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May 29, 2012

The Honorable Jerome Horton  
Chair, State Board of Equalization  
450 N. St.  
Sacramento, CA 94279-0080

Re: Public Notice dated April 6, 2012 of Proposed Amendments  
To Regulation 1684: **Suggestions to Expand Proposed Amendments.**

Dear Mr. Horton,

First I want to compliment the Board Members for the timeliness and general scope of the above notice which is to be considered by the Board at the Meetings of May 30-31, 2012. Hopefully, the proposed amendments can be implemented in time to produce substantial additional use tax revenue that could begin to flow in fiscal 2012-2013 should Stats. 2011, chapter 313 (AB 155) become effective on September 15, 2012, as currently seems possible, if not likely.

I suggest, respectfully, that Members consider expanding the rebuttable presumption in proposed Regulation 1684 (b) to recognize that all, or at least most, large remote retailers selling to California purchasers via the internet, catalogs, or telephonically do so via "sales on approval" under which, in accordance with present regulation 1628 (b) (3) (D), they continue to own the goods being sold until after their delivery to and acceptance by California purchasers. Thus, at least such large remote retailers should be considered to have substantial physical presence and "substantial nexus" within the state of California and therefore be liable to collect and remit use tax from their purchasers in accordance with RTC § 6203, as amended by AB 155.

In support of this suggestion, I am attaching the following documents:

1. A Memorandum of Points and Authorities filed on behalf of the State Board of Equalization by the California Attorney General in Direct Marketing Association, Inc. v. William M. Bennett, et al., No. CIVS 88-1067 MLS EM (U. S. Dist. Ct., E.D.Cal., filed June 14, 1991.
2. Order Granting Plaintiff's Motion for Summary Judgment in Direct Marketing Association, Inc. v. William M. Bennett, et al., supra, dated July 12, 1991.

3. Reporter's Transcript of hearing of June 28, 1991 before Judge Milton L. Schwartz in Direct Marketing Association, Inc. v. William M. Bennett, et al., supra.
4. Letter to Albin Koch from Susan Russell dated May 29, 2007.
5. Report dated July 15, 2007 from Professor Patrick A. Scholten, Ph.d. on internet sales operations.
6. Sample sales terms from a large internet retailer.

One possible approach to implementing this suggestion could be to:

Insert the following sentence at the end of proposed Regulation 1684 (b) (3):

"A retailer will be regarded as having a physical presence in California if it makes substantial sales to California purchasers that constitute 'sales on approval' within the meaning of existing Regulation 1628 (b) (3) (C)."

I appreciate the staff work and expertise reflected in the proposed revisions to Regulation 1684, and hope that this suggestion may be found useful in implementing AB 155 as promptly and productively as possible.

Yours very truly,

Albin C. Koch

CC: The Honorable John Chiang, State Controller  
The Honorable Betty T. Yee, Member, State Board of Equalization  
The Honorable Senator George Runner, Member State Board of Equalization  
The Honorable Michelle Steel, Member State Board of Equalization

Ms. Marcy Mandel, Deputy Controller  
Diane G. Olson, Chief, Board Proceedings Division

Enclosures: As listed above.



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9 EASTERN DISTRICT OF CALIFORNIA  
10

11	DIRECT MARKETING ASSOCIATION, INC., )	No. CIVS 88-1067 MLS EM
12	Plaintiff, )	
13	v. )	DEFENDANTS' MEMORANDUM OF
14	WILLIAM M. BENNETT, et al, )	POINTS & AUTHORITIES IN
15	Defendants. )	OPPOSITION TO PLAINTIFF'S
16	)	MOTION FOR SUMMARY JUDGMENT
	)	AND IN FAVOR OF SUMMARY
	)	<u>JUDGMENT FOR DEFENDANTS</u>

17  
18 I  
19 BRIEF SUMMARY

20 DIRECT MARKETERS CAN CONSTITUTIONALLY BE  
21 REQUIRED TO COLLECT CALIFORNIA'S USE TAXES

22 Unquestionably the activities of plaintiff's members, Direct Marketers, come within the  
23 requirements of section 6203(f), California Revenue and Taxation Code.<sup>1/</sup> Direct Marketers engage in  
24 substantial and recurring solicitations of and sales to California customers, benefit from the financing  
25 and debt collection of California financial institutions which issued the credit cards used to effectuate a  
26 great percentage of such sales, and have property in this state. The only issue before this Court is  
27

28 1. Unless otherwise specified, all statutory references are to the California Revenue and Taxation Code.

1 whether Direct Marketers can constitutionally be required to collect and remit the California use taxes,  
2 which are due from their California customers.

3 In State v. Quill Corp., \_\_\_ N.W.2d \_\_\_ (N.D. 1991),<sup>2/</sup> the North Dakota Supreme Court,  
4 relying on Complete Auto Transit, Inc. v. Brady, 430, U.S. 274 (1977), held that Quill, a mail-order  
5 retailer, can constitutionally be required, pursuant to a statute similar to section 6203, to collect and  
6 remit North Dakota's use taxes. Rejecting Quill's reliance upon National Bellas Hess, Inc. v. Illinois  
7 Rev. Depl., 386 U.S. 753 (1967),<sup>3/</sup> the court observed:

8 "The economic, social, and commercial landscape upon which Bellas Hess was  
9 premised no longer exists, save perhaps in the fertile imaginations of attorneys representing  
10 mail order interests. In the quarter-century which has passed in the interim, 'mail order'  
11 has grown from a relatively inconsequential market niche into a goliath now more  
12 accurately delineated as 'direct marketing.' The burgeoning technological advances of the  
13 1970's and 1980's have created revolutionary communications abilities and marketing  
14 methods which were undreamed of in 1967."<sup>4/</sup>

15 The dynamics of the direct marketing industry reflected in the stipulated facts herein bear  
16 little resemblance to the 1967 (and/or prior) activities of National Bellas Hess, Inc. The reference by  
17 the Supreme Court in National Bellas Hess (id. 759-60) to 2,300 taxing jurisdictions which could  
18 entangle a Direct Marketer in "virtual welter of complicated obligations to local jurisdictions", is  
19 inapplicable to this case. California imposes only a single, uniform statewide use tax rate.<sup>5/</sup>  
20 Section 6203(f) meets the criteria set forth in Complete Auto, supra, a decision in which the Supreme  
21 Court rejected previous holdings, (such as National Bellas Hess), to the effect that "exclusively"  
22 interstate commerce cannot be subject to state taxation, and promulgated the present standard to  
23 evaluate state taxation which is claimed to violate the commerce and due process clauses. To the extent  
24 that the precedent of National Bellas Hess, retains any validity, that holding is inapplicable to the facts  
25 of this case.<sup>6/</sup> As a matter of law, the defendants are entitled to summary judgment.<sup>7/</sup>

26 2. A copy of the memorandum opinion accompanies this memorandum in the Appendix.

27 3. Similarly, notwithstanding the length of, and authorities cited in, plaintiff's revised  
28 memorandum, plaintiff effectively rests its entire case on the holding of National Bellas Hess.

4. Assuming arguendo, as plaintiff argues, that the rejection of National Bellas Hess in Quill is  
dicta, the reasoned analysis of that court is what defendants cite to this Court.

5. Section 6203(j).

6. Plaintiff's citation (rev. mem., pp. 11 & 13) as support for the argument that National Bellas  
(continued...)

## II

MATERIAL FACTS

1  
2  
3 The defendants submit that all the stipulated facts and the affidavits of James Caldwell  
4 (filed March 27, 1991) and John Gibbs should be considered by the court. To the extent plaintiff  
5 implies (page 2, rev. mem.) that the "entire" factual record in this case is limited to the stipulated facts  
6 and the admitted allegations of plaintiff's complaint, the same is incorrect. The parties agreed, subject  
7 to the same "admission of relevancy" disclaimer contained within the stipulated facts, that the defendants  
8 could direct the court's attention to, and argue from, the facts set forth in the affidavits of James  
9 Caldwell and John Gibbs (being filed with this memorandum).

## III

THE "GOLIATH" OF DIRECT MARKETING WAS NOT  
THE BUSINESS BEFORE THE SUPREME COURT IN 1967

10  
11  
12  
13 The mail order company in National Bellas Hess utilized twice-a-year catalog mailings

## 6. (...continued)

14  
15  
16 Hess is the reason for the State's loss in the two pending (now on appeal) state section 6203(f) refund  
17 actions involving Lands' End, Inc. and Sturbridge Yankee Workshop, is extraordinary. Plaintiff obviously  
18 cites the cases as "rejection" by other courts of the State Board of Equalization's ("SBE") "nexus"  
19 position concerning section 6203(f). In an effort to provide a factual record to this Court with respect  
20 to the magnitude, and particulars of the sales and solicitations, by the mail order industry, of California  
21 customers, defendants proposed submitting to this Court the stipulated facts filed in both cases, because  
22 plaintiff is only a trade association without access to the sales and solicitation figures of its members.  
23 The defendants believe such facts would reflect the spectrum of the activities of mail order companies  
24 from the relatively modest (although above the registration criteria employed by SBE) activities of  
25 Sturbridge to the substantial activities of Lands' End. Plaintiff stated it would not agree to the  
26 submission of the stipulated facts from these cases because the same were not part of any "reported  
27 decision" but rather filings with trial courts whose decisions are without precedential effect. The  
28 Sturbridge facts were filed under seal. The Lands' End facts were filed under seal and then its counsel  
produced a "public" version. The defendants will provide copies of these stipulated facts to this Court  
upon order, if the Court believes that same would be helpful, and submit that plaintiff is now estopped  
from asserting that trial court decisions and underlying facts may not be considered because the same  
only involve "filings" made to a trial court. In addition, since plaintiff believes that state trial court  
decisions are worthy of citation to this court, in the appendix which accompanies this memorandum are  
copies of two 1991 Tennessee opinions wherein the particular mail order retailers' use tax collection  
challenges were overruled. (Bloomington's By Mail, Ltd. v. Huddleston, No. 89-3017-II (12th Dist.,  
Tenn. 1991) and SFA Folio Collections, Inc. v. Huddleston, No. 89-3015-III (20th Dist., Tenn. 1991)).

27 7. Summary judgment may be rendered in favor of the opposing party even if that party has  
28 made no cross motion. Cool Fuel, Inc. v. Connely, 685 F.2d 309, 311 (9th Cir. 1982). See also Nevada  
VTN v. General Insurance Company of America, 834 F.2d 770, 777 (9th Cir. 1987). Also see, Wright &  
Miller, Federal Practice and Procedure § 2720 n. 20.

1 supplemented by occasional advertising "flyers" and mail/or common carrier contacts which resulted in an  
2 unspecified amount of sales in Illinois. (386 U.S., 754-55)<sup>8/</sup> As the court noted in Quill, supra,<sup>9/</sup> the  
3 "facts" of direct marketing (the mail order industry), including the extent of business, and methods of  
4 doing business, so exceed anything considered by the court in National Bellas Hess<sup>10/</sup> so as to render  
5 factually inapplicable to the modern mail order industry the doctrine of that case upon which plaintiff  
6 herein relies.

7 In 1967 when National Bellas Hess was decided, national mail order sales were thought to  
8 be between \$2.4 billion (Id. at 763, Fortas, J., dissenting) and approximately \$13 billion.<sup>11/</sup> National  
9 mail order sales are now estimated to be at least \$183 billion and to account for fifteen percent (15%)  
10 of total national sales.<sup>12/</sup> In 1990, the mail order industry is estimated to have mailed 13.6 billion  
11 catalogs to national consumers with:

12 "computerized database marketing allowing mailings directed to specific demographical  
13 groups. In fact, the sale and rental of lists of names of prior or potential mail order purchasers  
14 has itself become a three-billion-dollar business. Technology has also changed the method of  
15 receiving orders, with the increased efficiency of toll-free telephone lines, fax orders, and direct  
16 computer ordering replacing the less-immediate "mail" order, and advances in the parcel delivery  
17 industry allow a wide variety of options, including overnight delivery." (Quill, at pp. 10-11)

18 The acceptance of credit cards, more fully discussed, infra, is among the most important  
19 methods through which Direct Marketers now conduct business, a means of accomplishing sales not  
20 mentioned or even intimated by the Supreme Court in National Bellas Hess.

21 The exact business (solicitation and sales figures) of any individual Direct Marketer is not  
22 before this Court. This Court decided that plaintiff, as opposed to an individual Direct Marketer, has  
23 standing to raise a constitutional challenge to California's legislative and administrative efforts to secure

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24 8. The dissent mentions sales figures (Id. at 760-61) but the same were not mentioned by the  
25 Supreme Court in its decision.

26 9. See also the memorandums of decision from the two Tennessee trial court cases appended  
27 hereto.

28 10. Or considered by the dissent. (Id. at 760-66)

11. See Hartman, "Collection of the Use Tax on Out-Of-State Mail Order Sales," (May 1986) 39  
Vanderbilt Law Review 993, 1006 ("Hartman"). A copy of this article is contained in the Appendix.

12. Quill, at 11, and Hartman, supra, at 1008.

1 use tax collection by Direct Marketers. Plaintiff is not informed of the "figures-numbers" of its members  
2 solicitation and sales activities. However, Direct Marketers do engage in substantial and recurring  
3 solicitations of and sales to California customers. (Stip. para. 16.)

4           Nevertheless, utilizing the undisputed facts, the information contained the in the affidavits  
5 of James Caldwell and John Gibbs, and the relevant cases and authorities, the enormous magnitude of  
6 Direct Marketers' California activities can reasonably be discerned.

7           California has the largest (28,314,000)<sup>13/</sup> population of any of the states, with a  
8 corresponding state budget (and budget deficit), and it is sometimes said that California's economy  
9 exceeds that of all countries but the world's largest industrial powers. <sup>14/</sup>For example, in fiscal 1989-  
10 90, SBE collected in excess of \$17,250,000,000 in sales and use taxes, (not including the "earthquake tax"  
11 or special district taxes) <sup>15/</sup> which roughly translates (using the applicable six percent (6%) tax rate) to  
12 annual sales of \$286,350,000,000 for which such taxes were collected. Even assuming that the fifteen  
13 percent (15%) of "total sales nationally" noted by the court in Quill is limited to retail sales of tangible  
14 personal property or is not exactly the "California" norm, the total volume of mail order sales in  
15 California is obviously in the tens of billions of dollars. If the sales by Direct Marketers in this state  
16 were as low as one percent (1%) of the 1989-90 sales for which sales and use taxes were collected, the  
17 annual amount would exceed \$2,800,000,000.<sup>16/</sup>

18           When the California economy (in terms of taxable sales) is considered in the context of the  
19 solicitation and sales figures of mail order companies with respect to states with much smaller  
20 populations (figures taken from recent "use tax" decisions) the magnitude of what is being accomplished  
21

22           13. California's state gross product (this State's share of GNP exceeds 12 percent (12%) of GNP.

23  
24           14. All the population and economic figures set forth in this and the following paragraphs are  
25 taken from the "Statistical abstract of the United States," U. S. Department of Commerce, (1990) and  
26 are for 1988.

27           15. See SBE's 1989-90 Annual Report (issued January 7, 1991), at pp. 13 & A-23.

28           16. Unquestionably, the 1989-90 sales and use taxes collected by SBE include remittances by mail  
order entities which have, for whatever reason, registered with SBE and collected California's use tax  
and which might not benefit from a judgment in plaintiff's favor. It may be correct to assume that the  
volume of business by the mail order industry in California includes entities which are not Direct  
Marketers.

1 in California by Direct Marketers becomes readily apparent.

2 In North Dakota, with a population of 667,000, Quill makes annual sales of just under  
3 \$1,000,000, to approximately 3,500 customers, while mailing into that state 230,000 separate catalogs and  
4 flyers. By comparison, Quill's overall annual sales exceed \$200,000,000. (Quill, at 29) Thus, Quill's  
5 North Dakota sales are less than one-half of one percent (0.5%) of total sales. Using the same ratios  
6 of sales, customers and mail solicitations, if Quill's California sales (or that of a corresponding Direct  
7 Marketer) were as low as five percent (5%) of national sales, the number of catalogs and flyers mailed  
8 into the state would exceed 2,000,000, the number of customers would exceed 35,000, and sales would  
9 equal \$10,000,000.

10 In 1987, SFA Folio Collections (a mail order retailer involved in litigation with many  
11 states) mailed 733,000 catalogs to Connecticut residents. SFA Folio Collections, Inc. v. Bannon, 585  
12 A.2d 666, 671 (fn. 5) (Conn. 1991). Connecticut's population of 3,233,000, is less than twelve percent  
13 (12%) of California's.

14 In 1983 and 1984, L.L. Bean (a national leader of the mail order industry)<sup>17/</sup> had sales in  
15 Pennsylvania of \$12.4 million and \$12.5 million. L.L. Bean, Inc. v. Commonwealth, 516 A.2d 820, 822  
16 (Pa. 1986). Pennsylvania's population of 12,001,000, is forty-two percent (42%) of California's.

17 The number of "California" "800" line telephone calls, credit card approvals, financing and  
18 debt collection, and product shipments which result from Direct Marketers' California solicitations and  
19 sales are, beyond question, correspondingly in the tens of millions. For example, each credit card sale  
20 involves a separate approval process. Approval is issued, usually through electronic equipment, by the  
21 California financial institution which has set a credit limit for the California customer. Thereafter, the  
22 institution, which issued the credit card, bills the customer, and if payment is not "voluntarily"  
23 forthcoming, utilizes all proper means of collection. (Stip. para's 18, 20, 33, 39, 40.) Unquestionably,  
24 all these activities take place in California.

25 Finally, every sale includes a separate delivery in California to a California customer. Even  
26 assuming a \$100 average sale by Direct Marketers, and as little as \$200 million in annual sales to  
27 California customers, 2,000,000 times each year (over 5,400 times each day) deliveries are made for

28

17. See Hartman, supra, at 994.

1 Direct Marketers in California, to a California customer on a California highway (a "benefit" afforded  
2 Direct Marketers).

3 The magnitude of the sales by Direct Marketers in California, relative to all entities which  
4 sell tangible personal property at retail in this state, is amply demonstrated by the fact that \$500,000 in  
5 annual sales places any retailer in the top seven percent (7%) of all permitted retailers.<sup>18/</sup> SBE only  
6 requires mail order entities with annual sales in excess of \$500,000 to register and collect California's  
7 use taxes (and only so long as other criteria are met).<sup>19/</sup>

8  
9 IV

10 REQUIRING DIRECT MARKETERS TO COLLECT AND  
11 REMIT CALIFORNIA'S USE TAXES SATISFIES THE  
12 COMPLETE AUTO CONSTITUTIONALITY STANDARD  
13 FOR STATE TAXATION OF INTERSTATE COMMERCE

14 A. The "Nexus" Standard.

15 Plaintiff, citing American Oil Co. v. Neill, 380 U.S. 451, 458 (1965), argues that "only  
16 where a corporation, pursuant to permission given, enters a state and proceeds to do local business  
17 (will) the definite link required by the Constitution . . . be found." (rev. mem. pg. 7.; emphasis added.)  
18 Such is not the law.<sup>20/ 21/</sup>

18 18. Gibb's affidavit, page 3.

19 19. The additional necessary criteria involve: retail sale of tangible personal property which  
20 would be subject to sales tax if sold in this state; 300,000 annual mail solicitations involving at least 3  
21 mailings; and, more than 1,000 sales paid by means of credit facilities extended by financial institutions  
22 regulated by or located in California. This fourth criteria can be alternatively met by other requirements  
23 set forth in the proposed regulation which accompanies the affidavit of James Caldwell. For this case,  
24 however, the "credit facilities extended: is the relevant criteria.

25 20. In American Oil a fuel dealer's predecessor in interest was licensed to do business in Idaho.  
26 The predecessor accepted federal government bids in Utah, which had been issued in Seattle, to deliver  
27 fuel. The fuel was subsequently delivered to the government outside Idaho at which time title passed.  
28 Idaho claimed an ability to levy an excise tax upon the transaction because the fuel dealer knew that the  
federal government would subsequently transport the fuel into Idaho for use there by a federal  
government agency. In rejecting the state's claimed ability to levy a tax upon the particular transaction  
involved, the Supreme Court observed that there must be "some definite link, some minimum  
connection between a state and the person, property or transaction it (the state) seeks to tax." The  
Supreme Court observed that while a corporation's business activities, pursuant to permission given, in a  
state permits a strong inference of a "link" between that business entity and the state, transactions  
dissociated with local business cannot be taxed by that state. (380 U.S. at 452-59; emphasis added.)

21. Similarly, and obviously intentionally misstated by plaintiff (rev. mem. p. 12), is the "nexus"  
(continued...)

1 In American Oil, Idaho was levying a tax directly upon the seller; in the present case  
2 California is only imposing a duty to collect the use tax from California purchasers/taxpayers. In  
3 American Oil the state was not even linked to the transactions by any sale from the taxpayer to any  
4 state resident or entity. The Supreme Court in National Geographic Society v. California Board of  
5 Equalization, 430 U.S. 551, 560 (1977), specifically distinguishing American Oil, made it clear that the  
6 "nexus" contacts which are required to permit imposition of a duty to collect use taxes are not as  
7 extensive as those required to permit the imposition of direct taxation upon an entity or person.

8 In Complete Auto, supra, the Supreme Court rejected previous holdings to the effect that  
9 exclusively interstate commerce was immune from state taxation, the doctrine specifically referenced in  
10 National Bellas Hess (Id. at 759). Instead the Supreme Court announced a standard by which state  
11 taxation in this area is to be tested, a standard which focuses not solely upon whether any entity subject  
12 to state tax requirements has a physical presence in that state, but also upon whether the activity sought  
13 to be taxed has a substantial "nexus" with the taxing state. The Supreme Court addressed a commerce  
14 clause challenge to a Mississippi tax assessed against that company which transported, by truck, new  
15 automobiles (assembled outside but rail shipped into Mississippi) from a Mississippi rail station to  
16 Mississippi dealers. (430 U.S. at 276) The company claimed the Mississippi transportation was part of  
17 interstate movement (and commerce) and, thus, that the taxes assessed were unconstitutional. The

18  
19 21. (...continued)  
20 standard of Illinois Commercial Men's Assn. v. Board of Equalization, 34 Cal.3d 839 (1983). The  
21 California Supreme Court never made the statement attributed to it by plaintiff (without reference by  
22 plaintiff to any page of the decision) but observed, citing National Bellas Hess, that:

22 "(t)he United States Supreme Court has considered the circumstances under which a state  
23 may, within the limits of the due process clause, impose a tax on a foreign corporation that  
24 conducts its business by mail from outside the taxing state. Generally speaking, the taxing state  
25 must have a substantial interest in the transactions in order to justify imposition of the tax. This  
26 interest is measured by the extent and nature of the contacts between the state and the foreign  
27 corporation (such as the presence of agents of the corporation within the state), and the benefits  
28 conferred on the corporation by the state." (Id. at \_\_\_\_\_)

26 In Scholastic Book Clubs, Inc. v. Board of Equalization, 207 Cal.App.3d 734, 738 (1989) that appellate  
27 court employed the above language of the California Supreme Court in addition to noting that (based  
28 upon National Bellas Hess, supra, and Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954)) "nexus" is  
"usually" absent without personal contact although mail is used to conduct business.

In neither case were the activities of Direct Marketers, as stipulated herein, at issue, while in both cases  
each business had agents working in California.

1 Supreme Court disagreed and established the following four-prong test for ascertaining if a state tax will  
2 withstand commerce clause scrutiny. State taxes are constitutional 1) if applied to an activity with a  
3 substantial nexus with the taxing state; 2) if fairly apportioned; 3) if not discriminatory against interstate  
4 commerce; and, 4) if fairly related to the services provided by the state. (430 U.S. at 279, 289.)

5 In Goldberg v. Sweet, 109 S.Ct. 582 (1989), the Supreme Court reaffirmed the Complete  
6 Auto test. The Supreme Court upheld the constitutionality of an Illinois telecommunications tax  
7 imposed upon both intra- and interstate telephone calls originating or terminating in Illinois, charged to  
8 an Illinois service address with credit given if a tax is paid to another state for the same call.  
9 Telecommunications retailers are required to collect the tax from consumers who charge calls to their  
10 service addresses. (109 S.Ct. at 585-86.) The Supreme Court observed that its decision in Complete  
11 Auto Transit "specifically reject(ed) the view that the states cannot tax interstate commerce." (109 S.Ct.  
12 at 588.)<sup>22/</sup> The Supreme Court noted the parties' agreement that Illinois had substantial nexus with the  
13 telecommunications subject to the tax (the first prong); that the tax can be applied only to the in-state  
14 component of the activity being taxed (the second prong); found that the tax did not discriminate  
15 against interstate commerce (the third prong); and finally, in discussing the fourth test (whether the tax  
16 is fairly related to the "taxpayers" activities within the state), the Supreme Court stated that the tax  
17 which may be imposed cannot be constitutionally limited to the costs to the state of the particular  
18 activity sought to be taxed. "On the contrary, interstate commerce may be required to contribute to the  
19 cost of providing all governmental services, including those services from which it arguably receives no  
20 direct benefit." (109 S.Ct. at 588-92; emphasis added.)

21 In California, section 6201 imposes a tax upon the storage, use or consumption of tangible  
22 personal property purchased from a retailer when the property will be stored, used or consumed in  
23 California. Here the tax is imposed upon California purchases from Direct Marketers. All states,  
24

25 22. See also D. H. Holmes v. McNamara (1988) 486 U.S. 24, 30-31, wherein the Court also  
26 reaffirmed its ruling from Complete Auto. Plaintiff's claim (rev. mem., p. 9) that in D. H. Holmes the  
27 Supreme Court "underscored" National Bellas Hess is specious. The Supreme Court specifically rejected  
28 the argument that D. H. Holmes' catalog mailings to Louisiana residents were immune from state  
taxation on the basis of National Bellas Hess by noting D. H. Holmes' receipt of direct benefits from  
Louisiana, physical connection to the state and economic presence in the state. (486 U.S. 33-34;  
emphasis added.) Under all three "nexus" criteria, D. H. Holmes had "nexus." If National Bellas Hess  
remains the "standard," D. H. Holmes' "economic pressure" in Louisiana would have been irrelevant.

1 including California, that impose sales taxes also impose a use tax, the constitutionality of which is  
2 settled, on purchases from out-of-state to protect sales tax revenue and place in-state retailers on  
3 competitive parity with out-of-state retailers exempt from sales tax. (National Geographic, 430 U.S.,  
4 555.) There is no double (or prohibited multiple) taxation because section 6406 provides a credit for  
5 any sales or use taxes paid, to any jurisdiction, for the same purchase.

6 In American Trucking Association v. Scheiner (1987) 483 U.S. 266, 282, the Supreme Court  
7 explained the discrimination (third prong) issue involving state taxation and the Commerce Clause, as  
8 follows: "do the methods by which the . . . taxes are assessed discriminate against some participants in  
9 interstate commerce in a way that contradicts the central purpose of the Commerce Clause?"<sup>23/</sup> Even if  
10 prohibited discrimination with respect to California's use tax scheme were claimed by plaintiff, the  
11 Supreme Court observed in National Geographic that "(s)tates necessarily impose the burden of  
12 collecting the tax on the out-of-state seller; the impracticality of its collection from the multitude of  
13 individual purchasers is obvious." (430 U.S. at 555; citation omitted.)<sup>24/</sup>

14 The fourth prong of the Complete Auto test is the corollary to the first. The activities  
15 conducted in the state (the first prong) must be benefitted, even if indirectly, by services provided by the  
16 state (the fourth prong). In this case where, pursuant to Complete Auto, there are no concerns with  
17 regard to apportionment or discrimination, the requirements of the commerce clause as articulated by  
18 the Supreme Court, amount to the due process standard. For both commerce clause and due process  
19 purposes, the totality of the Direct Marketers' transactions activities within California is what determines  
20 "nexus" and permits imposition of a use tax collection and remittance responsibility.

21  
22 23. In connection therewith, the Supreme Court recognized that when the state has used the only  
23 practicable means of collecting a tax, and the use of a more finely graduated method would pose  
genuine administrative burdens, the commerce clause prohibition on discrimination does not require the  
state to avoid the use of that practicable method. (483 U.S. at 296 & n. 26.)

24 24. Plaintiff's contention (rev. mem. p. 17, fn. 10) regarding this state making an effort to collect,  
25 from California residents, the use tax which Direct Marketers resist collecting, is meritless in view of this  
26 observation by the Supreme Court. In fact, if plaintiff actually wants to engage in a war of what the  
27 parties have not "shown" (footnote 10, supra) Direct Marketers have not "shown" in this modern  
28 computer age, where electronic equipment is utilized for obtaining the issuing institution's approval for  
every credit card sale, that collecting and remitting California's single rate use tax involves any burden  
whatsoever. Plaintiff and its members do not want to address technological advances (in court actions)  
with the states that seek only tax collection for billions of dollars in sales. In court the mail order  
industry relies on National Bellas Hess and its language discussing 1967 burdens while, in doing  
business, the industry relies upon any available 1990's technological advance.

1  
2 B. The Involvement of California Financial Institutions in Credit Card Sales  
3 Provides Constitutional "nexus".

4 Direct Marketers' sales to California customers are clearly transactions (activities) with a  
5 California "nexus" (the first prong). Orders are solicited in California through mailings into the state.  
6 Orders are taken from California through forms mailed from California and telephone calls placed from  
7 California in this state. Orders are delivered in California. Credit card approval and financing for many  
8 of these orders is provided by California financial institutions.

9 Plaintiff's recitation (rev. mem. pp. 3-4) of the undisputed facts, and argument (rev. mem.  
10 pp. 9-11) with respect to Direct Marketers' acceptance of VISA and MasterCard credit cards, <sup>25/</sup>  
11 obviously and intentionally distorts both these credit extension systems and the participation of Direct  
12 Marketers in transactions with "nexus" to California.

13 In Colorado Springs National Bank v. United States, 505 F.2d 1185 (10th Cir. 1974), the  
14 Court of Appeals engaged in an extended discussion of the mechanics of credit card transactions.<sup>26/</sup> As  
15 that court noted, using even the technology and computers available by 1974:

16 "[f]or years banks, including . . ., have issued letters of credit. The credit card  
17 program furnishes a facility to handle these operations in a simple manner adaptable to  
18 operation through modern computers. A letter of credit is 'a letter whereby one person  
19 requests some other person to advance money or give credit to a third person, and  
20 promises to repay the same to the person making the advancement.' [Citation omitted.]  
21 The same function is performed by the handy, plastic card issued by the bank. The  
22 participating merchant honors the card in payment for merchandise, the issuing bank pays  
23 the merchant, and the card user is liable to the bank.

24 "Banks, . . ., have for years made loans to merchants on accounts receivable. The  
25 credit card system performs the same function more easily. The merchant sends the sales  
26 slip to the bank which pays him, or gives him credit, for the amount shown on the slip less  
27 a negotiated discount. The only change is in the method. Instead of getting a bank loan  
28 on the security of accounts receivable, the merchant receives a discounted payment  
immediately. Instead of getting loan interest, bank receives the discount.

"Loans for consumer purchases are a recognized part of our economy. Over the  
years taxpayer, along with other commercial banks, has made many such loans in varying  
forms. The credit card system simplifies the procedures. The cardholder is charged with  
the amount of the purchase and, unless he pays the bank within a specified time after the

26 25. The facts are undisputed that Direct Marketers make over one-half of their sales through  
27 acceptance of credit cards and that a significant portion of sales to California customers are charged to  
28 VISA and MasterCard credit cards issued by California financial institutions. (Stip. para. )

26 26. The legal issue addressed was the deductibility of expenses associated with credit card  
27 operation start-up costs.

1 billing date, he must pay interest or a finance charge. The consumer gets the credit and  
2 the bank receives payment for the extension of credit.

3 "The credit card system takes advantage of modern technology. After a card is used,  
4 a key-punched sales slip is placed in a computer which processes and routes the transaction  
5 so that the necessary charges and credits will be made." (Id. at 1190; citations omitted.)

6 The two essential elements of the VISA and MasterCard systems in which Direct Marketers  
7 participate are the Direct Marketer and the financial institution which issued the credit card accepted  
8 for the purchases. All of the other components of these systems (acquiring banks, processors, call  
9 authorization centers, and settlement systems) only facilitate the process through which Direct  
10 Marketers: 1) accept these credit cards for purchases, after requesting and receiving the issuing  
11 institution's approval authorization; 2) send the transactions to acquiring banks for routing through the  
12 systems for proper charges and credits; and, 3) get paid at a discount (which is based upon the fees  
13 which must be paid to the issuing institution and the processing costs of the acquiring banks).

14 Plaintiff would like this Court to believe that credit card purchase approval comes from  
15 processors or acquiring banks. However, these entities are solely communicators of the approval which  
16 can only be provided by the issuing institution which must maintain 24-hour issuing capability. <sup>27/</sup>  
17 (Stip. para.'s 18, 19, 20, 31, 32.) Additionally, one obvious reason that customers placing telephone  
18 orders provide their telephone numbers to Direct Marketers (Stip. para. 12) is so that these customers  
19 can be recontacted in the event a credit card purchase is not approved.

20 Similarly, while the actual dollar transfer to Direct Marketers for credit card transactions is  
21 made through acquiring banks, as the court recognized in Colorado Springs, issuing institutions (not  
22 acquiring banks) are the source of payment to Direct Marketers. (505 F.2d at 1190) Direct Marketers  
23 request and obtain approval codes, provide this information to acquiring banks, and in doing so (and so  
24 long as the code was validly obtained) provide acquiring banks with the only means to require issuing  
25 institutions to provide the acquiring banks with credits. (Stip. para. 33) Such credits are the sole  
26 reason Direct Marketers are paid.<sup>28/</sup>

27 27. The only exception being if the issuing institution cannot be contacted so that approval is  
28 given by VISA or MasterCard based upon criteria provided by the issuer.

28 28. If this were not the "reality" of Direct Marketers' involvement in the credit card systems, (in  
(continued...)

1 In addition to 24-hour approval capability, the California financial institutions which issue  
 2 the VISA and MasterCard credits cards accepted by Direct Marketers are responsible for maintaining  
 3 accounts and collecting on delinquent accounts. (Stip. para.'s 39, 40) Undeniably, for the California  
 4 customers of Direct Marketers who use such credit cards for purchases, such activities occur in  
 5 California, and, pursuant to section 6203(f), through acceptance of VISA and MasterCard credit cards,  
 6 Direct Marketers engage in transactions connected to banking, financing, and debt collection in  
 7 California.

8 The connections between California and the VISA and MasterCard systems, in which Direct  
 9 Marketers participate, clearly include the establishment and maintenance of accounts, and the purchase  
 10 approval provided by California financial institutions which issue VISA and MasterCard credit cards.  
 11 The benefit to Direct Marketers of California providing the societal advantages permitting these  
 12 financial institutions to function in this state are not open to dispute.

13  
 14 C. Direct Marketer's Sales are Sales on Approval Which Provide Additional  
 nexus links.

15 Additionally, Direct Marketers provide their customers with promises of customer  
 16 satisfaction which permit customers to receive a refund or replacement if, at any time, ordered  
 17 merchandise is returned, and received by the Direct Marketer. (stip. para. 14.) Such sales, pursuant to  
 18 the California (and Uniform) Commercial Code, are sales on approval.<sup>29/30/</sup>

19  
 20 28. (...continued)  
 21 other words, if by obtaining approval codes Direct Marketers were not effectively guaranteeing payment  
 22 from issuing institutions to Direct Marketers) why would acquiring banks provide Direct Marketers with  
 23 the electronic authorization equipment and access to call authorization centers; why would the credit  
 24 card relationship between Direct Marketers and acquiring banks only involve the submission of approved  
 transactions; and, why would the discount fee paid by Direct Marketers be based in part upon the fees  
 which must be paid for each credit card transaction to issuing institutions? All of these facets of the  
 credit card transactions would not be involved if, as plaintiff would have this Court (incorrectly)  
 conclude, all Direct Marketers' (in relative isolation) do is sell credit card receivables to acquiring banks.

25 29. Section 2326, California Commercial Code provides (in relevant part):  
 26 "(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even  
 though they conform to the contract, the transaction is  
 27 "(a) A 'sale on approval' if the goods are delivered primarily for use, and  
 "(b) A 'sale or return' if the goods are delivered primarily for resale."  
 Section 2327, California Commercial Code provides (in relevant part):  
 28 "(1) Under a sale on approval unless otherwise agreed  
 "(a) Although the goods are identified to the contract the risk of loss and the title

(continued...)

1 As noted by the Court of Appeals in Gold'n Plump Poultry, Inc. v. Simmons Eng. Co., 805  
 2 F.2d 1312, 1319 (8th Cir. 1986), <sup>21/</sup> in a Uniform Commercial Code ("UCC") sale on approval, title  
 3 remains with the seller until acceptance by the buyer so long as the seller agrees that the buyer may  
 4 return the goods even though the goods conform to the sales contract. The buyer need only  
 5 "seasonably" return the ordered goods in order to be provided with a refund or replacement. (George v.  
 6 Davoli, 397 N.Y.S. 895,897 (Ont. County 1977)) The only variation by Direct Marketers on the UCC-  
 7 defined sale on approval, is allowed by California Commercial Code section 2327 and does not change  
 8 the fact that Direct Marketers make sales on approval: the expense of return and any risk of loss in the  
 9 return process rests with the buyer in the sales made by Direct Marketers. Therefore, until the  
 10 customers of Direct Marketers accept the goods shipped into California, or until the "seasonable" period  
 11 of time has elapsed, these goods, in California, remain the property of the Direct Marketers. This  
 12 property, like the offices in National Geographic, supra, and the single independent contractor solicitor  
 13 in Tyler Pipe Industries v. Washington, 483 U.S. 232, 250, (1987),<sup>22/</sup> are afforded the direct benefit of  
 14 California's police, fire and other government protections.

15  
 16 D. The Physical Mass of the Catalogs placed in California Provides Another  
"Nexus" Link.

17 Finally, the annual mail solicitations, generally catalogs, of California consumers by Direct  
 18 Marketers dwarfs the 230,000 catalogs and flyers, involving 24-tons of solid waste, which only one  
 19 company, Quill, produced in North Dakota. (Quill, supra, at 29, 33) The stipulations herein (stip., para.  
 20 9), paralleling the facts in Quill (at 10-11) reflect that mail solicitations are forwarded to persons whose  
 21 names Direct Marketers obtain from independent sources, in other words, persons who have never  
 22

23 29. (...continued)

do not pass to the buyer until acceptance; and

24 "(b) Use of the goods consistent with the purpose of trial is not acceptance but  
 failure seasonably to notify the seller of election to return the goods is acceptance, and if  
 25 the goods conform to the contract acceptance of any part is acceptance of the whole;"

26 30. The Court in one of the Tennessee cases, SFA Folio, at 4, so concluded.

27 31. The poultry company sued for a refund of the purchase price of processing equipment and  
 the district court dismissed the matter, a decision upheld by the appellate court. The poultry company  
 28 argued the transaction involved a sale an approval, but the appellate court disagreed.

32. See also Standard Pressed Steel v. Washington Rev. Dept. 419 U.S. 560, 561-62 (1974)

1 requested the catalog. If the 198 companies which have either registered or received determinations  
2 from the Board (pursuant to section 6203(f)) engage in a minimum of 300,000 catalog solicitations each  
3 year, using the 24 tons of waste created by Quill as an average, the solid waste which must be disposed  
4 of in California (a "benefit" to Direct Marketers) could easily exceed 4,752 tons!

5           These catalogs clearly benefit Direct Marketers. The sheer bulk of a major Direct  
6 Marketer's catalogs within California is more than a match for a single office which even plaintiff would  
7 concede would create "nexus." The protection California provides to this property is similar to the  
8 protection California would provide to one office. The availability of disposal for this paper is certainly  
9 a direct benefit provided to Direct Marketers by the state. (Quill, supra, at p. 33-34.)

## V

11           DIRECT MARKETERS' PURPOSEFUL DIRECTION OF  
12           ECONOMIC ACTIVITIES TO AND IN CALIFORNIA GIVES  
13           THIS STATE JURISDICTION TO REQUIRE USE TAX  
14           COLLECTION EVEN IF DIRECT MARKETERS HAVE NO  
15           PHYSICAL PRESENCE IN CALIFORNIA

16           The Supreme Court has held that states may require out-of-state entities to collect its use  
17 taxes when there is a "nexus"--"some definite link, some minimum connection"--between the entity and  
18 the state. National Geographic, 430 U.S. 561. The Supreme Court has found this requirement in both  
19 the due process and commerce clauses.

20           Nothing in the policies underlying the commerce or due process clause "nexus"  
21 requirements suggests that Direct Marketers should be exempt from state use tax collection  
22 requirements, particularly since the levy involved is a use tax. "The out-of-state seller becomes liable . . .  
23 . . . only by failing or refusing to collect the tax from the resident consumer . . . [T]he sole burden  
24 imposed upon the out-of-state seller by [a use tax statute] is the administrative one of collecting it."  
25 National Geographic, 430 U.S. 558. It hardly offends traditional due process notions of fair play to  
26 "make the distributor the tax collector for the state" (General Trading Co. v. Tax Comm'n 322 U.S. 335,  
27 338 (1944)) when Direct Marketers' intentional projection of their economic presence into the state has  
28 given rise to the taxed activity. Indeed, in an electronic age--and when, as here, sophisticated computer  
techniques allow for systematic exploitation of distant markets--it would be anomalous to hold that  
commercial entities may escape all taxation obligations by the states from which they draw substantial

1 benefits simply because they do not maintain a continuous physical presence there. Cf. Burger King  
 2 Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985); McGee v. International Life Insurance Co., 355 U.S. 220,  
 3 222-223 (1957).<sup>33/</sup>

4 Under these precedents, California courts plainly could assert jurisdiction over a Direct  
 5 Marketer if, for example, a California customer brought suit because he/she was injured by one of the  
 6 products the Direct Marketer had shipped into California. See Burger King, supra, 471 U.S. at 473;  
 7 World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297-298 (1980); McGee, 355 U.S. at 223. There is  
 8 no reason to suppose that a state nevertheless lacks authority to impose a duty to collect a tax on the  
 9 Direct Marketer arising out of the same transaction. To the contrary, the Supreme Court held in the  
 10 leading case of International Shoe Co. v. Washington 326 U.S. 310, 321 (1945)<sup>34/</sup> that due process  
 11 objections to personal jurisdiction and to state taxing authority must be judged by the same standard:  
 12 "The activities which establish [the taxpayer's] 'presence' subject it alike to taxation by the state and to  
 13 suit to recover the tax." And that is hardly surprising since the same "minimum contacts" formula is the  
 14 touchstone in each setting. (Compare, e.g. Burger King, supra, 471 U.S. at 474; World-Wide  
 15 Volkswagen, supra, 444 U.S. at 291; International Shoe, supra, 326 U.S. at 316, National Geographic  
 16 supra, 430 U.S. at 561; Miller Brothers Co. v. Maryland 347 U.S. 340, 345 (1954).)

17 Of particular relevance here is the Supreme Court's observation in Burger King that:

18 "[j]urisdiction in these circumstances may not be avoided merely because the  
 19 defendant did not physically enter the forum state. Although territorial presence frequently  
 20 will enhance a potential defendant's affiliation with a state and reinforce the reasonable  
 21 foreseeability of suit there, it is an inescapable fact of modern commercial life that a  
 22 substantial amount of business is transacted solely by mail and wire communications across  
 23 state lines, thus obviating the need for physical presence within a State in which business is  
 24 conducted. So long as a commercial actor's efforts are 'purposefully directed' toward  
 25 residents of another State, we have consistently rejected the notion that an absence of  
 26 physical contacts can defeat personal jurisdiction there." (471 U.S. at p. 476; emphasis added.)

27 The due process "nexus" requirement, with respect to state taxation, as the Supreme Court

28 33. This conclusion draws significant support from the Supreme Court's decisions in the closely  
 29 related area of personal jurisdiction. The Supreme Court has held that a "forum State does not exceed  
 30 its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that  
 31 delivers its products into the stream of commerce with the expectation that they will be purchased by  
 32 consumers in the forum State' and those products subsequently injure forum consumers." Burger King,  
 33 471 U.S. at 473, quoting World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 291, 297-298.

34. This case involved a personal jurisdiction and a state's jurisdiction to tax (see also Shaffer v.  
Heitner 433 U.S. 186, 203 (1977)).

1 has explained in describing the closely related due process limit on the assertion of personal jurisdiction,  
 2 is grounded on the principle that states may not assert authority over out-of-state entities in a manner  
 3 that "offend[s] 'traditional notions of fair play and substantial justice.'" (International Shoe, 326 U.S.  
 4 316 (citation omitted). See also World-Wide Volkswagen, supra, 444 U.S. 286, 292.) In the tax setting,  
 5 this due process "fair play" principle assures that "the taxing power exerted by the state bears fiscal  
 6 relation to protection, opportunities and benefits given by the State." Wisconsin v. J.C. Penney Co. 311  
 7 U.S. 435, 444 (1940). The parallel commerce clause nexus requirement--the initial prong of the four-  
 8 part Commerce Clause test first set out in Complete Auto 430 U.S. 287--is similar to (and in part  
 9 derived from) the due process nexus limitation; it prevents a multitude of states from impeding  
 10 interstate commerce by taxing transactions with which they have no substantial connection. (See also  
 11 Goldberg v. Sweet, supra, 109 S.Ct. 589-590.)

## VI

13 ASSUMING NATIONAL BELLAS HESS RETAINS ANY VALIDITY,  
 14 CALIFORNIA MAY STILL CONSTITUTIONALLY REQUIRE USE TAX  
 15 COLLECTION BY DIRECT MARKETERS

15 Plaintiff argues (rev. mem., pp. 8-10) that Direct Marketers are identical to the retailer in  
 16 National Bellas Hess by citing the dissenting opinion of Justice Fortas in National Bellas Hess, which  
 17 purported to relate the facts of that retailer's credit extension activities. The opinion of the Supreme  
 18 Court never discusses that mail order catalog retailer's credit extension activities or the manner in which  
 19 that retailer obtained payment for orders.<sup>25/ 26/</sup> Therefore, plaintiff's argument that in National Bellas  
 20

21 35. Chief Justice Charles Evans Hughes wrote the following statement in 1928:

22 "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to  
 23 the intelligence of a future day, when a later decision may possibly correct the error into  
 24 which the dissenting judge believes the court to have been betrayed." (Hughes, The  
 25 Supreme Court of the United States (1928), p. 68)

23 In National Bellas Hess, the three dissenting justices (Black, Douglas, and Fortas) stated a  
 24 belief that "a realistic approach to the facts of appellant's business" would have led to an upholding of  
 25 the tax in issue. (386 U.S. at 760) They noted that the affidavits upon which the case was tried did not  
 26 disclose the details of the company's credit operations in Illinois, but they were willing to make certain  
 27 assumptions that such credit business would lead to local activities. (Id. at 761-62) On the basis of  
 28 these assumptions, the dissenters concluded that "Bellas Hess is not simply using the facilities of  
 interstate commerce to serve customers in Illinois." (Id. at 762)

27 The majority in National Bellas Hess was unwilling to make these assumptions, basing its  
 28 holding on the statement of fact that "[a]ll of the contacts which National does have with the State are  
 via the United States mail or common carrier." (Id. at 754) (emphasis added) The majority simply  
 refused to make the assumptions regarding local activities which the dissent was willing to draw from

(continued...)

1 Hess the Supreme Court rejected predicating "nexus" on a mail-order retailer's credit extension activities  
2 is specious.

3           Clearly, Direct Marketers communicate (including accomplishing sales) with and have  
4 connections with their customers by means in addition to the mail and common carriers. Direct  
5 Marketers participate in at least two nationwide credit extension and collection systems (VISA and  
6 MasterCard). For plaintiff to argue (rev. mem. p. 9) that this participation takes place outside  
7 California basically begs the question which National Bellas Hess poses. The question is whether a  
8 retailer's communications and connections with customers involve anything more than the mails and  
9 common carriers. If so, (as occurs with Direct Marketers) the inquiries are then whether the state  
10 asserting a use tax collection responsibility directly or indirectly provides benefits and services to the  
11 retailer or to the retailer's in-state activities. If these inquiries are answered affirmatively, a retailer's  
12 activities are subject to state taxation. The fact that a retailer uses the mails or common carriers to  
13 conduct its business will not, then, take away the state's ability to require use tax collection.

14           The benefits and services provided to the California institutions which issue the credit cards  
15 accepted by Direct Marketers directly benefit Direct Marketers, as do the benefits afforded Direct  
16 Marketers' property in California and the disposal of Direct Marketers' catalogs. Similarly, to the extent

17  
18 35. (...continued)  
19 the facts that were present in the rather limited record.

20           If the courts were to make a general practice of using shortcomings pointed out in  
21 dissenting opinions, as plaintiff seeks, to broaden the scope of the majority opinions which were the  
22 targets of the dissenters, there would be a dangerous stifling of valuable dissent. Under those  
23 conditions, judges who conscientiously wished to point out what they perceived to be injustices resulting  
24 from misapplication of law or fact would hesitate to forthrightly set forth their dissenting views for fear  
25 that the shortcomings that they perceived in the majority opinion would later be turned around to add  
26 to the scope of the majority opinion and thus increase the perceived injustice. Under those conditions,  
27 the dissenting opinion could soon lose the noble function assigned to it by former Chief Justice Hughes.

28 36. Similarly, plaintiff's reliance on L.L. Bean v. Com., Dept. of Revenue (Pa.Cmwth. 1986) 516  
A.2d 820, 821-25) is misplaced. The use tax statute at issue was silent with respect to a retailer  
benefitting from banking in Pennsylvania. Although the stipulated facts reflected L.L. Bean's acceptance  
of credit cards issued by Pennsylvania institutions, the facts are absent any details concerning the credit  
card systems and/or L.L. Bean's involvement therein, and the opinion never discusses credit card  
acceptance. For the same reasons, the reference to Bloomington's v. Dept. of Revenue (Pa.Cmwth.  
1989) 567 A.2d 773, is unavailing. Plaintiff's citation to SFA Folio Collection, Inc. v. Bannon, 585 A.2d  
666 Conn. 1991), is meritless. In that case, the Court stated that retailer did not benefit from the  
Connecticut court system because the risk of loss "falls upon the credit card company." The stipulated  
facts herein reflect that Direct Marketers directly participate in the nationwide credit card systems which  
include activities in California.

1 the "physical presence" in California of the property of Direct Marketers, remains any prerequisite to an  
2 imposition of a use tax collection and remittance responsibility, Direct Marketers do, in fact, have  
3 property in California (catalogs and merchandise sold on approval).

4  
5 VII

6 PLAINTIFF'S CLAIMS OF BURDEN ARE MERITLESS  
7 BOTH PRACTICALLY AND LEGALLY

8 The question before this Court is whether Direct Marketers can constitutionally be required  
9 to collect and remit California's use taxes pursuant to section 6203(f). Plaintiff's arguments regarding  
10 burden (rev. mem. pp. 15, et. seq.) are both legally and practically incorrect and advanced seemingly to  
11 transform the single legal issue to be decided in this case to one of national legal policy and  
12 insurmountable complexity. SBE seeks Direct Marketers' compliance with section 6203(f). Not before  
13 this Court is the question of whether as a matter of national law involving Direct Marketers and all the  
14 states, use tax collection should be a uniform nationwide requirement.

15 Pursuant to section 6203(j), Direct Marketers are required to collect and remit a single rate  
16 of use tax for all sales to California. Therefore, whether or not 44 other states and the local  
17 jurisdictions therein may also constitutionally require Direct Marketers to collect the use taxes of such  
18 other states (and local jurisdictions) is irrelevant.

19 In National Bellas Hess, 386 U.S. 759-60, the Supreme Court focused on the "virtual welter  
20 of complicated obligations to local jurisdictions" which would occur if every political subdivision could  
21 "entangle" each mail-order seller in administrative and record-keeping requirements. By comparison, at  
22 issue herein is the constitutionality of a single use tax rate coupled with a single state sales and use tax  
23 return which is submitted to a single state entity, SBE.<sup>37/</sup> The "entanglement" rationale of the  
24 National Bellas Hess decision has no application to this case.

25 Nothing whatsoever in the record of this case supports plaintiff's contentions regarding the

26 37. Plaintiff's reference to the point-of-sale retailer not facing the "burden" of multiple  
27 jurisdiction sales tax collection (rev. mem. pg. 16) borders on the absurd. In California, the local  
28 retailer must pay the state, as well as any local, sales taxes applicable to each separate location. A  
retailer with more than one location in more than one local jurisdiction could find itself required to  
collect varying rates of California sales tax (as now occurs, for example, for "chain" retailers with  
locations in and out of the "BART" counties). Such retailers have administrative and bookkeeping  
requirements which do not burden Direct Marketers subject to the single California use tax rate.

1 expenses of and consequences (for example, lost catalog space) of notifying customers of any  
 2 jurisdiction's use tax requirements. These arguments (not fact) ignore the undisputed facts that most  
 3 sales by Direct Marketers are accomplished through the acceptance of credit cards and that customers  
 4 have access to "800" telephone numbers of every Direct Marketer. (Stip. para.'s 12, 15.) Direct  
 5 Marketers are not prevented from informing customers of California single use tax rate, when customers  
 6 call an "800" number and place an order using a credit card. In addition, Direct Marketers obviously  
 7 face collection requirements if, for whatever reason, customers who place mail orders fail to remit the  
 8 proper amount. Finally, just as computers allow Direct Marketers to process telephone orders from  
 9 every corner of the country, to seek approval for every credit card sale, and (for some Direct Marketers)  
 10 to generate computer entries for every credit card charge, computer technology (software) is available to  
 11 Direct Marketers for billing and remitting of use taxes.<sup>38/</sup>

VIII

CONCLUSION

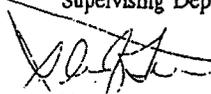
Summary judgment should be entered in favor of the defendants.

DATED: June 14, 1991.

Respectfully submitted,

DANIEL E. LUNGREN  
Attorney General

JAMES B. CUNEO  
Supervising Deputy Attorney General



STEVEN J. GREEN  
Deputy Attorney General

Attorneys for Defendants

38. See Hartman, *supra*, at 1011-12. Such software fills an obvious need as many firms have both local store and mail order components, and/or stores in jurisdictions with various rates and are thus required to collect and remit more than one tax rate to possibly more than one jurisdiction. Also, it defies logic to assume that Direct Marketers with at least \$500,000 and possibly in excess of \$10,000,000 in California sales alone, are conducting business utilizing modern computer technology in everything but internal accounting.

DECLARATION OF PERSONAL SERVICE

Case Name: DMA v. Bennett, et al.

No. S88-1067 MLS

I declare:

I am employed in the County of Sacramento, California; I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K St., P. O. Box 944255, Sacramento, California 94244-2550.

I served the attached:

DEFENDANTS' MEMORANDUM OF POINTS & AUTHORITIES IN  
OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND IN FAVOR OF SUMMARY JUDGMENT FOR DEFENDANTS

by personally delivering a true copy thereof to each of the following names persons on the date and at the address as follows in said cause:

NAME/ADDRESS

DATE

John A. Mendez  
Downey, m Brnad, Seymour & Rohwer  
555 Capitol Mall, 10th Floor  
Sacramento, CA 95814-4686

June 14, 1991

I declare under penalty of perjury the foregoing is true and correct, and that this declaration was executed at Sacramento, California on June 14, 1991.



STEVEN J. GREEN

DECLARATION OF SERVICE BY FAX

Case Name: DMA v. Bennett, et al.

No. S88-1067 MLS

I declare:

I am employed in the County of Sacramento, California; I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K St., P. O. Box 944255, Sacramento, California 94244-2550.

I served the attached:

DEFENDANTS' MEMORANDUM OF POINTS & AUTHORITIES IN  
OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND IN FAVOR OF SUMMARY JUDGMENT FOR DEFENDANTS

by Faxing a true copy thereof to each of the following named persons on the date and at the phone number as follows in said cause:

NAME/ADDRESS

DATE

Martin Eisenstein  
(207) 783-9325

June 14, 1991

I declare under penalty of perjury the foregoing is true and correct, and that this declaration was executed at Sacramento, California on June 14, 1991.



STEVEN J. GREEN

(2)

1 DOWNEY, BRAND, SEYMOUR & ROHWER  
JOHN A. MENDEZ (#95450)  
2 555 Capitol Mall, 10th Floor  
Sacramento, California 95814-4686  
3 (916) 441-0131

4 BRANN & ISAACSON  
GEORGE ISAACSON  
5 MARTIN I. EISENSTEIN  
Post Office Box 3070  
6 Lewiston, Maine 04243-3070  
(207) 786-3566

FILED

JUL 12 1991

CLERK, U. S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
BY \_\_\_\_\_  
DEPUTY CLERK

Attorneys for Plaintiff

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ORDERED

8 1991

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

DEPUTY CLERK

12 DIRECT MARKETING ASSOCIATION )  
INC., )  
13 )  
14 Plaintiff, )  
15 v. )  
16 WILLIAM M. BENNETT, et al., )  
17 Defendants. )  
18 )

No. CIVS-88-1067 MLS  
ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT

19 This matter came on for hearing on June 28, 1991, on the  
20 motion of Plaintiff DIRECT MARKETING ASSOCIATION, INC. for  
21 summary judgment and the cross-motion of Defendants WILLIAM M.  
22 BENNETT, et al. for summary judgment. Plaintiff was represented  
23 by George Isaacson of Brann & Isaacson and John A. Mendez of  
24 Downey, Brand, Seymour & Rohwer. Defendants were represented by  
25 Steven J. Green, Deputy Attorney General, State of California.

26 The Court, having read and considered the motions, memoranda  
27 of points and authorities, stipulated facts, and affidavits  
28 submitted both in favor and in opposition thereto, and having

DOWNEY  
BRAND  
SEYMOUR  
& ROHWER

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE: MILTON L. SCHWARTZ, JUDGE

---o0o---

DIRECT MARKETING,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. Civ S-88-1067
	)	
BENNETT, et al.,	)	
	)	
Defendants.	)	

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REPORTER'S TRANSCRIPT

JUNE 28, 1991

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Reported by: JANE E. BEAUCHAMP, CSR #6408

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APPEARANCES:

For the Plaintiff:

BRANN & ISAACSON  
Attorneys at Law  
184 Main Street  
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BY: GEORGE S. ISAACSON, Esq.

DOWNEY, BRAND, SEYMOUR & ROHWER  
Attorneys at Law  
555 Capitol Mall, Tenth Floor  
Sacramento, CA 95814-4686  
BY: JOHN A. MENDEZ, Esq.

For the Defendants:

DEPARTMENT OF JUSTICE  
Office of the Attorney General  
1515 K Street, Suite 511  
Post Office Box 944255  
Sacramento, CA 94244-2550  
BY: STEVEN J. GREEN,  
Deputy Attorney General

SACRAMENTO, CALIFORNIA, FRIDAY, JUNE 28, 1991

2:00 P.M.

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THE COURT: The following constitutes the decision of the Court on these cross-motions for summary judgment.

Plaintiff, Direct Marketing Association, Inc., filed this section 1983 action on behalf of its members seeking declaratory and injunctive relief.

The controversy arose when defendants, individual members and officers of the California Board of Equalization demanded that plaintiff's members collect a use tax from their California customers if they, one, maintained substantial and recurring solicitations of and sales to California customers; and two, accept credit cards issued by California financial institutions.

Plaintiff contends that imposition of use tax liability in this case is unconstitutional because there is an insufficient connection between California and the members it seeks to tax.

The Supreme Court has held that under the due process clause of the 14th amendment and the commerce clause, a state may not impose the burden of use tax collection against an out-of-state entity unless there is a sufficient nexus between the state and the entity.

National Bellas Hess, Inc. vs. Department of Revenue of

1 the State of Illinois, 386 U.S. 754 (1967). In applying  
 2 that rule, the Court has found a sufficient nexus where  
 3 the out-of-state entity has a place of business,  
 4 employees or property within the state. It has found the  
 5 nexus insufficient where the only connection with  
 6 customers in the taxing state is by common carrier or the  
 7 United States mail.

8 According to the facts presented to the Court by  
 9 stipulation of all parties in this case, plaintiff's  
 10 members do not have offices, outlets, stores, warehouses  
 11 or other facilities, stocks of goods, real property or  
 12 employees in California. They do not have agents,  
 13 independent contractors, or representatives soliciting  
 14 sales in California. They do not maintain bank accounts  
 15 in California. They do not ship products to California  
 16 customers from any location in California. Plaintiff  
 17 contends that in light of these facts, the Supreme  
 18 Court's holding in National Bellas Hess compels this  
 19 Court to rule that defendants' imposition of use tax  
 20 liability is unlawful.

21 Defendants, however, contend that plaintiff  
 22 interprets the sufficient nexus test too narrowly.  
 23 According to defendants, there is sufficient nexus in  
 24 this case because plaintiff's members accept credit cards  
 25 issued by California financial institutions. The parties

1 agree that a substantial portion of the credit card sales  
2 to California customers are charged to the customers'  
3 VISA and MasterCard credit cards issued by California  
4 banks. Defendants argue that other factors also weigh in  
5 favor of a finding of nexus, including the fact that  
6 defendants' advertisements and catalogues generate  
7 literal garbage which must be disposed of by the state,  
8 and the fact that sales to California residents require  
9 California 800 line telephone calls, debt collection in  
10 this state, and frequent shipments to California on state  
11 highways.

12 Defendants also contend that a rigid application  
13 of the doctrine articulated in National Bellas Hess is  
14 improper for several reasons. They contend that because  
15 the direct marketing industry has grown dramatically  
16 since National Bellas Hess was decided in 1967, the  
17 doctrine of that case is obsolete. They also contend  
18 that since the Supreme Court has expanded its notion of  
19 what constitutes "minimum contact<sup>5</sup>" with respect to  
20 personal jurisdiction, it is reasonable to assume that  
21 the Court is moving in the same direction with respect to  
22 sufficient nexus and use tax liability.

23 This Court does not find these arguments  
24 persuasive. The Court does not find use of California  
25 financial institutions or any of the other factors

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1 mentioned by defendants to be comparable to the  
 2 maintenance of retail outlets, employees, or property  
 3 within the State. Additionally, although the direct  
 4 marketing industry may have only been a fraction of its  
 5 current size at the time the case was decided, the sales  
 6 transactions which took place between Bellas Hess and its  
 7 Illinois customers clearly required reliance on Illinois  
 8 financial institutions. The dissent found this  
 9 significant in terms of meeting the sufficient nexus  
 10 test, but clearly the majority did not.

11 Furthermore, defendants' <sup>wa</sup> contention that  
 12 International Shoe Company vs. Washington, 326 U.S. 310  
 13 (1945), stands for the proposition that the test for  
 14 minimum contacts is or should be interchangeable with the  
 15 test for sufficient nexus. <sup>mb</sup> The Court finds that this  
 16 conclusion or reading of International Shoe is erroneous.  
 17 Although the Court stated that the activities of the  
 18 taxpayer in the taxing state subject it alike to taxation  
 19 by the state and to suit to recover the tax, the Court's  
 20 ruling was limited to the facts before it. Of course,  
 21 the factors which are relevant to a determination of  
 22 minimum contacts may also be relevant to a determination  
 23 of sufficient nexus. Nonetheless, the two doctrines are  
 24 distinct.

25 Defendants additionally argue that during the

1 short time prior to customer acceptance, the goods  
2 plaintiff's members shipped to California residents .  
3 remain the property of the members. Defendants conclude  
4 that because this property enjoys California police and  
5 fire protection, plaintiff's members are receiving a  
6 benefit from the state which justifies imposition of use  
7 tax liability. The Court does not agree with this  
8 analysis. Title to the goods in question remains with  
9 the seller only where the sales are sales on approval  
10 pursuant to Uniform Commercial Code Section 2-326. There  
11 is no evidence or facts before the Court indicating the  
12 sales by plaintiff's members are on approval. The  
13 general presumption runs against delivery to a customer  
14 being a sale on approval. Gold 'N Plump Poultry, Inc.  
15 vs. Simmons Engineering Company, 805 Federal Second 1312  
16 (Eighth Circuit 1988). In any event, a ruling in favor  
17 of plaintiff on this motion would not preclude defendants  
18 from imposing a use tax against an out-of-state retailer  
19 who maintained property in this state.

20 In sum, although defendants have raised a number  
21 of meritorious arguments as to why National Bellas Hess  
22 should be reconsidered or reversed or modified, this  
23 Court feels it is still bound by it. Consequently, the  
24 Court concludes that in the absence of a clearly  
25 distinguishing feature, defendants cannot lawfully

1 require plaintiff's members to collect and remit a use  
2 tax on sales to California customers solely on the basis  
3 that those members maintain substantial and recurring  
4 solicitations and sales to California customers and  
5 accept credit cards issued by California financial  
6 institutions. Accordingly, the Court is compelled to  
7 grant plaintiff's motion for summary judgment and does do  
8 so hereby and denies defendants' cross-motion for summary  
9 judgment.

10 MR. ISAACSON: The only question I have, since  
11 summary judgment is being entered, it resolves all the  
12 issues in the case, is judgment also being entered in  
13 plaintiff's favor?

14 THE COURT: That follows the granting of the  
15 motion for summary judgment.

16 Also, the affidavit of Stephen Clegg filed on  
17 behalf of plaintiff on June 21, 1991, is stricken.

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CERTIFICATE OF COURT REPORTER

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I, JANE E. BEAUCHAMP, Official Reporter,

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certify that the foregoing pages constitute a true and

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correct transcript of the testimony contained therein as

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reported by me and thereafter reduced to typewriting to

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the best of my ability.

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July 2, 1991.

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*Jane E. Beauchamp*

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JANE E. BEAUCHAMP, CSR #6408  
Official Shorthand Reporter.

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Medline Industries, Inc.  
Susan M. Russell

One Medline Place  
Mundelein, Illinois 60060-4486

1.847.643.4603 Phone  
1.847.837.2756 Fax

VIA FAX 559-312-2929

May 29, 2007

Mr. Albin C. Koch  
c/o Carrie Toomey  
MuniServices LLC  
Suncoast Lane  
El Dorado Hills, CA

Re: Delivery Obligations of Internet Retailers

Dear Mr. Koch:

My name is Susan Russell, and I am a corporate attorney with 10 years' experience working with companies that make sales to consumers and others via the internet. For a number of years I was employed as Associate General Counsel of Sears, Roebuck & Co. which has at least one subsidiary engaged in making internet sales.

You have asked what delivery obligation the internet industry generally accepts in making sales via the internet. For example, does the delivery obligation terminate upon shipment via common carrier from storage facilities to the customer or do they typically continue to be responsible for and own the goods shipped until after actual delivery to the customer occurs?

My experience is that the marketplace demands that internet retailers remain responsible for the goods that they ship until after actual delivery to the purchaser. This is because internet purchasers are not willing to purchase from websites before they actually can see the goods being purchased to make sure they fit their orders. This industry practice has helped make internet selling more and more successful.

Often people experienced with internet selling will refer to this practice as selling "FOB destination," even though no such language is posted on the website, because in business terms, that is what their shipping and delivery responsibility is.

Yours very truly,

Susan Russell  
Medline, Inc.  
Director of Tax and Insurance.

BRS-00259

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**Report for MuniServices LLC and the Attorney(s) Representing MuniServices, LLC**  
**Prepared by Patrick A. Scholten, Ph. D.**  
**Date: Sunday, July 15, 2007**

1. **Introductions**

In this report I will discuss a brief history of traditional retail markets, the different type of retail Internet entities along with their pros and cons, and various internal functional areas required to operate and maintain a successful retail Internet business. The discussion then moves to describing the legal and contractual formats utilized to transfer ownership of goods in retail Internet goods markets.

2. **Retail Internet Business Structures and Internal Operations**

**2.1 Traditional Retail Market Background**

This background information helps set the stage for the evolution of how to run a successful Internet retail operation. Similar issues that faced retailers in the 1870's and 1900's are cropping up again as the Internet changes the retail landscape.

Traditional means for retailers to sell their products was by renting or purchasing property where the physical entity (retail outlet) would reside and consumers would visit the outlet, inspect the goods' various characteristics and decide to purchase or not. The geographic reach of these traditional retail outlets was limited to consumers in the surrounding areas. To broaden its consumer base, traditional retailers had to rent or purchase additional property to set up another outlet. Not only was this costly, but managing geographically-disparate entities could prove to be problematic.

The traditional retail model confers both costs and benefits to consumers. On the benefit side, consumers could visit the entity and inspect the goods prior to making a purchase decision. Additionally, consumers could establish relationships with the store owners and other individuals working at the retail outlet. Thus, a trust relationship was built over time between the retailer and consumer. Consumers, however, incurred search costs each time they visited the retailer. This cost might come in the form of "shoe leather" costs (the explicit cost of travel to and from the physical outlet – such as gas or the bottoms of one's shoe). There is also an implicit cost of the time it takes a consumer away from other activities.

In 1872, Aaron Montgomery Ward established the first mail-order retail business. Ward's strategy was important for several reasons. First, creating a mail-order retail operation permitted a retailer to reach consumers in remote geographic areas, without incurring the fixed costs of setting up a retail outlet in each location. Second, it reduced consumers' search costs since consumers could simply thumb through the catalogue to find the item they wanted to purchase. Setting up a large-scale retail operation required that retail outlets be placed throughout the United

States. The cost of creating a mail-order retail business, however, was that the consumer had to trust that the retailer would deliver the promised items once transfer of payment had occurred. In addition, mail-order retailers had to make a cost-benefit analysis of which items to include in a catalogue. That is, only a subset of products could be advertised in a catalogue.

Ward's initial success was modest at best and faced significant opposition from rival local retailers in rural areas. Part of Ward's success was based on an innovative and (at the time) unprecedented company policy that gave consumers a "satisfaction guarantee or your money back." Since consumers shopping via catalogue could only see a picture and written description of an item, and not physically inspect it, Montgomery Ward's satisfaction guarantee policy was an integral part of gaining consumers' trust and its early success in the catalogue business. After a couple of decades and facing significant competition from its rival Sears, Roebuck and Company, Ward decided to open a retail outlet in Chicago and other outlets followed.

This brief history sets the stage for how competition on the Internet has evolved and will evolve in the future. While the lesson from the Montgomery Ward-Sears Roebuck rivalry suggests that retailers with a multi-channel distribution network will prevail, there are several reasons to expect an equilibrium to prevail consisting of a combination of Internet-only retailers and hybrid retailers that have both an Internet operation combined with one or more physical, traditional retail outlets. More importantly, however, the story illustrates the long-time origin of the money-back guarantee that is prevalent in today's retail Internet business. This policy illustrates a long-standing tradition, and the subsequent legal framework, among retailers that true ownership is not final until after taking possession of the good. Indeed, true transfer of ownership only takes place after a period extending beyond physical possession of the item.

## ***2.2 Key Retail Internet Business Structures***

There are two broad structures available to retailers using the Internet as a distribution channel. The first type of structure is a "pure-play" Internet retailer. This type of retailer only distributes goods over the Internet. It does not have a physical location where consumers can go to browse and inspect goods prior to purchasing them. Instead, pure-play Internet retailers have a virtual "storefront" where it displays physical and written descriptions of each of its products on its website. Once the main website is set up, maintenance of the product information on the website is as simple as changing information contained in a database to which the website is linked. Instead of having a physical location for consumers to visit, the pure-play retailer only needs a warehouse to store and ship goods. The obvious advantage is lower overhead costs to operate a physical facility that is appealing to consumers and not having to employ a trained sales force. On the other hand, it may

be necessary for the pure-play retailer to hire the professional services of a web design company.

The second entity structure utilized by retailers distributing goods via the Internet is a hybrid retailer that has both one or more physical retail outlets and a virtual storefront. While this structure is certainly more costly on many dimensions (cost of maintaining several locations, sales staff, cost of a web design firm or division), the cost of maintaining this type of structure may be offset by the benefit, depending on the retailers' strategy.

There are several things to consider in selecting a business structure. The business-structure decision impacts the retailers' cost structure. Based on a cost structure, a retailer can select a strategy to most effectively compete in the market.

### **2.3 Internal Operations**

#### **2.3.1 Management Team**

Retail Internet markets are extremely competitive and the management team is responsible for creating the company vision and ensuring that the other functional areas of the company are executing that vision. Given the dynamic nature of these markets, the management team must respond quickly to changes in the market.

#### **2.3.2 Marketing Department**

Successful large-scale Internet retailers have a multi-faceted marketing department. The functional areas associated with the team are merchandise selection; pricing and promotional activities; general policy selection such as credit policies, return policy, et cetera; ensuring that the virtual store is easy to navigate and has the psychological attributes that are comforting to consumers; providing visual images and written descriptions of the products; researching the demographic characteristics of its primary consumers; and executing and managing the company image and vision created by the management team.

Product lifecycle for many products sold on the Internet are relatively short. That means a team of individuals have to be constantly managing the inventory of existing products by adjusting prices and monitoring competitors' pricing activities. In addition, a worldwide team of buyers have to constantly be looking for new products and negotiating with vendors.

#### **2.3.3 Inventory and Warehouse Management Engineers**

A team of engineers is necessary to design and maintain an inventory control system. Effectively and efficiently running a large-scale operation requires a real-time intelligent information process warehouse and inventory system that automates and controls all aspects of the warehouse. This system would

inform consumers whether the product of interest is available prior to purchasing. If properly managed, such a system would also minimize inventory requirements by automatically flagging restocking when it reached a defined threshold.

Warehouse design to accommodate a real-time intelligent system is extremely important. For instance, once consumers initiate an order via the website, an automated warehouse system will have material handling equipment in place to know where that product is located in the inventory racks, be able to retrieve the product, package and place a shipping label on the product to be shipped out with the next delivery. This process can happen anytime of the day with minimal manual labor. However, a team of engineers are required to develop and maintain such an intricate system. The ability to automate this inventory and distribution systems has a dramatic impact on an organization's efficiency and profitability.

#### **2.3.4 *IT Department***

The IT department is the lubricant that makes the marketing and real-time intelligent system in the warehouse function smoothly. The marketing and inventory information content reside in databases, which is stored and managed on servers. These servers could be either owned by the retailer or leased space managed and operated by an Internet hosting company.

This team of individuals takes the marketing content – like digital photos and product descriptions – to create a database of products and ensures that it is properly displayed on the retailer's website. In addition, this team develops and maintains the linkage with the warehouse so that consumers know whether the product is available or when the inventory needs to be restocked.

Internet security is the root of all Internet retailers business. The IT department is ensuring that the shopping environment is secure for consumers so that personal information (i.e. credit card information) is not disseminated to unauthorized individuals. The technology required to maintain this aspect of the business is constantly being changed and updated. Security breaches could ruin an Internet retailer's reputation and business.

#### **2.3.5 *Other Information Pertaining to the Efficiency of Internal Operations***

The close linkages between the internal functional areas require that each department work closely with one another. Therefore, operating a large-scale retail Internet business is most efficiently operated with all of the functional areas in the same geographic location.

3. **Standard Legal and Contractual Format for Ownership Transfer in Retail Internet Markets**

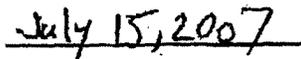
In many ways transfer of ownership of items in retail Internet markets parallels that of the mail-order catalogue market. Consumers find a product they want to purchase. Once the consumer has made a purchase decision they can inform the retailer of their "order" decision by providing product and payment information over a secure Internet connection.<sup>1</sup> When an order is communicated to an Internet retailer over a secure Internet connection, the retailer will send an automated email confirmation that provides essential information about the purchase. The retailer ships the item and ownership is transferred when the consumer receives 1) the bill of sale or receipt and 2) the physical item.

According to the Federal Trade Commission's (FTC) Facts for Consumers' Guide "Billed for Merchandise You Never Received? Here's What To Do" the company is obligated to ship an order with the time stated in an advertisement. In circumstances where no delivery time is promised, the retailer has up to 30 days after receiving the order to process and ship the item. According to the FTC Facts for Consumers' Guide, the one exception to this rule is that "if a company doesn't promise a shipping time, and you are applying for credit to pay for your purchase, the company has 50 days to ship after receiving your order."

According to the FTC Facts for Consumers' Guide "The Cooling-Off Rule: When and How to Cancel a Sale" when consumers purchases an item from a store's permanent physical location they may not be able to return a previously purchased item. However, when consumers purchase items at a location other than the seller's permanent place of business, The Cooling-Off Rule extends your right to cancel an order for a full refund extends until midnight of the third business day after the sale.

Internet retailers often have a more liberal return policy than that permitted under the FTC's Cooling-Off Rule. A sampling of online retailers revealed that items could be returned to seller between 10 to 30 days on most items.<sup>2</sup>

  
Patrick A. Scholten

  
Date

<sup>1</sup> In 1996, the United States Congressional Budget Office conducted a study entitled "Emerging Electronic Methods for Making Retail Payments," that discusses the forms of payment being accepted by online (and other) retailers.

<sup>2</sup> Some items are not returnable.

4. **References**

Federation of Tax Administrators: State Sales Tax Rates:

<http://www.taxadmin.org/FTA/rate/sales.html>

FTC Facts for Consumers "Billed for Merchandise You Never Received" Here's What To Do"

FTC Facts for Consumers "The Cooling-Off Rule: When and How to Cancel a Sale"

"Internet Sales Tax Fairness." The Hometown Advantage: Reviving Locally Owned Business: <http://www.newrules.org/retail/inttax2.html>

Montgomery Ward, from Wikipedia: [http://en.wikipedia.org/wiki/Montgomery\\_Ward](http://en.wikipedia.org/wiki/Montgomery_Ward)

## PATRICK A. SCHOLTEN

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### OFFICE ADDRESS

Department of Economics  
Bentley College  
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Home Page: [www.nash-equilibrium.com/scholten/index.php](http://www.nash-equilibrium.com/scholten/index.php)

### PERSONAL

Born November 20, 1968; married, 1 child; U.S. citizen

### EDUCATION

Ph.D. (Economics), Indiana University, August 2003

M.A. (Economics), Indiana University, December 2000

B.A. (Economics), Michigan State University, December 1992

### DISSERTATION

Title: "The Economics of Retail Pricing on the Internet"

### FIELDS OF RESEARCH

Industrial Organization, Game Theory and Strategy, and Applied Econometrics

### PUBLICATIONS & ACADEMIC RESEARCH

#### PUBLISHED & FORTHCOMING PAPERS

- "A Review of Three Directed Acyclic Graphs Software Packages: MIM, Tetrad, and WinMine." (with Dominique Haughton and Arnold Kamis), *The American Statistician*, August 2006, 60(3), 272-286.
- "Information, Search and Price Dispersion" (with Michael R. Baye and John Morgan) in *Handbook on Economics and Information Systems* (T.J. Hendershott, Ed.), Amsterdam: Elsevier, forthcoming.
- "Temporal Price Dispersion: Evidence from Shopper.com" (with Michael R. Baye and John Morgan), *Journal of Interactive Marketing*, Autumn 2004, 18 (4), 101-115.
- "Price Dispersion in the Small and in the Large: Evidence from an Internet Price Comparison Site" (with Michael R. Baye and John Morgan), *Journal of Industrial*

*Economics*, December 2004, 52 (4), 463-496. Winner of the 2004 Journal of Industrial Economic "Best Article Prize."

- "Persistent Price Dispersion in Online Markets" (with Michael R. Baye and John Morgan) in *The New Economy and Beyond: Past, Present and Future* (D.W. Jansen, Ed.), Edward Elgar, forthcoming.
- "Price Dispersion, Product Characteristics, and Firms' Behaviors: Stylized Facts from Shopper.com" (with Jihui Chen) in *Advances in Applied Microeconomics* (M.R. Baye, Ed.), JAI Press, 2003.
- "The Value of Information in Online Markets" (with Michael R. Baye and John Morgan), *Journal of Public Policy and Marketing*, Spring 2003, 22 (1), 17-25.
- "Price Dispersion Then and Now: Evidence from Retail and E-tail Markets" (with Adam Smith) in *Advances in Applied Microeconomics* (M.R. Baye, Ed.), JAI Press, 2002.

#### WORKING PAPERS & RESEARCH IN PROGRESS

- "The Nature of Sales in Online Markets: Asymmetric Consumer Information or Benefits to Bulk Shopping?" (with Jihui Chen and Jeffrey Livingston)
- "Pricing Behaviors of Firms on the Internet: Evidence from Price Comparison Sites Cnet and Nextag." (with Yu-Chen Lin)
- "The Propensity to Advertise Price Online: Evidence from Shopper.com." (with Jeffrey Livingston)
- "A Structural Equation Model of Gambling and Vice Expenditures in the UK" (with Dominique Haughton, David Gulley and Arnold Kamis)

#### OTHER PUBLICATIONS

- *Instructors Manual to Accompany Managerial Economics and Business Strategy*, 5<sup>th</sup> Edition (with Michael R. Baye), 2005.

#### PROFESSIONAL EXPERIENCE

##### TEACHING EXPERIENCE

- Assistant Professor, Bentley College, Department of Economics, *present – Fall 2003*.
  - Business Statistics.
  - The Economics of Internet Technology.
  - Industrial Organization and Markets.
  - The Economics of Antitrust and Regulation.

- Visiting Lecturer, Indiana University, Department of Business Economics and Public Policy, *Summer 2002 – Summer 2003*.  
Business and Economic Strategy in the Public Arena.
- Associate Instructor, Indiana University, Department of Economics, *Fall 1999 – Spring 2000*.  
Principles of Microeconomics.
- Teaching Assistant at Indiana University, Department of Economics, *Fall 1997 – Fall 1998*.  
Principles of Microeconomics.  
Introduction to Business Statistics.

#### TEACHING INTERESTS

Industrial Organization, Managerial Economics, Applied Game Theory, Applied Econometrics, Business Statistics.

#### ACADEMIC

- Research Assistant at Indiana University for Michael Baye. *Summer 1998 – Spring 2002*.

#### NON-ACADEMIC

- Consultant, Unext 2001
- Analyst, BankAtlantic 1994 – 1997

#### CONFERENCE PRESENTATIONS AND PARTICIPATION

- European Association for Research in Industrial Economics (EARIE), Amsterdam, Netherlands, August 2006. Paper Presented: "Pricing Behaviors of Firms on the Internet – Evidence from Price Comparison Sites CNet and NexTag."
- Southern Economic Association Conference, Washington, D.C., USA, November 2005. Paper Presented: "The Timing and Nature of Price Adjustments in Electronic Retail Markets: Evidence from a Price Comparison Site."
- 4<sup>th</sup> ZEW Conference on the Economics of Information and Communication Technologies, Mannheim, Germany, July 2 – 3, 2004. Paper Presented: "The Propensity to Advertise Price Online: Evidence from Shopper.com."
- University Research Conference, National Bureau of Economic Research, Cambridge, Massachusetts, May 7 – 8, 2004. Paper Presented: "The Propensity to Advertise Price Online: Evidence from Shopper.com."

- International Industrial Organization Conference, Chicago, Illinois, USA, April 23 – 24, 2004. Paper Presented: “The Propensity to Advertise Price Online: Evidence from Shopper.com.”
- Southern Economic Association Conference, San Antonio, Texas, USA, November 20 – 23, 2003. Paper Presented: “The Propensity to Advertise Price Online: Evidence from Shopper.com.”
- Bentley College, Department of Economics, February, 2003. Paper Presented: “Price Dispersion in the Small and in the Large: Evidence from an Internet Price Comparison Site.”
- University of Wyoming, Department of Economics and Finance, January, 2003. Paper Presented: “The Propensity to Advertise Price Online: Evidence from Shopper.com.”
- Grand Valley State University, Department of Economics, January, 2003. Paper Presented: “Price Dispersion in the Small and in the Large: Evidence from an Internet Price Comparison Site.”
- Indiana University, Department of Business Economics and Public Policy, November 2002. Paper Presented: “The Propensity to Advertise Prices Online: Evidence from Shopper.com.”
- Southern Economic Association Conference, New Orleans, Louisiana, USA, November 25-26, 2002. Paper Presenting: “Price Dispersion in the Small and in the Large: Evidence from an Internet Price Comparison Site.”
- Indiana University, Department of Economics Microeconomics Workshop, September 4, 2002. Paper Presented: “The Economics of Retail Pricing on the Internet.”
- World Congress of the Econometric Society, Seattle, Washington, USA, August 2000.
- NATO Advanced Study Institute: Stochastic Games and Applications, Stony Brook State University of New York, July 7 – 18, 1999.

#### ACADEMIC AWARDS AND HONORS

- 2004 Best Article Prize, *Journal of Industrial Economics* for “Price Dispersion in the Small and in the Large: Evidence from an Internet Price Comparison Site” (with Michael R. Baye and John Morgan).
- Fred and Judy Witney Scholarship Award presented by Indiana University, 2003.

**PROFESSIONAL ACTIVITIES**

**REFEREEING**

Economic Inquiry, Information Economics and Policy, National Science Foundation,  
Review of Industrial Organization.

**PROFESSIONAL AFFILIATIONS**

American Economic Association, Industrial Organization Society, and the Southern  
Economic Association.

6

WWW.

**Shipment Summary**

Ordered by:  
Sandra Heuer

Received by:  
Sandra Heuer

USA

USA

SHIPMENT DATE SHIPPED VIA TRACKING # ORDER #

09/08/02				2677025176353	
1	9738338284	Jimmy Neutron		Unit Price	Amount
				\$19.95	\$19.95
				Subtotal	\$19.95
				Shipping	6.88
				Tax	1.64
				Total	\$28.47



TC# 090047216310202927616275

UCC# 20020906-055858-284-091

Thank you for shopping at .com!

**Didn't receive your entire order?**

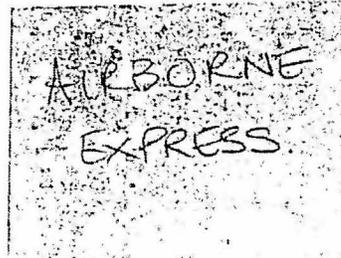
You may receive your order in separate shipments. If your entire order did not arrive in this shipment, you can track the status of your order at [www.com/tracking](http://www.com/tracking).

**Questions about your order?**

Call us at 1-800-966-5546, or visit our Web site at [www.com](http://www.com). We're happy to answer your questions, and we're committed to making your shopping experience easy and pleasant.

**Want to make a return?**

If you are not satisfied with your order, please refer to the Returns Information on the back of this invoice or on a separate sheet.



BRS-00981

## Returns Information

Your complete satisfaction is our number one priority. If any item you order from us does not meet your expectations, simply return it to us by one of the methods described below.

### To Return an Item to a Store

1. Take the item with all original packaging and accessories, plus the invoice (including this sheet) to the Customer Service Desk at your local
2. An associate will issue a credit to the original credit card or provide a store credit.

Please note: **Computer hardware and components must be returned by mail.** Simply use the provided return label and follow the instructions for returning items by mail.

### To Return an Item by Mail

1. Fill out the Reason for Return section below.
2. Box the item securely. Enclose the invoice (including this sheet), plus all original packaging and accessories.
3. Use the provided prepaid return label and ship via U.S. Postal Service (USPS).
4. We will issue a credit to the original credit card. Please allow two billing cycles for the credit to appear on the credit card's printed statement.

#### Reason for Return

To help us serve you better:

- Changed my mind
- Wrong item
- Wrong size

#### Other Return Details

- **Store Gift Cards** (shopping cards) are not returnable or refundable.
- For **oversize or perishable** items, please call our Help Desk at 1-800- for assistance.
- We cannot accept mail returns of items purchased in stores or
- If you were sent an **incorrect, damaged or defective** product, we will issue credit for any applicable shipping and gift wrapping charges.
- **CDs, DVDs, audiotapes, videotapes, video games and computer software** must be returned unopened within 45 days of receipt
- **Books** must be returned unused and unmarked within 45 days of receipt.
- **Computer hardware and components** must be returned with any included software within 15 days of receipt. Other electronics items must be returned within 90 days of receipt.

## Exchange Information

To exchange an item by mail, please fill out the two lines below, indicating the item you are returning and the new item you would like sent. Enclose this information with your return. Please be as specific as possible when describing the new item. For example, give the item name, color, size, etc.

The item returned will be credited to the original credit card and the new item(s) will be charged to the same card. Gift items are not exchangeable by mail. If returned, they will be credited to the original credit card. Shipping charges for the returned item are not refundable and shipping will be charged for the new item(s)

#### Items to Be Exchanged

Item Returned:

New Item Description:

Thank you for shopping at .com. We look forward to serving you in the future!

Home | Your Account |  Cart | [Track Order](#)

[Registry](#) | [Wish List](#) | [Gifts](#)

Hello Sandra Heuer! \$

<a href="#">Electronics</a>	<a href="#">Movies</a>	<a href="#">Music</a>	<a href="#">Books</a>	<a href="#">Toys</a>	<a href="#">Baby</a>	<a href="#">Jewelry</a>	<a href="#">Sports</a>	<a href="#">★ See All Departments</a>
<a href="#">For the Home</a>	<a href="#">Garden &amp; Patio</a>	<a href="#">Photo Center</a>	<a href="#">Video Games</a>	<a href="#">Apparel</a>	<a href="#">Gifts &amp; Flowers</a>	<a href="#">Pharmacy</a>	<a href="#">in Store</a>	

 Search  [Help](#) for:

You are here: [Home Page](#) > [Help](#) > [Ordering](#) > [Problems With Your Order](#)

## Problems With Your Order

[More Help: Ordering](#)

[Go to Help main page](#)

[Go to Ordering main p](#)

[An Item Is Missing](#)

[My Order Didn't Arrive](#)

[An Item Is Damaged or Defective](#)

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### An Item Is Missing

Sometimes because of varying item availability and warehouse locations, you may receive more than one shipment when you place an order with multiple items. We will not charge you extra for split shipments. The invoice you receive with your order will tell you which items have been shipped separately. If you still have questions about items missing from your order, please contact us and one of our knowledgeable Customer Service Associates will be happy to help you.

[See more on our Shipping Policy.](#)

[Top of Page](#)

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### My Order Didn't Arrive

Orders shipped through our Priority and Express shipping options can be tracked on our shipping carriers' Web sites. If you wish to track an order, go to [Track Your Orders](#). We're sorry, but orders shipped by the Standard option cannot be tracked door to door. If you still have questions about an order that has not arrived, please contact us and one of our knowledgeable Customer Service Associates will be happy to help you.

[See more on our Shipping Times.](#)

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### An Item Is Damaged or Defective

We are committed to your total shopping satisfaction. If an item you receive from [.com](#) does not meet your expectations, simply return it to us. Most merchandise can be returned to a store or by mail within 90 days of delivery. See our [Returns Policy](#) for exceptions.

Gift wrapping charges (if any) are not refundable. Shipping charges are not refundable except if you were sent an incorrect, damaged or defective product.

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### Do you have questions?

Please contact us, and a knowledgeable Customer Service Associate will help you. We're happy to serve you 24 hours a day, 7 days a week!

Account | Cart | Track Order

Registry | Wish List | Gift

Hello Sandra Heuer! S

- Electronics
- Movies
- Music
- Books
- Toys
- Baby
- Jewelry
- Sports
- \* See All Departments
- For the Home
- Garden & Patio
- Photo Center
- Video Games
- Apparel
- Gifts & Flowers
- Pharmacy
- In Store

Search  for:

You are here: Home Page > Help > Shipping and Returns > Shipping Costs & Times > Shipping and Returns > Returns Po

## Returns Policy

Your complete shopping satisfaction is our number one priority.

If an item you ordered from .com does not meet your expectations, simply return it either to a store or by mail within 90 days of receiving it, unless otherwise noted below.

To Return an Item to a Store

Returns Guidelines by Department

Returns Exceptions

Credit for Gift Returns

Exchanges

More Help: Shipping

[Go to Help main page](#)

[Go to Shipping and Return main page](#)

Related Topics

[Problems With Your Order](#)

Find a Store

Enter ZIP code to find a store near you.

ZIP Code:

### To Return an Item to a Store

- Take the item, invoice and all original packaging and accessories to Customer Service at your local
- For all payment methods except Bill Me Later®, an associate will issue an immediate credit to the original payment method or provide a store credit for the cost of the item and the sales tax, if applicable.
- For an item paid for with Bill Me Later, an associate can issue store credit in the form of a Shopping Card or a cash refund. Then you receive a bill from Bill Me Later and submit payment to Bill Me Later.

Return an Item by Mail

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### Returns Guidelines by Department

All merchandise purchased from .com may be returned either to a store or by mail within 90 days of receiving it, unless otherwise noted below. Additional guidelines are also noted below.

#### APPAREL, SHOES & ACCESSORIES

- All apparel, shoes and accessories items: 90 days with receipt and merchandise must be unworn, with tickets attached, and accompanied by the original pack list/invoice.

#### BOOKS, MOVIES & VIDEO GAMES

- CDs, DVDs, audiotapes, videotapes and video games: Must be returned unopened.
- Books: Must be returned unused and unmarked.

#### ELECTRONICS

- **Computer hardware:** Must be returned with any included software within 15 days of receipt.
- **Computer components and computer accessories:** Must be returned within 45 days of receipt.
- **Computer software:** Must be returned unopened.
- **Camcorders and digital cameras:** Must be returned within 30 days of receipt.

#### GIFTS

- **Electronic and plastic gift cards:** Not returnable or refundable for cash, except in states where required by law.
- **Perishables:** Items such as flowers and food may be returned to a store or by calling Customer Service at 1-800-966-6546. Cannot be returned by mail.

#### HOME & GARDEN

- **Custom window blinds:** Please see returns for window blinds.
- **Mattresses:** May be returned to a store or by Freight shipping. Under some circumstances, you may be charged for return shipping. To return an item by Freight, call Customer Service at 1-800-966-6546. They will also be able to inform you of any return shipping costs.
- **Gas-powered items:** Including but not limited to lawn mowers and pressure washers. Cannot be returned by mail, due to carrier restrictions. Must be returned to a store completely emptied of any flammable liquid (gas, oil).

#### MUSIC

- **CDs and DVDs:** Must be returned unopened.
- **Music downloads:** Cannot be returned. All sales are final and all charges from those sales are nonrefundable, except as otherwise stated in the Music Downloads Terms of Service.

#### PHARMACY

- **Diabetic supplies:** Cannot be returned. All sales are final. Please contact the manufacturer if you have any questions regarding defective items. Check your package for the manufacturer's name and contact information.

#### TIRES

- **Tires:** Tires shipped to a store for pick-up must be returned to a store and cannot be returned or exchanged by mail.

#### TOYS, SPORTS & FITNESS

- **Oversize table games and treadmills:** May be returned to a store or by Freight shipping. Under some circumstances, you may be charged for return shipping. To return an item by Freight, call Customer Service at 1-800-966-6546. They will also be able to inform you of any return shipping costs.
- **Autographed Sports Memorabilia:** Must be returned with the included Certificate of Authenticity.

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#### Returns Exceptions

- **Oversize items:** Some heavy or large items that are identified as oversize on their item pages may be returned to a store or by Freight shipping. Under some circumstances, you may be charged for return shipping. To return an item by

Freight, call Customer Service at 1-800-966-6546. They will also be able to inform you of any return shipping costs.

- If you were sent an incorrect, damaged or defective product, we will issue a credit for any applicable shipping and gift-wrapping charges.

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**Credit for Gift Returns**

- Returning a gift to a  store: An Associate will issue an immediate credit to the original payment method or provide a store credit for the cost of the item and the sales tax, if applicable.
- Returning a gift by mail: The cost of the item and the sales tax, if applicable, will be credited to the original payment method when we receive the item.

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**Exchanges**

To exchange an item by mail, fill out "Items to Be Exchanged" on the back of our invoice, indicating the item you are returning and the new item(s) you want sent. Please be as specific as possible when describing the new item. For example, give the item name, color, size, and so on. Then enclose the invoice with your return.

The item returned will be credited to the original payment method and the new item(s) will be charged to the same payment method. Shipping charges for the returned item are not refundable. Shipping will be charged for the new item(s) sent.

A gift you received is not exchangeable by mail. If you return a gift by mail, the cost of the item and the sales tax, if applicable, will be credited to the original payment method when we receive the item.

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**Do you have questions?**

Please contact us, and a knowledgeable Customer Service Associate will help you. We're happy to serve you 24 hours a day, 7 days a week!

[Continue shopping on .com](#)



Get the  Wire Email, with the latest Rollbacks & savings.



Learn more about other newsletters

Your email address will never be sold to a third party. See our [Privacy Policy](#).

**Ordering Help**

- [Track Your Orders](#)
- [Questions About Your Order](#)

**Shipping & Returns Help**

- [Shipping Costs & Times](#)
- [Our Return Policy](#)
- [Return an Item](#)

**Store Help**

- [Find a Store](#)
- [Stores Info](#)
- [Send Store Feedback](#)

**Still Have Questions?**

- [Online Customer Service](#)
- [Product Recall Info](#)
- [MSDS](#)

[Security & Privacy](#)

[Terms of Use](#)

[Credit Cards](#)

[Join Our Affiliate Program](#)

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[Store Finder](#)

[About](#)

[.com](#)

[Careers at .com](#)

[Associates](#)

drpw003.

.com null /catalog/catalog.jsp category id: 120564 path: 0:5436:119544:119544:120564

http://www.

com/catalog/catalog.jsp?cat=120564&path=0:5436:119544:119544:120564

12/20/2005

BRS-00985