been the Audit Supervisor at
3 the Department?

4 A: Since March of 2018.

5 Q: And how long have you been employed with the
6 Department?

7 A: A little over seven years.

8 Q: Prior to becoming the Audit Supervisor, what
9 was your role within the Department?

10 A: I was an Auditor.

11 Q: And was that the position you held during the
12 audit at issue in this case?

13 A: Yes.

14 Q: What types of audits were -- did you
15 participate in during your tenure at the
16 Department?

17 A: We conducted a variety of audits for different
18 tax types, for income tax, accommodations tax,
19 liquor tax, admissions, but mostly I focused on
20 Sales and Use Tax.

21 Q: And since this a Sales and Use Tax case, I
22 would like you to focus on Sales and Use Tax
23 audits. And please tell the Court, during the
24 time this audit took place, around 2016 through
25 March 2017, what was the typical process that



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1 you -- the Department would follow when
2 conducting a Sales and Use Tax audit?

3 A: We would send an initial audit appointment
4 letter. We would then work back and forth with
5 the taxpayer to gather the records and
6 determine if any sales tax liability was due.

7 Q: And what would you do once you made the
8 determination whether there was any tax
9 liability?

10 A: We would issue a Proposed Notice of Assessment.

11 Q: And what would typically happen after that
12 notice was issued?

13 A: The taxpayer could either agree with our
14 findings and pay the audit in full or they
15 could protest.

16 Q: How did you become involved with the audit that
17 we're here about today?

18 A: I was asked by Ricky Taylor to -- to start this
19 audit.

20 Q: And do you recall specifically what you were
21 asked to do?

22 A: I was asked to send the taxpayer an initial
23 appointment letter.

24 Q: Okay. What was the purpose or scope of the
25 audit that you were to initiate?



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1 A: We were looking at Sales and Use Tax from a
2 period covering January 1st of 2016 through the
3 end of March of 2016.

4 Q: Okay. When you sent the initial audit letter
5 on March 24th, 2016 ---

6 **MS. ACQUAVIVA:** And Elizabeth, if you could set up
7 Exhibit 181, which has been admitted.

8 **(Hearing Exhibit Number 181 was introduced into the**
9 **record at this time.)**

10 Q: Who did you send that audit letter to?

11 A: The purpose of the letter being sent was to
12 conduct an audit of Amazon.com, LLC and to
13 Amazon.com, DDC-LLC.

14 Q: And who's the taxpayer at issue in Court today?

15 A: Amazon Services.

16 Q: Do you recall why the initial audit letter was
17 seeking to audit Amazon.com, LLC and
18 Amazon.com, DDC-LLC?

19 A: At the time, I guess because of the number of
20 entities that Amazon had registered with us, we
21 weren't sure who was responsible for collecting
22 Sales and Use Tax.

23 Q: Why did you only audit a three-month period in
24 this case?

25 A: At the time when the letter was sent, there



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1 were only three months of returns that were
2 due.

3 Q: And why was it that Amazon didn't have a
4 responsibility to submit Sales and Use Tax
5 returns prior to January 1, 2016?

6 A: They had a five-year moratoria in the State of
7 South Carolina.

8 Q: After you sent the audit letter, when you spoke
9 with Mr. Jackson on April 1st, what did you
10 learn about some of Amazon's other entities?

11 **MR. RAZI:** Objection. Hearsay.

12 **MS. ACQUAVIVA:** Your Honor, it would be offered for
13 the effect on the listening, not for the truth
14 of the matter asserted. And also, I would
15 submit it's not hearsay because it's a
16 statement by a party opponent. Mr. Jackson is
17 an employee of Amazon.

18 **THE COURT:** Well, you need to lay that foundation
19 though.

20 **MS. ACQUAVIVA:** I apologize, Your Honor. It's in --
21 in the Exhibit 181. The letter was addressed
22 to the ---

23 **THE COURT:** Oh, okay.

24 **MS. ACQUAVIVA:** --- parent company, Amazon.

25 **THE COURT:** Well, let's just make it specific.



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1 **MS. ACQUAVIVA:** Sure.

2 Q: Specifically, who did you address the initial
3 audit appointment letter to?

4 A: Mr. Jim Jackson.

5 Q: And what was your understanding -- what was Mr.
6 Jim Jackson's role with Amazon.com, Inc.?

7 A: He was the Senior Tax Manager.

8 Q: Okay. And was Mr. Jackson the initial point of
9 contact that the Department had -- he was the
10 initial contact person for Amazon when this
11 audit began?

12 A: Yes. He was.

13 Q: Okay. I will re-ask my question.

14 **THE COURT:** Okay.

15 Q: When you spoke with Mr. Jackson on April 1st,
16 what did you learn from him about two of
17 Amazon's other entities?

18 **MR. RAZI:** Same objection. It's hearsay and it's --
19 frankly, it's not relative. We're now talking
20 about other entities, other than the taxpayer.

21 **THE COURT:** Overruled.

22 Q: You may answer the question.

23 A: We learned that Amazon had several other
24 entities that were also registered with us.

25 Q: Okay. What did you learn specifically at this



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1 point about Amazon Services, LLC?

2 A: They were reporting taxes on Prime memberships.

3 Q: Okay. And what license did they have the
4 Department in order to report that?

5 A: They had a sales tax license.

6 Q: Do you recall when they obtained that sales tax
7 license or for what period the sales tax
8 license was in effect?

9 A: I do not.

10 Q: Again, as of April 2016, prior to your more
11 detailed conversations with Amazon personnel,
12 what were the three types of transactions that
13 the Department thought Amazon.com, LLC may have
14 been responsible for remitting tax on -- sales
15 tax on?

16 A: There would have been sales of product owned
17 and shipped by Amazon. There would have been
18 sales of the product owned by a third party,
19 but shipped by Amazon using their fulfillment
20 services. And then, there would have been
21 sales of third -- third party products that the
22 third party was responsible for shipping once
23 the transaction was complete.

24 Q: Were you able to determine if Amazon.com, LLC
25 was remitting tax any of those three



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1 transaction types?

2 A: Yes, we were.

3 Q: And what was Amazon.com, LLC remitting Sales
4 and Use tax on?

5 A: They were remitting Sales and Use Tax of
6 products owned and shipped by Amazon.

7 Q: Very broadly and generally, what happened
8 during the audit between April and August of
9 2016?

10 A: There were several conversation with the
11 taxpayer just gaining a better understanding of
12 how they operate.

13 Q: When you had a conference meeting with Amazon
14 personnel on August 26, 2016, do you recall who
15 was present?

16 A: We had several members present from the
17 Department of Revenue along with several
18 representatives from Amazon. One of those being
19 Janet Matney.

20 Q: And how did you come to understand that the
21 people you were meeting with were
22 representatives of Amazon?

23 A: They -- they work for the Tax Department for
24 Amazon.

25 Q: At that August 26th meeting, what additional



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1 information did you learn about Amazon
2 Services, LLC?

3 A: We learned that we would need to send a
4 separate audit appointment letter specifically
5 addressed to Amazon Services, LLC to get any
6 additional documentation for product that's
7 owned by a third party.

8 Q: And do you recall why you needed to direct that
9 audit letter to Amazon Services as opposed to
10 Amazon.com, LLC?

11 A: Because they were separate entities and were
12 responsible for -- for different sales
13 transactions.

14 Q: Do you recall what you learned regarding Amazon
15 Services' relationship with the website
16 www.Amazon.com?

17 A: Yes. They -- they operate the website.

18 Q: And do you recall what you learned regarding
19 Amazon Services' relationship or interactions
20 with the third parties who owned some products
21 that are sold?

22 A: Yes. The contracts for the third parties to
23 sell through the website was with Amazon
24 Services.

25 MS. ACQUAVIVA: Could you put up Exhibit 172,



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1 please?

2 Q: Once you got this additional information about
3 Amazon Services, what did you do on September
4 1st, 2016?

5 A: We sent another audit appointment letter.

6 Q: And looking at Exhibit 172, would that be the
7 audit appointment letter that you sent to
8 Amazon Services?

9 **(Hearing Exhibit Number 172 was introduced into the**
10 **record at this time.)**

11 A: Yes. It would be.

12 Q: And specifically, data wise, for purposes of
13 your calculations, what was you that you were
14 looking for from Amazon Services?

15 A: We were looking for copies of all of the sales
16 transactions where product was sold owned by a
17 third party.

18 Q: Just through Amazon's website, correct?

19 A: Through the website.

20 Q: What information did Amazon Services provide to
21 you when you requested that data?

22 A: They provided a -- a one-page chart for the
23 first quarter of 2016 with the total sales.

24 Q: How did you use that chart to complete your
25 audit?



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1 A: We took total sales that were listed in that
2 chart and we divided that figure by three to
3 get a tax measure since our audit period was --
4 was a three-month -- covered a three-month
5 period.

6 Q: And why did you have to divide the total by
7 three?

8 A: The totals that were given to us were not
9 separated by month.

10 Q: Why did they need to separated by month?

11 A: Because the taxpayer has a monthly filing
12 requirement based on their sales tax license.

13 Q: And using that -- that data, how did you
14 calculate what the Department believed the tax
15 owed would be?

16 A: Once we divided that figure by three, that
17 amount was multiplied by a seven percent tax
18 rate to come up with tax due by period.

19 Q: What is South Carolina's State Sales and Use
20 Tax rate?

21 A: Six percent.

22 Q: So, why did you use seven percent rate?

23 A: We used the seven percent rate because the
24 County information was not provided and as an
25 average, the tax software that we use -- when



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1 the county information is not provided or is
2 unknown, it uses an average, which I guess
3 comes to -- to a one percent amount.

4 Q: Okay. And when you say county information
5 wasn't provided, what is the reason that the
6 Department would need county information?

7 A: We would need the county information to
8 determine where the products were shipped to so
9 that we could accurately determine any local
10 option or municipality taxes that would be due.

11 **MS. ACQUAVIVA:** Keep it at 175, please.

12 Q: When you completed the audit in December of
13 2016, what did you do?

14 A: We issued a Proposed Notice of Assessment.

15 Q: And what was the date of that Proposed
16 Assessment?

17 A: December 9th, 2016.

18 Q: And is Exhibit 175 the Proposed Assessment that
19 you sent Amazon Services?

20 **(Hearing Exhibit Number 175 was introduced into the**
21 **record at this time.)**

22 A: Yes. It would've -- this would have been one
23 page in the billing packet that we would have
24 sent them.

25 Q: What was the propose tax due?



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1 A: \$9,830,759.19.

2 **MS. ACQUAVIVA:** I need you to email those numbers
3 from Ms. Mitchell.

4 Q: What else is listed in the Proposed Assessment?

5 A: Penalty and interest.

6 Q: And why were penalties included?

7 A: Penalties were included for substantial
8 understatement.

9 Q: And what does that mean, substantial
10 understatement penalties?

11 A: The taxpayer failed to remit taxes by at least
12 20 percent of the tax required to be shown on
13 the return.

14 Q: And why was interest included?

15 A: Because the taxpayer did not properly remit the
16 tax due at the time, so interest would have
17 been calculated up through 30 days from the
18 date that we would have sent the proposed
19 notice of assessment letter.

20 Q: Okay. As we sit here today, are these numbers
21 accurate?

22 A: Yes. They are. Additional penalty and
23 interest would -- would be due though. Those
24 calculations will continue.

25 Q: So, I'll ask you again, is -- is the total



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1 amount accurate today, if -- if the numbers
2 were brought current to?

3 A: No.

4 Q: And why is that?

5 A: Because additional penalty and interest are due
6 now.

7 Q: Do you recall what happened after you issued
8 this initial proposed assessment to Amazon
9 Services?

10 A: Yes. They brought to our attention that there
11 was actually a math error in the chart that we
12 were provided. And they provided us with --
13 with a revised chart. So, we were able to --
14 to issue a revised Proposed Notice of
15 Assessment.

16 **MS. ACQUAVIVA:** Can you put up 182, please?

17 Q: And is Exhibit 182 the revised Proposed
18 Assessment?

19 **(Hearing Exhibit Number 182 was introduced into the**
20 **record at this time.)**

21 A: This would have been the revised explanation of
22 the audit assessment, which has the initial
23 date at the top where -- where would have
24 issued that initial assessment. And then,
25 there's a revised date.



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1 **MS. ACQUAVIVA:** You can just scroll through. I
2 think to the next page. Keep going. Yeah.
3 So, this I think was page 3 of Exhibit 182.
4 Would you zoom into the numbers?

5 Q: And with regard to the amount of tax proposed
6 to be due, what happened between the initial
7 Proposed Assessment and this amended Proposed
8 Assessment?

9 A: There was a change in the amount of tax
10 calculated to be due.

11 Q: What -- was it increased or decreased?

12 A: Decreased.

13 Q: What happened after you issued the amended
14 Proposed Assessment to Amazon Services?

15 A: We received a protest letter.

16 Q: And where did the file go after that?

17 A: After that, the file went over to our
18 litigation group.

19 Q: And what involvement, if any, did you have once
20 the audit file left your desk?

21 A: I had very little involvement past that point.

22 **MS. ACQUAVIVA:** I beg the Court's indulgence for one
23 moment.

24 Q: Just to take you back to the numbers, are these
25 estimated figures or actual figures based on



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1 data?

2 A: These are actual figures based on the data that
3 the tax payer provided.

4 Q: But it is an actual representation of what the
5 taxpayer may owe or is it an estimate based off
6 the numbers provided by the taxpayer?

7 A: I guess it would be an estimate based off of
8 that. And the potential that penalty and
9 interest may be different because of the way
10 the chart was provided, those figures may not
11 be exact.

12 Q: And, correct me if I'm wrong, you testified
13 that the additional one percent added when you
14 were calculating this figure was because of --
15 you just factored in unknown county?

16 A: Yes. That's correct.

17 Q: So, do you recall during the conference on
18 March 22nd, what the Department agreed with
19 Amazon Services it would do if the Department
20 were to prevail in this litigation regarding
21 the actual percentage -- excuse me -- of tax to
22 calculate -- related to the county's ---

23 **MR. RAZI:** Objection. Now, I think we're talking
24 about is hearsay. We're now -- I think the
25 question was about out of court statements by



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1 the witness or the Department. That's the
2 definition of inappropriate hearsay.

3 **MS. ACQUAVIVA:** And that's fine. This testimony was
4 to help Amazon if this figure may potentially
5 get reduced, but ---

6 **THE COURT:** That's fine, then.

7 **MS. ACQUAVIVA:** Then, I'll withdraw the question.
8 Pass the witness.

9 **THE COURT:** All right.

10 **MS. MITCHELL - CROSS-EXAMINATION BY MR. RAZI:**

11 Q: Good morning again, Ms. Mitchell.

12 A: Good morning.

13 **MR. RAZI:** Could we keep up 182, please?

14 Q: Is Exhibit 182 the -- the Notice of Proposed
15 Assessment that your work brought?

16 A: Yes. It is.

17 Q: Okay. And am -- and am I right, that prior to
18 creating that work product, you made no effort
19 to determine whether third party sellers had
20 collected and remitted sales tax and paid it to
21 South Carolina on the very same third party
22 sales transactions that are reflected in your
23 Notice to Proposed Assessment, correct?

24 A: Correct.

25 Q: Am I right -- do you know what a Use Tax is,



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1 ma'am?

2 A: Yes. I do.

3 Q: Okay. And am I right that you don't know as
4 you sit here today whether the third party sale
5 transactions that formed the basis of your
6 Notice of Proposed Assessment had already been
7 the subject of Use Tax payments to the South
8 Carolina Department of Revenue, correct?

9 A: We don't know that.

10 Q: Okay. And would you -- let me take a step
11 back, do you -- do you recognize that the money
12 that you're seeking from Amazon Services is
13 based on these third party sales transactions
14 on Amazon.com, correct?

15 A: Yes.

16 Q: Okay. And you would agree with me, I assume,
17 that it would be inappropriate for the
18 Department to collect sales tax on a single
19 sales transaction from two different taxpayers,
20 in other words, double collecting?

21 A: Yes. I agree with that.

22 Q: Okay. That would be wrong, correct?

23 A: Yes.

24 Q: Okay. And do I understand your testimony
25 correctly that you don't know whether of the



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1 many third party sales transactions that are
2 reflected in your notice of proposed
3 assessment, the Department has already been
4 paid the sales tax by some of the taxpayers?
5 But you don't know.

6 A: We don't know that.

7 Q: It is fair to say you were the lead person on
8 the audit?

9 A: Yes. That's correct.

10 Q: Okay. Person sort of who did the most work, if
11 you will?

12 A: Yes.

13 Q: And you reported up, as I recall, to Mr.
14 Taylor?

15 A: Yes.

16 Q: Okay. You described some on your direct the
17 steps that you took. I want to focus for a
18 minute on some of the things that I think you
19 didn't do. Is it fair to say that during the
20 course of the audit, you didn't talk to a
21 single third party seller on Amazon.com?

22 A: No. I did not.

23 Q: Okay. You didn't communicate in any way with
24 any third party seller on Amazon.com, correct?

25 A: No.



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1 Q: Okay. So, is it fair to say, you don't know
2 how it is that they list and offer products for
3 sale on Amazon.com?

4 A: Amazon came and did a demonstration for us that
5 kind of walked through how third party sellers
6 would go about selling on the website. But no,
7 I did not learn any of that directly from the
8 third party -- third parties themselves.

9 Q: Okay. So, the only information you had on that
10 topic is information that provided by Amazon
11 Services or another Amazon company?

12 A: Yes.

13 Q: Okay. What about customers on Amazon.com who
14 have purchased products from third party
15 sellers? Am I right that you have spoken with
16 any of them during the course of your audit?

17 A: I did not.

18 Q: Now, you talked about a number of meetings and
19 discussions you had with Amazon. Is it fair to
20 say that first of all Amazon Services and other
21 Amazon parties were cooperative with you during
22 the course of your audit?

23 A: Yes.

24 Q: You ask for information, they provided it?

25 A: They provided the information, but not how we



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1 asked for it.

2 Q: Okay. There were some -- there were some back
3 and forth for instance about how certain
4 information was to be provided, is that your
5 testimony?

6 A: Yes.

7 Q: Okay. But ultimately you got a substantial
8 amount of information from Amazon Services,
9 right?

10 A: Yes.

11 Q: They flew out here and met with you and your
12 team repeatedly, right?

13 A: Yes. They did.

14 Q: They -- if you asked for a call, they said,
15 let's have a call. We're happy to talk to you.

16 A: Yes.

17 Q: Right. But, that notwithstanding, fair to say
18 that from the beginning they just -- they
19 didn't agree with the idea that these taxes
20 that you're -- you're seeking to collect in the
21 -- the Notice of Proposed Assessment were
22 properly attributable to Amazon Services, fair?

23 **MS. ACQUAVIVA:** Your Honor, I would just object to
24 the who is they. Is it Amazon.com, Inc., they
25 didn't agree or due to the numerous entities



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1 that are related in this case?

2 **THE COURT:** All right. I'll allow you to cross ---

3 **MS. ACQUAVIVA:** And my question is ---

4 **THE COURT:** You can cross on that.

5 **MS. ACQUAVIVA:** Okay.

6 **THE COURT:** So. Go ahead and answer the question,
7 if you can.

8 A: I'm sorry. Could you repeat the question,
9 please?

10 Q: Sure. Is it fair to say from the very
11 beginning, although they were cooperative, the
12 Amazon representatives of the various Amazon
13 companies that you dealt with disagreed that
14 Amazon entities owed the taxes for the third
15 party sales?

16 A: Yes.

17 Q: And that was a position that they expressed
18 throughout your work, right?

19 A: Yes.

20 Q: They expressed it respectfully and politely,
21 right?

22 A: Yes.

23 Q: And they tried to make reasoned -- present you
24 with reasoned arguments and analysis as to why
25 they thought that you had the wrong taxpayer,



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1 fair?

2 A: Yes.

3 Q: I think that you mentioned Amazon Prime in your
4 direct testimony, you know what that is, right?

5 A: Yes.

6 Q: Okay. And you know that this case is not about
7 Amazon Prime, right?

8 A: Yes.

9 Q: Okay. You know, ma'am, based your on your
10 experience with the Department that services
11 when -- when -- that the receipts from
12 services, generally are not subject to tax?

13 A: Yes. That's right.

14 Q: Okay. And if, for instant, an audit is
15 commenced and the facts show that the -- the
16 taxpayer is a service provider, then no tax
17 should be assessed, correct?

18 A: Correct.

19 Q: Let me ask you a couple questions about on-line
20 retailers and online market places, do you know
21 what those are?

22 A: Yes. I do.

23 Q: Okay. And if I remember right, at the time of
24 your deposition, you had never audited any e-
25 commerce business?



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1 A: That's correct.

2 Q: Okay. And if I remember right, at the time of
3 your deposition, you had never audited any
4 online marketplace?

5 A: That's correct.

6 Q: And am I also right, that as of the first
7 quarter of 2016, there was no rule, regulation,
8 guidance, publication of any kind put out by
9 your department relating to the tax of third
10 party sales on online marketplaces?

11 A: Yes. As far as I know, that's correct.

12 Q: Okay. In other words, it's sometimes hard with
13 the yes and nos, but yes, there was zero
14 guidance, absolutely no guidance on that topic
15 that had been communicated or written down for
16 the public's benefit on the topic of third
17 party sales and online marketplaces of the
18 first quarter of 2016?

19 A: Yes.

20 Q: Now, since that time, it's fair to say, well
21 into the litigation of this case, a couple
22 months ago the Department has put out some
23 guidance on that topic, right?

24 A: Yes. They have.

25 Q: Okay. And you were a part of that process and



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1 then you -- you reviewed drafts of it before it
2 went out, I recall?

3 A: Yes.

4 Q: But that wasn't something you'd -- that you had
5 ever seen or heard of or knew about or
6 communicated to any taxpayer, whether it be an
7 Amazon company or anyone else as of the time,
8 the first quarter of 2016?

9 A: Yes.

10 Q: Hartley Powell is the director of the agency?

11 A: Yes, he is.

12 Q: Speaks on behalf of the agency?

13 A: Yes. He does.

14 Q: Okay. He's your ultimate boss?

15 A: Yes.

16 Q: And he's someone who, when he speak publically
17 on behalf of the agency, in your experience,
18 chooses his words carefully?

19 A: Yes. He does.

20 Q: Okay. And you know that he's made statements
21 publically about -- about this case, about
22 Amazon, right?

23 A: No. I'm not aware of any statements that he's
24 made publically.

25 Q: Okay. Have you yourself communicated with



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1 Director Powell?

2 A: Yes. I have.

3 Q: Okay. In your experience, he -- he generally
4 means what he says?

5 A: Yes.

6 Q: Am I right -- did I hear right on the direct
7 examination that you looked at the -- the so-
8 called BSA as part of your work?

9 A: I -- I don't remember stating that
10 specifically.

11 Q: Oh, okay. Do you know what the Business
12 Solutions Agreement is?

13 A: Yes. I -- now, that you word it like that. I
14 -- again, I don't necessarily know it by that
15 title, but they did provide some of that
16 documentation for us to review.

17 Q: Okay. And did you study those materials
18 throughout the course of your audit before
19 coming to the conclusion?

20 A: We would have reviewed, but I don't know that
21 I would necessarily studied them.

22 Q: Okay. And when you say, you know, you would've
23 reviewed them, and it doesn't -- I mean, it --
24 I just want to know what the answer is. It's
25 okay either way, but do you have a memory of



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1 actually reviewing the -- the Business
2 Solutions Agreement, that is the contact
3 between Amazon Services and third party seller?

4 A: I would have read the document, but that was
5 several years ago.

6 Q: Okay. Do you -- do you recall learning during
7 the course of your audit that the party that
8 contracted with third party sellers for
9 transaction processing services, that is
10 payment processing services, was a company
11 called Amazon Payments, Inc.?

12 A: That may have been brought to our attention,
13 but I don't remember.

14 Q: Okay.

15 **MR. RAZI:** Let's put up Exhibit Three.

16 Q: Do you have Exhibit Three on the screen in
17 front of you?

18 A: Yes. I do.

19 Q: Okay. Is this one of the documents that you
20 reviewed during the course of your audit?

21 A: Yes.

22 Q: Okay.

23 **MR. RAZI:** Let's go to Page 10 of the Exhibit.

24 Q: Do you see at the bottom where it says,
25 transaction processing services?



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1 A: Yes. I do.

2 Q: Okay. Tell the Court what those are.

3 A: It says, Amazon Payment, Inc. ---

4 Q: No. I'm sorry, ma'am. I'm just sticking with
5 transfer -- transaction processing services,
6 what are those?

7 A: I'm -- I'm not sure.

8 Q: Okay. And then, do you see that the -- the
9 contracting party from Amazon for transaction
10 processing services is Amazon Payments, Inc.?

11 A: Yes. I do see that.

12 Q: Okay. And what does that company do?

13 A: I'm not sure.

14 Q: You know though -- or maybe you don't. Did you
15 know that's a -- a separate company for the
16 taxpayer in this case, Amazon Services, LLC?

17 A: No. I did not know that.

18 **MR. RAZI:** We can put that down, Mr. Brooks.

19 Q: You would agree with me based on your -- your
20 work at the Department that a party can't
21 contract their way out of their tax
22 obligations?

23 A: Yes.

24 Q: Okay. But the opt -- opposite is true, also.

25 A contract alone is not enough to require a



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1 taxpayer under the law to have an obligation to
2 pay taxes, right?

3 A: I guess I don't understand the question.

4 Q: Okay. We started with the proposition that you
5 can't have contract get out of your obligations
6 to pay taxes, if under the law you have those
7 obligations. And you -- you agreed with me
8 about that, right?

9 A: Yes.

10 Q: Okay. And by the same token, you can't, you
11 know, contract -- commit yourself or someone
12 else to have a tax obligation under the law
13 that they don't have based on the true facts of
14 the transactions, fair?

15 **MS. ACQUAVIVA:** I would just object to the extent
16 that question calls for a legal conclusion.

17 **MR. RAZI:** And I would submit that Exhibit 175 and
18 182, which were her handiwork, were the built
19 upon false legal conclusions, but legal
20 conclusions. That's what this -- that's what
21 her testimony's all about.

22 **THE COURT:** Right. She can't -- she can test -- she
23 can't state a legal conclusion. She can state
24 that if -- if she exercised that perception in
25 making her determination, then you could ask



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1 her about that. So, you're not entirely
2 foreclosed, but foreclosed in the way you're
3 asking the question, so I sustain the
4 objection.

5 **MR. RAZI:** Okay.

6 Q: If doing the course of an audit, you determine
7 that a taxpayer had tried to enter into a
8 contract to get out of their obligations to pay
9 taxes, would that be the end of the matter?

10 A: No.

11 Q: Because of the reason you said earlier, that a
12 taxpayer can't contract their way out of an
13 obligation that exists under the law, right?

14 A: Yes.

15 Q: And that same principle applies to the third
16 party sellers that you looked at a little bit
17 in this case. If they have obligation under the
18 law to pay taxes, they can't just contract
19 their way of it, no?

20 A: Yes.

21 Q: And when you're doing an audit, if you
22 determined that there's a difference between
23 what, you know, a single piece of paper or
24 contract says, and -- on the one hand and on
25 the other hand, the true nature of the



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1 relationship between the parties. That is the
2 true facts. It's the facts and the true nature
3 of the relationship that controls, right?

4 A: Yes.

5 Q: Thank you.

6 **THE COURT:** Redirect?

7 **MS. MITCHELL - REDIRECT EXAMINATION BY MS. ACQUAVIVA:**

8 Q: Ms. Mitchell, what type of audit did you
9 conduct again, what was the tax type?

10 A: Sales tax audit.

11 Q: Okay. And what guidance, if any, does the
12 Department have regarding Sales and Use Tax?

13 A: We've got a lot of guidance. We've got a Sales
14 and Use Tax Manual that's available to the
15 public. And then, we specifically have
16 different documents dealing with Sales and Use
17 Tax on specific industries.

18 Q: Mr. Razi asked you about a lot about contracts
19 and making legal determinations. When issues
20 like that arise during an audit that you're
21 conducting, who, if anyone, do you work with to
22 navigate those issues?

23 A: We work directly with the taxpayer under audit.

24 Q: Do you work with anyone within the Department?

25 A: Sometimes.



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1 Q: And just to be general, what sections within
2 the Department would you typically work with
3 when trying to work through a contract, for
4 example?

5 A: Through our -- our policy section and our
6 litigation section.

7 Q: And what does the policy section at the
8 Department do?

9 A: They -- they do a variety of different things.
10 They -- they issue information to the public.
11 They answer a lot of our questions if -- if we
12 have a question about the application of the
13 law to a specific situation. And I'm sure they
14 -- they've got a variety of other functions as
15 far as helping other -- other sections within
16 our agency.

17 Q: And with this audit specifically, who if anyone
18 did you solicit advice from during the audit?

19 A: John McCormack.

20 Q: Did you speak with anyone else or even just any
21 other sections generally, if don't recall
22 specifics?

23 A: Other than our litigation section, no.

24 Q: When you audit a retailer in a Sales and Use
25 Tax audit, who do you typically speak with



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1 during the audit?

2 A: We would speak with potentially a CFO. We
3 speak with either an accountant or a
4 bookkeeper. It just depends on how complicated
5 the structure of the company is.

6 Q: How often do you speak with the taxpayer
7 customers?

8 A: Never.

9 Q: How often do you speak with parties that the
10 taxpayer has a contractual relationship with?

11 A: Never.

12 Q: Do you ever talk to vendors or wholesalers when
13 conducting a Sales and Use Tax audit?

14 A: We potentially could, if we are requesting
15 purchase records.

16 Q: And what would the extent of a typical
17 conversation with a vendor or wholesaler be?

18 A: We would either issue a customer authorization
19 form to get copies of those purchase records or
20 we do a summons.

21 Q: How often do you discuss with a wholesaler or
22 a vendor something beyond obtaining purchase
23 records?

24 A: We don't discuss anything else with them.

25 Q: When trying to understand a taxpayer's business



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1 structure and the facts and circumstances
2 surrounding a transaction, who do you typically
3 speak with?

4 A: We talk to the taxpayer.

5 Q: If you had wanted to speak with the third
6 parties whose products are sold on Amazon, how
7 would have done so?

8 A: I think we would be -- have to be careful if we
9 did that because it would create a disclosure
10 issue.

11 Q: How would know who the third parties were to
12 contact them?

13 A: That would have to be provided by the taxpayer.

14 Q: And what information, if any, did Amazon
15 Services provide you with regards to the third
16 parties' identities in this case?

17 A: They didn't provide any of that information.

18 Q: And how much time, if any, did Amazon Services
19 personnel spend with you going through the
20 Business Solutions Agreement?

21 A: None.

22 Q: You had stated on cross-examination you don't
23 know if tax was remitted by someone other than
24 Amazon Services on any of the transactions at
25 issue, do you recall saying that?



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1 A: Yes, I do.

2 Q: Why don't know of that information?

3 A: The third party seller information was not
4 provided to us for us to potentially look to
5 see if any of those third parties are
6 registered and remitting any tax.

7 Q: And when you're determining if tax was already
8 remitted on a transaction such to determine
9 whether a credit may be due, where do you get
10 that information from typically?

11 A: We would have to -- in -- in this case, where
12 we're talking about a -- a third party, we
13 would have to get a copy of everything that
14 they remitted on their return to see if the
15 transactions in question -- the tax had been
16 collected and remitted to us.

17 Q: And who does the Department typically look to
18 to get that information?

19 A: We would -- in this case, we would have to look
20 to that third party to do that.

21 Q: How would you find out who the third parties
22 were?

23 A: Amazon would have to provide us with that
24 information.

25 Q: Okay. So, you would have had to get any



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1 information about potential credit from Amazon
2 Services?

3 A: Yes.

4 Q: Okay. Do you recall when Director Powell
5 started at the Department?

6 A: I do not.

7 Q: Do you recall if it was before or after the
8 proposed assessment was issued in this case?

9 A: I don't know about that. I know he was not our
10 Director at the time -- when we started this
11 audit.

12 Q: Okay.

13 **MS. ACQUAVIVA:** I beg the Court's indulgence. No
14 further questions.

15 **MR. RAZI:** Just a few more, Your Honor.

16 **THE COURT:** On new matter.

17 **MR. RAZI:** New matter.

18 **MS. MITCHELL - RECROSS-EXAMINATION BY MR. RAZI:**

19 Q: Who would the -- who the Department of Revenue
20 contacts during the course of an audit, that's
21 the Department's decision to make, right?

22 A: Yes.

23 Q: Okay. And you understand that the Department
24 has the authority under the law to issue
25 requests for information to taxpayers



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1 informally, right?

2 A: Yes.

3 Q: You understand that the Department of Revenue
4 can contact a taxpayer or potential taxpayer
5 through a whole host of means and they're
6 empowered to do that under the law, right?

7 A: Yes.

8 Q: And whether to contact one taxpayer or another
9 taxpayer or still a third one, that's fully
10 within the Department of Revenue's control,
11 right?

12 A: Yes.

13 Q: In other words, Amazon doesn't have any
14 authority or obligation under the South
15 Carolina tax laws to contact other taxpayers on
16 behalf of the Department. So, that's the
17 Department's job, right?

18 **MS. ACQUAVIVA:** Again, I would object to the extent
19 that calls for a legal conclusion.

20 **THE COURT:** I sustain that. We'll have to go the
21 path we previously went.

22 **MR. RAZI:** I withdraw.

23 Q: And not only do you have the various means of
24 contacting taxpayers that you've already
25 testified about, but the Department of Revenue



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1 has other ways to get information from
2 taxpayers, too, right?

3 A: What other ways are you referencing?

4 Q: Where there are -- there are many, but do you
5 what a subpoena is, ma'am?

6 A: Yes. I do.

7 Q: Okay. That's a demand from a government agency
8 for records or testimony, correct?

9 A: Yes.

10 Q: And those are powers that your department has,
11 right?

12 A: Yes.

13 Q: Every day of the week, the Department of
14 Revenue has issued subpoenas to the taxpayers
15 or potential taxpayers seeking to understand
16 who owes sales taxes, who owes income taxes,
17 how much they owe and the like, right?

18 A: Yes.

19 Q: In fact, that's the job in part of the
20 Department of Revenue.

21 A: Yes.

22 Q: But you didn't in this case issue any subpoenas
23 to any third party sellers, did you?

24 A: We don't know who they were. No.

25 Q: Okay. Did you know, ma'am -- did you ever go



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1 on Amazon.com and, you know, look who the third
2 parties on there?

3 A: Not for the purposes of the audit, no.

4 Q: Well, for any purpose. I mean, did you know
5 that they're on there?

6 A: I don't -- I don't do my shopping on Amazon.
7 I'm not very familiar with buying stuff on
8 there.

9 Q: Okay. For -- for the purpose of this audit,
10 did you actually go on the website?

11 A: Yes. I looked at it.

12 Q: Okay. And did you know for instance that
13 there's something on the website called product
14 detail pages? Do you know what that is?

15 A: No.

16 Q: Okay. Did you know that there's something on
17 the website called and offer listing page where
18 for -- for any particular transaction, you can
19 see who the sellers are, did you know that?

20 A: No.

21 **MR. RAZI:** Will you put up Exhibit 210?

22 Q: During the course of your audit, did you ever
23 come across any web pages like this on
24 Amazon.com, where at the top there's a product
25 and then underneath that there's something



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1 called seller information?

2 A: I see that on here.

3 Q: Okay. And -- but does this ---

4 **MR. RAZI:** If you scroll down, Mr. Brooks.

5 Q: Do you see how we know this 'cause this has
6 come up before? But for this particular
7 product, there's 21 sellers. He -- you know,
8 there all different names, different
9 hyperlinks, different everything. Is that
10 something that you encountered during the
11 course of your audit?

12 A: I don't remember.

13 Q: Okay. Do you remember for instance learning on
14 the website, you could see the name of a third
15 party seller and then, just with your mouse
16 just press the button and go to the page that
17 provides information about the third party
18 seller is?

19 A: I did not know that.

20 Q: Okay. Okay. And you didn't do that in the
21 audit?

22 A: No.

23 Q: All right. You mentioned the Sales and Use Tax
24 manual, right?

25 A: Yes.



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1 Q: And that's some of the guidance that you've put
2 out for taxpayers as I understand?

3 A: Yes.

4 Q: Okay. And that's a document that you -- during
5 the course of your training and your work,
6 you've -- you've reviewed to some extent and --
7 and you understand at some level?

8 A: Yes.

9 Q: Okay. And the purpose again is to provide
10 guidance to taxpayers about the rules, right?

11 A: Yes.

12 Q: Okay. Let me hand you what we've marked as
13 Hearing Exhibit 215. I'm just asking if you
14 recognize the Exhibit?

15 **(Hearing Exhibit Number 215 was introduced into the**
16 **record at this time.)**

17 A: Yes. I do.

18 Q: Okay. What is it?

19 A: This is Sales and Use Tax Manual. It says it's
20 a 2015 edition.

21 Q: Okay. Who published that document?

22 A: Department of Revenue.

23 Q: Where -- where's it available?

24 A: It's available on our website.

25 Q: Okay. Anywhere else?



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1 A: I don't know if they print copies of these or
2 not anymore.

3 Q: Okay. Does the Department take care to try to
4 set forth the -- the rules and the principles
5 accurately before it puts the -- the Use Tax
6 Manual?

7 A: Yes. I think it would.

8 Q: All right. In other words, I mean, this isn't
9 like a tweet that somebody wrote late at night.
10 This is a -- this is a document that was
11 prepared as part of a iterative process
12 involving lawyers and policymakers and
13 auditors, the whole team, right?

14 A: Yes.

15 Q: All right. And do you know, ma'am, that this
16 was the document that was out there for the
17 world to know about South Carolina Sales and
18 Use Tax in the first quarter of 2016?

19 A: No. I did not know that.

20 Q: Okay. Are you aware, given your -- your
21 expertise and experience, of any other South
22 Carolina Sales and Use Tax Manual that was out
23 there for taxpayers or potential taxpayers to
24 access other than the 2015 edition in the first
25 quarter of 2016?



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1 A: No. I'm not aware of any.

2 Q: Okay. And just for the record, the -- the
3 Sales and Use Tax Manual is hundreds of pages,
4 right?

5 A: Yes. It is.

6 Q: Okay. And am I right that no where in that
7 hundreds of pages is there any reference to
8 online marketplaces, right?

9 A: I don't know because I haven't read the entire
10 thing front to back, but I don't imagine it
11 with any language in there at this time.

12 Q: Okay. And as you sit here today, it's -- it's
13 your belief that there is in fact not any
14 guidance in Exhibit 215 about online
15 marketplaces, right?

16 A: Correct.

17 Q: And there certainly isn't any guidance in
18 Exhibit 215 or anywhere else that was out there
19 in the first quarter of 2016 about third party
20 sales on online marketplaces, right?

21 A: Right.

22 Q: Okay. But the guidance does define a sale,
23 right?

24 A: Yes. It does.

25 Q: Okay.



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1 **THE COURT:** This is a new matter because it seems
2 like we're going a little further feel wise if
3 a new matter.

4 **MR. RAZI:** Right. The new matter was that Counsel
5 brought up the Sales and Use Tax Manual.

6 **THE COURT:** Okay.

7 **MR. RAZI:** Yeah. And the other guidance that's
8 published. There was pretty extensive
9 testimony about that.

10 **MS. ACQUAVIVA:** Your Honor, I would object to the
11 characterization that the testimony was
12 extensive.

13 **THE COURT:** All right. I think -- we've got more
14 extensive re -- re-cross than we do -- that it
15 was redirect, but go ahead.

16 **MR. RAZI:** Yeah. Right. And you know, that
17 sometimes happen when you call a witness.

18 **Q:** Can I direct your attention to chapter 2, Page
19 300.

20 **MR. RAZI:** I'm just about done, Your Honor.

21 **Q:** That's -- we've got a tape flag on your
22 version. I think it's probably the second tape
23 flag.

24 **A:** Yes. It is.

25 **Q:** Okay. And I'm not gonna ask you about all the



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1 impacts. Some -- what I'm gonna ask you about
2 is something really short. Do you see at the
3 top where it says sales or purchase?

4 A: Yes. I do.

5 Q: Okay. And is that provision of your Sales and
6 Use Tax Manual designed to provide a definition
7 for the guidance of taxpayers about the
8 definition of a sale or a purchase under South
9 Carolina law?

10 **MS. ACQUAVIVA:** Objection to the extent it calls for
11 legal conclusion.

12 **THE COURT:** I think he's asking the purpose the
13 manual. So I overrule that objection. I think
14 I heard that question correctly.

15 **MR. RAZI:** You did.

16 **MS. ACQUAVIVA:** And maybe I just misheard.

17 **THE COURT:** Yeah.

18 A: I think the section does give definitions of --
19 of a sale or purchase for the purpose of this
20 highlighted item.

21 Q: Okay. And for the purposes of the -- the
22 purposes of this highlighted item was to
23 provide guidance to taxpayers about the
24 Department's position and view about what it
25 means to engage in a sale or a purchase for



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1 purposes of the South Carolina Sales and Use
2 Tax Act, right?

3 A: Yes.

4 Q: And just -- just tell the Court, what was the
5 definition that was provided to taxpayers in
6 the 2015 Sales and Use Tax Manual about the
7 definition of a sale or purchase?

8 A: It says, a sale or purchase is a transfer of
9 title or possession of tangible personal
10 property for consideration. It includes
11 rentals, leases -- leases and licenses to use.

12 Q: Is that it?

13 A: Yes.

14 Q: And just as a general matter in how you conduct
15 audits, agree with me that's it's -- it's true
16 that similarly situated taxpayer should be
17 treated similarly?

18 A: Yes.

19 Q: Okay. And it's not appropriate to -- to come
20 down real hard on one taxpayer, but not do
21 anything at all to another taxpayer that's
22 doing the exact same thing, is that right?

23 A: Yes. That's correct.

24 Q: Thank you.

25 **THE COURT:** Re-redirect on new matter?



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1 **MS. ACQUAVIVA:** Nothing, Your Honor. We would just
2 ask that Ms. Mitchell be allowed to remain in
3 the Court Room, so she doesn't have to sit
4 outside by herself until we can return her to
5 the Department.

6 **THE COURT:** Okay.

7 **MR. RAZI:** No -- no objection.

8 **THE COURT:** So, that's permitted. And you may step
9 down. Is the chair shorter today than it was?

10 **MR. GREEN:** Looks like.

11 **THE COURT:** Thank you. All I could see was her
12 eyes.

13 **MS. MITCHELL:** I have short torso. Maybe -- maybe -
14 --

15 **THE COURT:** I was looking at you and you're not
16 short.

17 **MR. GREEN:** She's not short.

18 **THE COURT:** Okay.

19 **MR. GREEN:** Your Honor, we'd like to present just a
20 little bit of testimony via deposition. Notice
21 was given to opposing counsel last night and
22 they counter designated a few extra things.
23 So, we prepared some stuff to read all that
24 into the record. And so I want to get Mr.
25 Hand to come to the stand. I don't think he



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1 can -- this is for deposition testimony of
2 Christopher Poad, which was Amazon 30-B6
3 designee. I don't know if Andrew can do a
4 British accent quite like Mr. Poad.

5 **MR. HAND:** No.

6 **MR. GREEN:** But we will -- we will do our best.

7 **MR. RAZI:** May I just ask one question?

8 **MR. GREEN:** You may.

9 **MR. RAZI:** Do you have our counter designations in
10 there?

11 **MR. GREEN:** I do.

12 **MR. RAZI:** Okay.

13 **MR. GREEN:** Yes. But -- and if you want to take a
14 quick look just to make sure, but I made ever
15 effort to work all those in.

16 **MR. RAZI:** You may proceed if ---

17 **MR. GREEN:** If you see ---

18 **MR. RAZI:** --- one you left out ---

19 **MR. GREEN:** I certainly was not trying to omit.

20 **MR. RAZI:** I'll cross Mr. Hand if ---

21 **THE COURT:** Well, I ask that Mr. Hand not try to
22 give us an accent.

23 **MR. HAND:** It's probably a good idea.

24 **MR. GREEN:** I started to -- I started to sit and
25 read with my accent. Since I was the



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1 questioner there, I'll be the questioner here.
2 Can you pull up that TDF? That's fine. I
3 don't -- we had a little problem with
4 highlighting this morning. So, but anyway.
5 Yeah. Highlight 13 through 25 there. Okay.
6 And again, this was deposition testament of
7 Christopher Poad taking on November 6th,
8 beginning on November 6th, 2018, and then, some
9 would have been on that following date,
10 November 7th, 2018. So, Mr. Hand, starting on
11 Page 6 at Line 13, do you see where I'm talking
12 about?

13 MR. HAND: Yes.

14 MR. GREEN: Okay.

15 **PUBLICATION OF THE DEPOSITION OF CHRIS POAD:**

16 **(Publication of deposition testimony.)**

17 Q: Do you understand today that you are
18 giving testimony as the representative for
19 Amazon Services, LLC, the Petitioner in
20 this matter?

21 A: Yes.

22 Q: And if you will flip back to Exhibit A on
23 Exhibit One, The Matters for Examination.
24 Have you reviewed that Exhibit or
25 Attachment to the Notice of Deposition?



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1 A: Yes. I have.

2 Q: And are you prepared and able to testify
3 to these issues on behalf of Amazon
4 Services today?

5 A: Yes.

6 **(Publication of deposition testimony concluded.)**

7 **MR. GREEN:** Okay. Next page, Page 7, Lines 11
8 through 15.

9 **(Publication of deposition testimony.)**

10 Q: And how long have you worked for Amazon
11 Services?

12 A: I've worked or Amazon.com Incorporated or
13 their subsidiaries since January 2009.
14 So, that would be nine years and nine
15 months.

16 **(Publication of deposition testimony concluded.)**

17 **MR. GREEN:** Page 10, Line 6 through 21.

18 **(Publication of deposition testimony.)**

19 Q: Can you -- and what your current
20 responsibilities for Amazon Services?

21 A: I have responsibility for Amazon Business,
22 which is a set of services offered to
23 third party sellers in respect of
24 corporate and business customers. Our
25 responsibility primarily is our businesses



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1 outside the United States. I have teams
2 that recruit third party sellers who bring
3 product selection that will be appealing
4 to corporate or business customers. I
5 have responsibility for the marketing or
6 our third- party marketplace services
7 outside of the U.S. and respective Amazon
8 Business? I have some responsibility for
9 building new features on our international
10 websites for third party sellers.

11 **(Publication of deposition testimony concluded.)**

12 **MR. GREEN:** Okay. Page 13. And Lines 9 through 15.

13 **(Publication of deposition testimony.)**

14 Q: And you work for Amazon.com, Inc? There's
15 so many organizations, I get a little
16 confused sometimes. Or tell me which one
17 you work for again?

18 A: Well, I work for a subsidiary of
19 Amazon.com, Incorporated, the parent
20 publicly traded company.

21 **(Publication of deposition testimony concluded.)**

22 **MR. GREEN:** Okay. Now to Page 101. I think it
23 should be Lines 12 -- yes, Lines 12 through 25,
24 and then, 102 through -- 1 through 12, so.
25 Starting here.



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(Publication of deposition testimony.)

Q: What role does Amazon Services play then when a customer buys a product? Let's go back to the book. When a customer buys a book from a third party on the website, what role does Amazon Services play with respect to the charges?

A: Well, again, it's my understanding that the charging of the customer's credit card is initiated and managed by Amazon Payments. Amazon Services operates the Amazon.com website, which would include the functionality on the website to enable a customer to add a product to their cart and go through the checkout process. But the charging of the customer's credit card is ship generation, I believe, is an operation managed by Amazon Payments.

Q: So, Amazon Services to your understanding has no role in the process of charging a customer's credit card?

A: That's my understanding. When ship generation happens, which in the case of an MFN order would be when the seller confirms they've shipped the item or in



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1 the case of FVA is when the ship
2 generation is -- the shipping process
3 starts. It's Amazon Payments who charges
4 the customers credit card. That's my
5 understanding.

6 **(Publication of deposition testimony concluded.)**

7 **MR. GREEN:** And then Page 103, Lines 14-21.

8 **(Publication of deposition testimony.)**

9 Q: Which entities name shows up on the
10 customer's credit card?

11 A: I think it's called the field descriptor
12 and I believe it says Amazon -- it's an
13 abbreviation, but -- I think it says
14 something like Amazon Marketplace
15 Payments. But I think it's abbreviated to
16 M-K-T-P-Y-M-T-S or something like that.

17 **(Publication of deposition testimony concluded.)**

18 **MR. GREEN:** On Page 227, Lines 2 through 10, I want
19 to turn back to Exhibit 13, but -- I believe
20 this is Mr. Razi asking questions. This would
21 have been Mr. Razi asking questions at this
22 point and time.

23 **(Publication of deposition testimony.)**

24 Q: I want to turn back to Exhibit 13, which
25 is a Department determination. And before



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1 I ask you about some of the factual
2 assertions, let me ask you a question
3 about the basis for your testimony. Do
4 you believe that you have a factual basis
5 for testifying about how third party sales
6 are made on Amazon.com?

7 A: Yes.

8 **(Publication of deposition testimony concluded.)**

9 **MR. GREEN:** And then, Page 248, beginning on line --
10 yes, sir. I think you're right. 17. So,
11 start on 17. Okay. No. No. That's fine.
12 Okay. 17. All right. Start on 17. The next
13 sentence says, quote, as such -- again this is
14 Mr. Razi asking questions. I believe he's
15 asking questions from the Department
16 determination, is that correct? Ms. -- the
17 next sentence says, quote ---

18 **(Publication of deposition testimony.)**

19 Q: It says the taxpayer received a
20 consideration exchange for it transferring
21 the property. Do you see that?

22 A: Yes.

23 Q: Is that true or false.

24 A: False.

25 Q: Why?



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1 A: The taxpayer does not transfer the
2 property. The third party seller sells
3 the property to the customer. Amazon
4 payments processes the payment from the
5 customer and disperses that payment to the
6 seller less the fees and consideration of
7 the services provided not the transfer of
8 the property.

9 **(Publication of deposition testimony concluded.)**

10 **MR. GREEN:** And then, that would be extended
11 designations, Your Honor.

12 **THE COURT:** All right.

13 **MR. GREEN:** Thank you, Mr. Hand. Your Honor, we
14 have another witness to call, but they will
15 take a little -- more than 15 minutes, Your
16 Honor.

17 **THE COURT:** Well, I can go to 11:30. At least
18 11:15, but if -- if it's gonna be -- if y'all
19 would like to break now, we can just break.

20 **MR. GREEN:** I would propose a break just so that way
21 we can -- we'd be able to talk with the witness
22 and things before -- obviously, we can't talk
23 with during his testimony.

24 **THE COURT:** Okay. So, I may not be back until
25 around -- as late as 1:30, but can we just --



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1 time being 1:15 and y'all give me a little bit
2 of leeway.

3 **MR. GREEN:** That's fine with us.

4 **MR. RAZI:** Sure.

5 **THE COURT:** All right.

6 **MR. RAZI:** And just for the record, which witness is
7 this?

8 **MR. GREEN:** This would be Mr. McCormack.

9 **MR. RAZI:** Okay. And, you know, I guess we -- we
10 would have the same objection that we had about
11 Ms. Mitchell, but --- I mean, I could talk
12 about it more.

13 **THE COURT:** Well, it's gonna be the same exact
14 objection with the same exact circumstances,
15 you'll probably get the same exact ruling. But
16 we'll see if it's -- all -- everything's the
17 same when -- when I get back.

18 **MR. RAZI:** Okay. So, I guess this is just more
19 background?

20 **MR. GREEN:** Yes. Well, there's a little bit more.
21 I mean, background and how we came to the
22 position and things like that. Consistent with
23 how the Department witnesses testify if they
24 were allowed to testify.

25 **THE COURT:** All right. Thank y'all.



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1 MR. GREEN: Thank you.

2 MR. RAZI: Thank you.

3 (Off the record from 10:46 a.m. until 2:09 p.m.)

4 THE COURT: All right.

5 MR. ROBERTS: Thank you, Your Honor. The Department
6 calls John McCormack.

7 THE COURT: Okay. And I'll tell y'all. I apologize
8 it took so long. We've never had a -- a
9 judicial election that went like this that I
10 know of ever.

11 MR. RAZI: Your Honor, if I -- if we just note again
12 and maybe perhaps discuss briefly our objection
13 to ---

14 THE COURT: Yes, sir.

15 MR. RAZI: --- to Mr. McCormack's testimony. You
16 know, we objected this morning to the auditor
17 testifying and the basis was that she lacks
18 firsthand knowledge about the issues in the
19 case, which is how third parties sell products
20 on Amazon.com or how Amazon Services provides
21 services to customers. The Court, you know,
22 overruled that objection and let -- let her
23 testify for background. You know, I think it
24 was clear from the examination that she doesn't
25 have any first-hand knowledge about the key



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1 issues in dispute.

2 **THE COURT:** Well ---

3 **MR. RAZI:** Now ---

4 **THE COURT:** But did -- you talking the lady that
5 previously testified?

6 **MR. RAZI:** Yeah.

7 **THE COURT:** I thought she discussed things with
8 Amazon and you know, presented a pretty good
9 background just for an understanding of the
10 case, but ...

11 **MR. RAZI:** All right. Well -- well being that as it
12 may -- I don't -- I don't think that's really
13 probative of anything. Even if one did think
14 that, the next witness had no interactions with
15 Amazon by everyone's admission. He's sort of
16 a home office guy who helps work up legal
17 strategy and legal policy and -- and helps them
18 sort of prepare their case and litigate their
19 case, and present their case. So basically, a
20 legal expert with -- you know, who didn't kick
21 the tires, doesn't know the facts, and it just
22 -- it's -- I think it's wasteful. It's
23 prejudicial for them to just basically call,
24 you know, a tax law expert who doesn't know the
25 facts about this case and have him, you know,



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1 opine and explain what it is ---

2 **THE COURT:** Okay.

3 **MR. RAZI:** --- he thinks should happen.

4 **MR. ROBERTS:** Yes, Your Honor. I mean, Mr.
5 McCormack is familiar with the facts. Ms.
6 Mitchell when she testified, said that she
7 consulted with Mr. McCormack in developing the
8 Department's position. Again, this is related
9 to the background of how the Department
10 developed this position in this case. And you
11 know, to give a little preview of this
12 testimony, it's gonna be very similar to the
13 testimony that Mr. McCormack gave in the
14 Travelscape matter to just explain to the Court
15 and the other side how the Department got to
16 their position. They have raised the issue of,
17 you know, the Department kind of just pulled
18 this position out of thin air and -- and so
19 they have put that issue on the table and Mr.
20 McCormack has testimony that's relevant to that
21 -- that issue as well.

22 **THE COURT:** You want to respond to that?

23 **MR. RAZI:** I mean, look whatever -- whatever
24 evidentiary rulings are made in Travelscape, I
25 think evidentiary rulings ---



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1 **THE COURT:** That -- that ---

2 **MR. RAZI:** That particular ---

3 **THE COURT:** You don't have to respond to that.

4 **MR. RAZI:** Okay.

5 **THE COURT:** I'm talking about the -- the comment
6 about -- y'all have made ---

7 **MR. RAZI:** I wasn't a part of that case and I don't
8 know what arguments were made and ---

9 **THE COURT:** Yeah.

10 **MR. RAZI:** And what the evidence was -- was used
11 for. In terms of arguments that we've raised,
12 we certainly have mentioned Mr. McCormack in
13 any arguments. We've raised the -- the lack of
14 longstanding policy and guidance ground online
15 marketplaces, internet marketplaces, et cetera.
16 I don't think he's -- he doesn't have
17 information to the contrary. We took his
18 deposition, again. We -- you know, that's why
19 we did the Discovery to figure out who knows
20 about the case. He's not one of those people.
21 He does know -- I understand he knows why to
22 file for, you know, lawsuit while they're sort
23 of pursuing the case. But that's like, you
24 know, Mr. Green or, you know, all the advocates
25 know stuff and have opinions, but that's not --



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1 -

2 **THE COURT:** No.

3 **MR. RAZI:** No evidentiary is significant. I mean,
4 just because ---

5 **THE COURT:** How about his position about -- you're
6 taking -- you're -- what did you say? That
7 phrase you used.

8 **MR. ROBERTS:** There -- there -- I said pulled out of
9 thin air, but they may have argued that the
10 Department's position is unsupported by any
11 past Department policy or practice.

12 **THE COURT:** Yeah.

13 **MR. ROBERTS:** So, McCormack was involved in the
14 audit ---

15 **THE COURT:** No. You can stop that because that to
16 me is something y'all seemed to have raised.

17 **MR. RAZI:** I mean, it is true that it's not
18 supported by -- by any -- any prior precedent.
19 It's out there, but that's -- that's not a
20 factual question. That's not a -- I mean, it's
21 a legal question. And I don't see what he's
22 gonna do to shed any light on that other than
23 maybe get -- put some case cites in, which the
24 Department can -- can certainly do on its own.
25 And -- and I don't think -- let me clear about



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1 the facts. It's of no evidentiary value, right
2 -- in this case, what Logan Mitchell told Mr.
3 McCormack about how Amazon does business. And
4 there's no way the taxes are gonna be owed in
5 this case because Logan Mitchell told Mr.
6 McCormack something about some -- that doesn't
7 get you out ---

8 **THE COURT:** I don't know what you're talking about.

9 **MR. RAZI:** And I -- that's what he just said. He
10 said he knows the facts and Logan Mitchell told
11 him how the website works. And that doesn't
12 get ---

13 **THE COURT:** Well, I just didn't know who Logan
14 Mitchell was.

15 **MR. ROBERTS:** She was the witness, sir.

16 **THE COURT:** Oh. Oh. All right.

17 **MR. RAZI:** Yeah. And that just didn't get out of
18 the batter's box.

19 **MR. ROBERTS:** And that's not what I described as
20 testimony. I said Ms. Mitchell had stated that
21 she, during the audit, consulted with Mr.
22 McCormack in developing the Department's
23 position during the audit.

24 **THE COURT:** I understand that.

25 **MR. ROBERTS:** And -- and he will have testimony



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1 about the policies and practices that the
2 Department was looking at in developing its
3 position. They presented a witness yesterday
4 who, I believe, they said was providing his
5 summary factual infor- -- summary of the
6 factual information about the existence of
7 Department policy or practice and even there
8 is, you know, languages unsupported by the
9 Department policy practice.

10 **THE COURT:** Well, are you presenting him concerning
11 the issue whether there's a longstanding
12 practice or are you just presenting him as a
13 background?

14 **MR. ROBERTS:** A mix, Your Honor. So, a background
15 about how we -- how the Department got to its
16 position in the audit in this case and what
17 they were looking at in doing that. And that
18 sort of addresses my initial point about it --
19 how we knows it's unsupported by anything. And
20 then, about the existence and what are the
21 Department policies and practices that existed
22 and that the Department looked at in developing
23 their position.

24 **THE COURT:** Well, let me step out and just think
25 about this. I will say, maybe they -- in



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1 Travelscape nobody objected, but I -- I haven't
2 -- just because I've done something in the past
3 doesn't mean I need to do in the future, if
4 it's not ---

5 **MR. ROBERTS:** Now, that -- that ---

6 **THE COURT:** --- if it's not correct, so I'll ---

7 **MR. ROBERTS:** That wasn't my position.

8 **THE COURT:** I know. I know.

9 **MR. ROBERTS:** There was an objection and I think you
10 sort of narrowed to background and I think you
11 even said there's a similar long, so you know,
12 filling in what the Department did ---

13 **THE COURT:** Yeah. I don't need for him to be
14 telling what the law is.

15 **MR. ROBERTS:** He will not be.

16 **THE COURT:** All right. Well, what's your response
17 on that? Now, if you ---

18 **MR. RAZI:** Yeah. I mean ---

19 **THE COURT:** You sounds like you've got a note.

20 **MR. RAZI:** A couple of things. I do -- I got a
21 couple notes. He's -- he's -- it sounds like
22 he's been presented as a fact witness. Okay.
23 And the background of how they develop their
24 position in the case, those are not -- that's
25 not facts and dispute, right? That's -- that's



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1 litigation strategy. That's work product. You
2 know, we have -- we have background about how
3 we formulate our positions. We're not -- you
4 don't present that -- that's not a matter of
5 evidentiary significance. So, the background
6 facts are not admissible. The -- the opinion
7 testimony, I guess about the law ---

8 **THE COURT:** Well, he's already said he's not gonna
9 go into that, so.

10 **MR. RAZI:** No. Well, it sounds like he -- he is.
11 And we took his deposition and that -- I don't
12 know if the Court's had experience with Mr.
13 McCormack, but he -- once he gets started --
14 you know, there's a question and then he's
15 gonna go for quite a while. You know tying
16 things together, cases, and stuff and
17 regulations. And it's gonna be hard to stop
18 once we get started. And we think that that's
19 -- that's gonna be a highly prejudicial to have
20 on the record. He's not an expert witness.
21 He's not even a lawyer, I don't think.

22 **MR. ROBERTS:** He's not a lawyer.

23 **THE COURT:** Well, then that makes him ---

24 **MR. ROBERTS:** Makes him more of a fact witness.

25 **THE COURT:** Yeah. It makes him more of a fact



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1 witness.

2 **MR. ROBERTS:** Right.

3 **THE COURT:** So, I'm gonna ---

4 **MR. RAZI:** No. It's not -- not a fact witness when
5 you're talking about what legal positions have
6 been taking upon our cases and that makes him
7 an incompetent to opine on -- on the matter.

8 **THE COURT:** I'm gonna just take a short break.

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

10 (Off the Record)

11 **THE COURT:** I'm gonna let you call him and for the
12 general background, I don't see the -- the
13 Supreme Court's reviewed that in the past.
14 They don't have a problem with that. Neither
15 do I. But I don't know, I might start changing
16 my position down the road after this case, but
17 I -- I'm gonna short the leash though on this,
18 so call and I'll just -- I'll discern what to
19 do as we move along.

20 **MR. ROBERTS:** Understood, Your Honor. Thank you.

21 **JOHN PATRICK MCCORMACK,** having been duly sworn,
22 testifies as follows:

23 **MR. MCCORMACK - DIRECT EXAMINATION BY MR. ROBERTS:**

24 Q: Good afternoon, Mr. McCormack.

25 A: Good afternoon.



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1 Q: For the record, could you please provide your
2 full name?

3 A: John Patrick McCormack.

4 Q: All right. Where are currently employed?

5 A: I'm employed with a company called Apple One
6 that has a contract with the Department of
7 Revenue. So, I'm -- I'm helping out a special
8 project with the Department of Revenue.

9 Q: Where were you employed at before working for
10 Apple One?

11 A: I was employed with the Department of Revenue
12 for a couple months shy of 39 years.

13 Q: All right. When did you leave the Department?

14 A: At the end of December.

15 Q: December of what year?

16 A: I'm sorry. Of '18.

17 Q: Okay. Why did you leave the Department?

18 A: I retired.

19 Q: Congratulations. You just stated -- again, how
20 long did you work for the Department?

21 A: A couple months shy of 39 years.

22 Q: And what was the last position you held at the
23 Department of Revenue?

24 A: I was the Senior Policy Administrator.

25 Q: And how long were you in that position?



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1 A: Probably -- I'm trying to think because we --
2 we have had a lot of reorganizations for the
3 time frame. Probably two stints at probably
4 somewhere around -- and the -- it's had
5 different titles, but for somewhere around, I'm
6 guessing maybe 15 or so years.

7 Q: Okay. And what position were you holding in
8 the 2016-2017 time frame?

9 A: That as the Senior Policy Administrator. It
10 was called General Manager at that time.

11 Q: Can you just briefly explain your
12 responsibilities and duties in that position?

13 A: In that position, I was over the policy
14 section. The policy section drafted advisory
15 opinions for the Department that had to be
16 approved by the Director of Revenue rulings,
17 Revenue procedures, private letter rulings.
18 And I managed that section. I have -- I had a
19 Senior Manager under me and several, I'll call
20 it policy analysts. We also worked with
21 legislation. We would do summaries of
22 legislation at the end of the session every
23 year. We would draft technical changes the
24 Department might want to suggest. Also,
25 provided informal guidance to taxpayers, tax



1 professionals, auditors and revenue officers,
2 and deputy directors and the director within
3 the Department. Also, worked with the
4 regulation process as far as the promulgation
5 of regulations before approval by the General
6 Assembly.

7 Q: Thank you. In that position, fulfilling those
8 responsibilities, did you have any experience
9 with the South Carolina Sales and Use Taxes?

10 A: Yes. That was my main area of concentration
11 throughout my time in Policy.

12 Q: Within those years, rough estimate, how many
13 questions about Sales and Use Tax were
14 presented to you do you think?

15 A: It be hard to say because like the -- it began
16 probably in mid-80s when I was in the appeal
17 section before I went to the policy section.
18 When -- in the late 80s. So, it's probably
19 thousands.

20 Q: All right. Turning to this matter. Are you --
21 are you familiar with the issues that are in
22 dispute in this proceeding?

23 A: Yes.

24 Q: All right. Are you familiar with the
25 Department's position in this proceeding?



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1 A: Yes.

2 Q: Did you have any role in the development of the
3 Department's position during the audit of
4 Amazon with respect to Sales and Use Taxes?

5 A: Yes.

6 Q: All right. And what was your role?

7 A: Well, I think it was in the early part of 2016.
8 The statewide Audit Supervisor, Ricky Taylor --
9 he's retired now as well -- called me to his
10 office and asked me to -- talked to me about
11 this because I think that he had got some
12 questions ---

13 **MR. RAZI:** Objection. He's not here ---

14 **THE COURT:** I sustain the objection.

15 **MR. RAZI:** That was hearsay.

16 **THE COURT:** Unless you want to give me an exception
17 to the hearsay rule, I don't ---

18 **MR. ROBERTS:** I think it's going to the witness'
19 actions not ---

20 **THE COURT:** Well, he's -- he can testify to his own
21 actions.

22 **MR. ROBERTS:** Okay. I understand, Your Honor.
23 Okay.

24 **MR. RAZI:** And just so the record's clear, the
25 objection was because that wasn't what he was



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1 testifying about. He was testifying about a
2 conversation that he allegedly had with Ricky
3 Taylor.

4 **THE COURT:** Oh, it's hearsay. Yeah.

5 Q: Who did you work with the Department in
6 developing the position regarding Amazon?

7 A: Worked with Ricky Taylor and the folks within
8 our section when we were -- reviewed the issue
9 at the request of Ricky Taylor.

10 Q: When you say your -- your section, what section
11 are you ---

12 A: The policy section.

13 Q: What do you personally do in your conducting a
14 review with respect to Amazon and Sales and Use
15 Taxes?

16 A: The -- basically what I did was I assigned it
17 and discussed it initially with two of our
18 folks within policy, Corey Smith and Robert
19 Thomas. And so, we -- we discussed it and
20 then, they in turn did the research of the --
21 of the code of the regulations that we
22 discussed. The -- they also did some research
23 on Amazon's website to gather information. And
24 so they -- from there they begin to develop a
25 memo, a guidance to the -- to the field. And



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1 I was part of the -- there was discussions and
2 review.

3 **MR. RAZI:** Objection, Your Honor. There's been a --
4 ordinarily I would approach the bench to
5 address this. Maybe I'll do that. Can we do
6 this outside the hearing of the witness?
7 There's -- what they're now talking about is a
8 privileged document that they've clawed back
9 from production, but are now trying to use it
10 as a -- the sword and shield to suggest that
11 there was some ---

12 **THE COURT:** All right.

13 **MR. RAZI:** --- great risk of legal analysis that we
14 haven't been -- had access to, if that's what
15 he's about to talk about.

16 **THE COURT:** Is he about to talk about some
17 privileged document?

18 **MR. ROBERTS:** I don't believe he's gonna talk about
19 any privileged information. When they were
20 provided -- there was a memo that was clawed
21 back, but then they were provided another memo.

22 **THE COURT:** Oh. It was clawed back.

23 **MR. ROBERTS:** Clawed back. Yes, Your Honor.

24 **THE COURT:** Claw -- oh, clawed back.

25 **MR. ROBERTS:** And it was there was their claim and



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1 privilege that were not allowed to say.

2 **THE COURT:** I haven't ---

3 **MR. ROBERTS:** No. And he's not testifying about
4 that -- the contents of that document. They've
5 been provided.

6 **THE COURT:** Well, I'm gonna solve that. I hereby
7 instruct you that you're not to discuss that
8 document in your testimony. So, if you're
9 referring to that document, you're to let us
10 know.

11 **MR. McCORMACK:** Yes, sir.

12 **THE COURT:** At which I will stop you from doing so.

13 **MR. McCORMACK:** Yes, sir.

14 **THE COURT:** All right.

15 **MR. ROBERTS:** Thank you, Your Honor.

16 Q: Mr. McCormack, what developing of the position
17 in respect to Amazon and sales tax, what --
18 what statute did you look at?

19 A: Looked at the -- obviously the imposition
20 sections, 12-36-910 or the Sales Tax 12-36-1310
21 for the Use Tax. Looked at the definition of
22 retailer, which talks about a person who is
23 selling their own property or property of
24 others. We looked at the definition of gross
25 proceeds, which is the basis for the -- the



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1 sales tax, which, you know, talks about that.
2 That includes the proceeds from property sold
3 on consignment. The -- we looked at the -- the
4 collection requirements of a -- of a seller.
5 Again, I just want to make clear that the
6 definition of retailer in 12-36-70 is also the
7 definition of seller. But we looked at the --
8 the collection responsibility for a seller
9 under, I think it's 12-36-1350, it might be 40,
10 but I think it's 50.

11 Q: Thank you. Did you remove any information
12 about Amazon or Amazon Services?

13 A: The -- our team reviewed that information and,
14 you know, I was part of that discussion and the
15 team reviewing that information.

16 Q: Based on this review of information, what was
17 your conclusion with respect to Amazon's
18 liability for Sales and Use Tax?

19 MR. RAZI: Objection. I think that's the ultimate
20 issue in the case.

21 MR. ROBERTS: This is again going to his personal
22 experience and what the Department's or his
23 conclusion was ---

24 THE COURT: No. You said what was his conclusion.
25 At -- one thing is background, the other's for



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1 him to start telling me his perception of the
2 law. It sounds to me like that one is a
3 sustainable objection, unless you want to
4 explain it further.

5 **MR. ROBERTS:** Let me try to rephrase or come back to
6 it ---

7 **THE COURT:** Okay.

8 **MR. ROBERTS:** --- with a little more explanation.

9 Q: Was there any longstanding policies or
10 practices of the Department that you looked at
11 developing your position with respect to the --
12 with respect to Amazon Sales and Use Tax?

13 A: Well, the -- in -- in looking at the
14 longstanding policy, the Department, you know,
15 we looked at or we discussed those issues
16 dealing with, for example, consignment sales,
17 you know, locations that sell furniture on
18 consignment, that sell clothing on consignment,
19 the -- we talked about that. We also had
20 discussions concerning drop shipment ---

21 **MR. RAZI:** I'm just gonna object again due to the
22 reference of the discussions.

23 **THE COURT:** Where you gonna say what they were or
24 you were just gonna -- well, here. I'll allow
25 you to respond to that. I will say, while ago,



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1 I'm not sure about the accuracy of my ruling
2 because I said it was hearsay. If it's not
3 offered for the truth of the matter asserted,
4 it's not hearsay. So, I don't know what -- but
5 I can't get in his mind to know why he's
6 telling me this, so.

7 **MR. ROBERTS:** He's stating as a fact he's had -- he
8 had discussions. He's not saying what those
9 discussion ---

10 **THE COURT:** Okay. But ---

11 **MR. RAZI:** The only possible relevancy ---

12 **MR. ROBERTS:** To prove that point.

13 **MR. RAZI:** The only possible ---

14 **THE COURT:** Now, you're switching to relevancy. And
15 I'll hear that, but ---

16 **MR. RAZI:** Right. The only possible relevance could
17 be that it's true. That they all these ---

18 **THE COURT:** All right. Tell -- tell -- he can tell
19 me what somebody said and he could even
20 disagree with it ultimately, but what I'm
21 trying to do is avoid some of that and have --
22 I'm gonna ask you to just re -- start
23 redirecting here again.

24 **MR. RAZI:** Okay. And I'll just note our continued
25 objection, we think this testimony's highly



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1 improper.

2 Q: Mr. McCormack, you were discussing someone
3 saying they issued a policy that you looked at
4 when developing the Department's position.
5 Again, just tell us what those policies were.

6 A: Well, I essentially, I guess the overarching
7 policy is that you don't have to own property
8 in order to be the seller or the retailer of
9 that property.

10 **THE COURT:** You were talking about consignment
11 sales. Are you still on that now or are you --
12 -

13 A: That would be -- that -- a consignment sale
14 would be an example of that. Yes, sir.

15 **THE COURT:** Oh, I'm trying to see where you are now,
16 so. What are you discussing now?

17 A: Okay.

18 **THE COURT:** Consignment sales or have you moved on?

19 **MR. McCORMACK:** Consignment sales was the first.
20 Yes, sir.

21 **THE COURT:** Okay.

22 A: That -- there's overarching provision that, you
23 know, you don't necessarily have to be the
24 owner of the property to be the retailer or the
25 seller of the property. And that would include



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1 consignment sales. You know, you don't
2 technically have to have possession of the
3 property in order to be the seller of the
4 property and an example of that would be drop
5 shipments where you -- I'm a retailer, and you
6 may come to me and we either look through a --
7 a catalogue or we discuss it or I don't have --
8 I don't have that time. And so -- but you want
9 to buy it, and so then, I -- instead of having
10 property delivered to me and then, I deliver it
11 to you, I have it drop shipped directly from
12 either the manufacturer that I'm buying it from
13 or the distributor I'm buying it from, directly
14 to you. And that's, you know, my retail sale
15 to you, not the manufacturer's or the
16 distributor's. It's my retail sale to you.

17 **MR. RAZI:** And I just move to strike that is not
18 responsive to any question. There was no
19 question there. That was just sort of an
20 exegesis about the law.

21 **MR. ROBERTS:** He was responding exactly to my
22 question. I asked him what longstanding policy
23 and practices did he look at when developing
24 the Department's position with respect to
25 Amazon and Sales and Use Tax.



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1 **THE COURT:** I'll overrule that objection.

2 **MR. ROBERTS:** Thank you.

3 Q: Were these policies and practice in place prior
4 to the Amazon audit?

5 A: Yes.

6 Q: Has the Department ever publically released any
7 information about consignment sales with
8 respect to Sales and Use Taxes?

9 A: There is a -- a Sales and Use Tax Manual and
10 there's -- I know there's a question on
11 consignment sales in the FAQ chapter we have.
12 I think it's like Chapter 23 of this -- of the
13 Sales and Use Tax Manual and that is a question
14 that is addressed in that manual.

15 **MR. ROBERTS:** Your Honor, subject to the redirect, I
16 pass the witness.

17 **THE COURT:** All right.

18 **MR. McCORMACK - CROSS-EXAMINATION BY MR. RAZI:**

19 Q: Mr. McCormack, tell the Court what Revenue
20 Ruling 18-14 is?

21 A: 18 ---

22 Q: Just briefly what it -- what's the title?

23 A: I can't tell you the -- the exact title. I
24 know it concerns the -- the recent Wayfair
25 decision from 2018.



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1 Q: Yeah. And it -- it discusses for the very
2 first time in the extensive literature produced
3 by your Department online marketplaces, right?

4 A: It's the first time that it mentions online
5 marketplaces from any document, yes.

6 Q: Yeah. And the 18 -- in the 18-14, tell the
7 Court what that refers to.

8 A: I'm sorry. I don't understand your question.
9 You ---

10 Q: In -- in Revenue ruling 18-14, right, what is
11 the 18 referring?

12 A: The -- the year.

13 Q: Right. What year?

14 A: 2018.

15 Q: And when did you do this audit that you -- that
16 you describe this so-called audit?

17 A: I think the Department did the audit -- it
18 began in early 2016 or at least that's when the
19 issue came up. I don't know when they exactly
20 started the audit.

21 Q: Okay. So, more than two years after they did
22 your audit and went through that, I guess we
23 can call analysis that you just described, was
24 it the very first time that you put out any
25 publication at all about the taxation of sales



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1 on online marketplaces, is that right?

2 A: Well ---

3 Q: It's -- that's a yes or no question.

4 A: Yes. It's the first time we mentioned ---

5 Q: Thank you, sir. Thank you, sir. Mr. Roberts
6 will have an opportunity to ask you some more
7 questions if he chooses to do so, but this is
8 my time to make a few points, okay?

9 **THE COURT:** Well, the standard I set for them, I'll
10 leave as the standard for you. And that is
11 what I told the witness in the past was, if you
12 answer it yes or no and if you can't, let me
13 know. But, you get the right to -- but at
14 least I'll know whether it's a yes or no
15 answer. Okay?

16 **MR. McCORMACK:** Yes, sir.

17 Q: Now, the -- you were heavily involved in
18 working with the Sales and Use Tax Manual I
19 take it over the years?

20 A: Yes. I was the one that initially started it.
21 I can't tell you what year it was. And then,
22 it's -- editing I guess you might say has been
23 turned over to several people within that
24 section.

25 Q: All right. Sounds like the answers yes, you



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1 were heavily involved with that document.

2 A: Yes.

3 Q: Okay. For how many years?

4 A: Like I said, it's hard for me to remember when
5 that -- when we first did that document. It
6 may go back 2007, '08, '09, '10, somewhere in
7 that range. I'm just guessing.

8 Q: Okay.

9 A: I don't -- I don't remember exactly.

10 Q: You've got in front of you, Exhibit 215.

11 **MR. RAZI:** And why don't you put the cover up on the
12 screen.

13 Q: That's the Sales and Use Tax manual from 2015,
14 right?

15 A: Yes.

16 Q: And you -- you've read that, right, sir?

17 A: Yes.

18 Q: Okay. In fact, you probably wrote some of
19 what's in there, right?

20 A: Yeah. Yes.

21 Q: Okay. And how much time would say prior to the
22 first quarter of 2016 had you personally spent
23 working on the Sales and Use Tax Manual over
24 the year?

25 A: Oh, there's no way I could tell you the amount



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1 of time spent on that. I just have no idea.

2 Q: Hundreds of hours?

3 A: I don't -- like I said, I don't remember how
4 long it took me to -- to initially do it, but
5 a lot of hours initially and then, over the
6 years updating with legislation and court cases
7 and the like.

8 Q: Okay. And do you know, sir, when third parties
9 began selling products on online marketplaces
10 like Amazon.com?

11 A: Could you repeat the question?

12 Q: Sure. Do you know when third party sellers
13 began -- when in the recent history of the
14 internet, third party sellers began selling
15 products on online marketplaces like
16 Amazon.com?

17 A: No. I couldn't give you an exact date. I
18 don't know.

19 Q: Okay. That's not something that came up during
20 your -- your factual review and the discussions
21 that you described with your colleagues?

22 A: No. I don't think so because I think ---

23 Q: Okay.

24 A: --- there was issues dealing with Nexus on
25 various entities and we did not have Nexus for



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1 a long time on all the entities that were in
2 that business.

3 Q: Okay. But, in any case, you were aware of
4 Amazon.com when you wrote the -- the manual --
5 the South Carolina Sales and Use Tax manual,
6 the 2015 edition that we've written -- that
7 we've marked as Exhibit 215, right?

8 A: I know that Amazon existed, yes.

9 Q: Yeah. Not only do you know that now, but you
10 knew at the time you were working on the
11 document, right?

12 A: Which document are we talking about again?

13 Q: The one in your hands or on top -- Exhibit 215.

14 A: Yes. I knew there was -- Amazon existed at the
15 time this was issued in 2015.

16 Q: Right. And you didn't say a word in the
17 hundreds and hundreds of pages of Exhibit 215
18 about online marketplaces, right?

19 A: I don't think we mentioned online marketplaces
20 in -- in the document. We mentioned retailers,
21 but not online marketplaces.

22 Q: Right. Right. And in fact -- I don't know if
23 you said this or not, but this isn't even what
24 you would consider formal guidance from the
25 Agency, right? Even if you had said something



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1 in here, this isn't formal guidance, is it?

2 A: Like, no. It's -- it's not a formal advisor
3 opinion. I think it actually states that.

4 Q: Okay. Okay. I think I heard you. Was it no?

5 A: Yes, sir. That's what I said.

6 Q: And putting aside informal guidance, like --
7 like this document, which doesn't even say
8 anything about online marketplaces, certainly,
9 there wasn't any formal guidance about online
10 marketplaces that was put out by your
11 Department prior to the first quarter of 2016,
12 right?

13 A: We no -- we do not mention anything about
14 online marketplaces that I can recall on any
15 formal document prior to that date.

16 Q: Okay. Are you familiar sir with the -- with
17 any point of contact tests in the -- in the
18 various materials that you reviewed to
19 formulate your -- your opinion in this case?

20 A: Could you repeat the question?

21 Q: Sure. You -- I remember you said before, you
22 -- when you were doing the work with the
23 colleagues and having the discussions, that you
24 looked at the code, right?

25 A: Yes.



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1 Q: Remember that? And then, you looked at some
2 other stuff. I forgot what it was, but you
3 looked at some other things, right?

4 A: Yes.

5 Q: Okay. None of those materials say anything
6 about any point of contact test, right?

7 A: Don't know if they use that phrase in the point
8 of contact, no.

9 Q: Right. But do you know, the Department in this
10 case uses that phrase in trying to get taxes
11 from Amazon Services, LLC?

12 A: I know that that's part of what they've
13 addressed in -- in various documents filed with
14 the Court, yes.

15 Q: Okay. But that's not something that you found
16 any prior practice in the code or the other
17 materials that you looked at, right? That's
18 not a phrase you came up with from that work?

19 A: I don't think we've used that terminology ---

20 Q: Okay.

21 A: --- prior to ---

22 Q: Thank you. How about the -- the point of
23 communication test? When you did that research
24 on the code and all the other materials and you
25 talked with your two colleagues and you talked



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1 with Ms. Mitchell, did you find any support for
2 a so-called point of communication test?

3 A: We've never used that terminology that I know
4 of.

5 Q: All right. What about just a more general test
6 that involves the nature or the interaction of
7 bargain between two parties? Did you find that
8 -- any source for that in the code or any of
9 the other materials that you studied or any
10 other conversation with your colleagues?

11 A: Could you repeat the question?

12 Q: Sure. In your review of the code and the other
13 materials that you were given and the
14 discussions that you had in formulating your --
15 as I understand it, your opinion, did you find
16 any -- any support in those records for a,
17 quote, nature of the interaction and bargain
18 test?

19 A: Since I don't have -- I've never heard that
20 terminology before, I don't -- I can't say that
21 that particular terminology. But, you know,
22 there may be ---

23 Q: Yeah. Was that a ---

24 A: --- some report because of the -- of what we've
25 done in the past ---



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1 Q: Yeah. And that's fair enough.

2 **THE COURT:** Well, let him finish answering the
3 question.

4 **MR. RAZI:** I think he said he wasn't aware of any
5 presence of ---

6 **THE COURT:** Oh, I thought he was still answering the
7 question.

8 **MR. RAZI:** He was going on to speculate, Your Honor,
9 about what there may be. And I'm not
10 interested in any of that.

11 **THE COURT:** Well, if you have a problem with the
12 witness going on to -- you can object to that.

13 **MR. RAZI:** Okay.

14 **THE COURT:** But I normally don't let people cut
15 witnesses unless you object and then, I can
16 rule on that.

17 **MR. RAZI:** Okay.

18 **THE COURT:** All right.

19 **MR. RAZI:** Okay. And I just ---

20 **MR. ROBERTS:** Thank you, Your Honor.

21 **THE COURT:** Were you through with your answer?

22 A: I was just -- Your Honor, I was just trying
23 that, you know, there's -- there's a -- you
24 know, a lot of things that we deal with on, you
25 know, trying to make a determination about who



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1 the retailer is. And so, we just haven't, you
2 know, used that terminology before with respect
3 to that is what I was trying to -- the point I
4 was trying to make.

5 **THE COURT:** All right.

6 Q: Would it surprise you to know that third
7 parties began selling parties on online
8 marketplaces in -- like Amazon.com in 1999?

9 A: I don't have any comment with respect to that
10 one way or another. I just -- I don't know
11 when they started.

12 Q: Okay. And again, that's not something you
13 looked into during the course of your review?

14 A: Well, again, like I said, most -- a lot of
15 things, especially with respect to Amazon,
16 there was no Nexus with them. So, I mean --
17 you know, it -- like I said, with not looking
18 at that for prior years, we were looking at
19 what -- what we know now.

20 Q: Okay. All right.

21 **THE COURT:** You said no Nexus with them, what do you
22 mean by that?

23 **MR. McCORMACK:** I'm sorry. I can't hear.

24 **THE COURT:** When you say there was no Nexus with
25 them, what do you mean by that? I think I



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1 understand it, but I just want to be clear.

2 **MR. McCORMACK:** Well, two things, prior to that
3 Wayfair case, there was no -- there was only
4 physical presence Nexus. And then, in
5 addition, there was a special safe harbor for
6 certain retailers operating distribution
7 facilities that expired in January 1st, 2016.
8 And so, you know, basically that provision
9 said, it's almost like the distribution
10 facility didn't exist. You know, it wasn't a
11 calculation as far as determining whether some
12 -- somebody had Nexus or not. And so, in that
13 sense, you know, it -- there was no need to
14 look at anything with respect to Amazon, you
15 know, as far as here in those five years
16 because we had had no Nexus with them.

17 **THE COURT:** All right.

18 Q: Sir, you understand you're not here to testify
19 as an expert?

20 A: That's my understanding. Yes.

21 Q: Okay. You've been presented as a fact witness,
22 right?

23 A: That's my understanding. Yes.

24 Q: And would you agree with me that the only facts
25 that matter as to whether the sales taxes are



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1 owed in this case involve the true nature of
2 the relationship between Amazon Services, LLC,
3 and the third party sellers?

4 A: No. I would disagree with that.

5 Q: Okay. Have you reviewed the Court's order on
6 summary of judgement motions last week?

7 A: Yes.

8 Q: Okay. I take it, you disagree with the part
9 that talks about the true nature of the
10 relationship between the parties?

11 A: Well, I think you said that the only thing that
12 mattered was the -- the relationship between
13 Amazon and third parties. And I think the --
14 you're missing one party completely in there,
15 which is the customer.

16 Q: Okay. We'll get to that. But you agree with
17 me that the true facts of these relationships,
18 that's what governs, right?

19 A: Well, if that's what you're looking at. You're
20 looking at the facts and how they fit under the
21 law.

22 Q: Thank you. And we're not gonna talk the law
23 with you, but we are gonna talk about the
24 facts. So, first fact I want to know, were you
25 aware that third party sellers decide whether



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1 to offer products for sale on online
2 marketplaces?

3 A: Well, I mean, I think we discussed that in my
4 deposition. I mean, you know, if a third party
5 seller -- you know, they can contract whomever
6 they wish to -- so, yeah, they make that
7 decision whether they're going to work with
8 Amazon or not.

9 Q: Okay. So, you knew that fact at the time of
10 the audit as one of the facts that you consider
11 that third party sellers decide what to sell?

12 A: Well, I -- like I said, I -- like I said ---

13 Q: Yes or no, sir, please.

14 A: I -- I think that they -- you've got to look at
15 whether they -- the third party is -- I guess
16 what I'm trying to say is that the -- you know,
17 a third party can contract with whoever they
18 want. That's their decision.

19 Q: Sir ---

20 A: No -- no one's holding their gun to their head
21 saying you have to contract with Amazon is my
22 only point.

23 Q: All right. And I appreciate you trying to make
24 points, but it'll go more smoothly if you just
25 answer yes or no. If you can't answer yes or



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1 no, you can advise the Court and we'll figure
2 out a solution. Perhaps if Mr. Roberts can get
3 back and ask you expound a little more. Okay?
4 Is that okay with you?

5 A: Well, I mean, I'm a little bit confused because
6 I think -- I thought the Judge said that you
7 would just object, you know, if you were
8 concerned about my going on or ---

9 Q: I'm trying to do this in a -- in a collegial
10 manner. Trying to ask you yes or no questions
11 and just get the answers, and then proceed.
12 Are you aware, sir, that third party sellers
13 are the ones that source the products that they
14 sell on Amazon.com?

15 A: What do you mean by source?

16 Q: Obtain, get, access, buy.

17 A: That would only make sense.

18 Q: All right. And you became aware of these two
19 points, and we'll get into others, but based on
20 your discussion with your colleagues, is that
21 right?

22 A: Well, based on discussion that what realized
23 that people were, you know, putting their
24 products, you know, on Amazon.

25 Q: Yeah. Did you, for instance, interview any



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1 third party seller?

2 A: No.

3 Q: Okay. Did you interview anyone at Amazon?

4 A: Not me personally, no.

5 Q: Now, when I say interview, by the way, I'm
6 talking even more informal, even talking about
7 it?

8 A: Not me personally. No.

9 Q: Okay. And are you aware by the way, that for
10 instance, as to the first item, Amazon Services
11 does not decide whether a third party seller
12 sells on Amazon.com? That's the third party
13 seller that decides that. Did you know that?

14 A: Well, it would only make sense, that -- you
15 know, that Amazon's gotta decide for them what
16 they're gonna do. You know, they're going to
17 decide for themselves whether they're gonna put
18 a product on Amazon or not.

19 Q: Fair enough. And the same for sourcing, Amazon
20 Services is not somehow or is not anyway
21 pulling the strings as to how these third party
22 sellers get their products. That's something
23 that they do entirely on their own, right?

24 A: It's my understanding, yes.

25 Q: Okay. If the process of listing a product for



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1 sale on Amazon.com -- are you familiar with
2 that process?

3 A: Not technically how it's done, no.

4 Q: Okay. Do you know anything about it, just yes
5 or no?

6 A: I know people try to put their products on
7 there, but how they go about doing that I don't
8 know.

9 Q: Okay. Did you know, sir, that third party
10 sellers on Amazon.com during the time period
11 relevant to your work, set the prices of the
12 products that they offer for sale, did you know
13 that?

14 A: I knew that they -- they were setting prices,
15 but I thought -- I think there were some things
16 that were -- if I remember correctly that dealt
17 with -- that they were required today if -- you
18 know, under Amazon's rules.

19 Q: Yeah. Okay. And that's something one of your
20 colleagues told you?

21 A: I don't remember how I came across that
22 information. I guess it came part of those
23 discussions, but ---

24 Q: Yeah.

25 A: --- I'm not sure.



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1 Q: Okay. Did you make any inquiry at all when you
2 learned about that to determine if whatever
3 that rule was, if it had any practical impact
4 at all on even a single sale in the state of
5 South Carolina?

6 A: I'm not quite sure what your question is as far
7 as the impact, what you mean by impact on any
8 sales.

9 Q: Okay. I think what I mean is that the -- I
10 mean, I know what I mean and we can -- we can
11 read back, but before reading it back, let me
12 clarify. What I mean is the price that was
13 offered on any sale to any customer in South
14 Carolina in the first quarter of 2016, okay?
15 That -- so that's the impact, do you understand
16 that?

17 A: Yes.

18 Q: Okay. And with that understanding of impact,
19 did you do anything at all to assess or
20 determine whether this -- this vague idea of a
21 rule -- this rule that you -- that you're
22 remembering regarding price, had any impact at
23 all on even a single sale into South Carolina
24 in the first quarter of 2016?

25 A: I can't tell you whether it had an impact one



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1 way or the other.

2 Q: Okay. And I appreciate -- you went to the next
3 question. But as to the first question, did
4 you do anything at all to assess that question?

5 A: Not that I recall, no.

6 Q: Okay. So, in other words, you don't know
7 whether or whatever that pricing rule was had
8 an impact, is that fair?

9 A: I don't know whether it had an impact on -- on
10 any sale in South Carolina, no.

11 Q: Yeah. And not only do you not know whether it
12 had an impact, but you didn't do anything to
13 try and figure it out, right?

14 A: I'm not sure I saw a need to.

15 Q: Okay. But I didn't ask that, sir. You didn't
16 do anything to try to figure out whether this
17 price rule that you somehow learned of had any
18 impact at all on any sales in South Carolina,
19 right?

20 A: No.

21 Q: Did you learn during the course of your
22 discussions with your colleagues and your
23 review of the materials that third party
24 sellers on Amazon.com in many instances
25 packaged up products, labeled them and shipped



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1 them to customers without any involvement of
2 any Amazon company?

3 A: I understand that the -- the third parties in
4 -- in some cases shipped the products
5 themselves and package it.

6 Q: Okay. And you were aware that?

7 A: Yes.

8 Q: And you were aware that in other cases, the
9 third party shipped the products using a common
10 carrier?

11 A: But -- yeah that they shipped -- they shipped
12 either -- themselves. That's what I mean is
13 they -- they handled it all themselves as far
14 as shipment's concerned.

15 Q: Right. But I -- I think I'm hearing you. When
16 you say themselves, do you mean with the help
17 of perhaps Federal Express or the Postal
18 Services or UPS?

19 A: Whatever choice they make or they -- if they
20 happened to have their own trucks, yes.

21 Q: Okay. So, any of that would be doing it
22 themselves, right?

23 A: Yes, if they -- without Amazon's help in
24 shipping as far as shipping is concerned.

25 Q: Okay. And you were aware of all that back in



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1 the first quarter of 2016, right?

2 A: When we did our research, yes.

3 Q: Yeah. And then, you also learned that there
4 were certain orders that were -- certain third
5 party sale orders that were fulfilled by
6 Amazon, right?

7 A: Yes.

8 Q: And that's using a program called FBA, right?

9 A: Yes.

10 Q: Okay. Now, did you learn, sir, that credit
11 card payments on third party sale transactions
12 were processed by a company called Amazon
13 Payments, Inc.?

14 A: I don't remember. I think so at that time,
15 yes. But I'm not sure exactly when -- when I
16 learned that.

17 Q: Okay. But did you learn based on your review
18 and inquiry that that's actually a separate
19 company than the taxpayer in this case, Amazon
20 Services, LLC?

21 A: Again, I -- I -- I know that's -- I know that's
22 the situation. I just can't tell you when I
23 learned that.

24 Q: And then, lastly, with respect to payment for
25 the goods, you understand that when a third



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1 party -- you understand at the time that when
2 a third party sold a product on Amazon.com,
3 they received payment, right?

4 A: Eventually, yes.

5 Q: Yeah.

6 A: When products -- the product was sold on there,
7 eventually they received payment.

8 Q: All right. Now, let's -- let's turn to Amazon
9 Services and what facts you knew about them.
10 We talked about the third party sellers. You
11 knew, I assume, that Amazon Services, LLC
12 provided certain services to -- to third party
13 sellers, right?

14 A: Yes. I knew that they -- they listed and
15 advertised the products on their website and
16 that it was a surf-level of customer service --
17 -

18 Q: Okay.

19 A: --- on that.

20 Q: Okay. And for instance, you -- I think you
21 said you knew about FBA. Did you know that the
22 FBA service includes elements where Amazon
23 Fulfillment Services will package up items for
24 you and charge a fee for that, were you aware
25 of that service?



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1 A: Yes. That they -- that they shipped the
2 product out that was sold on their website.

3 Q: Yeah and that for instance, they might in some
4 circumstances, if the third party seller asked
5 you to, they may label the product, were you
6 aware that?

7 A: I wasn't aware of the details of the labeling,
8 but I knew that they, you know -- they packed
9 and shipped ---

10 Q: Okay.

11 A: --- so to speak.

12 Q: By the way, did you know -- do you know based
13 on your -- your long time 38 plus years at --
14 in the Department and your experience, whether
15 common carriers charge fees for packaging and
16 shipping items?

17 A: Well, I know that there's companies that do
18 that. You know, I don't know whether there all
19 common carriers or not.

20 Q: Did you know that -- that fulfillment by Amazon
21 -- or excuse me, Amazon Fulfillment Services
22 provides something called storage services?

23 A: Well, I know that they -- they stored those
24 products because they -- they built a big
25 distribution facility in Lexington, South



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1 Carolina. So, yes.

2 Q: Yeah. Okay. And if you can, let's just --
3 just to streamline it, try to stick with yes or
4 no, but I appreciate that -- that additional
5 information. Are you aware, sir, that there
6 are other companies in the marketplace that
7 offer storage services to individuals and to
8 business, right? That's a service that's
9 readily available out there in the marketplace,
10 right?

11 A: Yeah. Warehouses.

12 Q: Yeah. Nothing unusual about the storage
13 service offered by Amazon Fulfillment Services,
14 is there?

15 A: Limited to the storage service, yes. There's
16 nothing different about that in combination
17 with what the other things they do.

18 Q: Yeah. We'll -- we'll get to -- Mr. Roberts
19 might want to ask you about the combination.
20 I have some other questions. The advertising
21 services that you mentioned, you were aware
22 that Amazon Services offered advertising
23 services to third party sellers, right?

24 A: Well, I think putting on the website is -- is
25 advertising the product. Yes.



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1 Q: Okay.

2 A: Or displaying it, listing, however you want to
3 word it, yes.

4 Q: Uh-huh. And you know that it's been the
5 longstanding policy and -- and practice and
6 position of the Department that the receipts
7 from services -- the services are the true
8 object of a transaction are not subject to tax,
9 right?

10 A: What services are we talking about?

11 Q: Advertising services for instance. Are you
12 aware of that?

13 A: If that's the true object, yes. If ---

14 Q: Yeah.

15 A: --- it's not the true object, then, no.

16 Q: Okay. And if the -- the true object of the
17 services are shipping services, not subject to
18 taxes of the service, right?

19 A: Well, it depends on how you look at that
20 because if it's -- if it's part of the sale, it
21 is part -- it can be part of gross proceeds and
22 part of sales price and therefore taxable.

23 Q: Yeah. Okay. Well, I don't -- I'm not gonna go
24 through each and every service with you. And
25 you know, look, you don't have to agree with us



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1 if you don't want to. Then, we'll just -- we'll
2 argue it, but I -- I think you know, and tell
3 me if this is wrong, based on your experience
4 at the Department, that there's a longstanding
5 principle articulated by your Department that
6 services if -- the receipts from services, if
7 the services of a true object of the
8 relationship, those are generally not subject
9 tax, but there are some exceptions. But
10 services are subject to taxes. Just tell me
11 right now, do you agree or disagree with that?

12 A: Generally, that if the services are the true
13 object and it's not that your object is not the
14 sale of tangible personal property, but
15 services are the true object and they're not
16 one of the services that are specifically
17 taxable, and if they're not one of the services
18 that are part of the sale tangible personal
19 property, then yes, the service by itself -- if
20 that's the true object, would not be subject to
21 the tax.

22 Q: It sounds like the answer was yes, right?

23 A: If the true object -- yes, if that's the true
24 object.

25 Q: And am I right that although you -- you know,



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1 you learn something during the course of your
2 work about how -- you know, what other people
3 told you about how third party sellers do their
4 work and what other people told you about what
5 Amazon Services does, you don't really have any
6 firsthand knowledge about any of those topics,
7 do you?

8 A: Well, I mean, we were discussing those, I was
9 working with the team members on -- in the
10 policy section when we were providing guidance
11 to the -- to the audit section.

12 Q: Okay. So, whatever you know is just what your
13 colleagues told you at the Department and
14 whatever you may have read, that fair?

15 A: Either documents that they showed, information
16 I read, or our discussions with main -- main
17 focus at that time.

18 Q: You ever spoken with any third party seller on
19 Amazon.com in any capacity?

20 A: I don't know who might be a third party seller,
21 so I can't tell you. In any capacity is very
22 broad, so I don't know what your -- you know,
23 I could -- it could be a neighbor. So, I just
24 don't know if I've talked to the neighbor, but
25 not in respect to this issue.



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1 Q: Okay. By the way, did you know that third
2 party sellers are listed on the website?

3 A: No.

4 Q: Okay. So, for instance, if you wanted to know
5 who a third party seller was, you know you
6 could find that on the website, right?

7 A: Yes. But if it were -- if we're -- you have
8 the part of the issue is when we're talking
9 about Amazon Services, I can't talk to them
10 because of privacy issues.

11 Q: Even putting aside whether your understanding
12 of the privacy is right, you know that you
13 could have contacted a third party seller and
14 talked to them about these issues just without
15 mentioning the identity of the particular facts
16 in there right?

17 A: I don't think I could that because if -- if
18 we're talking about someone as -- as big as
19 Amazon, then, they're going to know who we're
20 talking about. And because we've had that
21 issue on similar issues where it might be the
22 only taxpayer in that area, it might be
23 something along that line and so, we do our
24 very best to comply with the privacy or secrecy
25 provisions, as they're sometimes called, of the



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1 code because we owe that to every -- every
2 retailer under sales tax including Amazon, all
3 retailers.

4 Q: What -- what about subpoenas, sir? You know
5 the Department has the ability to subpoena
6 information from the taxpayers and potential
7 taxpayers, right?

8 A: Yes.

9 Q: Yeah. And it's not hard at all for the
10 Department to get any information it wants from
11 any taxpayer in South Carolina. You know that,
12 right, sir?

13 A: Well, I know we can subpoena. I don't know
14 what all the rules are on that.

15 Q: Yeah, but you know that's something that's done
16 routinely, isn't it, sir?

17 A: I know that it's done. I can't -- you know how
18 often and that sort of thing, I can't tell you.

19 Q: Okay. But no one on your team, none of the
20 litigators or the analysts or policy people, or
21 the auditors and if there's anyone else I
22 missed -- none of them made any effort to
23 subpoena any of this information to learn about
24 how third party sellers sell their products?

25 A: I -- I can't tell you what audit or litigation



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1 did. I just can tell you that in policy that
2 we did not seek information from third party
3 sellers.

4 Q: Okay. And you never learned that -- that
5 anyone else in the Department did either,
6 right?

7 A: I have not heard. Don't know one way or the
8 other.

9 **MR. RAZI:** Could I have the Court's indulgence just
10 for a minute to consult with my colleagues?

11 Q: Just -- just to close off this point about
12 firsthand knowledge. You never talked directly
13 with anyone who is involved in any third party
14 sale transaction on Amazon.com, right?

15 A: As part of the research that our team did, did
16 not talk to any -- I did not talk to any third
17 party sellers.

18 Q: And as part of any other process that you were
19 engaged in and a -- in a official capacity at
20 the Department of Revenue, did you ever talk
21 with anyone, any person directly involved in a
22 third party sale transaction on Amazon.com?

23 A: Did I talk to -- are you asking if talked to
24 third party sellers or did I talk to somebody
25 else who talked to third party sellers? Your



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1 question's confusing.

2 Q: Let me ask again. During your many years at
3 the Department of Revenue, if for any business
4 purpose -- any work purpose, did you ever speak
5 with any person who was involved in a third
6 party sale transaction on Amazon.com, whether
7 it be a third party seller, whether it be
8 somebody at Amazon, whether it be a customer
9 purchasing a product through those
10 transactions?

11 A: I could have talked to somebody along those
12 lines, you know, but I can't tell you whether
13 -- we didn't talk about the particular issue of
14 -- of -- like for example, a third party seller
15 didn't get into an issue of whether, you know,
16 they were liable or Amazon was liable. It may
17 have been a retailer that just called me and
18 said is something exempt. You know, so, I
19 can't I didn't talk to somebody that's a third
20 party seller. It's just, you know, as far as
21 a third party seller, this issue, you know,
22 that we're talk -- here today to walk about, I
23 -- I did not talk to any third party sellers
24 about this issue.

25 Q: And forgive me, but that wasn't the question.



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1 And let me try and rephrase it. Maybe I wasn't
2 clear. Can you identify a single human being
3 that you ever spoke with in your official
4 capacity at the Department of Revenue who
5 participated in a third party sale transaction
6 using the Amazon.com website?

7 A: I can't tell you whether the one person we have
8 in there -- I don't know whether she worked --
9 does some things on ebay from time to time or
10 whether she does it on Amazon from time to
11 time, but there's one person in there, but not
12 as far as this particular issue that I can
13 recall.

14 Q: Okay. So, it sounds like you have a clear
15 memory of talking about third party sale
16 transactions on the internet with one person,
17 is that right?

18 A: Well, I mean, not -- not in the -- that I can
19 recall with any kind of official capacity that,
20 you know -- I just know that she's, you know,
21 sells things on the internet. I just don't
22 know, you know -- I know she does it with ebay,
23 but I don't know whether she ever did it with
24 Amazon is all I'm saying.

25 Q: Yeah. Okay. Would agree with the statement --



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1 and I don't think it's controversial -- you
2 don't have firsthand knowledge about how third
3 party sale transactions are conducted using
4 online marketplaces like Amazon.com?

5 A: I don't know what you mean by firsthand
6 knowledge.

7 Q: I mean, other than things that other people
8 told you.

9 A: I have never talked to anybody that's a third
10 party seller. The -- I have looked on Amazon
11 and seen information where it says, you know,
12 some other third party. But other than that,
13 no.

14 Q: Okay. And is that the full extent of your
15 firsthand knowledge of how these transactions
16 work?

17 A: That and anything that I would have read that
18 the -- the other folks provided. You know,
19 that they printed off of Amazon's website.

20 Q: And that is the full extent of your knowledge
21 of how these transactions work is the printouts
22 from Amazon's website, some brief time that you
23 may have spent on the website, and that's it?

24 A: And I think your pleadings, our pleadings.

25 Q: So, we're in a review of litigation papers, is



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1 that right?

2 A: Well, like I said they're -- our pleadings,
3 your pleadings with respect to this.

4 Q: Thank you, sir.

5 **MR. ROBERTS:** Beg the Court's indulgence for one
6 second. No further questions, Your Honor.

7 **THE COURT:** You may step down.

8 **MR. GREEN:** Your Honor, the Department rests.

9 **THE COURT:** Are you gonna -- do you have any
10 rebuttal or do want to take a break?

11 **MR. RAZI:** Your Honor, we don't have any rebuttal.
12 We'd like to talk about how to present our
13 final arguments to the Court when -- whenever
14 the Court's ready to discuss that.

15 **THE COURT:** I'm ready.

16 **MR. RAZI:** Okay. Well, we would propose and my
17 understanding from talking to Mr. Green and
18 some others is that the Court customarily
19 receives written proposed orders from the
20 parties, and we're perfectly comfortable doing
21 that. What we would also like to do while
22 we're here and given how important this case is
23 is to make a brief presentation to the Court
24 this afternoon about what we believe the
25 evidence showed. We're just not cover every



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1 little last issue in this case. We're just
2 gonna try to synthesize the evidence and then,
3 we'll come back to you 30 or 45 days after we
4 have a transcript and make a written
5 submission.

6 **MR. GREEN:** If I may add to that, the -- the
7 Department has no purpose to do a closing
8 today. But I understand the Court -- that is
9 the Court's discretion to allowing them and
10 everything. We would purpose, I think, the
11 standard practice is 30 days after the -- we
12 receive the transcription. I'd also ---

13 **THE COURT:** We could do it 30-30, I think -- well,
14 yes. After the transcript is placed in your
15 hands, 30 days for the proposed orders. Yeah.

16 **MR. GREEN:** I think we'd -- I'd like to propose, I
17 think Amazon is in agreement with this, to
18 maybe then have 15 days afterward to comment on
19 the other sides of the proposed order that are
20 submitted to you.

21 **THE COURT:** Do you?

22 **MR. RAZI:** Yes, sir.

23 **THE COURT:** Okay.

24 **MR. GREEN:** So -- so 30 days after the transcript in
25 our hands. And then, once we receive their



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1 proposed order to you, 15 days after that ---

2 **THE COURT:** Okay.

3 **MR. GREEN:** --- providing the comments -- whatever
4 on the other side of the proposal.

5 **THE COURT:** All right. So, we're gonna have
6 somewhat of a closing right now and then, that
7 also.

8 **MR. GREEN:** Yes, sir.

9 **THE COURT:** What time is it? So, you want to take a
10 break before we do closings?

11 **MR. RAZI:** Yes, sir.

12 **THE COURT:** All right. Thank you.

13 **(Off the Record)**

14 **THE COURT:** All right.

15 **CLOSING STATEMENT BY MR. RAZI:**

16 **MR. RAZI:** Your Honor, before I get into it, let me
17 just say at the start we want to -- on behalf
18 of Amazon Services we want to thank you for the
19 time that you've devoted to the case and for
20 hearing the evidence in this matter. This is
21 a very important case to Amazon Services and to
22 Amazon, as I think the Court has seen. Amazon
23 flew a number of witnesses out here as they did
24 during the course of the audit and the
25 litigation and has ---



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1 **THE COURT:** Certainly taken this seriously.

2 **MR. RAZI:** We're taking this very seriously because
3 it is serious. It's a very important case.
4 And another point in that regard, you know,
5 there have been cross-examination and there
6 have been some objections, but this is not --
7 there's nothing personal about this. This is
8 a dispute about the law and a dispute about
9 taxes that are owed. And -- and it's an
10 important one. Thank you. As we set up the
11 start of the trial on Monday morning, this case
12 is based on a fundamental misunderstanding of
13 how third party sellers sell products on
14 Amazon.com. The Department's misunderstanding
15 began at the very beginning when it started its
16 audit. And its misunderstanding has persisted
17 for years now. For any fairminded observer,
18 the evidence presented in this trial dispelled
19 once and for all that misunderstanding. We
20 promised at the very beginning to show that
21 Amazon Services is a service provider. We also
22 said at the start, that third party sellers
23 control all aspects of their sales. And the
24 Court's familiar with the slide now and I'm not
25 gonna go through it, but the evidence has shown



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1 emphatically that we were right. Your Honor
2 now knows that what we said at the outset is
3 true as a matter of fact. Amazon Services
4 provides non-taxable services in exchange for
5 fees. Third party sellers are the sellers of
6 their products under South Carolina law. We
7 know this because the evidence in the case has
8 been entirely one sided. The testimony from
9 our witnesses -- Amazon Services' witnesses was
10 entirely uncontroverted. No witness, despite
11 an extensive audit, years of litigation, the
12 Court's -- a request for relief from the Court
13 to take as many as dozens of depositions,
14 testified that Amazon Services is anything
15 other than a service provider. That Amazon
16 Services does anything at all ---

17 **THE COURT:** Does anything at all ---

18 **MR. RAZI:** --- that would make it ---

19 **THE COURT:** Oh.

20 **MR. RAZI:** --- a sale.

21 **THE COURT:** There was more.

22 **MR. RAZI:** There's no document that has been
23 introduced into evidence that would controvert
24 any of the witness testimony offered by Amazon
25 Services. Now, before getting into the -- what



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1 the evidence has shown. I want to outline for
2 the Court what we need to prove. We understand
3 the Court's ruling on the burden of proof. And
4 while we disagree respectfully with that ruling
5 for the purposes of this proceeding, this
6 trial, we have embraced that burden. The Court
7 ruled that we bear the burden to show by a
8 preponderance of the evidence that we do not
9 owe the taxes and penalties demanded by the
10 Department. In other words, we need to show
11 that Amazon Services doesn't owe any more to
12 the Department of Revenue than the \$150,000,000
13 plus that Amazon and other companies have paid
14 the Department since the beginning of 2016 just
15 in sales taxes. We have more than satisfied
16 that burden. In this case, the fundamental
17 legal question is actually relatively simple
18 and I think it's been crystalized substantially
19 over the last -- the ending of the briefing,
20 the Court Summary Judgement Order, and the
21 proceedings this week. What Amazon Services
22 needs to prove first and foremost by
23 preponderance is that it provided services in
24 exchange for fees. And as the Court knows, the
25 receipts from services when the services are



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1 the true object of the transaction, are not
2 subject to the Sales and Use Tax Act. And that
3 was in the first order last week. Now,
4 curiously, Mr. McCormack, he seemed to have
5 some qual with that. I don't -- I didn't quite
6 get -- we ultimately I think got him there that
7 generally that's the rule unless there's some
8 -- some exception. But ---

9 **THE COURT:** I guess the question is that that opens
10 up is you have to determine what is the true
11 object of this transaction. So, therein lies
12 the dispute in that.

13 **MR. RAZI:** Yeah. And -- and let us show you, Your
14 Honor, how we have done that and more. How
15 there is zero evidence that on the other side
16 of the table. Now -- and we'll -- we'll get
17 into that. But if the Court were to somehow
18 conclude that the website listing services here
19 and the advertising services here for which
20 fees were paid are somehow not services or that
21 when Amazon did the advertising and got a fee
22 for it, somehow the true object of that was not
23 to advertising services and get a fee. And the
24 same for when they boxed up all the products
25 and charged a fee for boxing up the products.



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1 And when they -- when they stored the products
2 and charged a fee from that, if somehow the
3 Court found that that wasn't the true object of
4 the storage fee, then, you can get past that
5 question. But I submit there's really -- there
6 is actually no evidence in the record that
7 there was any purpose for storage fees for
8 storage. No evidence in the record that
9 there's any purpose for shipping fees other
10 than shipping products, no evidence in the
11 record -- same for all of these fees. Zero,
12 which is the complete absence of evidence. And
13 on the other side, we have all this testimony
14 from reputable people whose credibility is not
15 called into question even once and I submit
16 couldn't have been. So, that's the first
17 question. But if for some reason we get passed
18 that, then we have other questions and they
19 relate to who's the seller. And the Tax Act
20 imposes the obligation to remit taxes on the
21 seller or the retailer of tangible personal
22 property, as the Court knows very well. And as
23 we -- we saw this morning I think in -- in very
24 clear precise terms in the Sales and Use Tax
25 Manual that Mr. McCormick put together with his



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1 team where the sale is -- it's a very simple
2 definition that they published for the whole
3 world to see in the manual that was applicable
4 at the very time of issue in this case. And
5 there's no citations. It's not that
6 complicated. It's just the transfer of title
7 or possession of tangible personal property for
8 consideration. So, if we're gonna talk about
9 who's the seller, we got to -- you have to
10 understand who it is in these transactions that
11 transfer title or possession of tangible
12 personal property for consideration. And we've
13 proven that, first off, Amazon Services never
14 did that. Amazon Services never did that. The
15 third party sellers -- not that we need to
16 prove that, right? We're not -- we're not
17 bringing a case against them, but I think the
18 evidence shows that the third party sellers are
19 the ones that did that. So, let's revisit the
20 evidence. And we started on Monday morning
21 with a witness from Amazon Services, Chris
22 Poad. And then, the next day, there was
23 another witness from Amazon, Tobin Weldele.
24 And what these witnesses testified and we tried
25 to distill it, it was extensive testimony. But



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1 we distilled it here to six key points. And
2 this testimony was consistent, it was credible,
3 it was emphatic that Amazon Services first of
4 all provides services in exchange for fees.
5 And I delineated some of those service a moment
6 ago and I think the Court's familiar with that.
7 Secondly and importantly, as to the sale
8 transactions, the third party sellers control.
9 Thirdly, if, to the extent it matters how one
10 can tell who's selling these products, the
11 evidence is now overwhelming that the third
12 party sellers are identified all over the
13 website. Now, I've heard -- there was some
14 testimony in the depositions and other places
15 they've seen about, you know, fine print and
16 the like. The -- the people at the Department
17 respectfully that -- that looked at this case,
18 we saw them today. We saw Ms. Mitchell. She
19 didn't even go on the website. We -- she
20 didn't -- so if there's any issue as to whether
21 the third party sellers were identified, I mean
22 the Court knows. We all saw. Everyone here
23 saw Exhibit 210, the offer-listing page. I
24 mean, it just hits you right over the head.
25 There are 21 sellers right there. Everyone



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1 knows in 2016, certainly in 2019 what a
2 hyperlink is. You see it, click it, you learn
3 more. I mean, this is -- this is just obvious
4 stuff. Fifth one, third party sellers control
5 their profits. They transfer them to
6 customers. They get paid. What they get paid
7 for -- the only thing they're getting paid for
8 in these transactions is their products.
9 That's the definition of consideration in a
10 sale of goods' context. We're not saying that
11 Amazon Services doesn't get any money. That's
12 not the point. The question is what do you get
13 the money for. And that's point number one,
14 Amazon Services got the money for providing
15 services. And then, lastly, and we're going to
16 get into this in some more detail, the BSA.
17 The -- the record is now clear that that
18 document -- okay, which we embrace and we don't
19 run away from and is part of -- part of the
20 evidence that should be considered by the
21 Court, but only a part -- imposes no meaningful
22 limitations on a third party seller's ability
23 to source products, list them, sell them, and
24 do all the things that a seller would do. And
25 I'm gonna get into some of the specific



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1 examples that the Court has identified, that
2 cross-examination has identified and that have
3 been identified elsewhere, and show that these
4 are just not limitations at all.

5 **THE COURT:** Well, here. Before you get there.

6 **MR. RAZI:** Please.

7 **THE COURT:** Are you still on the services though? I
8 didn't want to interrupt, but I just want to
9 start down this in my logic and see where we
10 go. As I listen to you, let's say I've got Mr.
11 A asks Mr. B to sell a product for him for a
12 fee. And Mr. B does everything. And this is
13 my hypothetical. But Mr. B does everything to
14 sell the product even receives the money and
15 the customer doesn't see anything about Mr. A,
16 so I'm just scoring the logic right now. Not
17 in this case, but generally. Would Mr. B be
18 considered the seller even though he did not
19 own the property or even have possession of it.
20 He was just hired by Mr. A to sell the product
21 and he did everything to sell the product and
22 the customer and never even knew about Mr. A?

23 **MR. RAZI:** Who got the consideration?

24 **THE COURT:** Mr. A would get the consideration and
25 Mr. B would file -- would get a fee for doing



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1 it.

2 **MR. RAZI:** I mean, the test is gonna be that -- that
3 sounds like a hypothetical that's entirely
4 different than the facts of this case.

5 **THE COURT:** Well, I'm trying -- I like to go to the
6 further limits of logic and then, work my back
7 into -- so, I'm just trying to see, is that a
8 possibility that B would -- Mr. B would be
9 considered the seller? Or if not, then it
10 makes it a lot easier for me to move -- move
11 into your case.

12 **MR. RAZI:** Yeah. Well, let me say this. I mean,
13 these are fact intensive inquiries. Okay.
14 Each one of these. And I don't think,
15 unfortunately, if we're gonna get into the
16 question of who the seller is that, you know,
17 there's gonna be sort of just an easy answer
18 like that.

19 **THE COURT:** Okay. Well, and that's a -- I'm just
20 asking you ---

21 **MR. RAZI:** Yeah.

22 **THE COURT:** --- to give your feel for the case.

23 **MR. RAZI:** Yeah. And I'll consider that a bit more
24 as I go, but I -- what I do agree with the
25 Court. We do agree with the Court that the



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1 true factual nature of the transaction is what
2 needs to be studied.

3 **THE COURT:** Okay.

4 **MR. RAZI:** And it just isn't something where you can
5 just print something off the internet and just
6 come to a conclusion and just be done with it.

7 **THE COURT:** Okay.

8 **MR. RAZI:** All right. So, let's -- let's -- so,
9 what I just showed you there was just sort of
10 the outline of the six points. I just want to
11 go into a little more detail. I think it's
12 important. So, now we're back on services in
13 exchange for fees. And what -- what the Court
14 will recall is that there was a seller in South
15 Carolina. The evidence is called Market Street
16 Supply. And they sell various kinds of products
17 and they did so in the first quarter of 2016.
18 And by the way, I assume the Court connected it
19 up -- that with -- with my cross this morning
20 of Ms. Mitchell. I thought it -- you know, it
21 was curious, right? What we saw with Market
22 Street Supply was actually that they collected
23 sales tax on a sale in South Carolina in the
24 first quarter of 2016, right? And then, this
25 morning that there was zero effort made at the



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1 Department to sort of reconcile that they had
2 already gotten paid for this stuff. Sort of
3 like selling the same product twice. So, they
4 can't, I mean -- they can't get away with that
5 kind of double counting and -- but back to the
6 point. Services in exchange for fees -- well
7 the reason ---

8 **THE COURT:** She -- sound like she admitted it. She
9 couldn't get away with it, but she just blamed
10 y'all.

11 **MR. RAZI:** Right. Which is of course not the way
12 the world works, right? You're the Department
13 of Revenue, you're the one responsible for
14 collecting taxes. It's not -- it's America.
15 It's a free county and, you know, the private
16 corporations have to conduct their own affairs
17 and government has -- gets paid and collects
18 taxes in order to its job. And that's a
19 question of -- you know, we talked about the
20 burden of proof. Again, it's a question of the
21 burden of who does the work in the tax context.
22 And the Department of Revenue can't just come
23 to Amazon because it's big, because it's easy
24 and just have them collect all their taxes for
25 it. And, you know what? They can -- they're



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1 actually -- states have been trying to do that
2 in -- I'll get into that in some detail. But
3 what they've done is they've changed their law.
4 They've adopted marketplace facilitator
5 legislation. So, look, the legislature
6 certainly has a lot of power and the executive,
7 but if you change the law, there's a lot of
8 things are possible. But without that, the
9 burden is on the Department. It's not on
10 Amazon. And that was -- that was crazy, by the
11 way. Excuse me. But the idea that she blamed
12 it on us. But then, at the same time, she's
13 the auditor. Okay. And I asked her did she do
14 anything to figure out who the third party
15 sellers are, which -- which ones sold products
16 into South Carolina. Remember what she said?
17 Remember? She said, I never went on the
18 website because I don't shop on Amazon. Are
19 you serious? Are you kidding me? After what
20 we just saw during this trial. The internet is
21 widely available to virtually every American.
22 The Department of Revenue has access to the
23 internet as good as anybody. All you have to
24 do to find these third party sellers is
25 literally fire up your computer and open up a



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1 browser and get on the Amazon website. We saw
2 it. We got 21 of them right there just on that
3 Asics pair of sneakers. I mean, this is not
4 rocket science.

5 **THE COURT:** Although, I will say that if you lived
6 in South Carolina, you may find out that the
7 Department of Revenue's access to the internet
8 has been limited after somebody hacked into the
9 Department of Revenue's computer system and
10 stole all of our identities, but -- I think
11 they restricted their access some after that.

12 **MR. RAZI:** Okay. You know, that sounds unfortunate,
13 but I don't understand that was an issue in the
14 first quarter of 2016. But back to the
15 services in exchange for fees. Okay. This is
16 -- this is what this is is zeroing in, lasering
17 in on one transaction. Not because this case
18 developed this one transaction, but because
19 they all work the same. Okay. So, this is one
20 transaction. And what -- what starts at the
21 top is you have the sales proceeds, \$12.79.
22 That's -- that's the starting point. And below
23 that, there's a number of fees that Amazon
24 charges and there's -- there's literally no
25 evidence in the record -- the only evidence in



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1 the record about -- for instance, let's say the
2 FBA pick and pack fee. Do you see that, Your
3 Honor?

4 **THE COURT:** Yeah.

5 **MR. RAZI:** Right. The only evidence in that record
6 that that fee of the \$1.06 is that -- and
7 there's substantial evidence for the record
8 that that fee was for picking a product -- okay
9 -- off a shelf, Amazon Fulfillment Services
10 paying an employee, training them up, having
11 them work at their warehouse and having him --
12 and I've been to these Fulfillment Centers --
13 having them walk around these -- these very
14 large warehouses, sometimes golf cart around,
15 get the product, put it in their bin, bring it
16 over to another part of the facility, pack it
17 up just right -- the way you have to do it.
18 You can't just do it any old way. Okay? For
19 -- for every product, they all have to be done
20 differently. There's different rules around
21 these things. So, there's a fee for that.
22 That's the only evidence in the record about
23 that fee. There is literally no way in the
24 world that there could be finding that that fee
25 is anything other than a fee for picking and



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1 packing the item. Okay? Same for, you know,
2 the weight handling fee. What -- what happens
3 with these companies that pack stuff and ship
4 it. So, they say is look at a certain point,
5 you know, as it gets bigger, we're going to
6 charge more. It's not just one fee, but the
7 big item, it requires more resources, more of
8 our time, more of our energy. I'm gonna charge
9 more. That's the only record evidence about
10 that fee. So, there's no way in the world that
11 the true object of those fees are anything but
12 what they are delineated as in the documents
13 including, for example, Exhibit 122. Next
14 point. Control, I think this is another one
15 just completely just overwhelming. Probably
16 can see it -- maybe you can see at this point
17 to see Mr. Poad explained how, just like any
18 other American with internet access could do.
19 He went onto Amazon.com, he looked at the
20 bottom -- and I said American. I'm being
21 silly. It could be -- anyone can do it. It
22 doesn't need to be -- you don't have to be in
23 this country. This happens all over the world.
24 You go to the bottom of the Amazon.com website.
25 There's -- there are buttons for -- sometimes



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1 it says sell on Amazon, I think is the phrase.
2 You click on that -- or it sometimes says start
3 selling. Click on that. That takes you to
4 seller central. You -- you -- or excuse me.
5 That take you to the selling on Amazon page and
6 that was the very first page of Exhibit 126.
7 We don't have that on the screen. It'd be page
8 23 of the Exhibit, but the very first page was
9 the page where you start to log in. And what
10 he walked us through in painstaking detail was
11 how you sign up all the information that you
12 put in and this is what the third party sellers
13 do. And how ultimately they post a picture of
14 their product, they set the price of their
15 product, they decide how the products gonna be
16 shipped to customers, and they do everything
17 and how that's done with no involvement of
18 Amazon -- any Amazon company. That testimony
19 just entirely unrevoked. Entirely -- no
20 contradictory testimony. Extensive audit,
21 years of litigation, not a single witness --
22 not a single person, not a single one of the
23 third party sellers contradicts that testimony.
24 And Mr. Poad didn't -- he didn't just base that
25 testimony on him going on the website and



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1 giving that example transaction, right? He
2 based on that on his 10 plus years of
3 experience working with the Amazon marketplace,
4 interacting with sellers, training, talking to,
5 training people about the marketplace, talking
6 with sellers. So he had a deep foundation for
7 that testimony. He was highly credible and
8 there should be no dispute at this point that
9 the third party sellers control all aspects of
10 their sales. We talked about how the third
11 party sellers are identified to people visiting
12 the website. And again, I think now that we're
13 getting to the point where this is obvious, but
14 this Hearing Exhibit 210. And this was the
15 example -- just, you know, one example of so
16 many products that are on the website. There's
17 nothing -- we didn't pick this out. We didn't
18 cherry pick this out. There's -- there's tons
19 of products on the websites. This is what
20 happens, you know, in many ways for all them.
21 Okay? And what we saw in this one was that for
22 this pair of Asics running sneakers, there were
23 literally 21 companies. I think it was 21
24 different companies offering the very same
25 product. 21 different companies. And if you



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1 were a customer looking at this, there's no way
2 in the world if you know how to read and use
3 the internet that you wouldn't know that there
4 were 21 different companies trying to sell this
5 product. Because at the top it says seller
6 information and then it proceeds to list 21
7 different companies. And if you -- and then,
8 in blue -- the seller names are blue. That's
9 because you can click on them and learn more
10 about them. So, we saw, for instance,
11 Roadrunner Sports. If you were interested in
12 knowing what that was, all you had to do was
13 click on it and you would see. I think it
14 said, they -- you know, they -- they advertise
15 themselves as a leading company selling running
16 clothes and running apparel, etcetera. Here's
17 our phone number. Here's where we're based.
18 Do I have a question for Roadrunner Sports.
19 Remember that? And Mr. Poad talked about how
20 if he had a question for them, what would you
21 do? Click on it. Think about how easy that
22 is. Think about -- think about the questions
23 in the Court's Summary Judgement Order about
24 communication and whether communication with
25 third party sellers is inhibited by these



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1 services or is it in fact made way, way easier
2 than it's ever been before. There's an
3 extraordinary amount of communication between
4 customers and third party sellers. That's the
5 -- the unrebutted testimony. And the reason --
6 starting reason for that -- why that it is, is
7 because they're identified repeatedly over and
8 over again on the website. Third party
9 sellers, let's talk about the money that they
10 get. We talked about the fees that Amazon
11 Services get. Third party sellers, they start
12 out with nothing. They decide what product
13 they want to sell. They get the product. They
14 sell the product. And what do they get in
15 return? Only one thing. Money. That's the
16 consideration for the product, just like every
17 other sales transactions that's ever been
18 conducted. And that's what Exhibit 122 says
19 and if we had more time, we would show the
20 Court the, you know, hundreds of thousands of
21 transactions in which -- millions of
22 transactions perhaps, in which third party
23 sellers have sold products and recieved
24 consideration just like you see on this page on
25 Exhibit 122 that's on the screen. All right.



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1 Let's talk about the services and let's talk
2 about some of the examples that have been
3 discussed. A lot of discussion during the
4 course of this case about the BSA. And I want
5 to spend some time on it. There are guidelines
6 in the BSA. No question about it. The
7 Business Solutions Agreement. The evidence is
8 that those guidelines do not meaningfully limit
9 -- do not inhibit what third party sellers do
10 in selling their products. You'll recall on
11 cross-examination, we were shown for instance
12 that -- that there's -- there are prohibition
13 funds selling unsafe items. Okay. There's
14 prohibitions on obscenity and the like. The
15 evidence showed, these are not meaningful
16 limitations. They're meant for the safety of
17 third party sellers, the safety of customers.
18 Like in a mall -- think about a mall and how,
19 you know, you can't -- let's say you have a
20 store in a mall and you keep ripping off
21 customers. Right? Customers buy stuff, you
22 don't give it to them. You do that over and
23 over again. How do you think that's gonna work
24 with your lease with the mall? Think they're
25 gonna let you get away with that? I doubt it.



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1 What about the security in the mall? It's a
2 fact that the mall provides security guards and
3 pays for them. Make them the seller of all the
4 products in the mall? I don't think so.
5 That's silly, right? It's silly. These are
6 basic, basic rules of the road, not meaningful
7 restrictions. And indeed, the services -- the
8 evidence is that those are really the ones that
9 are sort of at the periphery of the -- the
10 relationship. The real -- the real services
11 that we're talking about here and the real meat
12 of the BSA, okay, enhances. It doesn't limit
13 or obstruct. It enhances third party sellers
14 ability to sell their products. And I think
15 there's been some -- there may be some -- at
16 least maybe before the trial there was some
17 misunderstanding about that, but in the Court's
18 order for instance, there was a question as to
19 whether certain services could somehow, you
20 know, suffocate sellers and make them not be
21 able to do what they do. For instance, the
22 idea that Amazon Payments is gonna provide the
23 payment processing for the transactions. The
24 only evidence in the record and it's just
25 common sense, okay, is that payment processing



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1 services, those services help sellers sell
2 products. An example -- I'll just use a simple
3 example that everyone's familiar with.
4 Nowadays, you know, we all ride in taxis or
5 some of us ride in taxis sometimes. If you're
6 in a taxi, it used to be you paid cash, right?
7 Nowadays more and more of us have credit cards.
8 Okay. And it used to be hard to get the -- get
9 them to use your credit card. Nowadays, they
10 -- most taxis have credit card capability. And
11 you know how they have that? Because someone's
12 providing them payment processing services.
13 They usually have Square and they swipe and you
14 get an email. And maybe that experience is
15 familiar. Maybe it's not. But that's a
16 payment processing service. And what that
17 does, is that makes in that instance that taxi
18 driver -- that makes him able to sell his --
19 his service, in that case, more easily. That's
20 the same thing with Amazon Payments, right?
21 You have Matt Revich and his company or just
22 any other small company and Matt, you're just
23 getting started. You have the products. You
24 want to sell them on the internet. You can't
25 use cash. That's not how it works. Everyone



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1 knows that. For a million reasons. It's
2 impractical, it's unsafe, et cetera. You need
3 to have a payment processor. You don't have a
4 relationship with the bank or a credit card
5 company. There needs to be a payment
6 processor. So, that's a service that actually
7 facilitates. And I think that's why their --
8 the recent legislation, indeed, that's even
9 pending and being considered in South Carolina
10 -- it's been enacted in seven or eight states
11 already. They call it marketplace facilitators
12 because they don't limit or obstruct people in
13 selling. They facility. They enhance the --
14 the transaction. Same thing about credit card
15 fraud. How in the world could somebody saying
16 to a seller, if there's credit card fraud on
17 this transaction, okay, since I'm the
18 marketplace operator, I'm not gonna -- I'm not
19 gonna -- you're not gonna have to absorb the
20 hit on that fraud. Okay. We have a payment
21 processor that has a relationship with
22 financial institutions and has a contract. And
23 they've got an arrangement where they're gonna
24 -- they're gonna just take that out of our
25 hand. They're gonna deal with the fraud. How



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1 in the world would that ever stop a third party
2 seller or inhibit or meaningfully restrict a
3 seller from doing anything? It wouldn't. It's
4 just counterintuitive. Of course, it makes it
5 easier. How about the requirement that a third
6 party seller ensure that they're the seller of
7 their products? First of all, I would submit,
8 I -- I don't think that's much of a requirement
9 and that's sort of basic, like foundation of a,
10 you know -- the rule of law in a commercial
11 transaction in a civilized society. You know,
12 rule of -- that's sort of at the jump. You
13 have to own something before you can sell.
14 Okay. That -- and Amazon didn't event that.
15 That's -- so -- so I don't -- I don't put any
16 weight in that in terms of showing that
17 Amazon's the seller. If anything, of course --
18 although one can't contract around their tax
19 obligations to help you do that, but -- yeah,
20 I think it's -- it's relevant that the parties
21 in this transaction and their contract agreed
22 in no uncertain terms that the third party
23 sellers were the sellers. And not only did
24 they agree to it, but the sellers agreed that
25 they would take steps to ensure that they



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1 indeed owned the property that they sell on the
2 website and that they tell everyone that they
3 can, that they own the property. They write it
4 down, they put it in the box, they put in the
5 packing slip. That's what that H-I-J provision
6 -- that would be looked at and then cited in
7 the Court's orders all about. How about the A
8 to Z guarantee? Okay. The idea that -- that
9 an Amazon company is gonna in exceptional cases
10 step in and fix a problem between a customer and
11 a seller that those two aren't able to work out
12 for themselves. Okay. The record evidence is
13 that -- and this Mr. Poad's testimony. That
14 guarantee is implicated in 0.1 percent of the
15 many, many transactions on the marketplace.
16 So, no decision of this Court, no decision of
17 any court about what these transactions are all
18 about, are gonna be based on such a -- a
19 unimpactful, unimportant provision that in any
20 event has nothing to do with who the seller is.
21 So, the evidence simply does not support the
22 idea that the BSA limits the third party
23 sellers and run their business. And this is
24 the point that -- that we talked about earlier.
25 And let me -- let me just say something that's



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1 very important about this. And I tried to get
2 this into some of this with -- with the
3 witnesses today. The Court made very clear,
4 and we understand, that a person cannot
5 contract away their obligations under the South
6 Carolina Tax laws to prevent the Court from
7 engaging in a factual analysis of the true
8 nature of the relationship. Okay. But by the
9 same token, the opposite is true. The
10 Department can't ignore all evidence about the
11 true nature of a transaction and zero in on one
12 piece of paper in an extraordinary, voluminous
13 record developed over years to come to a
14 conclusion that a party is somehow is
15 contracted in to be responsible for the taxes.
16 That's their BSA argument. The Department has
17 intentionally and systematically avoided any
18 analysis of the true nature of the relationship
19 between the parties. All you heard from the
20 Department on cross-examination, okay, was 95
21 percent was asking our witnesses to read
22 provisions of the Business Solutions Agreement,
23 usually out of context, often -- mostly without
24 allowing them to explain anything about the
25 provision that was just read. We're just --



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1 we're just gonna read that correctly and that's
2 okay. That's perfectly appropriate. It's not
3 of any evidentiary significance beyond the
4 document. So, what we see is that it's just a
5 hyper-technical focus on this one single
6 document. Okay. And with regard to those
7 exceptional provisions in the -- in the BSA
8 that were such a focus. Remember the
9 unsuitable items -- you know, the house that
10 you can't sell stuff that might hurt people at
11 Amazon. You know, you can't sell illegal
12 items. You can't sell narcotics. Remember
13 those questions. Obscenity, pornography, okay.
14 And -- and the suggestion was that somehow that
15 those were, you know, a suffocating, oppressive
16 things for the sellers. And the testimony over
17 and over again from the Amazon witnesses were
18 -- was, that's not how the business works. And
19 these are quotes from our notes that we'll see
20 in the transcript. But, other provisions,
21 yeah. I do I see that there, but you know
22 what? That doesn't come up. You know what?
23 We've both been here a long time. 25 years
24 combined. Haven't encountered that. That
25 doesn't reflect, I respectfully submit these --



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1 these sort of peripheral odds and ends
2 provisions don't reflect the true nature of the
3 relationship that the Court is evaluating in
4 this case. Now, if there was any doubt at all
5 in the Court's mind after hearing from Mr. Poad
6 and if there's any doubt in the Court's mind
7 after factoring in Mr. Weldele's testimony, all
8 you had to do -- and it's on -- this is on this
9 question of third party control and Amazon
10 Services providing services in exchange for
11 fees and the importance of the BSA. Remember,
12 Matt Revich testified and he confirmed, you
13 know, in the -- in the form of a living human
14 being, in the form of a third party seller, he
15 confirmed without knowing he was doing so,
16 every single thing that the Amazon witnesses
17 said. He had his -- remember he had his on --
18 he was nervous and he had his own makeshift
19 checklist of all the things that he had done.
20 And that's in the record. And he talked about
21 how he does everything that a businessman would
22 do. He's -- he goes to Hong Kong and China to
23 get these products. He decides -- he
24 investigates and decides what he wants to sell.
25 He -- he samples the products. He obtains



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1 financing from friends and families. He -- he
2 does it all. He came here, you'll recall and
3 -- you know, he came here across the country
4 and he provided that testimony. And he came
5 here because as he said, he was offended that
6 someone was suggesting that anyone other than
7 him and his business colleague and the others
8 that they work with are the sellers of their
9 products. He didn't like that idea. Okay.
10 And you remember the cross-examination of Mr.
11 Revich? I think there was -- the suggestion
12 was that he was somehow in the tank for Amazon
13 Services. That he was biased. You being paid
14 for your testimony? Are you -- did you ever
15 work for Amazon? Do you ever testify for
16 Amazon? Does your brother ever testify for
17 Amazon? Does your sister work at Amazon? No.
18 No. No. That just fell entirely flat. Just
19 a -- just a highly -- highly credible witness.
20 No basis in the record. It would be
21 unfathomable that anyone could conclude that
22 anyone other than Yedi Housewares sells the
23 products that he described in detail about --
24 candidly, I would say in interesting details,
25 some of those products. And you know, the



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1 Court's questions for Mr. Revich were
2 interesting too. And we don't suggest that
3 he's -- you know, that he's knows everything in
4 the world. That's he's the most sophisticated
5 person. Of course, he's not. That's not the
6 point. But the Court asked him at the end of
7 his examination, you know, who's the seller of
8 your, under South Carolina law, of your
9 products essentially. And the Court asked --
10 and he's no expert. He's not a lawyer. But
11 there was one answer that was interesting. The
12 Court's -- the Court's did ask and the one time
13 he perked up, he said, is it your position that
14 Amazon is the seller of your products. And I
15 think that -- I think the Court even said under
16 the law. Of course, he probably doesn't know
17 much about -- but he got the part about is
18 Amazon the seller of his products. And he was
19 very clear about that. And he said, no. He
20 said, no because he doesn't believe it. He
21 believes he's the seller of the products. And
22 the reason he believes it -- and that's not a
23 legal believe, it's because he does all the leg
24 work. He's a businessman. He's a buyer and
25 seller of products. He knows better than any



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1 of us what it is to buy and sell products. And
2 that's what he does. That's how he makes his
3 living. That's his life's work. You know,
4 also interesting, the Court asked him, do you
5 think you owe the tax? And he thought about it
6 and what he said is interesting. And I submit
7 it's why we're all here. He said, I don't
8 know. Because there's a gap in the law, Judge.
9 There's a gap in the South Carolina Sales and
10 Use Tax Act as it relates to this case. All
11 right.

12 **THE COURT:** There's a gap in the law or is just
13 there's a gap that creates a -- a lack of
14 clarity of whether Amazon Services owes? And
15 the sellers owes it, so it -- isn't that pretty
16 clear in the law. And then we have to decide
17 who the seller is?

18 **MR. RAZI:** Yeah. As I said, I don't think you need
19 to get to that question because services are
20 not taxable and part of what happens ---

21 **THE COURT:** Right. But you're saying services
22 aren't taxable. Taxables would vary and
23 they're -- Amazon's not the seller. So, what
24 I'm saying, I don't really perceive a gap. I'm
25 asking this for you to correct me if I'm wrong,



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1 but ---

2 **MR. RAZI:** Sure.

3 **THE COURT:** And I don't perceive a gap because a gap
4 is someone owes it. If the -- if the product
5 is sold, someone was the seller. So, the
6 individual who is the seller is the one who
7 owes it.

8 **MR. RAZI:** Yeah. Fair enough. We don't agree --
9 well, we don't disagree with that. But I would
10 submit that if you saw the -- you know the
11 hail, Mary testimony that day from -- from Mr.
12 McCormack that -- I mean, that sounds to me
13 like gap when he was going on about this book
14 and that book and consignment and -- I mean, I
15 couldn't follow where he was going. He didn't
16 -- it wasn't rooted anything, right? Like
17 usually as lawyers, we say, no, no, you owe it
18 because, you know -- he was doing this kind of
19 journey through history and didn't really have
20 any firm landing places. So, let's -- let's
21 talk about the gap for a minute. Because I
22 think what happens in litigation is documents
23 get produced and, you know, there's discovery,
24 and you push for stuff. And they get repeated
25 over and over in pleadings that people become



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1 numb sometimes to -- to really how important
2 certain evidence is, right? We're here
3 litigating a highly contested case about
4 whether Amazon Services is liable for sales
5 taxes on items sold by third party on their
6 online marketplace. Okay. And the party that
7 we're litigating against, during the course of
8 the case, has said -- has admitted, there's not
9 a law about this. They've admitted that
10 there's a gap in the law that needs to be
11 fixed. There's -- there's a gap that needs to
12 be closed so nobody has to guess. Okay. Those
13 are the carefully chosen words of the most
14 senior official. Okay. The -- of the
15 Department of Revenue. And what the -- the
16 witnesses today said confirms what we know.
17 Okay. This is a responsible, serious
18 government official. When he says something,
19 he means it. He means it. There's a gap in
20 the law, it needs to be closed, so nobody has
21 to guess. Okay. Those are powerful, really
22 breathtaking admissions in case about whether
23 the law is clear as to who owes the sales tax
24 for third party sales on online marketplaces.
25 Remember, the law could not clearer, okay, that



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1 the taxpayer gets the benefit of the doubt in
2 these cases. The -- and the reason is because
3 the government -- the government can change the
4 law. That's the way this country works
5 perfectly fine. You want to change the rules,
6 that's fine. Change the rules. Amazon will
7 play by them just like it does in South
8 Carolina and every other state. But you can't
9 make it up as you go. I mean, that was -- I
10 mean, talk about admission. That was just
11 stunning to me. 38 plus years at the
12 Department. Okay. We're here arguing about
13 point of contact and point of sale. You know,
14 I'm probably one of the newest ones to the --
15 the South Carolina Sales Tax Law in the room,
16 but I've spent hours and hours studying this
17 stuff now. And I've got it. Okay. And we
18 just heard from the 38 plus year man that the
19 standards that are being hoisted upon and --
20 and wielded as sword against Amazon in this
21 case, never existed before. He literally said,
22 I'm not aware of us ever having said that the
23 point of contact is what matters. I'm not
24 aware of us ever having said that the point of
25 sale is the test. I'm not aware of us ever



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1 having said that the nature of the interaction
2 of bargaining is the test. I mean, this is --
3 this is topsy turvy if we're gonna be held
4 responsible under some new standard created
5 during the course of the case for litigation
6 purposes while at the same time, the
7 government, the government agency is in the
8 legislature trying to change the law going
9 forward for everyone. Remember, even -- even
10 their witnesses would agree, right? Because I
11 mean, it just -- you would look just so unfair
12 not to agree. But even they agree everybody's
13 gotta be treated the same. Okay. And the
14 evidence in the case was obvious. One
15 taxpayer. One particular online marketplace
16 facilitator is being singled out. But the
17 Department wants to collect taxes from the rest
18 of them too. But it's not gonna do the
19 litigation strategy against them. It's gonna
20 change the law going forward. Nothing wrong
21 with changing the law going forward. You can't
22 change the rules during the game. Hey, kids
23 know that. It's not acceptable. It's common
24 sense. It's not fair. It's unconstitutional.
25 It's -- it's -- it -- well, I hope we don't



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1 have to get there, but because -- and we don't
2 have to get there fortunately, hopefully
3 because of the Alltel case and the very clear
4 precedent from the Supreme Court of this state.
5 The very responsible reason precedent that
6 says, that look, in this country -- okay, it's
7 a free country. And the government's allowed
8 to collect taxes, but if it wants to collect
9 taxes, the way it does it is to write clear
10 laws and put out clear guidance about it. I
11 mean, you want to talk about ambiguous. I
12 mean, can you imagine in 2015 -- think of all
13 the commerce that's conducted on the internet.
14 The Court must know that these websites like
15 Amazon and ebay and Etsy, that's where people
16 buy stuff. That's where at Christmas time and
17 whatever holidays it is you celebrate, when
18 people buy gifts, that's what they do now.
19 Okay. They don't go over to the -- for better
20 or worse, right? Nobody goes to the, you know,
21 little tennis racket town in store in town
22 anymore to get a tennis racket, right? The
23 little Asics sneaker store, if there ever was
24 one. That's just not how the world works. So,
25 these guys sat down, the smartest people in the



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1 Department and wrote a manual that literally
2 runs hundreds and hundreds of page. It says
3 nothing about this stuff. No guidance. They
4 just freely admit, we never told anyone about
5 this. But then we're gonna take the book at Amazon
6 and run back for three years and let them deal
7 with it. Not fair. The Department has had
8 blinders on during the audit, during the
9 litigation, and I would even submit, during the
10 trial. You heard Ms. Mitchell tell you she
11 didn't even look at the website. That during
12 the course of the case, the Court -- we were
13 surprised at this, but the Court -- and we
14 fully accept it. The Court in a Discovery
15 ruling let them take the deposition. The Court
16 recognized, look, this is a big website, lot of
17 transactions, lot of the -- Amazon's a big
18 company, lot of sellers. It's gonna be a lot
19 of depositions in this case, right? Because we
20 have to figure it out. We gotta understand the
21 true nature of the transaction. Dozens of
22 depositions, right? No. No. Department
23 didn't go -- it wasn't just -- I was asking
24 those questions to Mr. McCormack, the policy
25 guy, but the litigators didn't do it either.



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1 They didn't depose. They didn't -- as far as
2 I know, talk to a single third party seller and
3 ask them if any of the stuff that we're
4 submitting to you is right or wrong. Blinders.
5 You know why? They didn't want to know the
6 answer. They had made a decision, okay, on the
7 very first day -- and it was some testimony
8 about it today. Very early on in the quarter
9 -- the first quarter of 2016, somebody in that
10 Department decided, you know what? We're gonna
11 get this money from Amazon. We're gonna do it.
12 And you know what? We're gonna figure out how
13 we're gonna do it. I'm not sure. I don't
14 know. Remember, I took Ricky Taylor's
15 deposition. He's the guy who started it all.
16 And you remember he said -- I mean, that was
17 just -- I assume that was fascinating for the
18 Court given the sum of the things the Court's
19 been focused on. He didn't look. He didn't
20 read the BSA, right? And then, we saw today in
21 the Manual about what a sale is. Transfer of
22 title or possession in exchange for
23 consideration. And you remember that testimony
24 yesterday that we read in with Demetri on the
25 stand. When I asked Mr. Taylor, well, so tell



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1 me about the importance of the transfer of
2 possession and your analysis of whether --
3 determining whether something's a sale. Well,
4 that's not important. I was like, okay. Well,
5 what about the transfer of title, like, is that
6 important? No. What about who receives the
7 consideration? Not important. What about,
8 like, who gets the products? Not important.
9 And I said -- remember, I said, remind me again
10 what it is that's important? And the answer,
11 it's in the record. My colleague, Mr. Akins
12 has an expression for you, he said word salad.
13 Doesn't make sense. It just starts with Amazon
14 and ends with Amazon. The only thing you get
15 out of that -- that -- that gibberish, is that
16 he just wants to get the taxes from Amazon.
17 They've been back throwing it every since then.
18 They've been just making up -- just coming up
19 with theories, grabbing at things. That's not
20 how the law works. That's not fair. All
21 right. After Amazon -- after we went and
22 presented testimony from our own experienced
23 personnel, 25 plus years at the company
24 combined, a third party seller, after we laid
25 out some of the admissions from the Department



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1 proving that the central thrust of the
2 Department's case is wrong, what did the
3 Department do? They didn't, I think tellingly
4 and rightly, move for any kind of ruling at
5 that time recognizing that -- that we met our
6 prima facie case. And what did they do in terms
7 of evidence? And this is not a criticism.
8 Okay. Because this is the evidence -- I assume
9 it's just not there. They did almost nothing.
10 Okay. They called the auditor and they called
11 Mr. McCormack. Both of whom admitted, the
12 first one more easily than the second one, that
13 they know nothing. They have no first-hand
14 knowledge about this case. You can't hold
15 someone liable in a court case based on just
16 printing some things out on the internet and
17 having discussion with your colleague. I mean,
18 that is crazy. You need evidence. You need
19 people who are willing to swear under oath that
20 other people did certain things. That's what
21 our Court's are all about. It's not about just
22 what you think and what you feel. There are --
23 there are standards. They need to be clearly
24 expressed, clearly applied, and then, people
25 need to come to Court and provide the facts to



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1 meet those standards. If that doesn't happen,
2 you're not allowed. You don't win a case
3 involving a lot of money. It doesn't work that
4 way. Despite having years to audit and
5 investigate Amazon Services, the Department
6 found nobody. Not a single man. Not a single
7 woman who was able to testify under oath that
8 Amazon Services engages in any activities of
9 the selling. Much less that Amazon Services
10 actually sold product. No witness testified
11 that Amazon is not the service provider, that
12 third party sellers are not the sellers of
13 their products, that customers are not made
14 aware who's selling them a product, that Amazon
15 Services or any Amazon company controls any
16 third party seller. And this is important too.
17 There's no witness, okay -- no witness who says
18 that Amazon Services entered into any kind of
19 partnership with any kind of third party
20 seller, that Amazon Services entered into any
21 kind of joint venture with third party sellers.
22 And remember, these are sophisticated people.
23 Mr. Weldele, the Senior Executive of Amazon, he
24 knows what a partnership is. Okay. That's
25 what he does. He's got an MBA. He does



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1 corporate transactions. He knows what a joint
2 venture is. I asked him about that. He said,
3 no. Didn't happen. Now, why didn't anyone
4 come to testify to any of that stuff? Because
5 those were -- were false, wrong allegations
6 from the very beginning. It just wasn't true.
7 It's not true. It wasn't true. They were
8 based on a fundamental misunderstanding. Okay.
9 Intentional or not. Now, I think probably not.
10 Probably based on more of -- a sort of a breezy
11 approach to figuring these things out. But --
12 but a fundamental misunderstanding all the same
13 of how third party sellers sell products on
14 Amazon.com. And that resulted from really, I
15 think, a predetermined rush to judgement. I
16 mean, they had that view we heard today from
17 the very start of Ms. Mitchell's work on the
18 audit. Early 2016, you know, it's Amazon.
19 It's Amazon. We just got to figure out which
20 company. Not only is not Amazon, okay, for --
21 for all the reasons I've explained, but the --
22 you know, it's definitely not Amazon Services.
23 I mean, that's just wacky, right? That a -- a
24 service provider would somehow be liable for
25 taxes as a seller. I mean, you gotta -- you



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1 gotta do better than that and you gotta be more
2 precise in that, right? Well, this is law.
3 We're the administrator of law court about
4 taxpayers and which taxpayer owes what. And we
5 need to be very careful. We need to be very
6 precise. And we need to base it on facts and
7 evidence in the record. Let me say -- let me
8 say a bit about Travelscape. It seems to be on
9 everyone's mind down here all the time. This
10 case is not Travelscape. Travelscape -- let's
11 talk about what Travelscape is about. And the
12 Court knows this, of course, better than me.
13 The Court lived the case. But -- and let me
14 just highlight a few selling points. I won't
15 be more than a briefing. The Travelscape --
16 they're -- Travelscape sourced the product.
17 That is took in these -- these hotel rooms and
18 sold them. Travelscape set the price. The
19 hotels in that case didn't communicate at all
20 with the customers. It all went through the
21 website. Customer paid the fees. Travelscape
22 got the consideration. Okay. Those are the
23 facts of Travelscape. Let's look at how that
24 squares up with this case. Amazon Services, no
25 involvement in sourcing the product. There's



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1 no way there can be a finding in this case that
2 Amazon Services sourced any product that a
3 third party seller sold. Price, the evidence,
4 I think, is very clear. Amazon Services did
5 not set the prices for third party sellers.
6 Communications with customers, this thing has
7 been, I hope, beaten to death, but the -- you
8 heard Mr. Revich testify yesterday. I mean,
9 the guy answered eleven buyer-seller messages
10 with customers before he came to court
11 yesterday at 9:00 in the morning. Okay. I
12 mean, that's just silly to suggest that third
13 party sellers don't communicate with customers.
14 Fees for services, okay, in the Amazon Services
15 situation, we don't get fees from customers.
16 We get fees from the sellers because we're
17 providing them services. We're not sharing in
18 the profits. We're doing services for fees.
19 It's different. Nobody testified in conflict.
20 Consideration, okay -- consideration, no
21 question. The money in this case -- the
22 transactions are processed by a company called
23 Amazon Payments, Inc. Not the taxpayer, okay,
24 but still has been a big focus for these guys.
25 But what Amazon Payments, Inc. is and what the



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1 uncontroverted evidence is -- is a conduit.
2 Okay. The money goes through to the seller.
3 Just like any other payment processing firm.
4 And what the Court said in the Travelscape case
5 is that -- what this Court said is that if
6 that's what we were talking about here is a
7 mere, you know, financial transaction conduit
8 situation, it be a totally different case. So,
9 that's Travelscape. It's -- obviously, it's
10 relevant for the Court's analysis. It's one of
11 the Court's prior decisions and I understand
12 the Court's gonna consider it and look at the,
13 you know, the Supreme Court case about it. But
14 there's nothing in that decision. Nothing in
15 that decision that dictates the results in this
16 case involving totally different facts, a
17 different tax, and just totally different
18 circumstances. And we look forward to briefing
19 that further. Let me just address some one-off
20 issues that came up during the course of the
21 case. It started in my opening. The Court had
22 a question. I said that the third party
23 sellers controlled the price. And I think
24 maybe the Court had a misunderstanding maybe
25 from some of the briefing about -- about that



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1 because you interrupted and you -- which is
2 your right to do. It's your courtroom. And
3 you asked me, you know, I thought that Amazon
4 Services exercised some control over the price.
5 And I think what the testimony -- the clear and
6 unequivocal testimony and even the documents
7 has been is that there is no control exercised
8 over the price. The third party seller that
9 testified -- testified he does it entirely on
10 his own. There is controlled though. There is
11 rigorous, extensive pressure in the marketplace
12 on pricing. Do you know what that is?
13 Competition. That's the engine of the American
14 economy. Okay. That's what this marketplace
15 is. It's great. You got -- you better have
16 low prices if you want to sell something.
17 That's true. No question about it. I mean, if
18 you -- if you're on that -- you have a pair of
19 those Asics sneakers and you want to sell them
20 in that 21-seller environment. Yeah, you're
21 damn right. You better -- excuse me. You're
22 right. You better have a good price. Pardon
23 me. But that's the pressure. That's the
24 control of the price. Nothing -- no evidence.
25 I think even Mr. McCormack said -- admitted



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1 today -- they're top thinker on this matter.
2 He doesn't know of a single transaction that
3 this case is about first quarter of 2016 in
4 which that price parody provision resulted in
5 any change at all in the price. So, that's
6 just their -- you know, not an issue. There
7 was a question the Court had and there's a lot
8 of stuff on the website that's interesting,
9 right? We all get a lot of questions. And
10 when we look at it, what's this, what's that
11 for the six in one rule. The Court will recall
12 there was a appliance protection plan on the
13 side. And the Court asked, rightly, who's
14 offering that. Maybe Amazon's doing this and
15 kind of adding extra services or -- and so, we
16 looked into that. And the witnesses told us,
17 no. That's a third party. That's an insurance
18 company, Allstate, right? You're in good hands
19 with Allstate. But that protection plan,
20 nothing about that's gonna make Amazon Services
21 the seller. The Buy Box, there's been some
22 suggestion in the briefing that -- that the Buy
23 Box means that Amazon Services effectively
24 chooses what product the customer buys. That
25 was the argument. Where was the evidence?



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1 None. No evidence. The Buy Box actually
2 doesn't control the product at all, right? The
3 customer chooses what product they buy. The
4 listing of the various offers is affected by an
5 algorithm that is very clearly disclosed to
6 everybody. I think the Court said in the order
7 the details of the algorithm haven't been
8 disclosed. If what the Court meant was the
9 computer code that -- that leads to the result
10 or ---

11 **THE COURT:** All I meant was weighted factors. I
12 just didn't ...

13 **MR. RAZI:** Sure. But at this point -- at this
14 point, it's not been disclosed. In other
15 words, the algorithm itself, yeah, that's a
16 highly protected intellectual property that
17 would be meaningless anyway to me and you,
18 right? It's just numbers and you know, ones
19 and zeros and stuff. It's computer code. So,
20 that's not useful information. But what it is
21 that gives you a sort of enhanced status and --
22 and a better status in the listing of orders,
23 that was -- that couldn't have been -- you
24 know, as clear as day. It was -- there's four
25 of them, there's price, availability, customer



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1 service, and someone will help with the others,
2 but it's -- it's on the document. It's on that
3 Exhibit. There's no mystery about it. It's a
4 fact available to anyone who wants to see it.
5 Sales tax collection responsibilities, the
6 Court, you know, asked an interesting question.
7 I think it was to Mr. Poad about well, what
8 happens and it was in that Market Street Supply
9 transaction. You know, what happens if you
10 collect the tax from the customer and you
11 provide that money that was collected at their
12 direction, on their behalf and you provided to
13 the seller and the -- how do we know that they
14 -- they actually paid the state the tax, right?
15 And that's a fair concern. And I'm sure the
16 Department of Revenue -- that's -- that's
17 sometimes their job, I assume, is to take steps
18 to ensure that the taxes are collected and
19 paid. But I mean, the same's true at --
20 anywhere else. If I go out to dinner tonight
21 and -- or, you know, anytime I buy a meal and
22 I'm charged a few dollars in tax. I mean,
23 right. It's gonna be that places obligation to
24 get the tax money to the Department. There's
25 no -- there's no one that sort of shows up and



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1 makes it happens. There's -- in this country
2 there's -- there's you know rules and
3 requirements and you've got to comply with them
4 and if you don't, there are consequences. But
5 there's nothing unusual about Amazon Services -
6 - Services that -- that makes that either more
7 or less of a problem. What it comes down to
8 again is the burdens, the burdens at tax
9 collection and who under the existing statutory
10 framework bears that burden. Who shoulders
11 that burden? Is it the Department or Revenue
12 or a private citizen, Amazon Services? I would
13 submit that you know while the company wants to
14 be cooperative and was cooperative and has
15 flown out here and met, talked and engaged, and
16 will do everything it can be to be cooperative.
17 The company's not gonna go beyond it's -- it's
18 obligation under the law. That's just not --
19 it's not how it works. And that's not really
20 fair. Getting back to the burden. The burden,
21 right, preponderance of the evidence. Everyone
22 knows the standard. Simple standard.
23 Basically -- basically, you know, you stack the
24 cases up next to each other, compare the cases,
25 you line it up and who's got the better



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1 evidence, who's got more evidence, who's got
2 more persuasive evidence. And -- and we've
3 tried to do a sort of simple lining up with
4 what the evidence presented was. And we had
5 our witnesses with the knowledge. We had a
6 third party seller. We had evidence about the
7 -- the true nature, really, of the transactions
8 and the relationship -- and by the way, let me
9 clear. The true nature, that includes the
10 agreement because in solutions, we don't run
11 away from the Business Solutions Agreement.
12 But like anything, right, that's one document
13 that applies to millions of transactions. So,
14 you need to dig a little deeper. You can't
15 just do that superficial look at a single piece
16 of paper. And we've done that -- that deeper
17 dive. We presented extensive evidence about
18 the nuts and bolts about how third party
19 sellers sell their products. And we presented
20 the extensive evidence form the website. You
21 know, live demonstrations of the website. It
22 should now be clear to anyone who's watched
23 this proceeding how it is. We could probably
24 all go home and do it real quickly, list
25 something and sell it, right? Or buy something



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1 from a third party seller. It's just -- it's
2 just plain as day. Now, what did the
3 Department do? That's what we did to show that
4 -- that we do services and we get fees in
5 exchange and therefore we're not liable for the
6 tax, and that third party sellers sell their
7 products. And then, the Department had a
8 chance to sort of undercut that or somehow show
9 that that was wrong, they didn't even try,
10 right? It's background about the audit.
11 Basically, an opinion about -- it almost
12 sounded like a -- sort of a law clerk or an
13 associate at a law firm. You know, what you
14 do? I ran this statute and read through this
15 and I did this. And it was sort of like how
16 hearing about how -- how a lawyer's supposed to
17 go to their case. Mr. McCormack's testimony,
18 but -- and I'm not saying there's anything
19 wrong with that. We all read. We all do that.
20 But that doesn't prove a case. I mean, that's
21 just -- that's the -- that's just the legal
22 work that's gonna be reflected in the briefing
23 and elsewhere. And I got the sense from him
24 that he's been pretty involved in putting
25 together some of these legal positions and that



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1 he's -- you know, he has great interest with
2 the proceedings. So, this is quick, but I
3 think our evidence, all that stuff on the left
4 side of the slide really proved these things
5 that are on the slide beyond a shadow of doubt.
6 That -- that we provide services, third party
7 sellers sell. Suppliers, this is a word I
8 haven't mentioned yet. The spokesman for the
9 Department, as he articulates the position of
10 the case -- everyone has a little different
11 spin on it. He doesn't do the point of contact
12 or any of that stuff. His position is that all
13 these third party sellers, the 21 for the Asics
14 shoes and Mr. Revich and all these others, his
15 position is that they're suppliers. They're
16 suppliers and no evidence of that. Zero
17 evidence of that. And while I'm on the
18 director, let me -- let me just say something
19 about his admissions. There's been some
20 suggestion that we took some statements of his
21 out of context or that -- that somehow, you
22 know, they don't mean what just the plain
23 language on the page means. But, you know,
24 he's right around the corner. They had an --
25 the Department had an opportunity if there was



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1 any -- and it needed to be clarified or put in
2 context or corrected. It wouldn't have taken
3 long. It wouldn't have taken long to be sure.
4 I mean, he would've been subject to cross-
5 examination, but he would have had an
6 opportunity to clarify and correct that. And
7 the full -- the full context of those
8 statements is -- is in the record. As I said
9 at the start, Amazon Services is a good
10 corporate actor company and all the Amazon
11 companies are -- companies trying to -- trying
12 to play by the rules, trying to do the right.
13 And frankly, in this -- in this era we're in,
14 it's -- around the country where -- where sales
15 -- state sales tax laws are -- they're influx
16 as they relate to online marketplace
17 transactions. You almost can't get away from
18 that. One of my very first questions -- I
19 think my very first question to Mr. McCormack
20 -- he started to get into the Wayfair decision
21 and we've tried in this case to avoid detours
22 about these sort of related, but slightly
23 different legal issues. But, you know, during
24 the course of this case, there's been an
25 important Supreme Court decision that



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1 implicates the same transactions that we're
2 talking about. And the State -- the State's
3 Department -- the State Department of Revenue,
4 like the one in this case, they've been working
5 very hard to -- to address that and to change
6 their rules and to change their laws.
7 Companies like Amazon, okay, we're trying to do
8 the right thing. Trying to play by the rules,
9 but at the same time, you know, trying to
10 protect their shareholders and protect their
11 business -- are during their best to comply in
12 that rapidly changing environment. And I would
13 submit that all this evidence and all this
14 stuff about what's going with the -- with the
15 law being changed and the gap that needs to be
16 closed and the like, you know, proves really at
17 a bare minimum -- at a bare minimum that this
18 statute is ambiguous. There is substantial
19 doubt as to how to interpret that statute as it
20 relates to these complex transactions. And
21 that, as the Court knows, in that circumstance
22 under -- under the law, the taxpayer gets the
23 benefit of the doubt. And there's -- there's
24 obviously a way to address that and we're so
25 close to having it happen. The way to address



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1 it is just to change the law and make it clear
2 for all taxpayers. And if that happens, Amazon
3 Services is gonna comply with the law. Of
4 course it is. It's a responsible corporate
5 actor, just likes it's doing in all these other
6 states, these eight other states. And the
7 Court saw we were looking at Mr. Poad's
8 account, the Amazon account. We'll recall when
9 the product was gonna be shipped into
10 Washington State, boom, the sales tax was
11 charged right at that time. It's not a
12 mystery. They changed the law. They have a
13 marketplace facilitator law just like the one
14 that's about to be passed in South Carolina.
15 But it comes to down to fundamental fairness.
16 The law needs to be the same for everybody.
17 Taxpayers can't be singled out. The law needs
18 to be reasonably clear. There needs to be some
19 guidance. You can't just bury the public in
20 paper about what your rules are and not say
21 anything about a topic and expect everyone to
22 figure it out. That's not how it works.
23 That's not fair. Thank you, Your Honor.

24 **CLOSING STATEMENT BY MR. GREEN:**

25 **MR. GREEN:** Thank you, Your Honor. Mr. Razi told me



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1 he had a brief closing argument. I asked is
2 brief by his definition or mine. And I think
3 now I know the answer to that. I will be
4 brief, Your Honor. I'm not -- I'm not good at
5 jury arguments and I'm not -- I'm not really
6 good at belabor things that we're going to
7 brief, as I think the Court probably knows.
8 And I'm -- I say that full well knowing that
9 I'm going to read a sum subsequent filing about
10 how I only spoke briefly on something and
11 didn't say this and didn't say that. But the
12 evidence in this case -- and -- and the point
13 about -- you know, their -- they complained
14 that we didn't talk and do these depositions of
15 all these people. Well, they only presented
16 two company witnesses. We deposed one of them.
17 The first person on the other side I think that
18 I've ever had to complain about doing less
19 discovery rather than more. I don't think that
20 gets anywhere really because again, they
21 presented two company witnesses. One of them
22 we deposed. I want to talk just briefly though
23 today about what they didn't really focus on
24 here. And one more thing I get into that.
25 They -- they -- Mr. Razi pointed repeatedly to



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1 people saying that -- witness saying that they
2 -- they seller or the third party seller. They
3 sort of presume the conclusion that they're
4 trying to prove and it's really an issue in
5 the case. Is Amazon a seller? And when we're
6 talking about that, necessarily we spend a lot
7 of time talking about the BSA and the third
8 party side and whether they're uploading
9 things, and what they upload, and the control
10 of that. But they don't -- Mr. Razi really
11 didn't talk about what goes on that website,
12 www.Amazon.com. A wide range of goods and --
13 goods and products available on that website
14 that no dispute that sales transactions going
15 through that website or sales of tangible
16 personal property. Testimony and evidence that
17 the persons who shop on that website are Amazon
18 customers, at least the ones who sign up for
19 it. We'll get to that in a minute. Certainly,
20 no dispute that Prime customers who use that
21 website are Amazon customers. They get certain
22 benefits, two-day shipping and the like.
23 Somebody wants to buy something on the website,
24 they go on there, they -- let's assume for a
25 minute they don't yet have an account. They



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1 search for some product or good. I think the
2 testimony was and I think you saw from of the
3 demonstrations that search result is returned,
4 populated with goods that are responsive or
5 products that are responsive to your search
6 request. You select one of them, go to a
7 product detail page. If you want to buy that,
8 you probably the one -- I think there was
9 testimony, at least greater than 50 percent of
10 the customers who buy a product, buy what's in
11 the Buy Box up to the right. You add that to
12 your shopping cart. That whole page there
13 displays Amazon Prime. Well, maybe it says --
14 maybe it says there some third party. Well,
15 it'll say that in small letters. You go to the
16 product detail page and we drill down two
17 levels, maybe it has a bunch of different ones.
18 But the ones in the Buy Box, it's -- that's
19 there. But it's Amazon.com everywhere or
20 Amazon Prime. I think mine shows Amazon Prime.
21 You put your product in your cart. You go --
22 let's say you sign up for an account. Log on.
23 You select an Amazon account. You want to buy
24 it, so you will enter your credit card
25 information on the Amazon account -- Amazon



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1 website. You can't use anything other than a
2 credit card. You can't use cash. Can't use
3 PayPal. Can't use any other payment system.
4 But you put your credit information on the
5 Amazon.com website. Put your shipping address.
6 Put your billing address. If you're not a
7 prime customer, you may have to pick selection
8 options. For prime, typically, you're gonna
9 get two days. You add that to the cart.
10 You've added it to the cart. You then, check
11 out. You go through. Press the button to pay
12 for that. It'll confirm the order. Order email
13 confirming that will come from Amazon Services.
14 It doesn't say the third party's name assuming
15 there's a third party product here for moment,
16 that -- it doesn't same the third party's name
17 in there. Well, they say you can drill down.
18 Well, maybe, but that's not what's coming to
19 you from the website. And that's not where you
20 made your transaction either. You made it on
21 Amazon.com. And then, you'll ultimately,
22 either whether it's FBA, fulfilled by Amazon,
23 or MFN, Merchant Fulfill Network, you'll get,
24 ultimately, some order -- a shipment
25 confirmation. Again, that comes from



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1 Amazon.com. Cred- -- you'll get a credit card
2 statement. It'll have some abbreviation Amazon
3 Marketplace Payments. You'll do all that -- or
4 you can do all that without every interacting
5 with anybody but Amazon.com. Nobody else. At
6 the end of the day, the main question here is
7 whether Amazon Services is a retailer or a
8 seller under the statute because it's --
9 because it's selling goods and services,
10 whether owned by themselves or others, through
11 that website. We submit that the evidence
12 shows that they are because really, ultimately,
13 at the bottom -- we can brief this and we will.
14 But at the bottom, what I've described makes
15 them the seller. Now, we go -- we certainly
16 did spend a lot of time on the BSA and the
17 like. And that's where non-Amazon persons and
18 entities -- we'll call them third parties. I
19 think everybody's kind of done that. They
20 enroll to participate in Amazon -- the
21 Amazon.com sales process. They sign up for
22 that. They agree to a BSA. They can't pick
23 and choose. It was drafted by on behalf of
24 Amazon entities. Refers to Amazon entities as
25 we. Said that an obligation required one



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1 Amazon and it can be done by any Amazon entity.
2 In fact, I think the testimony evidence shows
3 the entity they talked about -- they claimed
4 does -- separately does the shipping, it's not
5 a party to the BSA. If you select FBA, that's
6 with Amazon Services. They just contracted
7 separately to get AFS to do that. BSA requires
8 -- allows the Amazon affiliates to change the
9 terms at their sole discretion. BSA requires
10 third parties to sign up to use Amazon Payments
11 for processing payments. And just like
12 customers can't use PayPal, third parties can't
13 use PayPal to get their funds. They got to use
14 and go through Amazon.com. Now, they've said
15 they've got -- you know, there are a lot of
16 provisions. And they say, they don't matter.
17 They say, now that -- well, we're not running
18 from them, but they don't matter. But they do
19 matter. They matter because they said that
20 this is Amazon sales process. It's not -- the
21 third party may enroll to participate in it,
22 but this is Amazon.com's sales process. There
23 are terms and conditions on how payments are
24 made, terms and conditions imposed on shipping.
25 There's a whole stack of evidence about what



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1 people can and can't do in putting these goods
2 on the website for sale through Amazon's sales
3 process. Amazon gets a number of fees paid
4 from the proceed of sale. They say well these
5 are just service fees. They can't make it a
6 service fee by calling it a service fee. The
7 Court well knows that. But one of these fees
8 is a referral fee. And it depend -- depending
9 on the type of product or good it's a fairly --
10 it varies, but it's a significant fee. And I
11 think you saw from Exhibit -- it was the
12 Exhibit that we looked at which had the e-mails
13 and invoices and communication. If you look at
14 that last e-mail --- was that Exhibit 123,
15 Andrew?

16 **MR. HAND:** 122.

17 **MR. GREEN:** 122. Thank you. If you look at that
18 last page in that Exhibit, it looks like an
19 income statement. But all the profit went to
20 Amazon.com through the referral fees and the
21 like. Through that sale that was occurring
22 there. So before it even gets to this third
23 party and he's deducted whatever his cost of
24 the good was, there's a huge gross margin
25 that's gone. It's gone to Amazon. We don't



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1 dispute that they're good citizens. It's not
2 about their corporate citizenship or corporate
3 character. It's about whether they're required
4 to pay the taxes. The Department has concluded
5 that they do based on the nature of the
6 transactions on the website. We submit that
7 the answer is yes. So, for these reasons, Your
8 Honor. As I said, I would be brief, we'll
9 explain this a lot more in our proposed order
10 and commentary on their proposed order. This is
11 sales process conducted by Amazon. Amazon is
12 in the business of selling these good and
13 therefore liable for the sales tax under South
14 Carolina code law.

15 **THE COURT:** I asked Amazon a question. It may have
16 been difficult for them, I might have -- when
17 you say that a large part of that fee went to
18 Amazon, if I went with my Person A and Person
19 B, but I switched up the factual situation.
20 And I say that Person A asked Person B to help
21 them sell a product, but -- but when person B
22 sells a product they make it clear that -- that
23 they're selling it for person A. But in doing
24 so, they still charge. They say a 75 percent
25 fee for doing it, but is that -- but they're



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1 making it clear that they're selling it for
2 Person A. Would it still not be a sale of
3 Person A? Would Person A not be the seller?
4 In other words, I just thought ---

5 **MR. GREEN:** Yes, sir.

6 **THE COURT:** I think maybe the -- the amount of the
7 fee can be a factor to consider, but I don't
8 think ---

9 **MR. GREEN:** It is a factor to consider. No. I
10 don't -- I don't submit that any one thing in
11 this case is conclusive. No. No. No.

12 **THE COURT:** Okay.

13 **MR. GREEN:** It is -- it is -- if you look at the
14 totality of what's going on and weigh these
15 factors or evaluate these elements and factors,
16 and there's a lot in there to evaluate. Those
17 things weigh in to determining to whether this
18 is a sale by Amazon or not. And we have to
19 drop down to the third party. Department --
20 Department's position obviously, is that it's a
21 sale by -- in your instance, there would be a
22 sale by B regardless of what he charges because
23 he's out there selling the goods.

24 **THE COURT:** There's a sale by A, but go ahead.

25 **MR. GREEN:** You had say A asked B to sell, if I



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1 understood you correctly.

2 **THE COURT:** Asked -- A asked B to sell the product.

3 **MR. GREEN:** Right. So, I ---

4 **THE COURT:** They clearly -- or maybe I didn't make
5 it clear. That B made it clear that A -- they
6 were selling the product for A. Maybe I said
7 it wrong. And ---

8 **MR. GREEN:** Well, and it would it ---

9 **THE COURT:** No, but then B charged and exorbitant --
10 -

11 **MR. GREEN:** Yes, sir.

12 **THE COURT:** --- service fee to sell it for A. But
13 just because they charged an exorbitant service
14 fee, would not make them the seller. It would
15 still be -- they were selling it for A and
16 listed it for A.

17 **MR. GREEN:** Not alone, though it might be a factor.
18 It would be a factor it to weigh it, but not
19 alone. No. And I don't -- again, I don't say
20 anything that's conclusive. And -- and I will
21 agree with Mr. Razi on this, it is gonna depend
22 on some -- what is B doing? I mean, he say
23 that he is selling for A, but depending on the
24 nature of what he's doing as far as displaying
25 goods, how they're displayed and he's taking



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1 the money. B is a lot time -- B could very
2 easily be the seller in your circumstance,
3 regardless of whether says. Alone -- alone,
4 he'd say I'm just selling for A. I don't have
5 to collect the sales tax. That wouldn't be
6 enough. He's taking the money. If you handed
7 him your credit card. Let's say you hand him
8 your credit card and he runs it on his little
9 -- I call it Square-D. I think it is. My wife
10 uses it sometimes for some of her PTSO things
11 and they'll swipe the card. If he's taking the
12 money, that's the sale. And that's what
13 happened here. And the customer signs onto the
14 website, they pay their money through the
15 website. Payments may process it. I put my
16 card and there's no separate window -- I put my
17 card in on Amazon.com. And Amazon Services
18 runs that website. On the BSA, they pay --
19 they -- they are the ones responsible if I pick
20 FB -- the person picks FBA. That they've now
21 delegated that to another Amazon entity is not
22 sufficient for them to escape liability for
23 sales tax. Thank you, Your Honor.

24 **THE COURT:** Do you have a rebuttal. I don't need
25 it. I ---



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1 **MR. RAZI:** No. We'll do it in the briefing, I mean.

2 I will say that that last exchange to me -- I

3 mean, again, ambiguity comes to mind, but.

4 **THE COURT:** But I have to -- I'll ask you a question
5 about that.

6 **MR. RAZI:** Sure.

7 **THE COURT:** Because you refer to ambiguity. There's
8 ambiguity in the interpretation of the statute
9 and ambiguity in the application of the
10 statute. I'm saying all this to hear you
11 respond. Simply because there's ambiguity in
12 the application of the statute, doesn't mean
13 there's ambiguity in the interpretation of the
14 statute, does it?

15 **MR. RAZI:** Yeah. Now, you may be right about that.
16 But, I guess, I was loosely using the term
17 ambiguity and you know, I think what I will say
18 about -- I'll return to. I think that
19 hypothetical, although I appreciate the Court
20 what you're trying to do, it's fairly skeletal
21 in its ---

22 **THE COURT:** Well, I'll do it on both ends.

23 **MR. RAZI:** Of course. Yeah. No. And I get that.

24 **THE COURT:** I think we start on the ends and work
25 our way in sometimes it helps.



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1 **MR. RAZI:** Yeah. I here you. I think what you end
2 up with is a fact intensive inquiry and ---

3 **THE COURT:** Okay.

4 **MR. RAZI:** --- and -- and a conclusion that in this
5 case, you know, that third party seller the
6 seller. And at best though that the law is
7 highly ambiguous. And as a result ought to be
8 interpreted fairly.

9 **THE COURT:** Okay.

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

11 **THE COURT:** Thank y'all for your time. This case has
12 been A, interesting and B, the lawyers from
13 both sides have done an excellent job and I
14 enjoy that. I really do. It makes my job fun.

15 **MR. GREEN:** Thank you.

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

17 **THE COURT:** Thank -- Thank y'all. This hearing's
18 adjourned. Oh, my -- I mentioned it earlier.
19 Wait for the proposed orders. It's 30 days
20 from the day it's made available to you and
21 then apparently, we are going to do another --
22 a new wrinkle and that is a response to the
23 proposed orders 15 days after those -- those
24 proposed orders are given to each one of you.

25 **MR. GREEN:** And to you.



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1 MR. RAZI: Yes.

2 MR. GREEN: Then, we'll file -- we'll submit our
3 responses within 15 days after that.

4 THE COURT: But there will not response to the
5 response?

6 MR. GREEN: I would not proposing that.

7 THE COURT: Okay.

8 MR. RAZI: Very well, Your Honor. Thank you.

9 (There being nothing further, the hearing concluded
10 at 5:06 p.m.)
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