STATE OF SOUTH DAKOTA) : SS COUNTY OF HUGHES)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff, vs. WAYFAIR INC., OVERSTOCK.COM, INC., and NEWEGG INC., Defendants.	32CIV16-000092 **NOTICE OF FILING OF NOTICE OF REMOVAL**

TO: CLERK OF THE COURT
HUGHES COUNTY CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT
and
STATE OF SOUTH DAKOTA
RICHARD M. WILLIAMS

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1441(a) and 1446, on May 25th, 2016, Defendants Wayfair Inc., Overstock.com, Inc., and Newegg Inc., filed a Notice of Removal in the Office of the Clerk of the United States District Court for the District of South Dakota. A file-stamped copy of the Notice of Removal is attached hereto as Exhibit A.

Dated this 25th day of May, 2016.

BANGS, MCCULLEN, BUTLER, FOYE & SIMMONS, LLP

By: _____

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Telephone: (207) 786-3566
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*Admission *pro hac vice* pending in the United States District Court for the District of South Dakota

Attorneys for the Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2016, I served a true and correct copy of the foregoing Notice of Filing of Notice of Removal, via e-mail and U.S. Mail, postage prepaid, upon the following:

Richard M. Williams
Deputy Attorney General
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Facsimile: (605) 773-4106
rich.williams@state.sd.us
Attorneys for Plaintiff

One of the Attorneys for the Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

COPY
ORIG. FILED
MAY 25 2016
JOSEPH HAAS
Clerk

STATE OF SOUTH DAKOTA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV. NO. 16-3019
	)	
WAYFAIR INC.,	)	
OVERSTOCK.COM, INC., and	)	**NOTICE OF REMOVAL**
NEWEGG INC.,	)	
	)	
Defendants.	)	

TO: THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, CENTRAL DIVISION

Pursuant to 28 U.S.C. §§ 1441(a) and 1446, Defendants Wayfair Inc., Overstock.com, Inc., and Newegg Inc. ("Defendants") hereby give notice of removal of the action captioned *State of South Dakota v. Wayfair Inc., et al.*, Docket No. 32CIV16-000092, now pending in the Circuit Court of the Sixth Judicial Circuit, in and for Hughes County, South Dakota, (the "Action"), to the United States District Court for the District of South Dakota, Central Division. As grounds for removal, the Defendants state as follows:

1. On or about April 29 or May 2, 2016, Plaintiff State of South Dakota ("the State") served upon each Defendant a copy of the Complaint in the Action. True and accurate copies of the Complaint and all other documents served upon each of the Defendants are attached hereto as Exhibits A, B, and C, respectively.

EXHIBIT
tabbies
A

2. Pursuant to 28 U.S.C. § 1446, removal to the United States District Court for the District of South Dakota, Central Division, is appropriate because this action is being removed from the Sixth Judicial Circuit in and for Hughes County, South Dakota. *See* D.S.D. Local Rules, Divisions of District of South Dakota.

3. This Notice of Removal is timely filed within thirty (30) days after the receipt by the Defendants of a copy of the Complaint, as required under 28 U.S.C. § 1446(b).

4. This Notice of Removal is filed by all Defendants remaining in the Action. Systemax Inc., which was originally named as a Defendant in the Action, has since been voluntarily dismissed from the Action pursuant to a Notice of Voluntary Dismissal pursuant to SDCL § 15-6-41(a)(1)(A) filed by the State on May 19, 2016.

5. The Action is one over which the United States District Court has jurisdiction, as required under 28 U.S.C. § 1441(a), and as described below.

6. The Action seeks an affirmative declaration regarding the validity of a new state statute under the United States Constitution. On March 22, 2016, South Dakota Governor Dennis Daugaard signed into law "An Act to provide for the collection of sales taxes from certain remote sellers," (South Dakota Senate Bill No. 106) ("the Act"). The Act was adopted with the express understanding that its terms violate established requirements for state sales and use taxes under the Commerce Clause, U.S. Const. Art. I, Sec. 3, Cl. 8, as reaffirmed by the United States Supreme Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In *Quill*, the

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Supreme Court held that a State lacks the authority, under the "substantial nexus" standard applicable under the Commerce Clause, to require a company with no physical presence in the State to collect or report the State's sales and use taxes. *Quill*, 504 U.S. at 313-19.

7. The Action by the State seeks a declaratory judgment of the constitutional validity of the Act as applied to the Defendants, each of which the State alleges has no physical presence in South Dakota. Complaint, ¶ 19. As asserted and acknowledged by the State in the Complaint, "a declaration in its favor will require abrogation of the United States Supreme Court's decision in *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992)" and "the State recognizes that *a change in federal constitutional doctrine will be necessary* for the State to prevail in this case." *Id.,* ¶¶ 1, 51 (emphasis added).

8. The Complaint's discussion of the "Relevant Legal Background" to the Action also contains a lengthy recitation of the State's view of the federal constitutional doctrine on which the Action is premised and depends. *Id.*, ¶¶ 2-11.

9. The Complaint further alleges that the Action presents a "justiciable and ripe controversy, between adverse parties, in which the State has a legally protected interest." *Id.*, ¶ 23.

10. The Complaint thus alleges a question of federal law "arising under the Constitution . . . of the United States" which is necessarily raised by the Action, is actually disputed and substantial, and over which the exercise of jurisdiction by the federal District Court is both available and proper pursuant to 28 U.S.C. §

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1331. *See Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 313-14 (2005).

11. Defendants will promptly file with the Clerk for the Sixth Judicial Circuit in and for Hughes County, South Dakota, a Notice of Filing of Notice of Removal pursuant to 28 U.S.C. § 1446(b). A copy of this Notice is attached as Exhibit D.

WHEREFORE, Defendants remove this action, previously commenced in the Circuit Court of the Sixth Judicial Circuit, in and for Hughes County, South Dakota, to the United States District Court for the District of South Dakota, Central Division.

Dated this 25th day of May, 2016.

BANGS, MCCULLEN, BUTLER, FOYE & SIMMONS, LLP

By: _____

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jeffb@bangsmccullen.com
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Facsimile: (207) 783-9325
*Admission *pro hac vice* pending

Attorneys for the Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2016, I served a true and correct copy of the foregoing Notice of Removal, via e-mail and U.S. Mail, postage prepaid, upon the following:

Richard M. Williams
Deputy Attorney General
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Facsimile: (605) 773-4106
rich.williams@state.sd.us
Attorneys for Plaintiff

One of the Attorneys for the Defendants

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: ss	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	32 Civ. 16-92
Plaintiff,	)	SUMMONS
v.	)	
WAYFAIR INC 4 Copley PL FL 7 Boston MA 02116-6504	)	
SYSTEMAX INC 11 Harbor Park Dr Port Washington NY 11050	)	
OVERSTOCK.COM INC 6350 S 3000 E Salt Lake City UT 84121-5952	)	
NEWEGG INC 16839 E Gale Ave City of Industry CA 91745	)	
Defendants.	)	

GREETINGS FROM THE STATE OF SOUTH DAKOTA TO THE ABOVE-NAMED DEFENDANTS:

Corporation Service Co., 2711 Centerville Rd #400, Wilmington DE 19808
Registered Agent for: Wayfair Inc.

Corporation Service Co., 2711 Centerville Rd #400, Wilmington DE 19808
Registered Agent for: Systemax Inc.

The Corporation Trust Co., Corporation Trust Center, 1209 Orange St, Wilmington DE 19801
Registered Agent for: Overstock.com, Inc.

Corporation Service Co., 2711 Centerville Rd #400, Wilmington DE 19808
Registered Agent for: Newegg Inc.

EXHIBIT
A

Filed: 5/25/2016 2:47:36 PM CST Hughes County, South Dakota 32CIV16-000092

You are hereby summoned and required to serve upon the Attorney General, Plaintiff's attorney, whose address is the Office of the Attorney General, 1302 East Highway 14, Suite 1, Pierre, South Dakota 57501-8501, an Answer to the Complaint, which is herewith served upon you and filed on the 28th Day of April, 2016, in the office of the clerk of the Circuit Court of the Sixth Judicial Circuit at Pierre in and for the County of Hughes, State of South Dakota, within thirty (30) days after the service of this Summons and Complaint upon you, exclusive to the date of service. If you fail to file an Answer within thirty days of the date of service upon you, judgment by default will be taken against you for the relief as prayed for in the Complaint.

Dated this 29th day of April, 2016.

/s/ Richard M. Williams

Richard M. Williams
Deputy Attorney General
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the *Summons* in the above-entitled matter was filed electronically through the Odyssey File and Serve system.

I further certify that some of the participants in the case are not Odyssey File and Serve users. I have mailed the foregoing document by First-Class mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following:

WAYFAIR INC
4 Copley PL FL 7
Boston MA 02116-6504

OVERSTOCK.COM INC
6350 S 3000 E
Salt Lake City UT 84121-5952

SYSTEMAX INC
11 Harbor Park Dr
Port Washington NY 11050

NEWEGG INC
16839 E Gale Ave
City of Industry CA 91745

/s/ Richard M. Williams
Richard M. Williams
Deputy Attorney General

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: ss	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	32 Civ. 16-_____
Plaintiff,	)	
v.	)	COMPLAINT
WAYFAIR INC 4 Copley PL FL 7 Boston MA 02116-6504	)	
SYSTEMAX INC 11 Harbor Park Dr Port Washington NY 11050	)	
OVERSTOCK.COM INC 6350 S 3000 E Salt Lake City UT 84121-5952	)	
NEWEGG INC 16839 E Gale Ave City of Industry CA 91745	)	
Defendants.	)	

The State of South Dakota, by and through the Department of Revenue (hereinafter the State), Plaintiff in the above-entitled matter, for its Complaint states and alleges as follows:

SUMMARY

1. The State -- through this declaratory judgment action -- seeks a determination that it may require Defendants to collect and remit state sales tax on sales of tangible personal property and services for delivery into South Dakota. The State acknowledges that a declaration in its favor will require abrogation of the United States Supreme Court's decision in *Quill Corp. v. North*

Exhibit 1

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Dakota, 504 U.S. 298 (1992), and ultimately seeks a decision from the United States Supreme Court to that effect in this case.

RELEVANT LEGAL BACKGROUND

2. In 1967, in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), the Supreme Court of the United States held that the Due Process Clause and dormant Commerce Clause of the United States Constitution both prohibit states from requiring out-of-state mail-order retailers that lack any physical presence within a state to collect that state's sales and/or use taxes respecting sales for delivery to in-state residents.

3. Thereafter, the U.S. Supreme Court's jurisprudence regarding the "minimum contacts" sufficient to allow states to regulate conduct by non-residents became far less restrictive. The U.S. Supreme Court's cases regarding the dormant Commerce Clause also changed their focus. Responding to these changes, in 1991, the North Dakota Supreme Court held that *Bellas Hess* was "an obsolescent precedent." *State v. Quill Corp.*, 470 N.W. 2d 203, 208 (N.D. 1991).

4. The Supreme Court of the United States granted certiorari and reversed. In *Quill*, 504 U.S. at 306-308, it agreed with the North Dakota Supreme Court that the Due Process Clause holding of *Bellas Hess* had been overtaken by subsequent precedent. But it further held that, despite the fact that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today," *id.* at 311, the "continuing value of a bright-line rule in this area and the doctrine and

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principles of *stare decisis*," led it to "disagree with the North Dakota Supreme Court's conclusion that the time has come to renounce the bright-line test of *Bellas Hess*." *Id.* at 317-18. Particularly because the Due Process Clause holding would for the first time permit Congress to "overrule" *Bellas Hess* itself, the Court would withhold its "hand, at least for now." *Id.* at 318.

5. The effect of *Bellas Hess* and *Quill* is to effectively immunize out-of-state retailers lacking a physical presence within a state from having to remit any state sales or use taxes. As further explained below, the effects of that immunity on the State treasury and its general retail markets have vastly multiplied because of the meteoric rise of Internet commerce.

6. Nonetheless, in the 24 years since *Quill* was decided, Congress has failed to make good on the Supreme Court's invitation to address this issue through legislation at the federal level. Bills are introduced and debated, but routinely fail to receive even an up-or-down vote because of committee leaders advancing esoteric interests or other well-understood "veto" points that make congressional inaction the strong default rule. Indeed, while many states (including South Dakota) reacted to *Quill* by creating a "Streamlined" system that would allow out-of-state retailers to easily comply with the rationalized sales and use tax laws of all those states at once, Congress has not taken the necessary action to allow the Streamlined system to take effect.

7. The absence of federal legislative progress on this issue reflects the effect of *Bellas Hess* and *Quill* on the federal Constitution's separation of powers. Absent *Quill*, Congress would of course retain the power "to regulate

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Commerce . . . among the several States," U.S. Const. Art. 1, sec. 8, cl. 3, including by exempting out-of-state retailers that lack physical presence within a state from any obligation to collect and remit a state's sales or use taxes. But the effort to obtain affirmative congressional action would fall on those retailers seeking a special exemption from the states' ordinary powers of taxation, and the states would no longer be forced to seek Congress's permission to exercise their own sovereign authority. If -- as is quite often the case -- Congress were to continue to do nothing in this area, the power to tax those conducting business in the state would remain "reserved to the States respectively," as the Constitution provides. U.S. Const. Amend. X.

8. In a recent case, Justice Kennedy signaled that the United States Supreme Court may be willing to once again consider whether "the time has come to renounce the bright-line test of *Bellas Hess*." *Quill*, 504 U.S. at 317-18. In his concurrence in *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124, 1134 (Kennedy J., concurring), Justice Kennedy urged that "[t]he legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *Id.* at 1135. He noted that *Quill* was "now inflicting extreme harm and unfairness on the States," in part because of the massive explosion in e-commerce. *Id.* at 1134-1135. ("This argument has grown stronger, and the cause more urgent, with time. When the Court decided *Quill*, mail-order sales in the United States totaled $180 billion. But in 1992, the Internet was in its infancy. By 2008, e-commerce sales alone totaled $3.16 trillion per year in the United States.")(citation omitted).

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9. Indeed, Justice Kennedy specifically urged that cases permitting reconsideration of *Quill* should be developed as quickly as possible, because the harm to state treasuries has become severe. "Given these changes ... it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier." *Id.* at 1135.

10. The State has taken up Justice Kennedy's invitation, motivated by the imminent damage that *Quill* continues to cause to state tax revenues, by enacting Senate Bill 106, 91st Session, South Dakota Legislature, 2016, "An Act to provide for the collection of sales taxes from certain remote sellers." (Appendix A – hereafter referred to as "the Act" or cited to as "S.B. 106").

11. Legislative findings accompanying the passage of the Act reflect that Justice Kennedy's concerns are well placed, particularly with respect to South Dakota, and that the United States Supreme Court "should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax[.]" *See* S.B. 106 § 8(7).

PARTIES

12. Plaintiff is the sovereign State of South Dakota, which collects "[a]ll taxes levied and collected for state purposes . . . into the state treasury." S.D. Const. Art. XI, sec. 9.

13. The Department of Revenue administers the laws of the State respecting taxation generally, SDCL 10-1-1 *et seq.*, and the sales tax in particular. SDCL 10-45 *et seq.* The Secretary of the Department is charged

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with investigating and taking various enforcement actions respecting the sales tax. *See* SDCL 10-59-1, -5, -8, -10, -14, -15.

14. The State is specifically authorized by section 2 of the Act to "bring a declaratory judgment action under [SDCL] 21-24 in any circuit court" to establish that the obligations created by the Act are valid and applicable to any particular taxpayer that meets the statutory thresholds in the Act.

15. Defendant Newegg Inc. is one of the top online retailers in the United States, and is headquartered in City of Industry, California. It owns and operates Newegg.com, which sells a variety of consumer electronics. It ships these goods directly to purchasers throughout the United States, including into South Dakota.

16. Defendant Overstock.com Inc/ is one of the top online retailers in the United States, and is headquartered in Salt Lake City, Utah. Overstock.com sells a variety of products, ranging from home goods and furniture to clothing and diamond rings. It ships these goods directly to purchasers throughout the United States, including into South Dakota.

17. Defendant Systemax Inc. is a Fortune 1000 company headquartered in Port Washington, New York. It is a leading retailer of brand name and private label products, including industrial, material handling and supplies, personal computers, notebook computers, technology supplies, consumer electronics, and computer-related accessories. It operates a number of product sales websites that ship directly to purchasers throughout the United States, including into South Dakota.

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18. Defendant Wayfair Inc. is a leading online retailer of home goods and furniture headquartered in Boston, Massachusetts. It ships sales directly to purchasers throughout the United States, including into South Dakota.

PERSONAL JURISDICTION

19. Based on information and belief, Defendants lack a physical presence in South Dakota but are subject to the personal jurisdiction of the South Dakota courts under SDCL 15-7-2. SDCL 15-7-2 specifically extends the personal jurisdiction of the South Dakota courts to parties "[e]ntering into a contract for services to be rendered or for materials to be furnished in this state by such person," SDCL 15-7-2(5), and to parties committing "any act" when extending such jurisdiction "is not inconsistent with the Constitution of this state or with the Constitution of the United States." SDCL 15-7-2(14).

20. Both the State and Federal constitutions permit South Dakota state-court jurisdiction over retailers who solicit business from, and deliver tangible personal property and services to, residents of the State. *See Quill*, 504 U.S. at 306-08 (holding that "there is no question" that such contacts suffice for "due process purposes"); *Marschke v. Wratislaw*, 2007 S.D. 125, ¶13, 743 N.W. 2d 402, 406 (holding that personal jurisdiction of South Dakota courts extends to limits of federal constitution).

SUBJECT MATTER JURISDICTION

21. Section 2 of the Act creates a cause of action for declaratory judgment and empowers "any circuit court" to adjudicate that cause of action.

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Accordingly, the Sixth Judicial Circuit Court has subject matter jurisdiction over this action.

22. SDCL 21-24-1 empowers "[c]ourts of record within their respective jurisdictions ... to declare rights, status, and other legal relations whether or not further relief is or could be claimed[,]" provides that "[n]o action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for," and permits "[t]he declaration [to] be either affirmative or negative in form and effect[.]"

23. SDCL 21-24-3 permits "[a]ny person ... whose rights, status, or other legal relations are affected by a statute" to "have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status, or other legal relations thereunder." "[T]he State is a 'person' within the meaning of" the Declaratory Judgment Act. *Dan Nelson, Automotive, Inc. v. Viken*, 2005 S.D. 109, 706 N.W. 2d 239 (rejecting contrary dictum in *Pennington County v. State ex rel. Unified Judicial Sys.*, 2002 S.D. 31, 641 N.W. 2d 127).

24. As supported by the allegations below, this request for declaratory judgment also presents a justiciable and ripe controversy, between adverse parties, in which the State has a legally protectable interest. The declaration the State seeks will permit it to require sales tax to be collected and remitted from sellers without a physical presence in the State who are currently not complying with the Act; the State is clearly interested in obtaining the tax revenue it believes is due, and the Defendants have the contrary interest in

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resisting this tax obligation. Moreover, each Defendant has failed to register to collect and remit the state sales tax after receiving an individualized notice directing them to do so by April 25, 2016. That notice specifically instructed Defendants that failure to register would demonstrate that they did "not intend to comply with the Act." *See* Notices (Appendix B). Furthermore, under the structure of the Act, the State cannot currently enforce the Act's collection obligation against the Defendants unless the State prevails in this suit. Were the State to prevail, the Act will immediately apply to Defendants, requiring them to collect and remit the state sales tax on a going-forward basis.

25. "A matter is sufficiently ripe [for declaratory judgment] if the facts indicate imminent conflict." *Boever v. South Dakota Bd. of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995)(citation omitted)(setting forth requirements for declaratory judgment). The conflict between the State and the Defendants is not only imminent but present: This suit will determine whether or not Defendants must collect and remit state sales tax the day after it is decided.

VENUE

26. Venue is appropriate in this Court. Section 2 of the Act permits this suit to be brought in "any circuit court."

27. Furthermore, SDCL 15-5-6 permits venue "in any county which the plaintiff shall designate" in any case where, as here, "none of the defendants reside in the state."

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RELEVANT STATUTES

28. The Act provides that sellers without a physical presence in the State must comply with the State's sales tax laws "as if the seller had a physical presence in the state." S.B. 106 § 1.

29. The Act contains two threshold provisions, however, that limit the effect of this requirement on sellers who -- because of their limited size or geographic reach -- conduct relatively little business shipping goods and services to South Dakota residents. In particular, in order for the above obligation to apply, the out-of-state seller must have "gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceed[ing] one hundred thousand dollars," or must have "sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions." These thresholds are determined based on either the previous calendar year or the current calendar year to date. S.B. 106 § 1(1)-(2).

30. In addition, the Act creates a declaratory judgment action that the State may bring to determine the validity and applicability of this obligation with respect to individual taxpayers. S.B. 106 § 2. It also establishes special procedures designed to ensure the most expeditious possible adjudication of this action. S.B. 106 §§ 2, 4.

31. The Act contains three provisions designed to protect taxpayers from accruing any tax liability -- retroactive or otherwise -- during the

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pendency of this action. First, section 3 of the Act provides that the filing of this action operates as an injunction "prohibiting any state entity from enforcing the obligation in section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the sales tax on a voluntary basis."* *See* S.B. 106 § 3. The State filed this suit immediately before the May 1, 2016 effective date of the Act to trigger this injunction and prevent any uncertainty for taxpayers. *See* S.B. 106 § 9 (setting effective date). Second, section 5 of the Act provides that "[n]o obligation to remit the sales tax required by this Act may be applied retroactively." Finally, section 6 of the Act provides that "[i]f an injunction provided by this Act is lifted or dissolved, in general or with respect to a specific taxpayer, the state shall assess and apply the obligation established in section 1 of this Act from that date forward with respect to any taxpayer covered by the injunction."

32. Given the provisions above, the State has simultaneously filed with this Complaint an application for an injunction which records and makes certain the effect of section 3 of the Act. This application can and should be immediately granted without a hearing because the State asks only for an injunction restraining itself and benefiting the Defendants (as well as other taxpayers subject to the Act).

33. These provisions, together with the requested injunction, ensure that any seller not complying voluntarily with the Act will face tax liability only

* The Act also makes clear that this injunction will "not apply" to any taxpayer against whom the state prevails in an action like this one. *See* S.B. 106 § 3.

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prospectively from the date on which a court holding makes clear that the Act validly applies to the seller.

PROCEDURAL BACKGROUND

34. The Act was signed into law by Governor Dennis Daugaard on March 22, 2016. It provides that it will be effective on the first day of the first month that is at least fifteen calendar days from the date the Act is signed into law. Therefore, its effective date is May 1, 2016. *See* S.B. 106 § 9.

35. To prepare sellers lacking a physical presence in the State for the effect of the law, the Department of Revenue sent an individualized notice to 206 such sellers for whom available information made it almost certain that they met the statutory thresholds set forth above and in Section 1 of the Act. Defendants were each sent a copy of the notice (copies of which attached hereto as Appendix B) on March 25, 2016, by Andy Gerlach, Secretary of the Department of Revenue.

36. The State also posted relevant information about the Act on its website, at http://dor.sd.gov/Taxes/Business_Taxes/SB106.aspx.

37. The State identified the 206 sellers lacking a physical presence within the State who received the notice by using available data to calculate the likely amount of gross revenue that such sellers derive from sales into the State. After applying a mathematical factor designed to avoid close cases in which the seller might not meet the statutory thresholds, the State determined whether the remaining sellers had registered for a license to collect and remit sales tax. Sellers who were not registered, including all of the present

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Defendants, received the notice directing them to register by April 25, 2016, and thus received both actual and inquiry notice of the Act more than 30 days ago.

38. The notice carefully explained the consequences of failing to register:

> "If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds."

39. The notice also explained that any recipient who did not meet the statutory thresholds in section 1 of the Act should notify the State to avoid legal action.

40. Each Defendant failed to register to collect and remit the sales tax by April 25, 2016, and each has failed to register as of the date of this Complaint.

41. On information and belief, each Defendant meets either or both of the statutory thresholds, having at least $100,000 of gross revenue from sales into the State and/or at least 200 separate such transactions.

42. The State initiated this action against Defendants on the basis of their refusal to register for a license following individualized notice of the need to do so. Because of section 3 of the Act, the filing of this action immediately

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before the effective date enhances the protection of taxpayers (including Defendants) from any argument that they face an active and enforceable obligation to collect and remit sales taxes before the conclusion of this action.

RELEVANT LEGISLATIVE FINDINGS

43. In enacting the Act, the South Dakota Legislature determined that *Quill* causes a severe harm to the State's tax revenue, and a concomitant harm to state and local services:

a. "The inability to effectively collect the sales or use tax from remote sellers ... is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services," S.B. 106 § 8(1);

b. "The harm from the loss of revenue is especially serious in South Dakota because the state has no income tax, and sales and use tax revenues are essential in funding state and local services," *id.* § 8(2);

c. Refusal by out-of-state retailers to collect sales taxes "causes imminent harm to this state," *id.* § 8(9).

44. The Legislature's assessment is correct; the Department of Revenue estimates the revenue loss associated with *Bellas Hess* and *Quill* at approximately $48-$58 million annually for state and municipal taxes combined. These figures are based largely on a study conducted several years ago at the University of Tennessee, and relied upon in Justice Kennedy's

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concurrence in *DMA*. *See* D. Bruce, W. Fox, & L. Luna, State and Local Government Sales Tax Revenue Losses from Electronic Commerce 11 (2009).

45. Furthermore, the Legislature found that, even as the costs to the State from *Quill* have increased dramatically, the costs of compliance for taxpayers have fallen just as dramatically:

> In contrast with the expanding harms caused to the state from this exemption of sales tax collection duties for remote sellers, the costs of that collection have fallen. Given modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales taxes associated with sales into South Dakota.

S.B. 106 § 8(6).

46. Again, the legislature's assessment is clearly correct. Numerous retailers now collect and remit sales tax in every state, and are quite capable of administering all their state and local sales tax obligations when customers buy goods through their online sales channels. Software integration options are now readily available from multiple vendors for online "shopping carts." And because it is necessary to obtain immediate information from the purchaser regarding their residence in order to deliver the goods, it is possible for the software to immediately calculate and inform the consumer of the applicable sales tax before completing the transaction, and the tax can be easily collected at the time of the sale. Indeed, the industry that provides these integration options is robust and growing, which will make such software even easier and less expensive to obtain in the near future. Moreover, many sellers already have such software to address sales to states in which they do have a physical presence.

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47. This development is further supported by the Streamlined Sales and Use Tax Agreement, which has been enacted by more than twenty states (including South Dakota) in the wake of *Quill*. Any seller lacking a physical presence in the State who intends to comply with the obligations set forth in the Act can register to collect sales taxes through the voluntary Streamlined system. That system, in turn, provides sellers the option to use sales tax administration software from Certified Software Providers (CSPs), with the cost of such software borne by the states. Sellers may choose from seven different CSPs, and the CSP will file the tax returns and remit applicable taxes for sellers that use it. Sellers using a CSP are also immune from audit liability for the sales they process through that software. The Streamlined system also reduces sales tax administration cost and expense through:

a. uniform definitions of products and services across all Member states;

b. freely available tax rate and tax boundary databases;

c. single, state level tax administration;

d. uniform audit procedures (for sellers that choose not to use a CSP);

e. simplified tax rate structures;

f. uniform administration of sales tax expenses; and,

g. uniform rules for sourcing sales.

Accordingly, a taxpayer can comply with the obligations of the Act using the Streamlined system at little to no personal cost (apart from actually remitting the taxes collected from consumers), and with little to no concern

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regarding audits or errors in compliance. Moreover, many of the above benefits are available even to sellers who do not elect to participate in the Streamlined system as a whole, further easing the burden of compliance on all out-of-state retailers.

48. The Legislature also found that *Bellas Hess* and *Quill* distort the local retail market, causing unfairness to brick-and-mortar retailers generally, and to smaller, locally owned businesses in particular. Out-of-state retailers benefit from local infrastructure without paying their fair share of taxes. *See* S.B. 106 § 8(5). And they also "actively market sales as tax free or no sales tax transactions" even though "a use tax is owed" by the consumer. *Id.* § 8(3). As a result, local retailers are unable to compete fairly with online retailers, which is likely to cause even further harm to the State by harming the local businesses that employ local residents and make up the bulk of the State's tax base. *See id.* § 8(4) ("The structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future.").

49. Well-documented economic effects support the Legislature's judgment. Expert economists, including researchers associated with both sides of the political spectrum, agree that the special exemption from sales taxation created by *Quill* causes serious harm to state economies (and the national economy) by distorting the operation of the free market. *See, e.g.*, Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet*

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Commerce, 115 Q.J. Econ. 561 (2000); Arthur B. Laffler and Donna Arduin, *Pro-Growth Tax Reform and E-Fairness*, http://standwithmainstreet.com/ArtLafferStudy.pdf.

50. Finally, the Legislature made clear that it wanted to accommodate the difficulties that might be caused to out-of-state retailers by its effort to respond to Justice Kennedy's invitation to bring an action allowing the United States Supreme Court to reconsider *Quill*. It thus created a specific cause of action with unique protections for taxpayers, allowing the State to seek a declaratory judgment in circuit court, with a direct appeal to the South Dakota Supreme Court, both of which must be resolved as expeditiously as possible. *See* S.B. 106 §§ 2, 4; *see also id.* §§ 8(8)-(9) (finding that "[e]xpeditious review is necessary and appropriate," and that the Act is intended to "permit[] the most expeditious possible review of the constitutionality of this law"). That action obviates the need for an audit and any effort to obtain retroactive tax liability from any out-of-state seller who does not wish to comply with the Act on a voluntary basis. As the Legislature stated:

> Expeditious review is necessary and appropriate because, while it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the sales tax in light of existing federal constitutional doctrine, any such refusal causes imminent harm to this state.
>
> At the same time, the Legislature recognizes that the enactment of this law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question. Accordingly, the Legislature intends to clarify that the obligations created by this law would be appropriately stayed by the courts until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating

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its existing doctrine, or a final judgment applicable to a particular taxpayer.

S.B. 106 § 8 (9)-(10).

51. This declaratory judgment action thus represents "the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines, and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this Act." S.B. 106 § 8 (11). Like the Legislature, the State recognizes that a change in federal constitutional doctrine will be necessary for the State to prevail in this case. Nonetheless, the effect of the declaration that the State seeks in this action will be to immediately require the collection and remittance of taxes from these Defendants under the Act -- a collection which, absent such a declaration, the State is presently unable to enforce. There is accordingly an immediate controversy over whether existing federal constitutional doctrine should invalidate the Act or not, which this Court can and should adjudicate in the first instance by declaratory judgment.

PRAYER FOR RELIEF

WHEREFORE, the State hereby prays for relief as follows:

(1) That the Court declare that the requirements of section 1 of the Act are valid and applicable with respect to the defendants.

(2) That the Court immediately enter an order enjoining the enforcement of the Act during the pendency of this action -- reflecting on the record the automatic effect of Section 3 of the Act

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-- and dissolve such injunction upon the entry of a declaratory judgment in favor of the State. (A separate motion for an appropriate order of this form has been contemporaneously filed).

(3) That the Court enter an injunction requiring the defendants to register for a license to collect and remit the sales tax.

(4) That the Court grant such other relief as it deems just and proper in this matter.

Dated this 28th day of April, 2016.

/s/ Richard M. Williams

Richard M. Williams
Deputy Attorney General
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215

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State of South Dakota

OFFICE OF THE SECRETARY OF STATE

Department of State

United States of America, ☐
☐ **Secretary's Office**
State of South Dakota ☐

This is to certify that the attached instrument of writing is a true, correct and examined copy of Senate Bill 0106 in our office as filed March 22, 2016;

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the state of South Dakota at the city of Pierre, the capital, this day April 18, 2016.

Shantel Krebs

Shantel Krebs
Secretary of State

Appendix A

GOES 340
LITHO IN U.S.A.

State of South Dakota

OFFICE OF THE SECRETARY OF STATE

Department of State

United States of America,
State of South Dakota } SECRETARY'S OFFICE

This is to certify that the attached instrument of writing is a true, correct and examined copy of SB 0106 duly passed in the Legislature of the State of South Dakota, as an Emergency Act, and has been carefully compared with the original now on file in this office and found correct.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of South Dakota at the City of Pierre, the Capital, on March 22, 2016.

Shantel Krebs

Shantel Krebs, Secretary of State

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AN ACT

ENTITLED, An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state, provided the seller meets either of the following criteria in the previous calendar year or the current calendar year:

(1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or

(2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions.

Section 2. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, and whether or not the state initiates an audit or other tax collection procedure, the state may bring a declaratory judgment action under chapter 21-24 in any circuit court against any person the state believes meets the criteria of section 1 of this Act to establish that the obligation to remit sales tax is applicable and valid under state and federal law. The circuit court shall act on this declaratory judgment action as expeditiously as possible and this action shall proceed with priority over any other action presenting the same question in any other venue.

In this action, the court shall presume that the matter may be fully resolved through a motion to

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dismiss or a motion for summary judgment. However, if these motions do not resolve the action, any discovery allowed by the court may not exceed the provisions of subdivisions 15-6-73(2) and (4).

The provisions of § 10-59-34, along with any other provisions authorizing attorney's fees, do not apply to any action brought pursuant to this Act or any appeal from any action brought pursuant to this Act.

Section 3. That the code be amended by adding a NEW SECTION to read:

The filing of the declaratory judgment action established in this Act by the state operates as an injunction during the pendency of the action, applicable to each state entity, prohibiting any state entity from enforcing the obligation in section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the sales tax on a voluntary basis. The injunction does not apply if there is a previous judgment from a court establishing the validity of the obligation in section 1 of this Act with respect to the particular taxpayer.

Section 4. That the code be amended by adding a NEW SECTION to read:

Any appeal from the decision with respect to the cause of action established by this Act may only be made to the state Supreme Court. The appeal shall be heard as expeditiously as possible.

Section 5. That the code be amended by adding a NEW SECTION to read:

No obligation to remit the sales tax required by this Act may be applied retroactively.

Section 6. That the code be amended by adding a NEW SECTION to read:

If an injunction provided by this Act is lifted or dissolved, in general or with respect to a specific taxpayer, the state shall assess and apply the obligation established in section 1 of this Act from that date forward with respect to any taxpayer covered by the injunction.

Section 7. That the code be amended by adding a NEW SECTION to read:

A taxpayer complying with this Act, voluntarily or otherwise, may only seek a recovery of taxes,

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penalties, or interest by following the recovery procedures established pursuant to chapter 10-59. However, no claim may be granted on the basis that the taxpayer lacked a physical presence in the state and complied with this Act voluntarily while covered by the injunction provided in section 3 of this Act.

Nothing in this Act limits the ability of any taxpayer to obtain a refund for any other reason, including a mistake of fact or mathematical miscalculation of the applicable tax.

No seller who remits sales tax voluntarily or otherwise under this Act is liable to a purchaser who claims that the sales tax has been over-collected because a provision of this Act is later deemed unlawful.

Nothing in this Act affects the obligation of any purchaser from this state to remit use tax as to any applicable transaction in which the seller does not collect and remit or remit an offsetting sales tax.

Section 8. That the code be amended by adding a NEW SECTION to read:

The Legislature finds that:

(1) The inability to effectively collect the sales or use tax from remote sellers who deliver tangible personal property, products transferred electronically, or services directly into South Dakota is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services;

(2) The harm from the loss of revenue is especially serious in South Dakota because the state has no income tax, and sales and use tax revenues are essential in funding state and local services;

(3) Despite the fact that a use tax is owed on tangible personal property, any product transferred electronically, or services delivered for use in this state, many remote sellers

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actively market sales as tax free or no sales tax transactions;

(4) The structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future;

(5) Remote sellers who make a substantial number of deliveries into or have large gross revenues from South Dakota benefit extensively from this state's market, including the economy generally, as well as state infrastructure;

(6) In contrast with the expanding harms caused to the state from this exemption of sales tax collection duties for remote sellers, the costs of that collection have fallen. Given modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales taxes associated with sales into South Dakota;

(7) As Justice Kennedy recently recognized in his concurrence in *Direct Marketing Association v. Brohl*, the Supreme Court of the United States should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax, and as the foregoing findings make clear, this argument has grown stronger, and the cause more urgent, with time;

(8) Given the urgent need for the Supreme Court of the United States to reconsider this doctrine, it is necessary for this state to pass this law clarifying its immediate intent to require collection of sales taxes by remote sellers, and permitting the most expeditious possible review of the constitutionality of this law;

(9) Expeditious review is necessary and appropriate because, while it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the sales tax in light of existing federal constitutional doctrine, any such refusal causes imminent harm to this state;

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(10) At the same time, the Legislature recognizes that the enactment of this law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question. Accordingly, the Legislature intends to clarify that the obligations created by this law would be appropriately stayed by the courts until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating its existing doctrine, or a final judgment applicable to a particular taxpayer; and

(11) It is the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines, and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this Act.

Section 9. Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist. This Act shall be in full force and effect on the first day of the first month that is at least fifteen calendar days from the date this Act is signed by the Governor.

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An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency.

I certify that the attached Act originated in the

SENATE as Bill No. 106

Kay Johnson
Secretary of the Senate

President of the Senate

Attest:

Kay Johnson
Secretary of the Senate

Dean Wink
Speaker of the House

Attest:

Arlene Fridlen
Chief Clerk

Senate Bill No. 106
File No. ____
Chapter No. _____

Received at this Executive Office this 8th day of March, 2016 at 9:20 A M.

By Judy Swartz
for the Governor

The attached Act is hereby approved this 22nd day of March, A.D., 2016

Dennis Daugaard
Governor

STATE OF SOUTH DAKOTA,
ss.
Office of the Secretary of State

Filed March 22nd, 2016 at 11:10 o'clock A M.

Shantel Krebs
Secretary of State

By _____
Asst. Secretary of State

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South Dakota Department of Revenue

445 East Capitol Avenue
Pierre, South Dakota 57501-3185
Phone: 605-773-3311

March 25, 2016

NOTICE

Harry Amsden
Newegg Inc
17560 Rowland St
City of Industry CA 91748

Re: Important Changes to South Dakota Tax Laws for Remote Sellers

Dear Harry Amsden:

We are writing to bring your attention to recent changes in South Dakota law that may require you to begin remitting sales tax on transactions in which tangible personal property, products transferred electronically, or services are delivered into South Dakota. Our estimates indicate that your business meets the annual statutory thresholds that will apply to remote sellers. This notice explains the applicable legal changes and steps that you should take to begin complying with your South Dakota sales tax obligation, as well as the possible consequences that may follow from non-compliance.

Background

On March 22, 2016, Governor Dennis Daugaard signed into law Senate Bill 106, entitled "An Act to provide for the collection of sales taxes from certain remote sellers" ("the Act"), enclosed. The Act becomes effective on May 1, 2016, and may apply to your business from May 1, 2016, forward.

The Act provides that any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota must comply with all applicable South Dakota laws and procedures regarding the sales tax "as if the seller had a physical presence within the state." This requirement applies only to retailers who meet certain statutory thresholds. In particular, this obligation applies only if, **in the previous calendar year, or so far in the current calendar year**:

1. your gross revenue from sales into South Dakota **exceeded $100,000**; or
2. you made sales for delivery into South Dakota in **two hundred** or more separate transactions.

Applicability to You

Our estimates indicate that your business likely exceeds either or both of these thresholds. If so, you will be obligated to begin remitting sales tax to South Dakota. If you do not meet either of these thresholds notify us immediately to avoid any confusion or possible legal action against you.

Our records indicate that you currently do not have a South Dakota sales tax license. In order to collect sales tax from consumers and/or remit it to the State, you must register for a sales tax license. The State has endeavored to substantially simplify sales tax compliance for retailers by adopting the Streamlined Sales and Use Tax system. You can register for a South Dakota tax license at http://sd.gov/taxapp or through the Streamlined system at http://www.streamlinedsalestax.org.

If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds.

Written notification that you are not subject to this Act must be received by Kathy Smith no later than April 25, 2016. You may submit your written statement by email to Kathy.smith@state.sd.us or by regular mail to:

State of South Dakota
Attn: Kathy Smith
445 E Capitol Ave
Pierre SD 57501

Pursuant to the Act, the action described above will not result in any fees, penalties, or retroactive tax liability against you. Instead, if an action is initiated and a declaratory judgment is entered against you, you will be required to begin remitting the sales tax immediately from that point forward.

Additional information is available on our website at http//dor.sd.gov/.

If you have questions or need further assistance, you can contact Kathy Smith at 605-773-3311.

Sincerely,

Andy Gerlach, Secretary
South Dakota Department of Revenue

Enclosure

South Dakota Department of Revenue

445 East Capitol Avenue
Pierre, South Dakota 57501-3185
Phone: 605-773-3311

March 25, 2016

NOTICE

Robert Hughes
Overstock.com Inc
6350 South 3000 East #100
Salt Lake City UT 84121

Re: Important Changes to South Dakota Tax Laws for Remote Sellers

Dear Robert Hughes:

We are writing to bring your attention to recent changes in South Dakota law that may require you to begin remitting sales tax on transactions in which tangible personal property, products transferred electronically, or services are delivered into South Dakota. Our estimates indicate that your business meets the annual statutory thresholds that will apply to remote sellers. This notice explains the applicable legal changes and steps that you should take to begin complying with your South Dakota sales tax obligation, as well as the possible consequences that may follow from non-compliance.

Background

On March 22, 2016, Governor Dennis Daugaard signed into law Senate Bill 106, entitled "An Act to provide for the collection of sales taxes from certain remote sellers" ("the Act"), enclosed. The Act becomes effective on May 1, 2016, and may apply to your business from May 1, 2016, forward.

The Act provides that any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota must comply with all applicable South Dakota laws and procedures regarding the sales tax "as if the seller had a physical presence within the state." This requirement applies only to retailers who meet certain statutory thresholds. In particular, this obligation applies only if, **in the previous calendar year, or so far in the current calendar year:**

1. your gross revenue from sales into South Dakota **exceeded $100,000**; or
2. you made sales for delivery into South Dakota in **two hundred** or more separate transactions.

Applicability to You

Our estimates indicate that your business likely exceeds either or both of these thresholds. If so, you will be obligated to begin remitting sales tax to South Dakota. If you do not meet either of these thresholds notify us immediately to avoid any confusion or possible legal action against you.

Our records indicate that you currently do not have a South Dakota sales tax license. In order to collect sales tax from consumers and/or remit it to the State, you must register for a sales tax license. The State has endeavored to substantially simplify sales tax compliance for retailers by adopting the Streamlined Sales and Use Tax system. You can register for a South Dakota tax license at http://sd.gov/taxapp or through the Streamlined system at http://www.streamlinedsalestax.org.

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If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds.

Written notification that you are not subject to this Act must be received by Kathy Smith no later than April 25, 2016. You may submit your written statement by email to Kathy.smith@state.sd.us or by regular mail to:

State of South Dakota
Attn: Kathy Smith
445 E Capitol Ave
Pierre SD 57501

Pursuant to the Act, the action described above will not result in any fees, penalties, or retroactive tax liability against you. Instead, if an action is initiated and a declaratory judgment is entered against you, you will be required to begin remitting the sales tax immediately from that point forward.

Additional information is available on our website at http//dor.sd.gov/.

If you have questions or need further assistance, you can contact Kathy Smith at 605-773-3311.

Sincerely,

Andy Gerlach, Secretary
South Dakota Department of Revenue

Enclosure

South Dakota Department of Revenue

445 East Capitol Avenue
Pierre, South Dakota 57501-3185
Phone: 605-773-3311

March 25, 2016

NOTICE

Lawrence Reinhold
Systemax Inc
11 Harbor Park Dr
Port Washington NY 11050

Re: Important Changes to South Dakota Tax Laws for Remote Sellers

Dear Lawrence Reinhold:

We are writing to bring your attention to recent changes in South Dakota law that may require you to begin remitting sales tax on transactions in which tangible personal property, products transferred electronically, or services are delivered into South Dakota. Our estimates indicate that your business meets the annual statutory thresholds that will apply to remote sellers. This notice explains the applicable legal changes and steps that you should take to begin complying with your South Dakota sales tax obligation, as well as the possible consequences that may follow from non-compliance.

Background

On March 22, 2016, Governor Dennis Daugaard signed into law Senate Bill 106, entitled "An Act to provide for the collection of sales taxes from certain remote sellers" ("the Act"), enclosed. The Act becomes effective on May 1, 2016, and may apply to your business from May 1, 2016, forward.

The Act provides that any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota must comply with all applicable South Dakota laws and procedures regarding the sales tax "as if the seller had a physical presence within the state." This requirement applies only to retailers who meet certain statutory thresholds. In particular, this obligation applies only if, **in the previous calendar year, or so far in the current calendar year:**

1. your gross revenue from sales into South Dakota **exceeded $100,000;** or
2. you made sales for delivery into South Dakota in **two hundred** or more separate transactions.

Applicability to You

Our estimates indicate that your business likely exceeds either or both of these thresholds. If so, you will be obligated to begin remitting sales tax to South Dakota. If you do not meet either of these thresholds notify us immediately to avoid any confusion or possible legal action against you.

Our records indicate that you currently do not have a South Dakota sales tax license. In order to collect sales tax from consumers and/or remit it to the State, you must register for a sales tax license. The State has endeavored to substantially simplify sales tax compliance for retailers by adopting the Streamlined Sales and Use Tax system. You can register for a South Dakota tax license at http://sd.gov/taxapp or through the Streamlined system at http://www.streamlinedsalestax.org.

Filed: 4/28/2016 3:50:12 PM CST Hughes County, South Dakota 32CIV16-000092

Filed: 5/25/2016 2:47:36 PM CST Hughes County, South Dakota 32CIV16-000092

If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds.

Written notification that you are not subject to this Act must be received by Kathy Smith no later than April 25, 2016. You may submit your written statement by email to Kathy.smith@state.sd.us or by regular mail to:

State of South Dakota
Attn: Kathy Smith
445 E Capitol Ave
Pierre SD 57501

Pursuant to the Act, the action described above will not result in any fees, penalties, or retroactive tax liability against you. Instead, if an action is initiated and a declaratory judgment is entered against you, you will be required to begin remitting the sales tax immediately from that point forward.

Additional information is available on our website at http//dor.sd.gov/.

If you have questions or need further assistance, you can contact Kathy Smith at 605-773-3311.

Sincerely,

Andy Gerlach, Secretary
South Dakota Department of Revenue

Enclosure

South Dakota Department of Revenue

445 East Capitol Avenue
Pierre, South Dakota 57501-3185
Phone: 605-773-3311

March 25, 2016

NOTICE

Michael Fleisher
Wayfair LLC
177 Huntington Ave #6000
Boston MA 02115

Re: Important Changes to South Dakota Tax Laws for Remote Sellers

Dear Michael Fleisher:

We are writing to bring your attention to recent changes in South Dakota law that may require you to begin remitting sales tax on transactions in which tangible personal property, products transferred electronically, or services are delivered into South Dakota. Our estimates indicate that your business meets the annual statutory thresholds that will apply to remote sellers. This notice explains the applicable legal changes and steps that you should take to begin complying with your South Dakota sales tax obligation, as well as the possible consequences that may follow from non-compliance.

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Applicability to You

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State of South Dakota
Attn: Kathy Smith
445 E Capitol Ave
Pierre SD 57501

Pursuant to the Act, the action described above will not result in any fees, penalties, or retroactive tax liability against you. Instead, if an action is initiated and a declaratory judgment is entered against you, you will be required to begin remitting the sales tax immediately from that point forward.

Additional information is available on our website at http//dor.sd.gov/.

If you have questions or need further assistance, you can contact Kathy Smith at 605-773-3311.

Sincerely,

Andy Gerlach, Secretary
South Dakota Department of Revenue

Enclosure

CT Corporation

Service of Process Transmittal
05/02/2016
CT Log Number 529090579

TO: Mark Griffin, General Counsel
Overstock.com, Inc
6350 South 3000 East
Salt Lake City, UT 84121

RE: **Process Served in Delaware**

FOR: Overstock.com, Inc. (Domestic State: DE)

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

TITLE OF ACTION:	STATE OF SOUTH DAKOTA, Pltf. vs. WAYFAIR INC, et al., Dfts. // To: OVERSTOCK.COM INC
DOCUMENT(S) SERVED:	Summons, Complaint, Appendix(s), Attachment, Act, Notice(s)
COURT/AGENCY:	Hughes County - Sixth Judicial Circuit Court, SD Case # 32CIV1692
NATURE OF ACTION:	This declaratory judgment action thus represents "the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this Ac
ON WHOM PROCESS WAS SERVED:	The Corporation Trust Company, Wilmington, DE
DATE AND HOUR OF SERVICE:	By Process Server on 05/02/2016 at 14:00
JURISDICTION SERVED :	Delaware
APPEARANCE OR ANSWER DUE:	Within 30 days after the service of this Summons and Complaint upon you, exclusive to the date of service
ATTORNEY(S) / SENDER(S):	Richard M. Williams Office of the Attorney General 1302 East Highway 14, Suite 1 Pierre, SD 57501-8501 605-773-3215
ACTION ITEMS:	SOP Papers with Transmittal, via Fed Ex 2 Day , 782970393201 Image SOP Email Notification, Mark Griffin mgriffin@overstock.com Email Notification, Eddie Christensen echristensen@overstock.com Email Notification, Glen Nickle gnickle@overstock.com Email Notification, Krysta Pecharich kpecharich@overstock.com
SIGNED:	The Corporation Trust Company
ADDRESS:	1209 N Orange St

Information displayed on this transmittal is for CT Corporation's record keeping purposes only and is provided to the recipient for quick reference. This information does not constitute a legal opinion as to the nature of action, the amount of damages, the answer date, or any information contained in the documents themselves. Recipient is responsible for interpreting said documents and for taking appropriate action. Signatures on certified mail receipts confirm receipt of package only, not contents.

EXHIBIT
B

CT Corporation

Service of Process Transmittal
05/02/2016
CT Log Number 529090579

TO: Mark Griffin, General Counsel
Overstock.com, Inc
6350 South 3000 East
Salt Lake City, UT 84121

RE: **Process Served in Delaware**

FOR: Overstock.com, Inc. (Domestic State: DE)

Wilmington, DE 19801-1120
TELEPHONE: 302-658-7581

DOCKET HISTORY:

DOCUMENT(S) SERVED:	DATE AND HOUR OF SERVICE:	TO:	CT LOG NUMBER:
Summons, Complaint	By Process Server on 04/29/2016 at 13:45	Mark Griffin, General Counsel Overstock.com, Inc	529085359

Information displayed on this transmittal is for CT Corporation's record keeping purposes only and is provided to the recipient for quick reference. This information does not constitute a legal opinion as to the nature of action, the amount of damages, the answer date, or any information contained in the documents themselves. Recipient is responsible for interpreting said documents and for taking appropriate action. Signatures on certified mail receipts confirm receipt of package only, not contents.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: ss	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	32 Civ. 16-92
Plaintiff,	)	SUMMONS
v.	)	
WAYFAIR INC 4 Copley PL FL 7 Boston MA 02116-6504	)	
SYSTEMAX INC 11 Harbor Park Dr Port Washington NY 11050	)	
OVERSTOCK.COM INC 6350 S 3000 E Salt Lake City UT 84121-5952	)	
NEWEGG INC 16839 E Gale Ave City of Industry CA 91745	)	
Defendants.	)	

GREETINGS FROM THE STATE OF SOUTH DAKOTA TO THE ABOVE-NAMED DEFENDANTS:

Corporation Service Co., 2711 Centerville Rd #400, Wilmington DE 19808
Registered Agent for: Wayfair Inc.

Corporation Service Co., 2711 Centerville Rd #400, Wilmington DE 19808
Registered Agent for: Systemax Inc.

The Corporation Trust Co., Corporation Trust Center, 1209 Orange St, Wilmington DE 19801
Registered Agent for: Overstock.com, Inc.

Corporation Service Co., 2711 Centerville Rd #400, Wilmington DE 19808
Registered Agent for: Newegg Inc.

Filed: 5/25/2016 2:47:36 PM CST Hughes County, South Dakota 32CIV16-000092

You are hereby summoned and required to serve upon the Attorney General, Plaintiff's attorney, whose address is the Office of the Attorney General, 1302 East Highway 14, Suite 1, Pierre, South Dakota 57501-8501, an Answer to the Complaint, which is herewith served upon you and filed on the 28th Day of April, 2016, in the office of the clerk of the Circuit Court of the Sixth Judicial Circuit at Pierre in and for the County of Hughes, State of South Dakota, within thirty (30) days after the service of this Summons and Complaint upon you, exclusive to the date of service. If you fail to file an Answer within thirty days of the date of service upon you, judgment by default will be taken against you for the relief as prayed for in the Complaint.

Dated this 29th day of April, 2016.

/s/ Richard M. Williams

Richard M. Williams
Deputy Attorney General
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215

Filed: 5/25/2016 2:47:36 PM CST Hughes County, South Dakota 32CIV16-000092

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: ss	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, v. WAYFAIR INC 4 Copley PL FL 7 Boston MA 02116-6504 SYSTEMAX INC 11 Harbor Park Dr Port Washington NY 11050 OVERSTOCK.COM INC 6350 S 3000 E Salt Lake City UT 84121-5952 NEWEGG INC 16839 E Gale Ave City of Industry CA 91745 Defendants.	)	32 Civ. 16-92 COMPLAINT

The State of South Dakota, by and through the Department of Revenue (hereinafter the State), Plaintiff in the above-entitled matter, for its Complaint states and alleges as follows:

SUMMARY

1. The State -- through this declaratory judgment action -- seeks a determination that it may require Defendants to collect and remit state sales tax on sales of tangible personal property and services for delivery into South Dakota. The State acknowledges that a declaration in its favor will require abrogation of the United States Supreme Court's decision in *Quill Corp. v. North*

Dakota, 504 U.S. 298 (1992), and ultimately seeks a decision from the United States Supreme Court to that effect in this case.

RELEVANT LEGAL BACKGROUND

2. In 1967, in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), the Supreme Court of the United States held that the Due Process Clause and dormant Commerce Clause of the United States Constitution both prohibit states from requiring out-of-state mail-order retailers that lack any physical presence within a state to collect that state's sales and/or use taxes respecting sales for delivery to in-state residents.

3. Thereafter, the U.S. Supreme Court's jurisprudence regarding the "minimum contacts" sufficient to allow states to regulate conduct by non-residents became far less restrictive. The U.S. Supreme Court's cases regarding the dormant Commerce Clause also changed their focus. Responding to these changes, in 1991, the North Dakota Supreme Court held that *Bellas Hess* was "an obsolescent precedent." *State v. Quill Corp.*, 470 N.W. 2d 203, 208 (N.D. 1991).

4. The Supreme Court of the United States granted certiorari and reversed. In *Quill*, 504 U.S. at 306-308, it agreed with the North Dakota Supreme Court that the Due Process Clause holding of *Bellas Hess* had been overtaken by subsequent precedent. But it further held that, despite the fact that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today," *id.* at 311, the "continuing value of a bright-line rule in this area and the doctrine and

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principles of *stare decisis*," led it to "disagree with the North Dakota Supreme Court's conclusion that the time has come to renounce the bright-line test of *Bellas Hess*." *Id.* at 317-18. Particularly because the Due Process Clause holding would for the first time permit Congress to "overrule" *Bellas Hess* itself, the Court would withhold its "hand, at least for now." *Id.* at 318.

5. The effect of *Bellas Hess* and *Quill* is to effectively immunize out-of-state retailers lacking a physical presence within a state from having to remit any state sales or use taxes. As further explained below, the effects of that immunity on the State treasury and its general retail markets have vastly multiplied because of the meteoric rise of Internet commerce.

6. Nonetheless, in the 24 years since *Quill* was decided, Congress has failed to make good on the Supreme Court's invitation to address this issue through legislation at the federal level. Bills are introduced and debated, but routinely fail to receive even an up-or-down vote because of committee leaders advancing esoteric interests or other well-understood "veto" points that make congressional inaction the strong default rule. Indeed, while many states (including South Dakota) reacted to *Quill* by creating a "Streamlined" system that would allow out-of-state retailers to easily comply with the rationalized sales and use tax laws of all those states at once, Congress has not taken the necessary action to allow the Streamlined system to take effect.

7. The absence of federal legislative progress on this issue reflects the effect of *Bellas Hess* and *Quill* on the federal Constitution's separation of powers. Absent *Quill*, Congress would of course retain the power "to regulate

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Commerce . . . among the several States," U.S. Const. Art. 1, sec. 8, cl. 3, including by exempting out-of-state retailers that lack physical presence within a state from any obligation to collect and remit a state's sales or use taxes. But the effort to obtain affirmative congressional action would fall on those retailers seeking a special exemption from the states' ordinary powers of taxation, and the states would no longer be forced to seek Congress's permission to exercise their own sovereign authority. If -- as is quite often the case -- Congress were to continue to do nothing in this area, the power to tax those conducting business in the state would remain "reserved to the States respectively," as the Constitution provides. U.S. Const. Amend. X.

8. In a recent case, Justice Kennedy signaled that the United States Supreme Court may be willing to once again consider whether "the time has come to renounce the bright-line test of *Bellas Hess*." *Quill*, 504 U.S. at 317-18. In his concurrence in *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124, 1134 (Kennedy J., concurring), Justice Kennedy urged that "[t]he legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *Id.* at 1135. He noted that *Quill* was "now inflicting extreme harm and unfairness on the States," in part because of the massive explosion in e-commerce. *Id.* at 1134-1135. ("This argument has grown stronger, and the cause more urgent, with time. When the Court decided *Quill*, mail-order sales in the United States totaled $180 billion. But in 1992, the Internet was in its infancy. By 2008, e-commerce sales alone totaled $3.16 trillion per year in the United States.")(citation omitted).

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9. Indeed, Justice Kennedy specifically urged that cases permitting reconsideration of *Quill* should be developed as quickly as possible, because the harm to state treasuries has become severe. "Given these changes ... it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier." *Id.* at 1135.

10. The State has taken up Justice Kennedy's invitation, motivated by the imminent damage that *Quill* continues to cause to state tax revenues, by enacting Senate Bill 106, 91st Session, South Dakota Legislature, 2016, "An Act to provide for the collection of sales taxes from certain remote sellers." (Appendix A – hereafter referred to as "the Act" or cited to as "S.B. 106").

11. Legislative findings accompanying the passage of the Act reflect that Justice Kennedy's concerns are well placed, particularly with respect to South Dakota, and that the United States Supreme Court "should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax[.]" *See* S.B. 106 § 8(7).

PARTIES

12. Plaintiff is the sovereign State of South Dakota, which collects "[a]ll taxes levied and collected for state purposes . . . into the state treasury." S.D. Const. Art. XI, sec. 9.

13. The Department of Revenue administers the laws of the State respecting taxation generally, SDCL 10-1-1 *et seq.*, and the sales tax in particular. SDCL 10-45 *et seq.* The Secretary of the Department is charged

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with investigating and taking various enforcement actions respecting the sales tax. *See* SDCL 10-59-1, -5, -8, -10, -14, -15.

14. The State is specifically authorized by section 2 of the Act to "bring a declaratory judgment action under [SDCL] 21-24 in any circuit court" to establish that the obligations created by the Act are valid and applicable to any particular taxpayer that meets the statutory thresholds in the Act.

15. Defendant Newegg Inc. is one of the top online retailers in the United States, and is headquartered in City of Industry, California. It owns and operates Newegg.com, which sells a variety of consumer electronics. It ships these goods directly to purchasers throughout the United States, including into South Dakota.

16. Defendant Overstock.com Inc/ is one of the top online retailers in the United States, and is headquartered in Salt Lake City, Utah. Overstock.com sells a variety of products, ranging from home goods and furniture to clothing and diamond rings. It ships these goods directly to purchasers throughout the United States, including into South Dakota.

17. Defendant Systemax Inc. is a Fortune 1000 company headquartered in Port Washington, New York. It is a leading retailer of brand name and private label products, including industrial, material handling and supplies, personal computers, notebook computers, technology supplies, consumer electronics, and computer-related accessories. It operates a number of product sales websites that ship directly to purchasers throughout the United States, including into South Dakota.

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18. Defendant Wayfair Inc. is a leading online retailer of home goods and furniture headquartered in Boston, Massachusetts. It ships sales directly to purchasers throughout the United States, including into South Dakota.

PERSONAL JURISDICTION

19. Based on information and belief, Defendants lack a physical presence in South Dakota but are subject to the personal jurisdiction of the South Dakota courts under SDCL 15-7-2. SDCL 15-7-2 specifically extends the personal jurisdiction of the South Dakota courts to parties "[e]ntering into a contract for services to be rendered or for materials to be furnished in this state by such person," SDCL 15-7-2(5), and to parties committing "any act" when extending such jurisdiction "is not inconsistent with the Constitution of this state or with the Constitution of the United States." SDCL 15-7-2(14).

20. Both the State and Federal constitutions permit South Dakota state-court jurisdiction over retailers who solicit business from, and deliver tangible personal property and services to, residents of the State. *See Quill*, 504 U.S. at 306-08 (holding that "there is no question" that such contacts suffice for "due process purposes"); *Marschke v. Wratislaw*, 2007 S.D. 125, ¶13, 743 N.W. 2d 402, 406 (holding that personal jurisdiction of South Dakota courts extends to limits of federal constitution).

SUBJECT MATTER JURISDICTION

21. Section 2 of the Act creates a cause of action for declaratory judgment and empowers "any circuit court" to adjudicate that cause of action.

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Accordingly, the Sixth Judicial Circuit Court has subject matter jurisdiction over this action.

22. SDCL 21-24-1 empowers "[c]ourts of record within their respective jurisdictions ... to declare rights, status, and other legal relations whether or not further relief is or could be claimed[,]" provides that "[n]o action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for," and permits "[t]he declaration [to] be either affirmative or negative in form and effect[.]"

23. SDCL 21-24-3 permits "[a]ny person ... whose rights, status, or other legal relations are affected by a statute" to "have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status, or other legal relations thereunder." "[T]he State is a 'person' within the meaning of" the Declaratory Judgment Act. *Dan Nelson, Automotive, Inc. v. Viken*, 2005 S.D. 109, 706 N.W. 2d 239 (rejecting contrary dictum in *Pennington County v. State ex rel. Unified Judicial Sys.*, 2002 S.D. 31, 641 N.W. 2d 127).

24. As supported by the allegations below, this request for declaratory judgment also presents a justiciable and ripe controversy, between adverse parties, in which the State has a legally protectable interest. The declaration the State seeks will permit it to require sales tax to be collected and remitted from sellers without a physical presence in the State who are currently not complying with the Act; the State is clearly interested in obtaining the tax revenue it believes is due, and the Defendants have the contrary interest in

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resisting this tax obligation. Moreover, each Defendant has failed to register to collect and remit the state sales tax after receiving an individualized notice directing them to do so by April 25, 2016. That notice specifically instructed Defendants that failure to register would demonstrate that they did "not intend to comply with the Act." *See* Notices (Appendix B). Furthermore, under the structure of the Act, the State cannot currently enforce the Act's collection obligation against the Defendants unless the State prevails in this suit. Were the State to prevail, the Act will immediately apply to Defendants, requiring them to collect and remit the state sales tax on a going-forward basis.

25. "A matter is sufficiently ripe [for declaratory judgment] if the facts indicate imminent conflict." *Boever v. South Dakota Bd. of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995)(citation omitted)(setting forth requirements for declaratory judgment). The conflict between the State and the Defendants is not only imminent but present: This suit will determine whether or not Defendants must collect and remit state sales tax the day after it is decided.

VENUE

26. Venue is appropriate in this Court. Section 2 of the Act permits this suit to be brought in "any circuit court."

27. Furthermore, SDCL 15-5-6 permits venue "in any county which the plaintiff shall designate" in any case where, as here, "none of the defendants reside in the state."

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RELEVANT STATUTES

28. The Act provides that sellers without a physical presence in the State must comply with the State's sales tax laws "as if the seller had a physical presence in the state." S.B. 106 § 1.

29. The Act contains two threshold provisions, however, that limit the effect of this requirement on sellers who -- because of their limited size or geographic reach -- conduct relatively little business shipping goods and services to South Dakota residents. In particular, in order for the above obligation to apply, the out-of-state seller must have "gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceed[ing] one hundred thousand dollars," or must have "sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions." These thresholds are determined based on either the previous calendar year or the current calendar year to date. S.B. 106 § 1(1)-(2).

30. In addition, the Act creates a declaratory judgment action that the State may bring to determine the validity and applicability of this obligation with respect to individual taxpayers. S.B. 106 § 2. It also establishes special procedures designed to ensure the most expeditious possible adjudication of this action. S.B. 106 §§ 2, 4.

31. The Act contains three provisions designed to protect taxpayers from accruing any tax liability -- retroactive or otherwise -- during the

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pendency of this action. First, section 3 of the Act provides that the filing of this action operates as an injunction "prohibiting any state entity from enforcing the obligation in section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the sales tax on a voluntary basis."* *See* S.B. 106 § 3. The State filed this suit immediately before the May 1, 2016 effective date of the Act to trigger this injunction and prevent any uncertainty for taxpayers. *See* S.B. 106 § 9 (setting effective date). Second, section 5 of the Act provides that "[n]o obligation to remit the sales tax required by this Act may be applied retroactively." Finally, section 6 of the Act provides that "[i]f an injunction provided by this Act is lifted or dissolved, in general or with respect to a specific taxpayer, the state shall assess and apply the obligation established in section 1 of this Act from that date forward with respect to any taxpayer covered by the injunction."

32. Given the provisions above, the State has simultaneously filed with this Complaint an application for an injunction which records and makes certain the effect of section 3 of the Act. This application can and should be immediately granted without a hearing because the State asks only for an injunction restraining itself and benefiting the Defendants (as well as other taxpayers subject to the Act).

33. These provisions, together with the requested injunction, ensure that any seller not complying voluntarily with the Act will face tax liability only

* The Act also makes clear that this injunction will "not apply" to any taxpayer against whom the state prevails in an action like this one. *See* S.B. 106 § 3.

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prospectively from the date on which a court holding makes clear that the Act validly applies to the seller.

PROCEDURAL BACKGROUND

34. The Act was signed into law by Governor Dennis Daugaard on March 22, 2016. It provides that it will be effective on the first day of the first month that is at least fifteen calendar days from the date the Act is signed into law. Therefore, its effective date is May 1, 2016. *See* S.B. 106 § 9.

35. To prepare sellers lacking a physical presence in the State for the effect of the law, the Department of Revenue sent an individualized notice to 206 such sellers for whom available information made it almost certain that they met the statutory thresholds set forth above and in Section 1 of the Act. Defendants were each sent a copy of the notice (copies of which attached hereto as Appendix B) on March 25, 2016, by Andy Gerlach, Secretary of the Department of Revenue.

36. The State also posted relevant information about the Act on its website, at http://dor.sd.gov/Taxes/Business_Taxes/SB106.aspx.

37. The State identified the 206 sellers lacking a physical presence within the State who received the notice by using available data to calculate the likely amount of gross revenue that such sellers derive from sales into the State. After applying a mathematical factor designed to avoid close cases in which the seller might not meet the statutory thresholds, the State determined whether the remaining sellers had registered for a license to collect and remit sales tax. Sellers who were not registered, including all of the present

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Defendants, received the notice directing them to register by April 25, 2016, and thus received both actual and inquiry notice of the Act more than 30 days ago.

38. The notice carefully explained the consequences of failing to register:

> "If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds."

39. The notice also explained that any recipient who did not meet the statutory thresholds in section 1 of the Act should notify the State to avoid legal action.

40. Each Defendant failed to register to collect and remit the sales tax by April 25, 2016, and each has failed to register as of the date of this Complaint.

41. On information and belief, each Defendant meets either or both of the statutory thresholds, having at least $100,000 of gross revenue from sales into the State and/or at least 200 separate such transactions.

42. The State initiated this action against Defendants on the basis of their refusal to register for a license following individualized notice of the need to do so. Because of section 3 of the Act, the filing of this action immediately

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before the effective date enhances the protection of taxpayers (including Defendants) from any argument that they face an active and enforceable obligation to collect and remit sales taxes before the conclusion of this action.

RELEVANT LEGISLATIVE FINDINGS

43. In enacting the Act, the South Dakota Legislature determined that *Quill* causes a severe harm to the State's tax revenue, and a concomitant harm to state and local services:

a. "The inability to effectively collect the sales or use tax from remote sellers ... is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services," S.B. 106 § 8(1);

b. "The harm from the loss of revenue is especially serious in South Dakota because the state has no income tax, and sales and use tax revenues are essential in funding state and local services," *id.* § 8(2);

c. Refusal by out-of-state retailers to collect sales taxes "causes imminent harm to this state," *id.* § 8(9).

44. The Legislature's assessment is correct; the Department of Revenue estimates the revenue loss associated with *Bellas Hess* and *Quill* at approximately $48-$58 million annually for state and municipal taxes combined. These figures are based largely on a study conducted several years ago at the University of Tennessee, and relied upon in Justice Kennedy's

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concurrence in *DMA*. *See* D. Bruce, W. Fox, & L. Luna, State and Local Government Sales Tax Revenue Losses from Electronic Commerce 11 (2009).

45. Furthermore, the Legislature found that, even as the costs to the State from *Quill* have increased dramatically, the costs of compliance for taxpayers have fallen just as dramatically:

> In contrast with the expanding harms caused to the state from this exemption of sales tax collection duties for remote sellers, the costs of that collection have fallen. Given modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales taxes associated with sales into South Dakota.

S.B. 106 § 8(6).

46. Again, the legislature's assessment is clearly correct. Numerous retailers now collect and remit sales tax in every state, and are quite capable of administering all their state and local sales tax obligations when customers buy goods through their online sales channels. Software integration options are now readily available from multiple vendors for online "shopping carts." And because it is necessary to obtain immediate information from the purchaser regarding their residence in order to deliver the goods, it is possible for the software to immediately calculate and inform the consumer of the applicable sales tax before completing the transaction, and the tax can be easily collected at the time of the sale. Indeed, the industry that provides these integration options is robust and growing, which will make such software even easier and less expensive to obtain in the near future. Moreover, many sellers already have such software to address sales to states in which they do have a physical presence.

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47. This development is further supported by the Streamlined Sales and Use Tax Agreement, which has been enacted by more than twenty states (including South Dakota) in the wake of *Quill*. Any seller lacking a physical presence in the State who intends to comply with the obligations set forth in the Act can register to collect sales taxes through the voluntary Streamlined system. That system, in turn, provides sellers the option to use sales tax administration software from Certified Software Providers (CSPs), with the cost of such software borne by the states. Sellers may choose from seven different CSPs, and the CSP will file the tax returns and remit applicable taxes for sellers that use it. Sellers using a CSP are also immune from audit liability for the sales they process through that software. The Streamlined system also reduces sales tax administration cost and expense through:

a. uniform definitions of products and services across all Member states;

b. freely available tax rate and tax boundary databases;

c. single, state level tax administration;

d. uniform audit procedures (for sellers that choose not to use a CSP);

e. simplified tax rate structures;

f. uniform administration of sales tax expenses; and,

g. uniform rules for sourcing sales.

Accordingly, a taxpayer can comply with the obligations of the Act using the Streamlined system at little to no personal cost (apart from actually remitting the taxes collected from consumers), and with little to no concern

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regarding audits or errors in compliance. Moreover, many of the above benefits are available even to sellers who do not elect to participate in the Streamlined system as a whole, further easing the burden of compliance on all out-of-state retailers.

48. The Legislature also found that *Bellas Hess* and *Quill* distort the local retail market, causing unfairness to brick-and-mortar retailers generally, and to smaller, locally owned businesses in particular. Out-of-state retailers benefit from local infrastructure without paying their fair share of taxes. *See* S.B. 106 § 8(5). And they also "actively market sales as tax free or no sales tax transactions" even though "a use tax is owed" by the consumer. *Id.* § 8(3). As a result, local retailers are unable to compete fairly with online retailers, which is likely to cause even further harm to the State by harming the local businesses that employ local residents and make up the bulk of the State's tax base. *See id.* § 8(4) ("The structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future.").

49. Well-documented economic effects support the Legislature's judgment. Expert economists, including researchers associated with both sides of the political spectrum, agree that the special exemption from sales taxation created by *Quill* causes serious harm to state economies (and the national economy) by distorting the operation of the free market. *See, e.g.*, Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet*

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Commerce, 115 Q.J. Econ. 561 (2000); Arthur B. Laffler and Donna Arduin, *Pro-Growth Tax Reform and E-Fairness*, http://standwithmainstreet.com/ArtLafferStudy.pdf.

50. Finally, the Legislature made clear that it wanted to accommodate the difficulties that might be caused to out-of-state retailers by its effort to respond to Justice Kennedy's invitation to bring an action allowing the United States Supreme Court to reconsider *Quill*. It thus created a specific cause of action with unique protections for taxpayers, allowing the State to seek a declaratory judgment in circuit court, with a direct appeal to the South Dakota Supreme Court, both of which must be resolved as expeditiously as possible. *See* S.B. 106 §§ 2, 4; *see also id.* §§ 8(8)-(9) (finding that "[e]xpeditious review is necessary and appropriate," and that the Act is intended to "permit[] the most expeditious possible review of the constitutionality of this law"). That action obviates the need for an audit and any effort to obtain retroactive tax liability from any out-of-state seller who does not wish to comply with the Act on a voluntary basis. As the Legislature stated:

> Expeditious review is necessary and appropriate because, while it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the sales tax in light of existing federal constitutional doctrine, any such refusal causes imminent harm to this state.
>
> At the same time, the Legislature recognizes that the enactment of this law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question. Accordingly, the Legislature intends to clarify that the obligations created by this law would be appropriately stayed by the courts until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating

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its existing doctrine, or a final judgment applicable to a particular taxpayer.

S.B. 106 § 8 (9)-(10).

51. This declaratory judgment action thus represents "the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines, and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this Act." S.B. 106 § 8 (11). Like the Legislature, the State recognizes that a change in federal constitutional doctrine will be necessary for the State to prevail in this case. Nonetheless, the effect of the declaration that the State seeks in this action will be to immediately require the collection and remittance of taxes from these Defendants under the Act -- a collection which, absent such a declaration, the State is presently unable to enforce. There is accordingly an immediate controversy over whether existing federal constitutional doctrine should invalidate the Act or not, which this Court can and should adjudicate in the first instance by declaratory judgment.

PRAYER FOR RELIEF

WHEREFORE, the State hereby prays for relief as follows:

(1) That the Court declare that the requirements of section 1 of the Act are valid and applicable with respect to the defendants.

(2) That the Court immediately enter an order enjoining the enforcement of the Act during the pendency of this action -- reflecting on the record the automatic effect of Section 3 of the Act

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-- and dissolve such injunction upon the entry of a declaratory judgment in favor of the State. (A separate motion for an appropriate order of this form has been contemporaneously filed).

(3) That the Court enter an injunction requiring the defendants to register for a license to collect and remit the sales tax.

(4) That the Court grant such other relief as it deems just and proper in this matter.

Dated this 28th day of April, 2016.

/s/ Richard M. Williams

Richard M. Williams
Deputy Attorney General
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215

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State of South Dakota

OFFICE OF THE SECRETARY OF STATE

Department of State

United States of America, ☐
☐ **Secretary's Office**
State of South Dakota ☐

This is to certify that the attached instrument of writing is a true, correct and examined copy of Senate Bill 0106 in our office as filed March 22, 2016;

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the state of South Dakota at the city of Pierre, the capital, this day April 18, 2016.

Shantel Krebs

Shantel Krebs
Secretary of State

Appendix A

JUNO IN U.S.A.

State of South Dakota

OFFICE OF THE SECRETARY OF STATE

Department of State

United States of America,
State of South Dakota } SECRETARY'S OFFICE

This is to certify that the attached instrument of writing is a true, correct and examined copy of SB 0106 duly passed in the Legislature of the State of South Dakota, as an Emergency Act, and has been carefully compared with the original now on file in this office and found correct.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of South Dakota at the City of Pierre, the Capital, on March 22, 2016.

Shantel Krebs

Shantel Krebs, Secretary of State

AN ACT

ENTITLED, An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state, provided the seller meets either of the following criteria in the previous calendar year or the current calendar year:

(1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or

(2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions.

Section 2. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, and whether or not the state initiates an audit or other tax collection procedure, the state may bring a declaratory judgment action under chapter 21-24 in any circuit court against any person the state believes meets the criteria of section 1 of this Act to establish that the obligation to remit sales tax is applicable and valid under state and federal law. The circuit court shall act on this declaratory judgment action as expeditiously as possible and this action shall proceed with priority over any other action presenting the same question in any other venue.

In this action, the court shall presume that the matter may be fully resolved through a motion to

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dismiss or a motion for summary judgment. However, if these motions do not resolve the action, any discovery allowed by the court may not exceed the provisions of subdivisions 15-6-73(2) and (4).

The provisions of § 10-59-34, along with any other provisions authorizing attorney's fees, do not apply to any action brought pursuant to this Act or any appeal from any action brought pursuant to this Act.

Section 3. That the code be amended by adding a NEW SECTION to read:

The filing of the declaratory judgment action established in this Act by the state operates as an injunction during the pendency of the action, applicable to each state entity, prohibiting any state entity from enforcing the obligation in section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the sales tax on a voluntary basis. The injunction does not apply if there is a previous judgment from a court establishing the validity of the obligation in section 1 of this Act with respect to the particular taxpayer.

Section 4. That the code be amended by adding a NEW SECTION to read:

Any appeal from the decision with respect to the cause of action established by this Act may only be made to the state Supreme Court. The appeal shall be heard as expeditiously as possible.

Section 5. That the code be amended by adding a NEW SECTION to read:

No obligation to remit the sales tax required by this Act may be applied retroactively.

Section 6. That the code be amended by adding a NEW SECTION to read:

If an injunction provided by this Act is lifted or dissolved, in general or with respect to a specific taxpayer, the state shall assess and apply the obligation established in section 1 of this Act from that date forward with respect to any taxpayer covered by the injunction.

Section 7. That the code be amended by adding a NEW SECTION to read:

A taxpayer complying with this Act, voluntarily or otherwise, may only seek a recovery of taxes,

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penalties, or interest by following the recovery procedures established pursuant to chapter 10-59. However, no claim may be granted on the basis that the taxpayer lacked a physical presence in the state and complied with this Act voluntarily while covered by the injunction provided in section 3 of this Act.

Nothing in this Act limits the ability of any taxpayer to obtain a refund for any other reason, including a mistake of fact or mathematical miscalculation of the applicable tax.

No seller who remits sales tax voluntarily or otherwise under this Act is liable to a purchaser who claims that the sales tax has been over-collected because a provision of this Act is later deemed unlawful.

Nothing in this Act affects the obligation of any purchaser from this state to remit use tax as to any applicable transaction in which the seller does not collect and remit or remit an offsetting sales tax.

Section 8. That the code be amended by adding a NEW SECTION to read:

The Legislature finds that:

(1) The inability to effectively collect the sales or use tax from remote sellers who deliver tangible personal property, products transferred electronically, or services directly into South Dakota is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services;

(2) The harm from the loss of revenue is especially serious in South Dakota because the state has no income tax, and sales and use tax revenues are essential in funding state and local services;

(3) Despite the fact that a use tax is owed on tangible personal property, any product transferred electronically, or services delivered for use in this state, many remote sellers

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actively market sales as tax free or no sales tax transactions;

(4) The structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future;

(5) Remote sellers who make a substantial number of deliveries into or have large gross revenues from South Dakota benefit extensively from this state's market, including the economy generally, as well as state infrastructure;

(6) In contrast with the expanding harms caused to the state from this exemption of sales tax collection duties for remote sellers, the costs of that collection have fallen. Given modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales taxes associated with sales into South Dakota;

(7) As Justice Kennedy recently recognized in his concurrence in *Direct Marketing Association v. Brohl*, the Supreme Court of the United States should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax, and as the foregoing findings make clear, this argument has grown stronger, and the cause more urgent, with time;

(8) Given the urgent need for the Supreme Court of the United States to reconsider this doctrine, it is necessary for this state to pass this law clarifying its immediate intent to require collection of sales taxes by remote sellers, and permitting the most expeditious possible review of the constitutionality of this law;

(9) Expeditious review is necessary and appropriate because, while it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the sales tax in light of existing federal constitutional doctrine, any such refusal causes imminent harm to this state;

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(10) At the same time, the Legislature recognizes that the enactment of this law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question. Accordingly, the Legislature intends to clarify that the obligations created by this law would be appropriately stayed by the courts until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating its existing doctrine, or a final judgment applicable to a particular taxpayer; and

(11) It is the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines, and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this Act.

Section 9. Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist. This Act shall be in full force and effect on the first day of the first month that is at least fifteen calendar days from the date this Act is signed by the Governor.

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An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency.

I certify that the attached Act originated in the

SENATE as Bill No. 106

Kay Johnson
Secretary of the Senate

President of the Senate

Attest:

Kay Johnson
Secretary of the Senate

Dean Wick
Speaker of the House

Attest:

Arlene Kirsten
Chief Clerk

Senate Bill No. 106
File No. ____
Chapter No. _____

Received at this Executive Office this 8th day of March, 2016 at 9:20 A.M.

By Judy Swartz
for the Governor

The attached Act is hereby approved this 22nd day of March, A.D., 2016

Dennis Daugaard
Governor

STATE OF SOUTH DAKOTA,
ss.
Office of the Secretary of State

Filed March 22nd, 2016 at 11:32 a o'clock A M.

Shantel Krebs
Secretary of State

By _____
Asst. Secretary of State

South Dakota Department of Revenue

445 East Capitol Avenue
Pierre, South Dakota 57501-3185
Phone: 605-773-3311

March 25, 2016

NOTICE

Harry Amsden
Newegg Inc
17560 Rowland St
City of Industry CA 91748

Re: Important Changes to South Dakota Tax Laws for Remote Sellers

Dear Harry Amsden:

We are writing to bring your attention to recent changes in South Dakota law that may require you to begin remitting sales tax on transactions in which tangible personal property, products transferred electronically, or services are delivered into South Dakota. Our estimates indicate that your business meets the annual statutory thresholds that will apply to remote sellers. This notice explains the applicable legal changes and steps that you should take to begin complying with your South Dakota sales tax obligation, as well as the possible consequences that may follow from non-compliance.

Background

On March 22, 2016, Governor Dennis Daugaard signed into law Senate Bill 106, entitled "An Act to provide for the collection of sales taxes from certain remote sellers" ("the Act"), enclosed. The Act becomes effective on May 1, 2016, and may apply to your business from May 1, 2016, forward.

The Act provides that any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota must comply with all applicable South Dakota laws and procedures regarding the sales tax "as if the seller had a physical presence within the state." This requirement applies only to retailers who meet certain statutory thresholds. In particular, this obligation applies only if, **in the previous calendar year, or so far in the current calendar year:**

1. your gross revenue from sales into South Dakota **exceeded $100,000**; or
2. you made sales for delivery into South Dakota in **two hundred** or more separate transactions.

Applicability to You

Our estimates indicate that your business likely exceeds either or both of these thresholds. If so, you will be obligated to begin remitting sales tax to South Dakota. If you do not meet either of these thresholds notify us immediately to avoid any confusion or possible legal action against you.

Our records indicate that you currently do not have a South Dakota sales tax license. In order to collect sales tax from consumers and/or remit it to the State, you must register for a sales tax license. The State has endeavored to substantially simplify sales tax compliance for retailers by adopting the Streamlined Sales and Use Tax system. You can register for a South Dakota tax license at http://sd.gov/taxapp or through the Streamlined system at http://www.streamlinedsalestax.org.

If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds.

Written notification that you are not subject to this Act must be received by Kathy Smith no later than April 25, 2016. You may submit your written statement by email to Kathy.smith@state.sd.us or by regular mail to:

State of South Dakota
Attn: Kathy Smith
445 E Capitol Ave
Pierre SD 57501

Pursuant to the Act, the action described above will not result in any fees, penalties, or retroactive tax liability against you. Instead, if an action is initiated and a declaratory judgment is entered against you, you will be required to begin remitting the sales tax immediately from that point forward.

Additional information is available on our website at http//dor.sd.gov/.

If you have questions or need further assistance, you can contact Kathy Smith at 605-773-3311.

Sincerely,

Andy Gerlach, Secretary
South Dakota Department of Revenue

Enclosure

South Dakota Department of Revenue

445 East Capitol Avenue
Pierre, South Dakota 57501-3185
Phone: 605-773-3311

March 25, 2016

NOTICE

Robert Hughes
Overstock.com Inc
6360 South 3000 East #100
Salt Lake City UT 84121

Re: Important Changes to South Dakota Tax Laws for Remote Sellers

Dear Robert Hughes:

We are writing to bring your attention to recent changes in South Dakota law that may require you to begin remitting sales tax on transactions in which tangible personal property, products transferred electronically, or services are delivered into South Dakota. Our estimates indicate that your business meets the annual statutory thresholds that will apply to remote sellers. This notice explains the applicable legal changes and steps that you should take to begin complying with your South Dakota sales tax obligation, as well as the possible consequences that may follow from non-compliance.

Background

On March 22, 2016, Governor Dennis Daugaard signed into law Senate Bill 106, entitled "An Act to provide for the collection of sales taxes from certain remote sellers" ("the Act"), enclosed. The Act becomes effective on May 1, 2016, and may apply to your business from May 1, 2016, forward.

The Act provides that any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota must comply with all applicable South Dakota laws and procedures regarding the sales tax "as if the seller had a physical presence within the state." This requirement applies only to retailers who meet certain statutory thresholds. In particular, this obligation applies only if, **in the previous calendar year, or so far in the current calendar year:**

1. your gross revenue from sales into South Dakota **exceeded $100,000**; or
2. you made sales for delivery into South Dakota in **two hundred** or more separate transactions.

Applicability to You

Our estimates indicate that your business likely exceeds either or both of these thresholds. If so, you will be obligated to begin remitting sales tax to South Dakota. If you do not meet either of these thresholds notify us immediately to avoid any confusion or possible legal action against you.

Our records indicate that you currently do not have a South Dakota sales tax license. In order to collect sales tax from consumers and/or remit it to the State, you must register for a sales tax license. The State has endeavored to substantially simplify sales tax compliance for retailers by adopting the Streamlined Sales and Use Tax system. You can register for a South Dakota tax license at http://sd.gov/taxapp or through the Streamlined system at http://www.streamlinedsalestax.org.

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If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds.

Written notification that you are not subject to this Act must be received by Kathy Smith no later than April 25, 2016. You may submit your written statement by email to Kathy.smith@state.sd.us or by regular mail to:

State of South Dakota
Attn: Kathy Smith
445 E Capitol Ave
Pierre SD 57501

Pursuant to the Act, the action described above will not result in any fees, penalties, or retroactive tax liability against you. Instead, if an action is initiated and a declaratory judgment is entered against you, you will be required to begin remitting the sales tax immediately from that point forward.

Additional information is available on our website at http//dor.sd.gov/.

If you have questions or need further assistance, you can contact Kathy Smith at 605-773-3311.

Sincerely,

Andy Gerlach, Secretary
South Dakota Department of Revenue

Enclosure

South Dakota Department of Revenue

445 East Capitol Avenue
Pierre, South Dakota 57501-3185
Phone: 605-773-3311

March 26, 2016

NOTICE

Lawrence Reinhold
Systemax Inc
11 Harbor Park Dr
Port Washington NY 11050

Re: Important Changes to South Dakota Tax Laws for Remote Sellers

Dear Lawrence Reinhold:

We are writing to bring your attention to recent changes in South Dakota law that may require you to begin remitting sales tax on transactions in which tangible personal property, products transferred electronically, or services are delivered into South Dakota. Our estimates indicate that your business meets the annual statutory thresholds that will apply to remote sellers. This notice explains the applicable legal changes and steps that you should take to begin complying with your South Dakota sales tax obligation, as well as the possible consequences that may follow from non-compliance.

Background

On March 22, 2016, Governor Dennis Daugaard signed into law Senate Bill 106, entitled "An Act to provide for the collection of sales taxes from certain remote sellers" ("the Act"), enclosed. The Act becomes effective on May 1, 2016, and may apply to your business from May 1, 2016, forward.

The Act provides that any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota must comply with all applicable South Dakota laws and procedures regarding the sales tax "as if the seller had a physical presence within the state." This requirement applies only to retailers who meet certain statutory thresholds. In particular, this obligation applies only if, **in the previous calendar year, or so far in the current calendar year:**

1. your gross revenue from sales into South Dakota **exceeded $100,000;** or
2. you made sales for delivery into South Dakota **in two hundred** or more separate transactions.

Applicability to You

Our estimates indicate that your business likely exceeds either or both of these thresholds. If so, you will be obligated to begin remitting sales tax to South Dakota. If you do not meet either of these thresholds notify us immediately to avoid any confusion or possible legal action against you.

Our records indicate that you currently do not have a South Dakota sales tax license. In order to collect sales tax from consumers and/or remit it to the State, you must register for a sales tax license. The State has endeavored to substantially simplify sales tax compliance for retailers by adopting the Streamlined Sales and Use Tax system. You can register for a South Dakota tax license at http://sd.gov/taxapp or through the Streamlined system at http://www.streamlinedsalestax.org.

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If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds.

Written notification that you are not subject to this Act must be received by Kathy Smith no later than April 25, 2016. You may submit your written statement by email to Kathy.smith@state.sd.us or by regular mail to:

State of South Dakota
Attn: Kathy Smith
445 E Capitol Ave
Pierre SD 57501

Pursuant to the Act, the action described above will not result in any fees, penalties, or retroactive tax liability against you. Instead, if an action is initiated and a declaratory judgment is entered against you, you will be required to begin remitting the sales tax immediately from that point forward.

Additional information is available on our website at http//dor.sd.gov/.

If you have questions or need further assistance, you can contact Kathy Smith at 605-773-3311.

Sincerely,

Andy Gerlach, Secretary
South Dakota Department of Revenue

Enclosure

South Dakota Department of Revenue

445 East Capitol Avenue
Pierre, South Dakota 57501-3185
Phone: 605-773-3311

March 25, 2016

NOTICE

Michael Fleisher
Wayfair LLC
177 Huntington Ave #6000
Boston MA 02115

Re: Important Changes to South Dakota Tax Laws for Remote Sellers

Dear Michael Fleisher:

We are writing to bring your attention to recent changes in South Dakota law that may require you to begin remitting sales tax on transactions in which tangible personal property, products transferred electronically, or services are delivered into South Dakota. Our estimates indicate that your business meets the annual statutory thresholds that will apply to remote sellers. This notice explains the applicable legal changes and steps that you should take to begin complying with your South Dakota sales tax obligation, as well as the possible consequences that may follow from non-compliance.

Background

On March 22, 2016, Governor Dennis Daugaard signed into law Senate Bill 106, entitled "An Act to provide for the collection of sales taxes from certain remote sellers" ("the Act"), enclosed. The Act becomes effective on May 1, 2016, and may apply to your business from May 1, 2016, forward.

The Act provides that any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota must comply with all applicable South Dakota laws and procedures regarding the sales tax "as if the seller had a physical presence within the state." This requirement applies only to retailers who meet certain statutory thresholds. In particular, this obligation applies only if, **in the previous calendar year, or so far in the current calendar year:**

1. your gross revenue from sales into South Dakota **exceeded $100,000**; or
2. you made sales for delivery into South Dakota in **two hundred** or more separate transactions.

Applicability to You

Our estimates indicate that your business likely exceeds either or both of these thresholds. If so, you will be obligated to begin remitting sales tax to South Dakota. If you do not meet either of these thresholds notify us immediately to avoid any confusion or possible legal action against you.

Our records indicate that you currently do not have a South Dakota sales tax license. In order to collect sales tax from consumers and/or remit it to the State, you must register for a sales tax license. The State has endeavored to substantially simplify sales tax compliance for retailers by adopting the Streamlined Sales and Use Tax system. You can register for a South Dakota tax license at http://sd.gov/taxapp or through the Streamlined system at http://www.streamlinedsalestax.org.

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If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds.

Written notification that you are not subject to this Act must be received by Kathy Smith no later than April 25, 2016. You may submit your written statement by email to Kathy.smith@state.sd.us or by regular mail to:

State of South Dakota
Attn: Kathy Smith
445 E Capitol Ave
Pierre SD 57501

Pursuant to the Act, the action described above will not result in any fees, penalties, or retroactive tax liability against you. Instead, if an action is initiated and a declaratory judgment is entered against you, you will be required to begin remitting the sales tax immediately from that point forward.

Additional information is available on our website at http//dor.sd.gov/.

If you have questions or need further assistance, you can contact Kathy Smith at 605-773-3311.

Sincerely,

Andy Gerlach, Secretary
South Dakota Department of Revenue

Enclosure

CORPORATION SERVICE COMPANY®

null / ALL
Transmittal Number: 15097799
Date Processed: 05/02/2016

Notice of Service of Process

Primary Contact: Julie J Miranda
Newegg, Inc.
17560 Rowland Street
City of Industry, CA 91748

Copy of transmittal only provided to: Jenny Rim

Entity:	Newegg Inc. Entity ID Number 2373386
Entity Served:	Newegg Inc.
Title of Action:	State of South Dakota vs. Wayfair Inc
Document(s) Type:	Summons/Complaint
Nature of Action:	Violation of State/Federal Act
Court/Agency:	Hughes County Circuit Court, South Dakota
Case/Reference No:	32 Civ. 16-92
Jurisdiction Served:	Delaware
Date Served on CSC:	04/29/2016
Answer or Appearance Due:	30 Days
Originally Served On:	CSC
How Served:	Personal Service
Sender Information:	Richard M. Williams 605-773-3215

Information contained on this transmittal form is for record keeping, notification and forwarding the attached document(s). It does not constitute a legal opinion. The recipient is responsible for interpreting the documents and taking appropriate action.

To avoid potential delay, please do not send your response to CSC

CSC is SAS70 Type II certified for its Litigation Management System.

2711 Centerville Road Wilmington, DE 19808 (888) 690-2882 | sop@cscinfo.com

EXHIBIT
C

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: ss	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,	)	32 Civ. 16-92
Plaintiff,	)	SUMMONS
v.	)	
WAYFAIR INC 4 Copley PL FL 7 Boston MA 02116-6504	)	
SYSTEMAX INC 11 Harbor Park Dr Port Washington NY 11050	)	
OVERSTOCK.COM INC 6350 S 3000 E Salt Lake City UT 84121-5952	)	
NEWEGG INC 16839 E Gale Ave City of Industry CA 91745	)	
Defendants.	)	

GREETINGS FROM THE STATE OF SOUTH DAKOTA TO THE ABOVE-NAMED DEFENDANTS:

Corporation Service Co., 2711 Centerville Rd #400, Wilmington DE 19808
Registered Agent for: Wayfair Inc.

Corporation Service Co., 2711 Centerville Rd #400, Wilmington DE 19808
Registered Agent for: Systemax Inc.

The Corporation Trust Co., Corporation Trust Center, 1209 Orange St, Wilmington DE 19801
Registered Agent for: Overstock.com, Inc.

Corporation Service Co., 2711 Centerville Rd #400, Wilmington DE 19808
Registered Agent for: Newegg Inc.

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You are hereby summoned and required to serve upon the Attorney General, Plaintiff's attorney, whose address is the Office of the Attorney General, 1302 East Highway 14, Suite 1, Pierre, South Dakota 57501-8501, an Answer to the Complaint, which is herewith served upon you and filed on the 28th Day of April, 2016, in the office of the clerk of the Circuit Court of the Sixth Judicial Circuit at Pierre in and for the County of Hughes, State of South Dakota, within thirty (30) days after the service of this Summons and Complaint upon you, exclusive to the date of service. If you fail to file an Answer within thirty days of the date of service upon you, judgment by default will be taken against you for the relief as prayed for in the Complaint.

Dated this 29th day of April, 2016.

/s/ Richard M. Williams

Richard M. Williams
Deputy Attorney General
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215

Filed: 5/25/2016 2:47:36 PM CST Hughes County, South Dakota 32CIV16-000092

STATE OF SOUTH DAKOTA : ss COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, v. WAYFAIR INC 4 Copley PL FL 7 Boston MA 02116-6504 SYSTEMAX INC 11 Harbor Park Dr Port Washington NY 11050 OVERSTOCK.COM INC 6350 S 3000 E Salt Lake City UT 84121-5952 NEWEGG INC 16839 E Gale Ave City of Industry CA 91745 Defendants.	)	32 Civ. 16-92 COMPLAINT

The State of South Dakota, by and through the Department of Revenue (hereinafter the State), Plaintiff in the above-entitled matter, for its Complaint states and alleges as follows:

SUMMARY

1. The State -- through this declaratory judgment action -- seeks a determination that it may require Defendants to collect and remit state sales tax on sales of tangible personal property and services for delivery into South Dakota. The State acknowledges that a declaration in its favor will require abrogation of the United States Supreme Court's decision in *Quill Corp. v. North*

Dakota, 504 U.S. 298 (1992), and ultimately seeks a decision from the United States Supreme Court to that effect in this case.

RELEVANT LEGAL BACKGROUND

2. In 1967, in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), the Supreme Court of the United States held that the Due Process Clause and dormant Commerce Clause of the United States Constitution both prohibit states from requiring out-of-state mail-order retailers that lack any physical presence within a state to collect that state's sales and/or use taxes respecting sales for delivery to in-state residents.

3. Thereafter, the U.S. Supreme Court's jurisprudence regarding the "minimum contacts" sufficient to allow states to regulate conduct by non-residents became far less restrictive. The U.S. Supreme Court's cases regarding the dormant Commerce Clause also changed their focus. Responding to these changes, in 1991, the North Dakota Supreme Court held that *Bellas Hess* was "an obsolescent precedent." *State v. Quill Corp.*, 470 N.W. 2d 203, 208 (N.D. 1991).

4. The Supreme Court of the United States granted certiorari and reversed. In *Quill*, 504 U.S. at 306-308, it agreed with the North Dakota Supreme Court that the Due Process Clause holding of *Bellas Hess* had been overtaken by subsequent precedent. But it further held that, despite the fact that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today," *id.* at 311, the "continuing value of a bright-line rule in this area and the doctrine and

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principles of *stare decisis*," led it to "disagree with the North Dakota Supreme Court's conclusion that the time has come to renounce the bright-line test of *Bellas Hess*." *Id.* at 317-18. Particularly because the Due Process Clause holding would for the first time permit Congress to "overrule" *Bellas Hess* itself, the Court would withhold its "hand, at least for now." *Id.* at 318.

5. The effect of *Bellas Hess* and *Quill* is to effectively immunize out-of-state retailers lacking a physical presence within a state from having to remit any state sales or use taxes. As further explained below, the effects of that immunity on the State treasury and its general retail markets have vastly multiplied because of the meteoric rise of Internet commerce.

6. Nonetheless, in the 24 years since *Quill* was decided, Congress has failed to make good on the Supreme Court's invitation to address this issue through legislation at the federal level. Bills are introduced and debated, but routinely fail to receive even an up-or-down vote because of committee leaders advancing esoteric interests or other well-understood "veto" points that make congressional inaction the strong default rule. Indeed, while many states (including South Dakota) reacted to *Quill* by creating a "Streamlined" system that would allow out-of-state retailers to easily comply with the rationalized sales and use tax laws of all those states at once, Congress has not taken the necessary action to allow the Streamlined system to take effect.

7. The absence of federal legislative progress on this issue reflects the effect of *Bellas Hess* and *Quill* on the federal Constitution's separation of powers. Absent *Quill*, Congress would of course retain the power "to regulate

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Commerce . . . among the several States," U.S. Const. Art. 1, sec. 8, cl. 3, including by exempting out-of-state retailers that lack physical presence within a state from any obligation to collect and remit a state's sales or use taxes. But the effort to obtain affirmative congressional action would fall on those retailers seeking a special exemption from the states' ordinary powers of taxation, and the states would no longer be forced to seek Congress's permission to exercise their own sovereign authority. If -- as is quite often the case -- Congress were to continue to do nothing in this area, the power to tax those conducting business in the state would remain "reserved to the States respectively," as the Constitution provides. U.S. Const. Amend. X.

8. In a recent case, Justice Kennedy signaled that the United States Supreme Court may be willing to once again consider whether "the time has come to renounce the bright-line test of *Bellas Hess*." *Quill*, 504 U.S. at 317-18. In his concurrence in *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124, 1134 (Kennedy J., concurring), Justice Kennedy urged that "[t]he legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *Id.* at 1135. He noted that *Quill* was "now inflicting extreme harm and unfairness on the States," in part because of the massive explosion in e-commerce. *Id.* at 1134-1135. ("This argument has grown stronger, and the cause more urgent, with time. When the Court decided *Quill*, mail-order sales in the United States totaled $180 billion. But in 1992, the Internet was in its infancy. By 2008, e-commerce sales alone totaled $3.16 trillion per year in the United States.")(citation omitted).

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9. Indeed, Justice Kennedy specifically urged that cases permitting reconsideration of *Quill* should be developed as quickly as possible, because the harm to state treasuries has become severe. "Given these changes ... it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier." *Id.* at 1135.

10. The State has taken up Justice Kennedy's invitation, motivated by the imminent damage that *Quill* continues to cause to state tax revenues, by enacting Senate Bill 106, 91st Session, South Dakota Legislature, 2016, "An Act to provide for the collection of sales taxes from certain remote sellers." (Appendix A – hereafter referred to as "the Act" or cited to as "S.B. 106").

11. Legislative findings accompanying the passage of the Act reflect that Justice Kennedy's concerns are well placed, particularly with respect to South Dakota, and that the United States Supreme Court "should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax[.]" *See* S.B. 106 § 8(7).

PARTIES

12. Plaintiff is the sovereign State of South Dakota, which collects "[a]ll taxes levied and collected for state purposes . . . into the state treasury." S.D. Const. Art. XI, sec. 9.

13. The Department of Revenue administers the laws of the State respecting taxation generally, SDCL 10-1-1 *et seq.*, and the sales tax in particular. SDCL 10-45 *et seq.* The Secretary of the Department is charged

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with investigating and taking various enforcement actions respecting the sales tax. *See* SDCL 10-59-1, -5, -8, -10, -14, -15.

14. The State is specifically authorized by section 2 of the Act to "bring a declaratory judgment action under [SDCL] 21-24 in any circuit court" to establish that the obligations created by the Act are valid and applicable to any particular taxpayer that meets the statutory thresholds in the Act.

15. Defendant Newegg Inc. is one of the top online retailers in the United States, and is headquartered in City of Industry, California. It owns and operates Newegg.com, which sells a variety of consumer electronics. It ships these goods directly to purchasers throughout the United States, including into South Dakota.

16. Defendant Overstock.com Inc/ is one of the top online retailers in the United States, and is headquartered in Salt Lake City, Utah. Overstock.com sells a variety of products, ranging from home goods and furniture to clothing and diamond rings. It ships these goods directly to purchasers throughout the United States, including into South Dakota.

17. Defendant Systemax Inc. is a Fortune 1000 company headquartered in Port Washington, New York. It is a leading retailer of brand name and private label products, including industrial, material handling and supplies, personal computers, notebook computers, technology supplies, consumer electronics, and computer-related accessories. It operates a number of product sales websites that ship directly to purchasers throughout the United States, including into South Dakota.

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18. Defendant Wayfair Inc. is a leading online retailer of home goods and furniture headquartered in Boston, Massachusetts. It ships sales directly to purchasers throughout the United States, including into South Dakota.

PERSONAL JURISDICTION

19. Based on information and belief, Defendants lack a physical presence in South Dakota but are subject to the personal jurisdiction of the South Dakota courts under SDCL 15-7-2. SDCL 15-7-2 specifically extends the personal jurisdiction of the South Dakota courts to parties "[e]ntering into a contract for services to be rendered or for materials to be furnished in this state by such person," SDCL 15-7-2(5), and to parties committing "any act" when extending such jurisdiction "is not inconsistent with the Constitution of this state or with the Constitution of the United States." SDCL 15-7-2(14).

20. Both the State and Federal constitutions permit South Dakota state-court jurisdiction over retailers who solicit business from, and deliver tangible personal property and services to, residents of the State. *See Quill*, 504 U.S. at 306-08 (holding that "there is no question" that such contacts suffice for "due process purposes"); *Marschke v. Wratislaw*, 2007 S.D. 125, ¶13, 743 N.W. 2d 402, 406 (holding that personal jurisdiction of South Dakota courts extends to limits of federal constitution).

SUBJECT MATTER JURISDICTION

21. Section 2 of the Act creates a cause of action for declaratory judgment and empowers "any circuit court" to adjudicate that cause of action.

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Accordingly, the Sixth Judicial Circuit Court has subject matter jurisdiction over this action.

22. SDCL 21-24-1 empowers "[c]ourts of record within their respective jurisdictions ... to declare rights, status, and other legal relations whether or not further relief is or could be claimed[,]" provides that "[n]o action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for," and permits "[t]he declaration [to] be either affirmative or negative in form and effect[.]"

23. SDCL 21-24-3 permits "[a]ny person ... whose rights, status, or other legal relations are affected by a statute" to "have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status, or other legal relations thereunder." "[T]he State is a 'person' within the meaning of" the Declaratory Judgment Act. *Dan Nelson, Automotive, Inc. v. Viken*, 2005 S.D. 109, 706 N.W. 2d 239 (rejecting contrary dictum in *Pennington County v. State ex rel. Unified Judicial Sys.*, 2002 S.D. 31, 641 N.W. 2d 127).

24. As supported by the allegations below, this request for declaratory judgment also presents a justiciable and ripe controversy, between adverse parties, in which the State has a legally protectable interest. The declaration the State seeks will permit it to require sales tax to be collected and remitted from sellers without a physical presence in the State who are currently not complying with the Act; the State is clearly interested in obtaining the tax revenue it believes is due, and the Defendants have the contrary interest in

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resisting this tax obligation. Moreover, each Defendant has failed to register to collect and remit the state sales tax after receiving an individualized notice directing them to do so by April 25, 2016. That notice specifically instructed Defendants that failure to register would demonstrate that they did "not intend to comply with the Act." *See* Notices (Appendix B). Furthermore, under the structure of the Act, the State cannot currently enforce the Act's collection obligation against the Defendants unless the State prevails in this suit. Were the State to prevail, the Act will immediately apply to Defendants, requiring them to collect and remit the state sales tax on a going-forward basis.

25. "A matter is sufficiently ripe [for declaratory judgment] if the facts indicate imminent conflict." *Boever v. South Dakota Bd. of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995)(citation omitted)(setting forth requirements for declaratory judgment). The conflict between the State and the Defendants is not only imminent but present: This suit will determine whether or not Defendants must collect and remit state sales tax the day after it is decided.

VENUE

26. Venue is appropriate in this Court. Section 2 of the Act permits this suit to be brought in "any circuit court."

27. Furthermore, SDCL 15-5-6 permits venue "in any county which the plaintiff shall designate" in any case where, as here, "none of the defendants reside in the state."

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RELEVANT STATUTES

28. The Act provides that sellers without a physical presence in the State must comply with the State's sales tax laws "as if the seller had a physical presence in the state." S.B. 106 § 1.

29. The Act contains two threshold provisions, however, that limit the effect of this requirement on sellers who -- because of their limited size or geographic reach -- conduct relatively little business shipping goods and services to South Dakota residents. In particular, in order for the above obligation to apply, the out-of-state seller must have "gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceed[ing] one hundred thousand dollars," or must have "sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions." These thresholds are determined based on either the previous calendar year or the current calendar year to date. S.B. 106 § 1(1)-(2).

30. In addition, the Act creates a declaratory judgment action that the State may bring to determine the validity and applicability of this obligation with respect to individual taxpayers. S.B. 106 § 2. It also establishes special procedures designed to ensure the most expeditious possible adjudication of this action. S.B. 106 §§ 2, 4.

31. The Act contains three provisions designed to protect taxpayers from accruing any tax liability -- retroactive or otherwise -- during the

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pendency of this action. First, section 3 of the Act provides that the filing of this action operates as an injunction "prohibiting any state entity from enforcing the obligation in section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the sales tax on a voluntary basis."[1] *See* S.B. 106 § 3. The State filed this suit immediately before the May 1, 2016 effective date of the Act to trigger this injunction and prevent any uncertainty for taxpayers. *See* S.B. 106 § 9 (setting effective date). Second, section 5 of the Act provides that "[n]o obligation to remit the sales tax required by this Act may be applied retroactively." Finally, section 6 of the Act provides that "[i]f an injunction provided by this Act is lifted or dissolved, in general or with respect to a specific taxpayer, the state shall assess and apply the obligation established in section 1 of this Act from that date forward with respect to any taxpayer covered by the injunction."

32. Given the provisions above, the State has simultaneously filed with this Complaint an application for an injunction which records and makes certain the effect of section 3 of the Act. This application can and should be immediately granted without a hearing because the State asks only for an injunction restraining itself and benefiting the Defendants (as well as other taxpayers subject to the Act).

33. These provisions, together with the requested injunction, ensure that any seller not complying voluntarily with the Act will face tax liability only

[1] The Act also makes clear that this injunction will "not apply" to any taxpayer against whom the state prevails in an action like this one. *See* S.B. 106 § 3.

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prospectively from the date on which a court holding makes clear that the Act validly applies to the seller.

PROCEDURAL BACKGROUND

34. The Act was signed into law by Governor Dennis Daugaard on March 22, 2016. It provides that it will be effective on the first day of the first month that is at least fifteen calendar days from the date the Act is signed into law. Therefore, its effective date is May 1, 2016. *See* S.B. 106 § 9.

35. To prepare sellers lacking a physical presence in the State for the effect of the law, the Department of Revenue sent an individualized notice to 206 such sellers for whom available information made it almost certain that they met the statutory thresholds set forth above and in Section 1 of the Act. Defendants were each sent a copy of the notice (copies of which attached hereto as Appendix B) on March 25, 2016, by Andy Gerlach, Secretary of the Department of Revenue.

36. The State also posted relevant information about the Act on its website, at http://dor.sd.gov/Taxes/Business_Taxes/SB106.aspx.

37. The State identified the 206 sellers lacking a physical presence within the State who received the notice by using available data to calculate the likely amount of gross revenue that such sellers derive from sales into the State. After applying a mathematical factor designed to avoid close cases in which the seller might not meet the statutory thresholds, the State determined whether the remaining sellers had registered for a license to collect and remit sales tax. Sellers who were not registered, including all of the present

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Defendants, received the notice directing them to register by April 25, 2016, and thus received both actual and inquiry notice of the Act more than 30 days ago.

38. The notice carefully explained the consequences of failing to register:

> "If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds."

39. The notice also explained that any recipient who did not meet the statutory thresholds in section 1 of the Act should notify the State to avoid legal action.

40. Each Defendant failed to register to collect and remit the sales tax by April 25, 2016, and each has failed to register as of the date of this Complaint.

41. On information and belief, each Defendant meets either or both of the statutory thresholds, having at least $100,000 of gross revenue from sales into the State and/or at least 200 separate such transactions.

42. The State initiated this action against Defendants on the basis of their refusal to register for a license following individualized notice of the need to do so. Because of section 3 of the Act, the filing of this action immediately

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before the effective date enhances the protection of taxpayers (including Defendants) from any argument that they face an active and enforceable obligation to collect and remit sales taxes before the conclusion of this action.

RELEVANT LEGISLATIVE FINDINGS

43. In enacting the Act, the South Dakota Legislature determined that *Quill* causes a severe harm to the State's tax revenue, and a concomitant harm to state and local services:

a. "The inability to effectively collect the sales or use tax from remote sellers ... is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services," S.B. 106 § 8(1);

b. "The harm from the loss of revenue is especially serious in South Dakota because the state has no income tax, and sales and use tax revenues are essential in funding state and local services," *id.* § 8(2);

c. Refusal by out-of-state retailers to collect sales taxes "causes imminent harm to this state," *id.* § 8(9).

44. The Legislature's assessment is correct; the Department of Revenue estimates the revenue loss associated with *Bellas Hess* and *Quill* at approximately $48-$58 million annually for state and municipal taxes combined. These figures are based largely on a study conducted several years ago at the University of Tennessee, and relied upon in Justice Kennedy's

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concurrence in *DMA*. *See* D. Bruce, W. Fox, & L. Luna, State and Local Government Sales Tax Revenue Losses from Electronic Commerce 11 (2009).

45. Furthermore, the Legislature found that, even as the costs to the State from *Quill* have increased dramatically, the costs of compliance for taxpayers have fallen just as dramatically:

> In contrast with the expanding harms caused to the state from this exemption of sales tax collection duties for remote sellers, the costs of that collection have fallen. Given modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales taxes associated with sales into South Dakota.

S.B. 106 § 8(6).

46. Again, the legislature's assessment is clearly correct. Numerous retailers now collect and remit sales tax in every state, and are quite capable of administering all their state and local sales tax obligations when customers buy goods through their online sales channels. Software integration options are now readily available from multiple vendors for online "shopping carts." And because it is necessary to obtain immediate information from the purchaser regarding their residence in order to deliver the goods, it is possible for the software to immediately calculate and inform the consumer of the applicable sales tax before completing the transaction, and the tax can be easily collected at the time of the sale. Indeed, the industry that provides these integration options is robust and growing, which will make such software even easier and less expensive to obtain in the near future. Moreover, many sellers already have such software to address sales to states in which they do have a physical presence.

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47. This development is further supported by the Streamlined Sales and Use Tax Agreement, which has been enacted by more than twenty states (including South Dakota) in the wake of *Quill*. Any seller lacking a physical presence in the State who intends to comply with the obligations set forth in the Act can register to collect sales taxes through the voluntary Streamlined system. That system, in turn, provides sellers the option to use sales tax administration software from Certified Software Providers (CSPs), with the cost of such software borne by the states. Sellers may choose from seven different CSPs, and the CSP will file the tax returns and remit applicable taxes for sellers that use it. Sellers using a CSP are also immune from audit liability for the sales they process through that software. The Streamlined system also reduces sales tax administration cost and expense through:

a. uniform definitions of products and services across all Member states;

b. freely available tax rate and tax boundary databases;

c. single, state level tax administration;

d. uniform audit procedures (for sellers that choose not to use a CSP);

e. simplified tax rate structures;

f. uniform administration of sales tax expenses; and,

g. uniform rules for sourcing sales.

Accordingly, a taxpayer can comply with the obligations of the Act using the Streamlined system at little to no personal cost (apart from actually remitting the taxes collected from consumers), and with little to no concern

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regarding audits or errors in compliance. Moreover, many of the above benefits are available even to sellers who do not elect to participate in the Streamlined system as a whole, further easing the burden of compliance on all out-of-state retailers.

48. The Legislature also found that *Bellas Hess* and *Quill* distort the local retail market, causing unfairness to brick-and-mortar retailers generally, and to smaller, locally owned businesses in particular. Out-of-state retailers benefit from local infrastructure without paying their fair share of taxes. *See* S.B. 106 § 8(5). And they also "actively market sales as tax free or no sales tax transactions" even though "a use tax is owed" by the consumer. *Id.* § 8(3). As a result, local retailers are unable to compete fairly with online retailers, which is likely to cause even further harm to the State by harming the local businesses that employ local residents and make up the bulk of the State's tax base. *See id.* § 8(4) ("The structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future.").

49. Well-documented economic effects support the Legislature's judgment. Expert economists, including researchers associated with both sides of the political spectrum, agree that the special exemption from sales taxation created by *Quill* causes serious harm to state economies (and the national economy) by distorting the operation of the free market. *See, e.g.*, Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet*

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Commerce, 115 Q.J. Econ. 561 (2000); Arthur B. Laffler and Donna Arduin, *Pro-Growth Tax Reform and E-Fairness*, http://standwithmainstreet.com/ArtLafferStudy.pdf.

50. Finally, the Legislature made clear that it wanted to accommodate the difficulties that might be caused to out-of-state retailers by its effort to respond to Justice Kennedy's invitation to bring an action allowing the United States Supreme Court to reconsider *Quill*. It thus created a specific cause of action with unique protections for taxpayers, allowing the State to seek a declaratory judgment in circuit court, with a direct appeal to the South Dakota Supreme Court, both of which must be resolved as expeditiously as possible. *See* S.B. 106 §§ 2, 4; *see also id.* §§ 8(8)-(9) (finding that "[e]xpeditious review is necessary and appropriate," and that the Act is intended to "permit[] the most expeditious possible review of the constitutionality of this law"). That action obviates the need for an audit and any effort to obtain retroactive tax liability from any out-of-state seller who does not wish to comply with the Act on a voluntary basis. As the Legislature stated:

> Expeditious review is necessary and appropriate because, while it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the sales tax in light of existing federal constitutional doctrine, any such refusal causes imminent harm to this state.
>
> At the same time, the Legislature recognizes that the enactment of this law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question. Accordingly, the Legislature intends to clarify that the obligations created by this law would be appropriately stayed by the courts until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating

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its existing doctrine, or a final judgment applicable to a particular taxpayer.

S.B. 106 § 8 (9)-(10).

51. This declaratory judgment action thus represents "the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines, and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this Act." S.B. 106 § 8 (11). Like the Legislature, the State recognizes that a change in federal constitutional doctrine will be necessary for the State to prevail in this case. Nonetheless, the effect of the declaration that the State seeks in this action will be to immediately require the collection and remittance of taxes from these Defendants under the Act -- a collection which, absent such a declaration, the State is presently unable to enforce. There is accordingly an immediate controversy over whether existing federal constitutional doctrine should invalidate the Act or not, which this Court can and should adjudicate in the first instance by declaratory judgment.

PRAYER FOR RELIEF

WHEREFORE, the State hereby prays for relief as follows:

(1) That the Court declare that the requirements of section 1 of the Act are valid and applicable with respect to the defendants.

(2) That the Court immediately enter an order enjoining the enforcement of the Act during the pendency of this action -- reflecting on the record the automatic effect of Section 3 of the Act

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-- and dissolve such injunction upon the entry of a declaratory judgment in favor of the State. (A separate motion for an appropriate order of this form has been contemporaneously filed).

(3) That the Court enter an injunction requiring the defendants to register for a license to collect and remit the sales tax.

(4) That the Court grant such other relief as it deems just and proper in this matter.

Dated this 28th day of April, 2016.

/s/ Richard M. Williams
Richard M. Williams
Deputy Attorney General
Office of the Attorney General
1302 East Highway 14, Suite 1
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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: ss	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, v. WAYFAIR INC 4 Copley PL FL 7 Boston MA 02116-6504 SYSTEMAX INC 11 Harbor Park Dr Port Washington NY 11050 OVERSTOCK.COM INC 6350 S 3000 E Salt Lake City UT 84121-5952 NEWEGG INC 16839 E Gale Ave City of Industry CA 91745 Defendants.	)	32 Civ. 16-92 COMPLAINT

The State of South Dakota, by and through the Department of Revenue (hereinafter the State), Plaintiff in the above-entitled matter, for its Complaint states and alleges as follows:

SUMMARY

1. The State -- through this declaratory judgment action -- seeks a determination that it may require Defendants to collect and remit state sales tax on sales of tangible personal property and services for delivery into South Dakota. The State acknowledges that a declaration in its favor will require abrogation of the United States Supreme Court's decision in *Quill Corp. v. North*

Dakota, 504 U.S. 298 (1992), and ultimately seeks a decision from the United States Supreme Court to that effect in this case.

RELEVANT LEGAL BACKGROUND

2. In 1967, in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), the Supreme Court of the United States held that the Due Process Clause and dormant Commerce Clause of the United States Constitution both prohibit states from requiring out-of-state mail-order retailers that lack any physical presence within a state to collect that state's sales and/or use taxes respecting sales for delivery to in-state residents.

3. Thereafter, the U.S. Supreme Court's jurisprudence regarding the "minimum contacts" sufficient to allow states to regulate conduct by non-residents became far less restrictive. The U.S. Supreme Court's cases regarding the dormant Commerce Clause also changed their focus. Responding to these changes, in 1991, the North Dakota Supreme Court held that *Bellas Hess* was "an obsolescent precedent." *State v. Quill Corp.*, 470 N.W. 2d 203, 208 (N.D. 1991).

4. The Supreme Court of the United States granted certiorari and reversed. In *Quill*, 504 U.S. at 306-308, it agreed with the North Dakota Supreme Court that the Due Process Clause holding of *Bellas Hess* had been overtaken by subsequent precedent. But it further held that, despite the fact that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today," *id.* at 311, the "continuing value of a bright-line rule in this area and the doctrine and

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principles of *stare decisis*," led it to "disagree with the North Dakota Supreme Court's conclusion that the time has come to renounce the bright-line test of *Bellas Hess*." *Id.* at 317-18. Particularly because the Due Process Clause holding would for the first time permit Congress to "overrule" *Bellas Hess* itself, the Court would withhold its "hand, at least for now." *Id.* at 318.

5. The effect of *Bellas Hess* and *Quill* is to effectively immunize out-of-state retailers lacking a physical presence within a state from having to remit any state sales or use taxes. As further explained below, the effects of that immunity on the State treasury and its general retail markets have vastly multiplied because of the meteoric rise of Internet commerce.

6. Nonetheless, in the 24 years since *Quill* was decided, Congress has failed to make good on the Supreme Court's invitation to address this issue through legislation at the federal level. Bills are introduced and debated, but routinely fail to receive even an up-or-down vote because of committee leaders advancing esoteric interests or other well-understood "veto" points that make congressional inaction the strong default rule. Indeed, while many states (including South Dakota) reacted to *Quill* by creating a "Streamlined" system that would allow out-of-state retailers to easily comply with the rationalized sales and use tax laws of all those states at once, Congress has not taken the necessary action to allow the Streamlined system to take effect.

7. The absence of federal legislative progress on this issue reflects the effect of *Bellas Hess* and *Quill* on the federal Constitution's separation of powers. Absent *Quill*, Congress would of course retain the power "to regulate

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Commerce . . . among the several States," U.S. Const. Art. 1, sec. 8, cl. 3, including by exempting out-of-state retailers that lack physical presence within a state from any obligation to collect and remit a state's sales or use taxes. But the effort to obtain affirmative congressional action would fall on those retailers seeking a special exemption from the states' ordinary powers of taxation, and the states would no longer be forced to seek Congress's permission to exercise their own sovereign authority. If -- as is quite often the case -- Congress were to continue to do nothing in this area, the power to tax those conducting business in the state would remain "reserved to the States respectively," as the Constitution provides. U.S. Const. Amend. X.

8. In a recent case, Justice Kennedy signaled that the United States Supreme Court may be willing to once again consider whether "the time has come to renounce the bright-line test of *Bellas Hess*." *Quill*, 504 U.S. at 317-18. In his concurrence in *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124, 1134 (Kennedy J., concurring), Justice Kennedy urged that "[t]he legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *Id.* at 1135. He noted that *Quill* was "now inflicting extreme harm and unfairness on the States," in part because of the massive explosion in e-commerce. *Id.* at 1134-1135. ("This argument has grown stronger, and the cause more urgent, with time. When the Court decided *Quill*, mail-order sales in the United States totaled $180 billion. But in 1992, the Internet was in its infancy. By 2008, e-commerce sales alone totaled $3.16 trillion per year in the United States.")(citation omitted).

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9. Indeed, Justice Kennedy specifically urged that cases permitting reconsideration of *Quill* should be developed as quickly as possible, because the harm to state treasuries has become severe. "Given these changes ... it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier." *Id.* at 1135.

10. The State has taken up Justice Kennedy's invitation, motivated by the imminent damage that *Quill* continues to cause to state tax revenues, by enacting Senate Bill 106, 91st Session, South Dakota Legislature, 2016, "An Act to provide for the collection of sales taxes from certain remote sellers." (Appendix A – hereafter referred to as "the Act" or cited to as "S.B. 106").

11. Legislative findings accompanying the passage of the Act reflect that Justice Kennedy's concerns are well placed, particularly with respect to South Dakota, and that the United States Supreme Court "should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax[.]" *See* S.B. 106 § 8(7).

PARTIES

12. Plaintiff is the sovereign State of South Dakota, which collects "[a]ll taxes levied and collected for state purposes . . . into the state treasury." S.D. Const. Art. XI, sec. 9.

13. The Department of Revenue administers the laws of the State respecting taxation generally, SDCL 10-1-1 *et seq.*, and the sales tax in particular. SDCL 10-45 *et seq.* The Secretary of the Department is charged

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with investigating and taking various enforcement actions respecting the sales tax. *See* SDCL 10-59-1, -5, -8, -10, -14, -15.

14. The State is specifically authorized by section 2 of the Act to "bring a declaratory judgment action under [SDCL] 21-24 in any circuit court" to establish that the obligations created by the Act are valid and applicable to any particular taxpayer that meets the statutory thresholds in the Act.

15. Defendant Newegg Inc. is one of the top online retailers in the United States, and is headquartered in City of Industry, California. It owns and operates Newegg.com, which sells a variety of consumer electronics. It ships these goods directly to purchasers throughout the United States, including into South Dakota.

16. Defendant Overstock.com Inc/ is one of the top online retailers in the United States, and is headquartered in Salt Lake City, Utah. Overstock.com sells a variety of products, ranging from home goods and furniture to clothing and diamond rings. It ships these goods directly to purchasers throughout the United States, including into South Dakota.

17. Defendant Systemax Inc. is a Fortune 1000 company headquartered in Port Washington, New York. It is a leading retailer of brand name and private label products, including industrial, material handling and supplies, personal computers, notebook computers, technology supplies, consumer electronics, and computer-related accessories. It operates a number of product sales websites that ship directly to purchasers throughout the United States, including into South Dakota.

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18. Defendant Wayfair Inc. is a leading online retailer of home goods and furniture headquartered in Boston, Massachusetts. It ships sales directly to purchasers throughout the United States, including into South Dakota.

PERSONAL JURISDICTION

19. Based on information and belief, Defendants lack a physical presence in South Dakota but are subject to the personal jurisdiction of the South Dakota courts under SDCL 15-7-2. SDCL 15-7-2 specifically extends the personal jurisdiction of the South Dakota courts to parties "[e]ntering into a contract for services to be rendered or for materials to be furnished in this state by such person," SDCL 15-7-2(5), and to parties committing "any act" when extending such jurisdiction "is not inconsistent with the Constitution of this state or with the Constitution of the United States." SDCL 15-7-2(14).

20. Both the State and Federal constitutions permit South Dakota state-court jurisdiction over retailers who solicit business from, and deliver tangible personal property and services to, residents of the State. *See Quill*, 504 U.S. at 306-08 (holding that "there is no question" that such contacts suffice for "due process purposes"); *Marschke v. Wratislaw*, 2007 S.D. 125, ¶13, 743 N.W. 2d 402, 406 (holding that personal jurisdiction of South Dakota courts extends to limits of federal constitution).

SUBJECT MATTER JURISDICTION

21. Section 2 of the Act creates a cause of action for declaratory judgment and empowers "any circuit court" to adjudicate that cause of action.

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Accordingly, the Sixth Judicial Circuit Court has subject matter jurisdiction over this action.

22. SDCL 21-24-1 empowers "[c]ourts of record within their respective jurisdictions ... to declare rights, status, and other legal relations whether or not further relief is or could be claimed[,]" provides that "[n]o action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for," and permits "[t]he declaration [to] be either affirmative or negative in form and effect[.]"

23. SDCL 21-24-3 permits "[a]ny person ... whose rights, status, or other legal relations are affected by a statute" to "have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status, or other legal relations thereunder." "[T]he State is a 'person' within the meaning of" the Declaratory Judgment Act. *Dan Nelson, Automotive, Inc. v. Viken*, 2005 S.D. 109, 706 N.W. 2d 239 (rejecting contrary dictum in *Pennington County v. State ex rel. Unified Judicial Sys.*, 2002 S.D. 31, 641 N.W. 2d 127).

24. As supported by the allegations below, this request for declaratory judgment also presents a justiciable and ripe controversy, between adverse parties, in which the State has a legally protectable interest. The declaration the State seeks will permit it to require sales tax to be collected and remitted from sellers without a physical presence in the State who are currently not complying with the Act; the State is clearly interested in obtaining the tax revenue it believes is due, and the Defendants have the contrary interest in

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resisting this tax obligation. Moreover, each Defendant has failed to register to collect and remit the state sales tax after receiving an individualized notice directing them to do so by April 25, 2016. That notice specifically instructed Defendants that failure to register would demonstrate that they did "not intend to comply with the Act." *See* Notices (Appendix B). Furthermore, under the structure of the Act, the State cannot currently enforce the Act's collection obligation against the Defendants unless the State prevails in this suit. Were the State to prevail, the Act will immediately apply to Defendants, requiring them to collect and remit the state sales tax on a going-forward basis.

25. "A matter is sufficiently ripe [for declaratory judgment] if the facts indicate imminent conflict." *Boever v. South Dakota Bd. of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995)(citation omitted)(setting forth requirements for declaratory judgment). The conflict between the State and the Defendants is not only imminent but present: This suit will determine whether or not Defendants must collect and remit state sales tax the day after it is decided.

VENUE

26. Venue is appropriate in this Court. Section 2 of the Act permits this suit to be brought in "any circuit court."

27. Furthermore, SDCL 15-5-6 permits venue "in any county which the plaintiff shall designate" in any case where, as here, "none of the defendants reside in the state."

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RELEVANT STATUTES

28. The Act provides that sellers without a physical presence in the State must comply with the State's sales tax laws "as if the seller had a physical presence in the state." S.B. 106 § 1.

29. The Act contains two threshold provisions, however, that limit the effect of this requirement on sellers who -- because of their limited size or geographic reach -- conduct relatively little business shipping goods and services to South Dakota residents. In particular, in order for the above obligation to apply, the out-of-state seller must have "gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceed[ing] one hundred thousand dollars," or must have "sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions." These thresholds are determined based on either the previous calendar year or the current calendar year to date. S.B. 106 § 1(1)-(2).

30. In addition, the Act creates a declaratory judgment action that the State may bring to determine the validity and applicability of this obligation with respect to individual taxpayers. S.B. 106 § 2. It also establishes special procedures designed to ensure the most expeditious possible adjudication of this action. S.B. 106 §§ 2, 4.

31. The Act contains three provisions designed to protect taxpayers from accruing any tax liability -- retroactive or otherwise -- during the

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pendency of this action. First, section 3 of the Act provides that the filing of this action operates as an injunction "prohibiting any state entity from enforcing the obligation in section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the sales tax on a voluntary basis."* *See* S.B. 106 § 3. The State filed this suit immediately before the May 1, 2016 effective date of the Act to trigger this injunction and prevent any uncertainty for taxpayers. *See* S.B. 106 § 9 (setting effective date). Second, section 5 of the Act provides that "[n]o obligation to remit the sales tax required by this Act may be applied retroactively." Finally, section 6 of the Act provides that "[i]f an injunction provided by this Act is lifted or dissolved, in general or with respect to a specific taxpayer, the state shall assess and apply the obligation established in section 1 of this Act from that date forward with respect to any taxpayer covered by the injunction."

32. Given the provisions above, the State has simultaneously filed with this Complaint an application for an injunction which records and makes certain the effect of section 3 of the Act. This application can and should be immediately granted without a hearing because the State asks only for an injunction restraining itself and benefiting the Defendants (as well as other taxpayers subject to the Act).

33. These provisions, together with the requested injunction, ensure that any seller not complying voluntarily with the Act will face tax liability only

* The Act also makes clear that this injunction will "not apply" to any taxpayer against whom the state prevails in an action like this one. *See* S.B. 106 § 3.

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prospectively from the date on which a court holding makes clear that the Act validly applies to the seller.

PROCEDURAL BACKGROUND

34. The Act was signed into law by Governor Dennis Daugaard on March 22, 2016. It provides that it will be effective on the first day of the first month that is at least fifteen calendar days from the date the Act is signed into law. Therefore, its effective date is May 1, 2016. *See* S.B. 106 § 9.

35. To prepare sellers lacking a physical presence in the State for the effect of the law, the Department of Revenue sent an individualized notice to 206 such sellers for whom available information made it almost certain that they met the statutory thresholds set forth above and in Section 1 of the Act. Defendants were each sent a copy of the notice (copies of which attached hereto as Appendix B) on March 25, 2016, by Andy Gerlach, Secretary of the Department of Revenue.

36. The State also posted relevant information about the Act on its website, at http://dor.sd.gov/Taxes/Business_Taxes/SB106.aspx.

37. The State identified the 206 sellers lacking a physical presence within the State who received the notice by using available data to calculate the likely amount of gross revenue that such sellers derive from sales into the State. After applying a mathematical factor designed to avoid close cases in which the seller might not meet the statutory thresholds, the State determined whether the remaining sellers had registered for a license to collect and remit sales tax. Sellers who were not registered, including all of the present

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Defendants, received the notice directing them to register by April 25, 2016, and thus received both actual and inquiry notice of the Act more than 30 days ago.

38. The notice carefully explained the consequences of failing to register:

> "If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds."

39. The notice also explained that any recipient who did not meet the statutory thresholds in section 1 of the Act should notify the State to avoid legal action.

40. Each Defendant failed to register to collect and remit the sales tax by April 25, 2016, and each has failed to register as of the date of this Complaint.

41. On information and belief, each Defendant meets either or both of the statutory thresholds, having at least $100,000 of gross revenue from sales into the State and/or at least 200 separate such transactions.

42. The State initiated this action against Defendants on the basis of their refusal to register for a license following individualized notice of the need to do so. Because of section 3 of the Act, the filing of this action immediately

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before the effective date enhances the protection of taxpayers (including Defendants) from any argument that they face an active and enforceable obligation to collect and remit sales taxes before the conclusion of this action.

RELEVANT LEGISLATIVE FINDINGS

43. In enacting the Act, the South Dakota Legislature determined that *Quill* causes a severe harm to the State's tax revenue, and a concomitant harm to state and local services:

a. "The inability to effectively collect the sales or use tax from remote sellers ... is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services," S.B. 106 § 8(1);

b. "The harm from the loss of revenue is especially serious in South Dakota because the state has no income tax, and sales and use tax revenues are essential in funding state and local services," *id.* § 8(2);

c. Refusal by out-of-state retailers to collect sales taxes "causes imminent harm to this state," *id.* § 8(9).

44. The Legislature's assessment is correct; the Department of Revenue estimates the revenue loss associated with *Bellas Hess* and *Quill* at approximately $48-$58 million annually for state and municipal taxes combined. These figures are based largely on a study conducted several years ago at the University of Tennessee, and relied upon in Justice Kennedy's

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concurrence in *DMA*. *See* D. Bruce, W. Fox, & L. Luna, State and Local Government Sales Tax Revenue Losses from Electronic Commerce 11 (2009).

45. Furthermore, the Legislature found that, even as the costs to the State from *Quill* have increased dramatically, the costs of compliance for taxpayers have fallen just as dramatically:

> In contrast with the expanding harms caused to the state from this exemption of sales tax collection duties for remote sellers, the costs of that collection have fallen. Given modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales taxes associated with sales into South Dakota.

S.B. 106 § 8(6).

46. Again, the legislature's assessment is clearly correct. Numerous retailers now collect and remit sales tax in every state, and are quite capable of administering all their state and local sales tax obligations when customers buy goods through their online sales channels. Software integration options are now readily available from multiple vendors for online "shopping carts." And because it is necessary to obtain immediate information from the purchaser regarding their residence in order to deliver the goods, it is possible for the software to immediately calculate and inform the consumer of the applicable sales tax before completing the transaction, and the tax can be easily collected at the time of the sale. Indeed, the industry that provides these integration options is robust and growing, which will make such software even easier and less expensive to obtain in the near future. Moreover, many sellers already have such software to address sales to states in which they do have a physical presence.

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47. This development is further supported by the Streamlined Sales and Use Tax Agreement, which has been enacted by more than twenty states (including South Dakota) in the wake of *Quill*. Any seller lacking a physical presence in the State who intends to comply with the obligations set forth in the Act can register to collect sales taxes through the voluntary Streamlined system. That system, in turn, provides sellers the option to use sales tax administration software from Certified Software Providers (CSPs), with the cost of such software borne by the states. Sellers may choose from seven different CSPs, and the CSP will file the tax returns and remit applicable taxes for sellers that use it. Sellers using a CSP are also immune from audit liability for the sales they process through that software. The Streamlined system also reduces sales tax administration cost and expense through:

a. uniform definitions of products and services across all Member states;

b. freely available tax rate and tax boundary databases;

c. single, state level tax administration;

d. uniform audit procedures (for sellers that choose not to use a CSP);

e. simplified tax rate structures;

f. uniform administration of sales tax expenses; and,

g. uniform rules for sourcing sales.

Accordingly, a taxpayer can comply with the obligations of the Act using the Streamlined system at little to no personal cost (apart from actually remitting the taxes collected from consumers), and with little to no concern

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regarding audits or errors in compliance. Moreover, many of the above benefits are available even to sellers who do not elect to participate in the Streamlined system as a whole, further easing the burden of compliance on all out-of-state retailers.

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Commerce, 115 Q.J. Econ. 561 (2000); Arthur B. Laffler and Donna Arduin, *Pro-Growth Tax Reform and E-Fairness*, http://standwithmainstreet.com/ArtLafferStudy.pdf.

50. Finally, the Legislature made clear that it wanted to accommodate the difficulties that might be caused to out-of-state retailers by its effort to respond to Justice Kennedy's invitation to bring an action allowing the United States Supreme Court to reconsider *Quill*. It thus created a specific cause of action with unique protections for taxpayers, allowing the State to seek a declaratory judgment in circuit court, with a direct appeal to the South Dakota Supreme Court, both of which must be resolved as expeditiously as possible. *See* S.B. 106 §§ 2, 4; *see also id.* §§ 8(8)-(9) (finding that "[e]xpeditious review is necessary and appropriate," and that the Act is intended to "permit[] the most expeditious possible review of the constitutionality of this law"). That action obviates the need for an audit and any effort to obtain retroactive tax liability from any out-of-state seller who does not wish to comply with the Act on a voluntary basis. As the Legislature stated:

> Expeditious review is necessary and appropriate because, while it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the sales tax in light of existing federal constitutional doctrine, any such refusal causes imminent harm to this state.
>
> At the same time, the Legislature recognizes that the enactment of this law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question. Accordingly, the Legislature intends to clarify that the obligations created by this law would be appropriately stayed by the courts until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating

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its existing doctrine, or a final judgment applicable to a particular taxpayer.

S.B. 106 § 8 (9)-(10).

51. This declaratory judgment action thus represents "the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines, and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this Act." S.B. 106 § 8 (11). Like the Legislature, the State recognizes that a change in federal constitutional doctrine will be necessary for the State to prevail in this case. Nonetheless, the effect of the declaration that the State seeks in this action will be to immediately require the collection and remittance of taxes from these Defendants under the Act -- a collection which, absent such a declaration, the State is presently unable to enforce. There is accordingly an immediate controversy over whether existing federal constitutional doctrine should invalidate the Act or not, which this Court can and should adjudicate in the first instance by declaratory judgment.

PRAYER FOR RELIEF

WHEREFORE, the State hereby prays for relief as follows:

(1) That the Court declare that the requirements of section 1 of the Act are valid and applicable with respect to the defendants.

(2) That the Court immediately enter an order enjoining the enforcement of the Act during the pendency of this action -- reflecting on the record the automatic effect of Section 3 of the Act

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-- and dissolve such injunction upon the entry of a declaratory judgment in favor of the State. (A separate motion for an appropriate order of this form has been contemporaneously filed).

(3) That the Court enter an injunction requiring the defendants to register for a license to collect and remit the sales tax.

(4) That the Court grant such other relief as it deems just and proper in this matter.

Dated this 28th day of April, 2016.

/s/ Richard M. Williams

Richard M. Williams
Deputy Attorney General
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215

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State of South Dakota

OFFICE OF THE SECRETARY OF STATE

Department of State

United States of America, ☐
☐ **Secretary's Office**
State of South Dakota ☐

This is to certify that the attached instrument of writing is a true, correct and examined copy of Senate Bill 0106 in our office as filed March 22, 2016;

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the state of South Dakota at the city of Pierre, the capital, this day April 18, 2016.

Shantel Krebs

Shantel Krebs
Secretary of State

Appendix A

JUMO IN USA

State of South Dakota

OFFICE OF THE SECRETARY OF STATE

Department of State

United States of America,
State of South Dakota } SECRETARY'S OFFICE

This is to certify that the attached instrument of writing is a true, correct and examined copy of SB 0106 duly passed in the Legislature of the State of South Dakota, as an Emergency Act, and has been carefully compared with the original now on file in this office and found correct.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of South Dakota at the City of Pierre, the Capital, on March 22, 2016.

Shantel Krebs

Shantel Krebs, Secretary of State

AN ACT

ENTITLED, An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state, provided the seller meets either of the following criteria in the previous calendar year or the current calendar year:

(1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or

(2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions.

Section 2. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, and whether or not the state initiates an audit or other tax collection procedure, the state may bring a declaratory judgment action under chapter 21-24 in any circuit court against any person the state believes meets the criteria of section 1 of this Act to establish that the obligation to remit sales tax is applicable and valid under state and federal law. The circuit court shall act on this declaratory judgment action as expeditiously as possible and this action shall proceed with priority over any other action presenting the same question in any other venue.

In this action, the court shall presume that the matter may be fully resolved through a motion to

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dismiss or a motion for summary judgment. However, if these motions do not resolve the action, any discovery allowed by the court may not exceed the provisions of subdivisions 15-6-73(2) and (4).

The provisions of § 10-59-34, along with any other provisions authorizing attorney's fees, do not apply to any action brought pursuant to this Act or any appeal from any action brought pursuant to this Act.

Section 3. That the code be amended by adding a NEW SECTION to read:

The filing of the declaratory judgment action established in this Act by the state operates as an injunction during the pendency of the action, applicable to each state entity, prohibiting any state entity from enforcing the obligation in section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the sales tax on a voluntary basis. The injunction does not apply if there is a previous judgment from a court establishing the validity of the obligation in section 1 of this Act with respect to the particular taxpayer.

Section 4. That the code be amended by adding a NEW SECTION to read:

Any appeal from the decision with respect to the cause of action established by this Act may only be made to the state Supreme Court. The appeal shall be heard as expeditiously as possible.

Section 5. That the code be amended by adding a NEW SECTION to read:

No obligation to remit the sales tax required by this Act may be applied retroactively.

Section 6. That the code be amended by adding a NEW SECTION to read:

If an injunction provided by this Act is lifted or dissolved, in general or with respect to a specific taxpayer, the state shall assess and apply the obligation established in section 1 of this Act from that date forward with respect to any taxpayer covered by the injunction.

Section 7. That the code be amended by adding a NEW SECTION to read:

A taxpayer complying with this Act, voluntarily or otherwise, may only seek a recovery of taxes,

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penalties, or interest by following the recovery procedures established pursuant to chapter 10-59. However, no claim may be granted on the basis that the taxpayer lacked a physical presence in the state and complied with this Act voluntarily while covered by the injunction provided in section 3 of this Act.

Nothing in this Act limits the ability of any taxpayer to obtain a refund for any other reason, including a mistake of fact or mathematical miscalculation of the applicable tax.

No seller who remits sales tax voluntarily or otherwise under this Act is liable to a purchaser who claims that the sales tax has been over-collected because a provision of this Act is later deemed unlawful.

Nothing in this Act affects the obligation of any purchaser from this state to remit use tax as to any applicable transaction in which the seller does not collect and remit or remit an offsetting sales tax.

Section 8. That the code be amended by adding a NEW SECTION to read:

The Legislature finds that:

(1) The inability to effectively collect the sales or use tax from remote sellers who deliver tangible personal property, products transferred electronically, or services directly into South Dakota is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services;

(2) The harm from the loss of revenue is especially serious in South Dakota because the state has no income tax, and sales and use tax revenues are essential in funding state and local services;

(3) Despite the fact that a use tax is owed on tangible personal property, any product transferred electronically, or services delivered for use in this state, many remote sellers

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actively market sales as tax free or no sales tax transactions;

(4) The structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future;

(5) Remote sellers who make a substantial number of deliveries into or have large gross revenues from South Dakota benefit extensively from this state's market, including the economy generally, as well as state infrastructure;

(6) In contrast with the expanding harms caused to the state from this exemption of sales tax collection duties for remote sellers, the costs of that collection have fallen. Given modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales taxes associated with sales into South Dakota;

(7) As Justice Kennedy recently recognized in his concurrence in *Direct Marketing Association v. Brohl*, the Supreme Court of the United States should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax, and as the foregoing findings make clear, this argument has grown stronger, and the cause more urgent, with time;

(8) Given the urgent need for the Supreme Court of the United States to reconsider this doctrine, it is necessary for this state to pass this law clarifying its immediate intent to require collection of sales taxes by remote sellers, and permitting the most expeditious possible review of the constitutionality of this law;

(9) Expeditious review is necessary and appropriate because, while it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the sales tax in light of existing federal constitutional doctrine, any such refusal causes imminent harm to this state;

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(10) At the same time, the Legislature recognizes that the enactment of this law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question. Accordingly, the Legislature intends to clarify that the obligations created by this law would be appropriately stayed by the courts until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating its existing doctrine, or a final judgment applicable to a particular taxpayer; and

(11) It is the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines, and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this Act.

Section 9. Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist. This Act shall be in full force and effect on the first day of the first month that is at least fifteen calendar days from the date this Act is signed by the Governor.

Filed: 5/25/2016 2:47:36 PM CST Hughes County, South Dakota 32CIV16-000092

An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency.

I certify that the attached Act originated in the

SENATE as Bill No. 106

Kay Johnson
Secretary of the Senate

President of the Senate

Attest:

Kay Johnson
Secretary of the Senate

Dean Wick
Speaker of the House

Attest:

Arlene Kriesler
Chief Clerk

Senate Bill No. 106
File No. ____
Chapter No. _____

Received at this Executive Office this 8th day of March, 2016 at 9:20 A.M.

By Judge Swartz
for the Governor

The attached Act is hereby approved this 22nd day of March, A.D., 2016

Dennis Daugaard
Governor

STATE OF SOUTH DAKOTA,
ss.
Office of the Secretary of State

Filed March 22nd, 2016 at Noon o'clock M.

Shantel Krebs
Secretary of State

By _____
Asst. Secretary of State

South Dakota Department of Revenue

445 East Capitol Avenue
Pierre, South Dakota 57501-3185
Phone: 605-773-3311

March 25, 2016

NOTICE

Harry Amsden
Newegg Inc
17560 Rowland St
City of Industry CA 91748

Re: Important Changes to South Dakota Tax Laws for Remote Sellers

Dear Harry Amsden:

We are writing to bring your attention to recent changes in South Dakota law that may require you to begin remitting sales tax on transactions in which tangible personal property, products transferred electronically, or services are delivered into South Dakota. Our estimates indicate that your business meets the annual statutory thresholds that will apply to remote sellers. This notice explains the applicable legal changes and steps that you should take to begin complying with your South Dakota sales tax obligation, as well as the possible consequences that may follow from non-compliance.

Background

On March 22, 2016, Governor Dennis Daugaard signed into law Senate Bill 106, entitled "An Act to provide for the collection of sales taxes from certain remote sellers" ("the Act"), enclosed. The Act becomes effective on May 1, 2016, and may apply to your business from May 1, 2016, forward.

The Act provides that any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota must comply with all applicable South Dakota laws and procedures regarding the sales tax "as if the seller had a physical presence within the state." This requirement applies only to retailers who meet certain statutory thresholds. In particular, this obligation applies only if, **in the previous calendar year, or so far in the current calendar year**:

1. your gross revenue from sales into South Dakota **exceeded $100,000**; or
2. you made sales for delivery into South Dakota in **two hundred** or more separate transactions.

Applicability to You

Our estimates indicate that your business likely exceeds either or both of these thresholds. If so, you will be obligated to begin remitting sales tax to South Dakota. If you do not meet either of these thresholds notify us immediately to avoid any confusion or possible legal action against you.

Our records indicate that you currently do not have a South Dakota sales tax license. In order to collect sales tax from consumers and/or remit it to the State, you must register for a sales tax license. The State has endeavored to substantially simplify sales tax compliance for retailers by adopting the Streamlined Sales and Use Tax system. You can register for a South Dakota tax license at http://sd.gov/taxapp or through the Streamlined system at http://www.streamlinedsalestax.org.

If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds.

Written notification that you are not subject to this Act must be received by Kathy Smith no later than April 25, 2016. You may submit your written statement by email to Kathy.smith@state.sd.us or by regular mail to:

State of South Dakota
Attn: Kathy Smith
445 E Capitol Ave
Pierre SD 57501

Pursuant to the Act, the action described above will not result in any fees, penalties, or retroactive tax liability against you. Instead, if an action is initiated and a declaratory judgment is entered against you, you will be required to begin remitting the sales tax immediately from that point forward.

Additional information is available on our website at http//dor.sd.gov/.

If you have questions or need further assistance, you can contact Kathy Smith at 605-773-3311.

Sincerely,

Andy Gerlach, Secretary
South Dakota Department of Revenue

Enclosure

South Dakota Department of Revenue

445 East Capitol Avenue
Pierre, South Dakota 57501-3185
Phone: 605-773-3311

March 25, 2016

NOTICE

Robert Hughes
Overstock.com Inc
6360 South 3000 East #100
Salt Lake City UT 84121

Re: Important Changes to South Dakota Tax Laws for Remote Sellers

Dear Robert Hughes:

We are writing to bring your attention to recent changes in South Dakota law that may require you to begin remitting sales tax on transactions in which tangible personal property, products transferred electronically, or services are delivered into South Dakota. Our estimates indicate that your business meets the annual statutory thresholds that will apply to remote sellers. This notice explains the applicable legal changes and steps that you should take to begin complying with your South Dakota sales tax obligation, as well as the possible consequences that may follow from non-compliance.

Background

On March 22, 2016, Governor Dennis Daugaard signed into law Senate Bill 106, entitled "An Act to provide for the collection of sales taxes from certain remote sellers" ("the Act"), enclosed. The Act becomes effective on May 1, 2016, and may apply to your business from May 1, 2016, forward.

The Act provides that any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota must comply with all applicable South Dakota laws and procedures regarding the sales tax "as if the seller had a physical presence within the state." This requirement applies only to retailers who meet certain statutory thresholds. In particular, this obligation applies only if, **in the previous calendar year**, or **so far in the current calendar year**:

1. your gross revenue from sales into South Dakota **exceeded $100,000**; or
2. you made sales for delivery into South Dakota in **two hundred** or more separate transactions.

Applicability to You

Our estimates indicate that your business likely exceeds either or both of these thresholds. If so, you will be obligated to begin remitting sales tax to South Dakota. If you do not meet either of these thresholds notify us immediately to avoid any confusion or possible legal action against you.

Our records indicate that you currently do not have a South Dakota sales tax license. In order to collect sales tax from consumers and/or remit it to the State, you must register for a sales tax license. The State has endeavored to substantially simplify sales tax compliance for retailers by adopting the Streamlined Sales and Use Tax system. You can register for a South Dakota tax license at http://sd.gov/taxapp or through the Streamlined system at http://www.streamlinedsalestax.org.

Filed: 5/25/2016 2:47:36 PM CST Hughes County, South Dakota 32CIV16-000092

If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds.

Written notification that you are not subject to this Act must be received by Kathy Smith no later than April 25, 2016. You may submit your written statement by email to Kathy.smith@state.sd.us or by regular mail to:

State of South Dakota
Attn: Kathy Smith
445 E Capitol Ave
Pierre SD 57501

Pursuant to the Act, the action described above will not result in any fees, penalties, or retroactive tax liability against you. Instead, if an action is initiated and a declaratory judgment is entered against you, you will be required to begin remitting the sales tax immediately from that point forward.

Additional information is available on our website at http//dor.sd.gov/.

If you have questions or need further assistance, you can contact Kathy Smith at 605-773-3311.

Sincerely,

Andy Gerlach, Secretary
South Dakota Department of Revenue

Enclosure

South Dakota Department of Revenue

445 East Capitol Avenue
Pierre, South Dakota 57501-3185
Phone: 605-773-3311

March 26, 2016

NOTICE

Lawrence Reinhold
Systemax Inc
11 Harbor Park Dr
Port Washington NY 11050

Re: Important Changes to South Dakota Tax Laws for Remote Sellers

Dear Lawrence Reinhold:

We are writing to bring your attention to recent changes in South Dakota law that may require you to begin remitting sales tax on transactions in which tangible personal property, products transferred electronically, or services are delivered into South Dakota. Our estimates indicate that your business meets the annual statutory thresholds that will apply to remote sellers. This notice explains the applicable legal changes and steps that you should take to begin complying with your South Dakota sales tax obligation, as well as the possible consequences that may follow from non-compliance.

Background

On March 22, 2016, Governor Dennis Daugaard signed into law Senate Bill 106, entitled "An Act to provide for the collection of sales taxes from certain remote sellers" ("the Act"), enclosed. The Act becomes effective on May 1, 2016, and may apply to your business from May 1, 2016, forward.

The Act provides that any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota must comply with all applicable South Dakota laws and procedures regarding the sales tax "as if the seller had a physical presence within the state." This requirement applies only to retailers who meet certain statutory thresholds. In particular, this obligation applies only if, **in the previous calendar year, or so far in the current calendar year:**

1. your gross revenue from sales into South Dakota **exceeded $100,000**; or
2. you made sales for delivery into South Dakota **in two hundred** or more separate transactions.

Applicability to You

Our estimates indicate that your business likely exceeds either or both of these thresholds. If so, you will be obligated to begin remitting sales tax to South Dakota. If you do not meet either of these thresholds notify us immediately to avoid any confusion or possible legal action against you.

Our records indicate that you currently do not have a South Dakota sales tax license. In order to collect sales tax from consumers and/or remit it to the State, you must register for a sales tax license. The State has endeavored to substantially simplify sales tax compliance for retailers by adopting the Streamlined Sales and Use Tax system. You can register for a South Dakota tax license at http://sd.gov/taxapp or through the Streamlined system at http://www.streamlinedsalestax.org.

Filed: 5/25/2016 2:47:36 PM CST Hughes County, South Dakota 32CIV16-000092

If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds.

Written notification that you are not subject to this Act must be received by Kathy Smith no later than April 25, 2016. You may submit your written statement by email to Kathy.smith@state.sd.us or by regular mail to:

State of South Dakota
Attn: Kathy Smith
445 E Capitol Ave
Pierre SD 57501

Pursuant to the Act, the action described above will not result in any fees, penalties, or retroactive tax liability against you. Instead, if an action is initiated and a declaratory judgment is entered against you, you will be required to begin remitting the sales tax immediately from that point forward.

Additional information is available on our website at http//dor.sd.gov/.

If you have questions or need further assistance, you can contact Kathy Smith at 605-773-3311.

Sincerely,

Andy Gerlach, Secretary
South Dakota Department of Revenue

Enclosure

South Dakota Department of Revenue

445 East Capitol Avenue
Pierre, South Dakota 57501-3185
Phone: 605-773-3311

March 25, 2016

NOTICE

Michael Fleisher
Wayfair LLC
177 Huntington Ave #6000
Boston MA 02115

Re: Important Changes to South Dakota Tax Laws for Remote Sellers

Dear Michael Fleisher:

We are writing to bring your attention to recent changes in South Dakota law that may require you to begin remitting sales tax on transactions in which tangible personal property, products transferred electronically, or services are delivered into South Dakota. Our estimates indicate that your business meets the annual statutory thresholds that will apply to remote sellers. This notice explains the applicable legal changes and steps that you should take to begin complying with your South Dakota sales tax obligation, as well as the possible consequences that may follow from non-compliance.

Background

On March 22, 2016, Governor Dennis Daugaard signed into law Senate Bill 106, entitled "An Act to provide for the collection of sales taxes from certain remote sellers" ("the Act"), enclosed. The Act becomes effective on May 1, 2016, and may apply to your business from May 1, 2016, forward.

The Act provides that any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota must comply with all applicable South Dakota laws and procedures regarding the sales tax "as if the seller had a physical presence within the state." This requirement applies only to retailers who meet certain statutory thresholds. In particular, this obligation applies only if, in the previous calendar year, or so far in the current calendar year:

1. your gross revenue from sales into South Dakota exceeded $100,000; or
2. you made sales for delivery into South Dakota in two hundred or more separate transactions.

Applicability to You

Our estimates indicate that your business likely exceeds either or both of these thresholds. If so, you will be obligated to begin remitting sales tax to South Dakota. If you do not meet either of these thresholds notify us immediately to avoid any confusion or possible legal action against you.

Our records indicate that you currently do not have a South Dakota sales tax license. In order to collect sales tax from consumers and/or remit it to the State, you must register for a sales tax license. The State has endeavored to substantially simplify sales tax compliance for retailers by adopting the Streamlined Sales and Use Tax system. You can register for a South Dakota tax license at http://sd.gov/taxapp or through the Streamlined system at http://www.streamlinedsalestax.org.

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If you intend to comply with your obligations under the Act, you should register by April 25, 2016, thereby committing to remit sales tax. If by that date you have neither (1) registered nor (2) notified us in writing that you are not subject to the Act because you do not meet the thresholds above, the State will assume you do not intend to comply with the Act. This may result in the State initiating a legal action against you pursuant to Section 2 of the Act. That section allows the State to address your intent not to comply before assessing any taxes against you by asking a court to declare that the Act is applicable and valid as applied to you. Because the State may file this declaratory judgement action without undertaking an audit or any other administrative process, it is important that you notify us immediately if you intend to comply with the Act or you do not meet the statutory thresholds.

Written notification that you are not subject to this Act must be received by Kathy Smith no later than April 25, 2016. You may submit your written statement by email to Kathy.smith@state.sd.us or by regular mail to:

State of South Dakota
Attn: Kathy Smith
445 E Capitol Ave
Pierre SD 57501

Pursuant to the Act, the action described above will not result in any fees, penalties, or retroactive tax liability against you. Instead, if an action is initiated and a declaratory judgment is entered against you, you will be required to begin remitting the sales tax immediately from that point forward.

Additional information is available on our website at http//dor.sd.gov/.

If you have questions or need further assistance, you can contact Kathy Smith at 605-773-3311.

Sincerely,

Andy Gerlach, Secretary
South Dakota Department of Revenue

Enclosure

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff, vs. WAYFAIR INC., OVERSTOCK.COM, INC., and NEWEGG INC., Defendants.	32CIV16-000092 **NOTICE OF FILING OF NOTICE OF REMOVAL**

TO: CLERK OF THE COURT
HUGHES COUNTY CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT
and
STATE OF SOUTH DAKOTA
RICHARD M. WILLIAMS

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1441(a) and 1446, on May 25th, 2016, Defendants Wayfair Inc., Overstock.com, Inc., and Newegg Inc., filed a Notice of Removal in the Office of the Clerk of the United States District Court for the District of South Dakota. A file-stamped copy of the Notice of Removal is attached hereto as Exhibit A.

EXHIBIT
D

Dated this 25th day of May, 2016.

BANGS, MCCULLEN, BUTLER, FOYE & SIMMONS, LLP

By: _____

Jeff Bratkiewicz
jeffb@bangsmccullen.com
Kathryn J. Hoskins
khoskins@bangsmccullen.com
6340 South Western Avenue, Suite 160
P.O. Box 88208
Sioux Falls, SD 57109-8208
Telephone: (605) 339-6800
Facsimile: (605) 339-6801

and

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BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, ME 04243-3070
Telephone: (207) 786-3566
Facsimile: (207) 783-9325
*Admission *pro hac vice* pending in the United States District Court for the District of South Dakota

Attorneys for the Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2016, I served a true and correct copy of the foregoing Notice of Filing of Notice of Removal, via e-mail and U.S. Mail, postage prepaid, upon the following:

Richard M. Williams
Deputy Attorney General
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Facsimile: (605) 773-4106
rich.williams@state.sd.us
Attorneys for Plaintiff

One of the Attorneys for the Defendants