No. 99-83802-AS

IN THE SUPREME COURT OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF INTERCARD, INC., FROM AN ORDER OF THE DIVISION OF TAXATION ON ASSESSMENT OF COMPENSATING USE TAX

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION

Appeal from the Board of Tax Appeals
BOTA Docket No. 1998-6864-DT

David Clauser, No. 15571
Kansas Department of Revenue
Legal Services
915 S.W. Harrison
Topeka, KS 66612-1588
Phone: (785) 296-2381
Fax: (785) 296-5213

Resident Attorney of Record for
Multistate Tax Commission

TABLE OF CONTENTS

INTEREST OF THE *AMICUS CURIAE* 1
K.S.A. 79-4301.....1
Oklahoma Tax Comm'n v. *Jefferson Lines*,
514 U.S. 175, 184 (1995).....2
Quill Corp. v. *North Dakota*, 504 U.S. 298 (1992).....2

INTRODUCTION 3
Quill Corp. v. *North Dakota*, 504 U.S. 298, 312 (1992) 3

ARGUMENT 3

I. Did Intercard's market-enhancing physical presence in Kansas establish Commerce Clause nexus?.....3

Complete Auto Transit, Inc. v. *Brady*,
430 U.S. 274, 287 (1977) 3, 4
National Bellas Hess, Inc. v. *Dept. of Revenue*,
386 U.S. 753 (1967).....*passim*
Quill Corp. v. *North Dakota*,
504 U.S. 298 (1992) .....*passim*
D.H. Holmes v. *McNamara*, 486 U.S. 24, 33 (1988) 4
Oklahoma Tax Comm'n v. *Jefferson Lines*,
514 U.S. 175, 184 (1995) 4
Barclay's Bank PLC v. *Franchise Tax Bd.*,
512 U.S. 298, 330 (1994) 4
Hunt-Wesson, Inc. v. *Franchise Tax Bd.*,
120 S.Ct. 1022, 1023 (2000) 4
In the Matter of Intercard, Inc., Kan. Bd. of Tax Appeals,
Docket No. 1998-6864-DT 6
Felt & Tarrant Mfg. Co. v. *Gallagher*, 306 U.S. 62 (1939) 6
Tyler Pipe Industries, Inc. v. *Washington State Dept. of Revenue*,
483 U.S. 232, 250-51 (1987) 6
Std. Pressed Steel Co. v. *Dept. of Revenue*, 419 U.S. 560 (1975) 7
General Trading Co. v. *State Tax Comm'n*, 322 U.S. 335, 337 (1944) ..8

II. Has Intercard proved that its physical presence in Kansas was *de minimis*, not exceeding a "slightest presence," so as to avoid imposition of the use tax? 8

Nat'l Geographic Society v. *California Bd. Of Equalization*,
430 U.S. 551, 556 (1977) 8
Quill Corp. v. *North Dakota*, 504 U.S. 298 (1992) .....*passim*

Wisconsin Dept. of Revenue v. *Wm. Wrigley, Jr., Co.*, 505 U.S. 214 (1992) .....*passim*
Webster's Third New Int'l Dictionary of the Eng. Lang. Unabridged, 1913 & 2322 (1986) 9
Container Corp. v. *Franchise Tax Bd.*, 463 U.S. 159, 175-176 (1983) 10
John Henry Wigmore, *Wigmore's Code of the Rules of Evidence in Trials at Law*, §2486 (3rd ed. 1942) 10
Hessel v. *O'Hearn*, 977 F.2d 299 (7th Cir., 1992) 12
First Bank Stock Corp. v. *Minnesota*, 301 U.S. 234 (1937) 13
Wheeling Steel Corp. v. *Fox*, 298 U.S. 193, 208-211 (1936).....13
27A Am. Jur. 2d *Equity* § 118 (1996) 13
Mitchell v. *Comm'rs of Leavenworth*, 9 Kan. 344 (Kan. 1872), *affirmed*, 91 U.S. 206 (1875) 13

III. Does Intercard's duty to collect and remit the use tax end the moment that the last Intercard employee leaves Kansas? 13

CONCLUSION 15
National Bellas Hess, Inc. v. *Dept. of Revenue*, 386 U.S. 753 (1967) 15
Quill Corp. v. *North Dakota*, 504 U.S. 298 (1992) 15

IN THE SUPREME COURT OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF INTERCARD, INC., FROM AN ORDER OF THE DIVISION OF TAXATION ON ASSESSMENT OF COMPENSATING USE TAX.	)))))	Docket No. 99-83802-AS

BRIEF OF *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

The Multistate Tax Commission ("MTC") is the administrative agency created by the Multistate Tax Compact ("Compact"). *See, e.g.,* K.S.A. 79-4301. Twenty-one States, including Kansas, have legislatively established full membership in the Compact. In addition, two States are sovereignty members and nineteen States are associate members.[1]

The purposes of the Compact are to (1) facilitate proper determination of state and local tax liability of multistate taxpayers; (2) promote uniformity or compatibility in significant components of tax systems; (3) facilitate taxpayer convenience and compliance; and (4) avoid duplicative taxation. K.S.A. 79-4301.

In furtherance of the identified goals of the Compact, the MTC seeks a correct and uniform understanding of the constitutional nexus standard for the imposition of the use tax. A correct nexus standard ensures that

[1] **Compact Members:** Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. **Sovereignty Members:** Florida and Wyoming. **Associate Members:** Arizona, Connecticut, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Wisconsin, and West Virginia.

interstate commerce pays its fair share of state sales and use taxes. *See Oklahoma Tax Comm'n* v. *Jefferson Lines*, 514 U.S. 175, 184 (1995). A uniform nexus standard facilitates taxpayer convenience and compliance, because taxpayers will more readily understand the constitutional limits of the Commerce Clause on state use taxes.

The MTC takes issue with the nexus standard here, because it is not a standard but a case-by-case "gut feeling" of the underlying facts and circumstances. The Board of Tax Appeal's ("BOTA") blurry "standard" ignores the Supreme Court's retention of a bright-line nexus test in *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992). Consistent with this bright-line objective, in-state activities of a remote seller promoting a market clearly constitute sufficient "physical presence" to impose a use tax collection duty. No one benefits from a fuzzy nexus standard that would embroil the judicial system in case specific "gut level" reactions to determine nexus.

By contrast, the MTC's proposed standard entails a presumptive approach that promotes *Quill*'s objectives of clarity and practicality. The MTC standard is also consistent with well-established jurisprudence. We believe that certainty based upon established jurisprudential moorings will promote the free flow of goods in our national economy in furtherance of the purposes of the Commerce Clause.

INTRODUCTION

Preliminarily, we note Intercard rightly concedes Due Process jurisdiction and relies solely on the Commerce Clause. Appellee Br. at 19-20. Considering that Intercard made 158 sales in Kansas totaling $164,967 during the audit period, Appellant's Br. at Ex. B, we do not see how the position of Intercard could be otherwise. This concession is important, because it means Due Process fairness is not at issue:

> Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires [asking] whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. * * * "[N]otice" or "fair warning" [are] the analytical touchstone of due process nexus analysis. [*Quill*, 504 U.S. at 312].

ARGUMENT

I. Did Intercard's market-enhancing physical presence in Kansas establish Commerce Clause nexus?

Even though the fairness requirements of the Due Process Clause are met, the Commerce Clause independently protects remote sellers engaged in interstate commerce from a state's use tax in certain circumstances. The Commerce Clause permits a State to impose a tax with respect to interstate commerce, or in this instance to require a remote seller to collect and remit the use tax, if the tax meets a four prong test: (1) the activity must be sufficiently connected to the state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must fairly relate to state services. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 287 (1977).

Only the first, or nexus, prong of *Complete Auto* is at issue here—whether Intercard's sales and installation activities were sufficiently connected with Kansas to allow Kansas to impose its use tax.

It is useful to recall that the *descriptive* phrase "substantial nexus" used in *Quill* to describe taxing jurisdiction does not define the level of activity that will support a finding of Commerce Clause nexus. The Supreme Court uses various terms to describe taxing jurisdiction. *National Bellas Hess, Inc.* v. *Dept. of Revenue*, 386 U.S. 753, 756-57 (1967) ("some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax"); *Quill*, 504 U.S. at 311 ("substantial nexus"); *Complete Auto*, 430 U.S. at 278, 287 ("sufficient nexus"; "sufficiently connected"); *D.H. Holmes* v. *McNamara*, 486 U.S. 24, 33 (1988) ("nexus aplenty"); *Oklahoma Tax Comm'n*, 514 U.S. at 184 ("Commerce Clause nexus"); *Barclay's Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 330 (1994) ("adequate nexus"); and *Hunt-Wesson, Inc.* v. *Franchise Tax Bd.*, 120 S.Ct. 1022, 1023 (2000) ("minimal connection"). *Bellas Hess* and *Quill* substantively define Commerce Clause nexus.

In 1967 the U.S. Supreme Court examined use tax jurisdiction in the context of an out-of-state company that limited its activities to contacts through the U.S. mail or common carrier. *National Bellas Hess,* 386 U.S. at 754. The Supreme Court barred Illinois from imposing its use tax, distinguishing between companies that marketed their products through

"retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier. . . ." *Id.* at 758.

In 1992 North Dakota asked the U.S. Supreme Court to overturn *Bellas Hess* based on "'wholesale changes' in both the economy and the law." *Quill,* 504 U.S. at 303. North Dakota argued nexus encompassed a company, like Quill, that intentionally marketed and sold its products into a State. The Court agreed as to Due Process nexus and overruled *Bellas Hess* to that extent. The Court found for the first time a distinct nexus standard under the Commerce Clause, however. Expressing reluctance and adhering to *stare decisis*, the Court reaffirmed *Bellas Hess* as a statement of the jurisdictional standard under the Commerce Clause. The Court determined that the measuring stick for determining Commerce Clause nexus was the *Bellas Hess* "safe harbor for vendors 'whose only connection with customers in the [taxing] State is by common carrier or the United States mail,'" *Quill*, 504 U.S. at 315. *Quill* added nothing new to understanding when sufficient connection exists under the Commerce Clause to support nexus for imposing a use tax obligation on a remote seller. *Id.* at 317-18.

The activities of Missouri-based Intercard within Kansas clearly fall outside the safe harbor of *Bellas Hess* and *Quill*. Its employee-technicians installed the very products whose sales are the subject of assessment. Sending employees into Kansas on eleven occasions to

install card readers unarguably facilitated these sales. Appellant's Br. at Ex. A, Joint Stip. no. 7. The in-state installation activity was concurrent with Intercard's first sale in March 1993 of the card readers to the Kansas operations of Kinko's. *Id.* at Ex. B, sch. 1, page 1, Ex. D, sch. 1, page 1, Ex. A., Joint Stip. no. 10. Intercard admits that it had a practice of providing installation services to Kinko's "at times." *Id.* at Ex. A., Joint Stip. no. 6. Thus, in-state installations were foreseeable at the time the sales occurred and consistent with existing policy.

We do not understand BOTA's conclusion that the installation services were unrelated to Intercard's market in Kansas. *In the Matter of Intercard, Inc.*, Kan. Bd. of Tax Appeals, Docket No. 1998-6864-DT, ¶ 36 (1999). Intercard's policy and actions reflect a common sense appreciation that customers will be reluctant to buy technical hardware requiring installation support unless the seller assures that support.

There has been little doubt for many years, that in-person presence of employees engaging in market-enhancement activities establishes sufficient jurisdictional contact to uphold a State's taxing jurisdiction. *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62 (1939); *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U.S. 232, 250-51 (1987) (non-solicitation activities established nexus, because "the crucial factor governing nexus is whether the activities performed in [the taxing] state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in *** the state for the sales").

See also Std. Pressed Steel Co. v. *Dept. of Revenue*, 419 U.S. 560 (1975) (non-sales personnel establishing customer relations establishes nexus).

BOTA seems to have understood these principles when it correctly concluded Intercard "clearly had more contact than would allow it to survive the bright-line test of *National Bellas Hess*" *Matter of Intercard* ¶ 35. However, BOTA erred when it then viewed *Quill* as articulating a different test for nexus. *Id.* at ¶ 36. We submit that BOTA should have ended its analysis once it found Intercard had physical presence that exceeded the bright-line test of *Bellas Hess* and *Quill*. Instead, BOTA blurred into a single test its nexus determination based on physical presence and its determination that such presence was *de minimis*. Combining these two determinations in effect changes the bright-line understanding of physical presence into a "contextual balancing" test, an approach *Quill* explicitly rejected to maintain the substantial reliance of the mail-order industry. *Quill*, 504 U.S. at 316-317. Intercard erroneously urges a test for nexus that requires "a fact intensive inquiry into the nature and extent of [the taxpayer's] presence." Appellee Br. at 11.

Intercard tries to excuse the legal impact of its market-enhancing physical presence and to insert the rejected contextual balancing test by introducing the notion of a "continuous physical presence." *Id.* at 11. But the Court long ago resolved the issue of temporary presence when it held that Iowa could impose its use tax based on the presence of "traveling

salesmen sent into Iowa from their Minnesota headquarters." *General Trading Co.* v. *State Tax Comm'n*, 322 U.S. 335, 337 (1944).

II. Has Intercard proved that its physical presence in Kansas was *de minimis*, not exceeding a "slightest presence," so as to avoid imposition of the use tax?

Intercard attempts to utilize the *de minimis* exception to the physical presence recognized in *Nat'l Geographic Society* v. *California Bd. Of Equalization*, 430 U.S. 551, 556 (1977), and first applied in *Quill*, 504 U.S. at 315 n.8, to defeat the legal consequences of its uncontroverted, market-enhancing physical presence in Kansas. This attempt fails, because Intercard has not established any set of facts that would justify the application of the *de minimis* doctrine. In addition, the physical presence here is different from the *de minimis* presence in *Quill* as to both the level and the nature of the contact with the taxing State. But before addressing these aspects we first examine the *de minimis* concept itself.

The* de minimis *concept. One month after *Quill*, the Supreme Court provided considerable insight on the *de minimis* concept in determining the limits of a State's taxing jurisdiction. *Wisconsin Dept. of Revenue* v. *Wm. Wrigley, Jr., Co.*, 505 U.S. 214, 231*ff.* (1992). Although *Wrigley* involved a federal statutory restriction on the exercise of state taxing jurisdiction based upon the concept of solicitation, the *de minimis* concept is the same as is attempted to be applied here. *Wrigley* explained that the *de minimis* concept is important when a rule operates in a "stark

all-or-nothing fashion," *id.*, a circumstance also a part of the "bright-line" nexus rule of *Quill*.

In *Wrigley*, the Court found that any activity that established a "non-trivial" additional connection with the taxing state was not *de minimis*. *Id.* at 231. The Court viewed *de minimis* as a trivial additional connection with the taxing state that is not regular and systematic or a part of a company's policy. *Id.* at 233 n.8, 235.

The term 'regular' means normal. *Webster's Third New Int'l Dictionary of the Eng. Lang. Unabridged,* 1913 (1986). 'Systematic' means methodical, *Id.* at 2322, and in this specific context that the potentially disqualifying presence was methodically planned to further the business of the remote seller.

The understanding that *de minimis* is not available to a taxpayer whose presence is regular and systematic, or in pursuit of a company policy, preserves the bright-line. When a business makes an affirmative decision to pursue its market through physical presence in a taxing state, it should know that it loses its tax exemption. The taxpayer has purposefully extended its connection with the taxing state beyond contacts by U.S. mail or common carrier. There is no need for a gut reaction on whether the in-state activity has reached a sufficient level of contact to create nexus. The taxpayer has exited the safe harbor.

***Applying* de minimis.** Once jurisdiction under *Quill* is established through physical presence, and in this case by market-enhancing

physical presence, if the seller seeks to avoid jurisdiction it must justify that avoidance. The taxpayer must show through proof of facts exclusively within its control that its presence is not regular and systematic or a part of a company policy. *See Container Corp.* v. *Franchise Tax Bd.*, 463 U.S. 159, 175-176 (1983); John H. Wigmore, *Wigmore's Code of the Rules of Evidence in Trials at Law*, §2486 (3rd ed. 1942).

So what has Intercard, a Missouri-based remote seller, shown to establish that its presence is so trivial in Kansas as to overcome the existence of nexus? We submit the record is devoid of any suggestion that Intercard's market-enhancing in-state activities in Kansas are *de minimis*. Indeed, the record proves the opposite.

Intercard stipulated that its practice was to assist Kinko's, its largest customer, with the installation of card readers "at times." Appellee's Br. at Ex. A., Joint Stip. nos. 4 and 6. The fact that Intercard offered the option of in-state services to Kinko's at times makes the appearance of its employees in Kansas a regular event, something that was normal, not unusual. Similarly, notwithstanding BOTA's conclusion to the contrary, Intercard's in-state presence facilitated the sale of a costly, complex piece of hardware. In this sense the in-state presence is systematic, meaning the presence was methodically planned to further the business of Intercard, i.e., the sale of card readers and cards to support their use.

Contrasting Intercard's presence with an inadvertent presence, a presence that remains within the *Bellas Hess* safe harbor, further illuminates the point being made. Thus, if an out-of-state company's representative, independently and without company authorization, enters Kansas and makes an isolated sale or repair, that in-state presence would be *de minimis*. The company has not consciously decided to leave the safe harbor as part of its business plan. Or, if an out-of-state company decides to send a group of its employees temporarily into Kansas for a one week seminar dealing with time management skills, that temporary presence is also qualitatively *de minimis* because the in-state visit is not related to developing a market in Kansas.

But presence is not inadvertent when it reflects a conscious choice of the remote seller to enter the jurisdiction of the taxing State under an established company policy. Presence following a decision to use a physical presence to establish and maintain a market in Kansas is not inadvertent. Although installation assistance could have been provided by others, Appellee's Br. at 11, Intercard chose to compete in the Kansas marketplace for installation services knowing that doing so allowed it to control the installation of its own product.

Intercard errs in asking this Court to look at *de minimis* quantitatively and not qualitatively. A quantitative visit test would embroil the judicial system in endless facts and circumstances analyses rejected in *Quill*. How many visits are enough? Seven, eleven, fifteen, or some other

quantity? Would a quantitative *de minimis* test distinguish between one visit to complete a multi-million dollar equipment sale and four visits to sell a tractor? A qualitative *de minimis* analysis lessens the need for litigation by focusing on the company's own choices. If it has consciously left the safe harbor, it is subject to the State's taxing jurisdiction.

We think Judge Posner correctly analyzed the *de minimis* concept in the context of alleged minor violations. *Hessel* v. *O'Hearn*, 977 F.2d 299, 302 (7th Cir., 1992) (*de minimis* unavailable where police officer took a can of soda while executing a search warrant). Posner rejected *de minimis* within this context, because the "doctrine is not intended for definite losses, however small, inflicted by definite wrongs." *Id.* at 304. "You are not privileged to kill a person because he has only one minute to live, or to steal a penny from a Rockefeller." *Id.* at 303. Likewise, *de minimis* is not applicable in this case, because Intercard purposefully sent its employees into Kansas to further its business interests in that State.

Differences from Quill. This matter does not present anything approaching the minimal presence that was recognized in *Quill* as justifying application of the *de minimis* concept. All at issue in *Quill* was the licensing of software on a "few floppy diskettes" that permitted merchandise to be ordered. *Quill*, 504 U.S. at 315 n.8. Only one customer had ever used the software to order merchandise from Quill. Appellant's Reply Br. at 15, *Quill*, (No. 91-194).

More importantly, determining nexus based upon the licensing of an intangible like software is different from nexus based upon the in-state physical presence of employees. An intangible is present within a State when the use rises to the level of a business situs. *See First Bank Stock Corp.* v. *Minnesota*, 301 U.S. 234 (1937); *Wheeling Steel Corp.* v. *Fox*, 298 U.S. 193, 208-211 (1936). No comparable limiting concept applies to in-state presence of employees that facilitate the taxed sales.

Extraordinary equity powers. Intercard essentially asks this Court to apply its extraordinary powers in equity to relieve a remote seller of its in-state presence. 27A Am. Jur. 2d *Equity* § 118 (1996) ("Possibly the best known maxim of equity is '*de minimis non curat lex*,' signifying 'the law does not concern itself with trifles.'"). Kansas previously rejected a taxpayer's attempted invocation of equity to defeat an otherwise valid tax. *Mitchell* v. *Comm'rs of Leavenworth*, 9 Kan. 344 (Kan. 1872), *affirmed*, 91 U.S. 206 (1875). This Court reasoned that even though the taxpayer did not break any laws, it would not lend its aid to further the motive of escaping the just burdens that society imposes on him.

III. Does Intercard's duty to collect and remit the use tax end the moment that the last Intercard employee leaves Kansas?

Kansas' jurisdiction did not end the moment that the last Intercard employee left Kansas. It would be odd if Intercard could enter Kansas for one week each quarter and make no sales during that week but make its

sales in all the other weeks of the quarter without ever having established nexus in Kansas. In effect, this is what Intercard is arguing.

This Court should employ a proximate cause analysis to determine when jurisdiction to impose a use tax once established ends. The appropriate question is, "Were Intercard's sales of card reader supplies (the bulk of sales occurring after Intercard had no further presence in Kansas) proximately related to the previous sales and services for which nexus was established?" These supplies, including store cards and copy cards, are necessarily for use on the card readers sold and installed by Intercard. The sale of the supporting products that occurred after the sale of the hardware and in-person installation are necessarily proximately related to the previous sales for which nexus was established.

To determine the duration of nexus we believe a taxpayer must at least address two things: (1) that it no longer has an in-state presence; and (2) that its former in-state presence is not proximately related to the later sales. Intercard has met the first prong by providing a date beyond which it no longer had a presence in Kansas. Intercard has failed to provide any evidence, however, that its sales during the last two years of the audit period were not proximately related to its former in-state presence. The circumstances here provide Intercard no reasonable chance of establishing this necessary predicate to ending its nexus properly established. We do not suggest that proximate cause can last forever,

only that in this case it was reasonable for the Department of Revenue to assess the use tax for the additional two years beyond the last in-state visit.

CONCLUSION

Intercard's physical presence in Kansas was sufficient for the State to subject it to its taxing jurisdiction. Intercard has failed to avoid this conclusion by establishing that it is entitled to equitable relief under the *de minimis* concept. Further, nexus with respect to sales occurring after the termination of a period of market-enhancing physical presence continues where the sales are proximately related to the pervious presence. The decision by the Board of Tax Appeals should be reversed and the bright-line test articulated in *Bellas Hess* and later upheld in *Quill* should be affirmed, thereby providing clear guidance to all out-of-state companies that enter Kansas and benefit from her marketplace.

Respectfully submitted,

_____ _____ _____

Paull Mines Sheldon H. Laskin H. Beau Baez III
Attorneys for Multistate Tax Commission
444 N. Capitol Street N.W., Suite 425
Washington, D.C. 20001
(202) 624-8699

and

_____

David Clauser, No. 15571
Kansas Department of Revenue, Legal Services
915 S.W. Harrison
Topeka, KS 66612-1588
Phone: (785) 296-2381 Fax: (785) 296-5213
Resident Attorney of Record for Multistate Tax Commission

CERTIFICATE OF SERVICE

I hereby certify that five true and correct copies of the above and foregoing *Amicus Curiae* Brief were deposited in the United States Mail, first class postage prepaid, on the ___ day of June, 2000, addressed to:

Mark A. Burghart
Alderson, Alderson, Weiler, Conklin, Burghart & Crow, L.L.C.
2101 S.W. 21st Street
Topeka, Kansas 66604-3174
Attorney for Intercard, Inc.

and caused sixteen (16) copies of the foregoing *Amicus Curiae* Brief to be filed with the:

Clerk of the Appellate Courts
Kansas Judicial Center
301 S.W. 10th Street
Topeka, Kansas 66612

_____
David Clauser