

STATE OF SOUTH DAKOTA     )  
  :  
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

**DEFENDANTS' REPLY BRIEF  
IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT**

Defendants Wayfair Inc., Overstock.com, Inc., and Newegg Inc., submit this reply brief in support of their motion for summary judgment on the Complaint for declaratory relief filed by the Plaintiff, the State of South Dakota (“the State”).

The State’s candid Response to Defendants’ Motion for Summary Judgment (“Response”) clearly establishes the following: while the parties may vigorously contest the policy considerations and implications of the physical presence standard of “substantial nexus” under the Commerce Clause, as reaffirmed by the Supreme Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and of the State’s unprecedented, alternative “economic nexus” standards under S.B. 106, the State agrees with Defendants that there are no disputed material facts and that the Defendants are entitled to judgment as a matter of law based on *Quill*. See Fed. R. Civ. P. 56(a); Response at 1-2; Plaintiff’s Response to Defendants’ Statement of Material Facts.

The Court’s remaining task is, therefore, straightforward. The Defendants respectfully request that the Court enter an order granting the Defendants’ motion for summary judgment and dismissing the State’s Complaint, with prejudice.

Dated this 24th day of February, 2017.

BANGS, MCCULLEN, BUTLER, FOYE & SIMMONS, LLP

By: /s/ Jeff Bratkiewicz

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

George S. Isaacson

gisaacson@brannlaw.com

Martin I. Eisenstein

meisenstein@brannlaw.com

Matthew P. Schaefer

mschaefer@brannlaw.com

BRANN & ISAACSON

184 Main Street

P.O. Box 3070

Lewiston, Maine 04243-3070

Telephone: (207) 786-3566

Facsimile: (207) 783-9325

*Attorneys for Defendants Wayfair Inc.,*

*Overstock.com, Inc., and Newegg Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on February 24, 2017, a true and correct copy of the foregoing Defendants' Reply Brief in Support of Motion for Summary Judgment was served electronically via the Odyssey system, via e-mail, and/or via U.S. Mail, postage prepaid, upon the following attorneys of record for Plaintiff, the State of South Dakota:

Richard M. Williams-Deputy Attorney General  
[Rich.Williams@state.sd.us](mailto:Rich.Williams@state.sd.us)  
Kirsten E. Jasper-Assistant Attorney General  
[Kirsten.Jasper@state.sd.us](mailto:Kirsten.Jasper@state.sd.us)  
Office of the Attorney General  
1302 E. Highway 14, Suite 1  
Pierre, SD 57501-8501

Ronald A. Parsons, Jr.  
[ron@janklowabdallah.com](mailto:ron@janklowabdallah.com)  
Johnson, Janklow, Abdallah, Reiter &  
Parsons, LLP  
P.O. Box 2348  
Sioux Falls, SD 57101-2348

Andrew L. Fergel-Chief Legal Counsel  
[Andrew.Fergel@state.sd.us](mailto:Andrew.Fergel@state.sd.us)  
South Dakota Department of Revenue  
445 E. Capitol Avenue  
Pierre, SD 57501

*Attorneys for Plaintiff*

By: /s/ Jeff Bratkiewicz  
One of the Attorneys for the Defendants