

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

**Sep 21 2020**

**SC Court of Appeals**

---

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable John D. McLeod, Administrative Law Judge

---

Case No. 16-ALJ-178-0113-CC  
Appellate Case No. 2017-001519  
Opinion No. 5721 (S.C. Ct. App. filed April 29, 2020)  
Supreme Court Case No. 2020-001102

---

Books-A-Million, Inc.

Petitioner,

v.

South Carolina Department of Revenue

Respondent.

---

**PETITIONER BOOKS-A-MILLION, INC'S REPLY TO  
RESPONDENT SOUTH CAROLINA DEPARTMENT OF REVENUE'S RETURN TO  
PETITIONER'S PETITION FOR A WRIT OF CERTIORARI**

---

Burnet R. Maybank III (SC Bar No 3699)  
James Peter Rourke (SC Bar No. 79879)  
NEXSEN PRUET, LLC  
1230 Main Street, Suite 700 (29201)  
Post Office Drawer 2426  
Columbia, SC 29202-2426  
Phone: 803.771.8900  
Facsimile: 803.253.8277  
[BMaybank@nexsenpruet.com](mailto:BMaybank@nexsenpruet.com)  
[JRourke@nexsenpruet.com](mailto:JRourke@nexsenpruet.com)

Attorneys for Petitioner Books-A-Million, Inc.

Columbia, South Carolina  
September 21, 2020

**TABLE OF CONTENTS**

**ARGUMENTS**.....1

I. PETITIONER HAS ESTABLISHED A BASIS FOR GRANTING ITS PETITION FOR CERTIORARI UNDER RULE 242(B).....1

    A. THERE IS A NOVEL QUESTION OF LAW.....1

    B. THERE IS A CONSTITUTIONAL ISSUE IN THIS LITIGATION.....3

II. PETITIONER HAS ESTABLISHED AN EXCEPTIONAL CIRCUMSTANCE THAT WOULD JUSTIFY GRANTING THE PETITION FOR CERTIORARI.....5

**CONCLUSION** .....8

**TABLE OF AUTHORITIES**

**Cases**

*Barnes & Noble Superstores, Inc. v. Huddleston*, 1996 WL 596955 (Tenn. Ct. App. 1996)..... 7  
*Books-A-Million v. S.C. Dep't of Revenue*, Op. No. 5721 (S.C. Ct. App filed April 29, 2020  
Shearouse Adv. Sh. No. 17)..... 5  
*Dine-Out Tonight Club v. Dept. of Revenue Servs.*, 210 Conn. 567 (1989)..... 7  
*Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23,602 S.E.2d 772, 779 (2004)..... 3  
*In re Breast Implant Product Liability Litigation*, 331 S.C. 540, 503, S.E.2d 445 (1998) ..... 5  
*Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 471, 674 S.E.2d 154,160 (2009) ..... 5  
*State v. Ann. West County, Promotions, Inc.*, 645 N.W. 2d 196 (N.D. 2002) ..... 7  
*Tronco's Catering, Inc. v. S.C. Dep't of Revenue*, 2010 WL 5871622 (S.C. Admin. Law Ct. April  
12, 2010) ..... 5

**Statutes**

S.C. Code Ann. § 12-36-910..... 2  
S.C. Code Ann. §12-36-60..... 2  
S.C. Code Ann. §12-36-70..... 2  
S.C. Code Ann. §12-36-90..... 2

**Other Authorities**

Fla. Dep. of Rev. Technical Advisements 89A-022 ..... 7  
Oklahoma Tax Comm'n LTR-14-001 ..... 7  
Tenn. Rev. Rul. #14-08..... 7

## ARGUMENTS

### **I. PETITIONER HAS ESTABLISHED A BASIS FOR GRANTING ITS PETITION FOR CERTIORARI UNDER RULE 242(B), SCACR.**

#### **A. There is a Novel Question of Law.**

Membership loyalty programs come in several different flavors: (i) free voluntary memberships (CVS, BiLo); (ii) paid optional memberships (Books-A-Million, Barnes & Noble and many others) (see attached Exhibit A); and (iii) paid mandatory membership (Sam's, Costco) and they are big business. According to the Retail Prophet, (Exhibit B) in 2016, the consumer loyalty, management market was valued at \$1.93 billion. In the U.S. alone consumers collectively hold more than 3.8 billion loyalty program memberships.

According to Investopedia (Exhibit C) Costco alone had \$3.35 billion in revenue from membership fees in 2019. Given that its net income was \$3.66 billion, you can see why membership fees were so important to Costco and the Department of Revenue, as stated below, holds that Costco's membership fees are exempt from sales tax, whereas Books-A-Million's voluntary fees are not.

It is not just large retailers. Many museums, zoos, aquariums, golf courses, etc. have membership programs which entitle holders to discounts at their gift shops. According to the Court of Appeals' decision, all of these retailers must now add back their membership fees to their sales tax returns. (It is a safe bet that none are currently doing so today.)

Petitioner Books-A-Million, Inc. (hereinafter "Petitioner" or "Books-A-Million") agrees with the assertion of Respondent Department of Revenue (hereinafter "Respondent" or "Department") that South Carolina's sales tax structure is found in Chapter 36 of Title 12. "A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property as

retail.” S.C. Code Ann. § 12-36-910(A). Books-A-Million is a “retailer” selling “tangible personal property.” See §§ 12-36-70 and 12-36-60. Therefore, Books-A-Million is required to remit sales tax in South Carolina. S.C. Code Ann. § 12-36-90 defines “gross proceeds of sales” as “the value proceeding or accruing from the sale, lease, or rental of tangible personal property.” Books-A-Million is a retailer. The only issue is whether it is required to collect sales tax on sales of intangibles such as gift cards and memberships.

The Department’s Return to Petitioner’s Petition for a Writ of Certiorari (hereinafter the “Return”) states:

Books-A-Million argues extensively that the sale of the Millionaire’s Club membership along with other items is a bundled transaction. Although not defined in South Carolina outside of the “transmission of the voice or messages,” a “bundled transaction” is routinely defined as a transaction involving distinct taxable and non-taxable items, which are sold for one *non-itemized* price. A “non-itemized” price is also a requirement for a bundled transaction according to the Multistate Tax Commission and the Streamlined Sales Tax Governing Board. The Millionaire’s Club membership fee is not combined with the price of other merchandise sold; each item is priced separately. (R. p. 438.) Therefore, the sales of the Millionaire’s Club along with other merchandise is not a bundled transaction. Both the merchandise and the related discount membership club are taxable. Moreover, because there is no bundled transaction at issue, Books-A-Million’s argument that the Court of Appeals’ interpretation of “gross proceeds of sales” undercuts other statutory sales tax exemptions is unsupportable.

Return at pp. 1-2, fn 1 (citations omitted). The Department’s Return makes plain: if a retailer sells a good subject to sales tax, all other otherwise items subject to statutory sales tax exemptions by the General Assembly purchased in the same transaction are also subject to sales taxes. The exemptions are voided.

The Court of Appeals’ decision is novel because, as stated below, it is the first appellate court case to include the rental (or sale) of real property in the sales tax base. Thousands, if not tens of thousands, of such transactions occur annually in South Carolina.

The Court of Appeals' decision is also the first to hold that Sam's/Costco membership fees are not subject to sales tax whereas optional membership fees are included in the sales tax base – thus giving these large retailers a huge competitive advantage over thousands of smaller retailers in South Carolina.

The case contains another novel issue of law regarding renewals of memberships. Both the ALC and the Court of Appeals held that the renewal of membership fees were included in the sales tax base. Renewals are generally automatic, and the purchaser is typically billed twelve months after the initial purchase. Section 12-36-90 provides that consideration “proceeding or *accruing* from the sale” of tangible personal property is included in the sales tax base. Prior to the Court of Appeals' decision, no ALC or appellate case had ever held that an otherwise exempt purchase made twelve months later was considered *accruing* from the initial purchase.

**B. There is a Constitutional Issue in this Litigation.**

In deciding whether to grant a petition for certiorari, this Court may consider whether “substantial constitutional issues are directly involved.” The Department argues “Books-A-Million raises the specter of a constitutional issue, but it fails to describe why that issue is ‘substantial.’ More importantly, however, the supposed constitutional issue is not a genuine issue.” Return at p. 13.

The Department's Return also states, “Books-A-Million contends that, ‘although strenuously argued at both the ALC and Court of Appeals level, neither Court addressed the obvious due process question of why Walmart (Sam's Club) and Costco's mandatory membership fees are not included in the sales tax base but Books-A-Million's options fees are.’” *Id.*

Lastly, the Department's Return argues “[f]irst, to the extent that an issue is raised but not ruled upon by a lower court is it not preserved for review. *Elam v. S.C. Dep't of Transp.*, 361 S.C.

9, 23,602 S.E.2d 772, 779 (2004). Therefore, the issue should not serve as a basis for granting [Books-A-Million]’s Petition.” *Id.*

Sam’s, Costco and Books-A-Million compete by selling the same items, books, CDs, calendars and the like. All provide membership fees. Sam’s/Costco’s membership are mandatory, whereas Books-A-Million’s membership fees are voluntary. DOR Private Letter Ruling #16-1 provides that membership fees charged by a membership-only warehouse are not included in the sales tax base.

And where does the Sales Tax Act so provide? Mandatory membership fees are value proceeding or accruing from the sale, lease or rental of personal property. “But for” the purchase of a Sam’s/Costco membership, you cannot get in the store to purchase goods. The Department, as is stated in their Return, may have taken this position for decades, but what statute or case law supports it?

There are obvious due process concerns over allowing two huge retailers to not to have to pay sales tax on membership fees but requiring other smaller retailers to have to pay them for the exact same intangible (membership fee).

The Department is correct – the Court of Appeals failed to rule on this issue. But it is preserved for review as Petitioner’s Petition for Rehearing argued this issue at length. *See* Petition for Rehearing at pp. 5-6. Obviously an appellant cannot force a court to rule on an issue, it can only argue before the court and file a Petition for Rehearing if the court fails to address it. Indeed, the Court of Appeals’ failure to address this central issue should be grounds for this court to accept the appeal.

**II. PETITIONER HAS ESTABLISHED AN EXCEPTIONAL CIRCUMSTANCE THAT WOULD JUSTIFY GRANTING THE PETITION FOR WRIT OF CERTIORARI.**

“[A] writ of certiorari may be issued when exceptional circumstances exist.” *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 471, 674 S.E.2d 154,160 (2009) (citing *In re Breast Implant Product Liability Litigation*, 331 S.C. 540, 503, S.E.2d 445 (1998)).

The Department argues that when two or more exempt items are purchased with a taxable item, the entire transaction is taxable, notwithstanding the General Assembly’s creation of numerous sales tax exemptions. The Department argues that the words contained in § 12-36-90, “gross proceeds of sale” include “the value proceeding or accruing from the sale, lease or rental of tangible personal property” override the numerous exemptions and exclusions contained in the sales tax code, all of which are far more specific than the language above, and many enacted years, if not decades, after the enactment of § 12-36-90 and its predecessor statute. This is certainly an exceptional circumstance.

In this case the Department has prevailed in reading out the taxation of “*tangible* personal property” found in § 12-36-90 as memberships are intangible.

Even more egregiously, the Court of Appeals’ decision holds that the rental – and thus sale – of real property is contained in the sales tax base. See *Books-A-Million v. S.C. Dep’t of Revenue*, Op. No. 5721 (S.C. Ct. App filed April 29, 2020 Shearouse Adv. Sh. No. 17 at 50-51) and its discussion of *Tronco’s Catering, Inc. v. S.C. Dep’t of Revenue*, 2010 WL 5871622 (S.C. Admin. Law Ct. April 12, 2010) which held that the rental of real property was contained in the sales tax base. This certainly meets the novel standard for Supreme Court review, as no appellate decision has heretofore ever held that the sale or rental of real property is contained in the sales tax base.

The Department says the test is simple – value proceeding or accruing from the sale, lease or rental of tangible personal property. This test is typically met anytime an item exempt from sales tax is rung up in the cash register, closing document or contract for sale as a non-exempt item.

The Department also asserts that sales tax exemptions and exclusions are overridden whenever “the sale of the thing the Department contends is subject to sales tax would occur ‘but for’ the sale of the tangible personal property.”

Section 12-36-2120 contains numerous sales tax exemptions. Subsection (4) exempts “livestock.” Is the sale of livestock now taxable if the farmer also purchased non-exempt hay from the seller with the same transaction?

Subsection 10(a) exempts meals or foodstuffs used in furnishing meals to certain school children. Are meals subject to sales tax if the vendor also sells in the same transaction non-exempt knives, forks, napkins and the like?

Subsection (16) exempts farm machinery but explicitly does not include automobiles and trucks. Is farm machinery subject to sales tax where the vendor also sells a truck in the same transaction?

Subsection (28) exempts certain prescription medicine. Is such medicine subject to sales tax if the patient also purchases non-exempt items (pain relievers) in the same transaction?

Subsection (60) exempts a lottery ticket. Is a lottery ticket subject to sales tax where the purchaser purchases gasoline and a cold beer in the same transaction?

Finally, unprepared food (groceries) are exempt under subsection (75). If a person purchases potatoes (exempt) and a Fry Daddy to cook them in (non-exempt), are the potatoes now subject to sales tax?

Is the cash register attendant supposed to inquire, “Sir, would you have purchased that lottery ticket ‘but for’ your purchase of gasoline and a cold beer?”

The above examples may seem ridiculous. But many if not most, retailers sell exempt as well as non-exempt goods in the same transaction, and the value of the exempt good proceeds or accrues from the sale, lease or rental of the non-exempt goods. The cash register Point of Sale system is programmed to comply with the South Carolina Sales Tax Act and the bar code tells the POS system whether the General Assembly has subjected each item to sales tax or whether it is exempt. The cash register POS systems charges sales tax on the non-exempt item (Fry Daddy) and not on the exempt item (potatoes). No POS is programmed to override the exemption if the potato is “value proceeding or accruing from the sale” of the Fry Daddy. No person operating the cash register has ever been instructed or trained to ask “sir, would you have purchased that potato ‘but for’ the purchase of that Fry Daddy?”

Ridiculous? Absurd? That is exactly the DOR’s position in their Return! An otherwise exempt intangible – membership – is subject to sales tax as it is value proceeding or accruing from the sale of a non-exempt item (book or CD).

The DOR denies that membership fees are an intangible. See Return at p. 14, fn. 3. Indeed, this is a major thrust of their argument. Yet other Courts and Department of Revenues, both in the Southeast and across the country, have uniformly held that memberships are an intangible and thus not subject to sales tax. See *Barnes & Noble Superstores, Inc. v. Huddleston*, 1996 WL 596955 (Tenn. Ct. App. 1996); Fla. Dep. of Rev. Technical Advisements 89(A)-022 (issued April 12, 1989); Tenn. Rev. Rul. #14-08; *Dine-Out Tonight Club v. Dept. of Revenue Servs.*, 210 Conn. 567 (1989); *State v. Ann. West County, Promotions, Inc.*, 645 N.W. 2d 196 (N.D. 2002) and Oklahoma Tax Comm’n LTR-14-001 (“Taxability of Discount Club Membership”).

The Department's position in this case is an attempt to replace a straightforward and predictable system of sales tax exemptions with a vague and amorphous alternative test focused on the purchaser's mind at the time of sale. The Department is essentially molding a subjective and unknowable taxation scheme out of what should strive to be an objective system. It undoubtedly will put the Department on the offensive with respect to future audits and create an uncertainty amongst retailers in this state that could lead to overtaxation. Faced with fear of audit, retailers could simply assess sales tax on everything, rendering exemptions irrelevant.

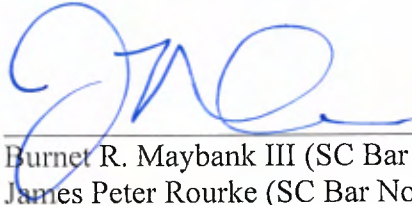
### CONCLUSION

This case is novel. Until the Court of Appeals' decision, no appellate court had ever held that sale or rental of real property was subject to sales tax.

No one expects as a result of the "parade of horrors" given above that merchants will recalibrate their POS cash register systems. They will rightfully ignore the Court of Appeals' decision. But every day in commercial and industrial transactions, exempt items are sold in the same transaction as taxable items, e.g. manufacturers buy exempt and non-exempt M&E from the same vendor in the same sales contract. The manufacturer typically self-assesses the use tax which it remits to the Department. The manufacturer has to calculate the use tax which in many cases is hundreds of thousands of dollars. Does it follow the Court of Appeals' decision? Or ignore it? To repeat, the non-exempt items are in the same contract as the exempt M&E. The exempt M&E is value proceeding or accruing the non-exempt furniture/fixtures/material handling equipment and would not have been purchased "but for" the purchase of the non-exempt. (The factory could not run without all of the above.)

The Court of Appeals' decision has implications far beyond membership fees.

Respectfully submitted,



---

Burnet R. Maybank III (SC Bar No 3699)

James Peter Rourke (SC Bar No. 79879)

NEXSEN PRUET, LLC

1230 Main Street, Suite 700 (29201)

Post Office Drawer 2426

Columbia, SC 29202-2426

Phone: 803.771.8900

Facsimile: 803.253.8277

[BMaybank@nexsenpruet.com](mailto:BMaybank@nexsenpruet.com)

[JRourke@nexsenpruet.com](mailto:JRourke@nexsenpruet.com)

Attorneys for Petitioner Books-A-Million, Inc.

Columbia, South Carolina  
September 21, 2020

# **Exhibit A**

**Ad-free. Influence-free.  
Powered by consumers.**

# Pros and Cons of Retail Membership Programs

The benefits may sound great, but there's more to think about

By Beth Braverman

Last updated: November 09, 2019



More retailers are now providing membership plans, betting that you'll pay a fee for the privilege of shopping with them.

They're probably on to something. Amazon charges \$119 per year for Amazon Prime and has more than 100 million members who make the e-commerce giant their first stop when they go shopping.

In exchange for that loyalty, Prime members get lots of

Join

Or, Sign In

At least a dozen other chain retailers now offer membership plans, and that's likely to grow.

#### MORE ON SHOPPING

[When Are Sales Too Good to Be True?](#)

[How to Spend the Last 50 Cents on Your Gift Card](#)

[How to Steer Clear of Online Shopping Scams](#)

[How to Avoid Buying Counterfeit Products Online](#)

[How to \(Really\) Stay Ahead of Your Credit Card Bills](#)

“We anticipate more paid loyalty programs will launch in the next few years, including programs at grocery stores and gas stations,” says Scott Robinson, vice president of design and strategy at [Bond Brand Loyalty](#), a marketing and consulting firm.

As more membership plans become available, consumers need to carefully weigh the pros and cons. In addition to the perks these plans offer, the cost of membership and the risk that you'll turn you into a spendthrift could outweigh any benefits.

“Once you make a financial commitment to being a loyal customer, you've got a conscious or unconscious goal to get your money's worth out of that membership,” says Josh Lowitz, a partner and co-founder of Consumer Intelligence Research Partners. And that can quickly get expensive.

[Join](#)

Or, [Sign In](#)

# Your Money Matters

News & advice from CR experts in our FREE Money newsletter.

[Sign Up](#)

## More Membership Plans

Among the membership plans that may now be vying for your business are Bed Bath & Beyond's Beyond +, which you can join for \$29 per year. For that, you get 20 percent off every time you make a purchase online or at the store. You also get free shipping.

Others, including Sephora, Newegg.com, Restoration Hardware, and Wayfair, have rolled out or are testing membership programs, charging fees up to \$100 per year.

Lululemon has a pilot program that's currently only available in Austin, Denver, and Houston, but the retailer has plans to expand to other markets. CVS recently expanded its CarePass program nationwide.

When you sign up, these retailers offer online and in-store discounts, deals on shipping, dedicated customer service, and financing deals with lower interest rates. Depending on the retailer, membership comes with other perks, too, such as

[Join](#)

Or, [Sign In](#)

**Go to Consumer Reports' 2019 Holiday Gift Guide for updates on deals, expert product reviews, insider shopping tips, and much more.**

## What to Consider Before Signing Up

To help figure out whether a membership will be worth the cost, ask yourself these questions.

**Will the discounts really save you money?** One of the most appealing aspects of paid retail membership programs is the opportunity to pay less for your purchases. But weigh the size of those discounts against the cost of the membership, says Kit Yarrow, professor emerita of psychology at Golden Gate University and author of "Decoding the New Consumer Mind: How and Why We Shop and Buy."

A \$15 per year, the PowerUp Rewards Pro membership at GameStop, for example, will get you 10 percent off all pre-owned games, so you'd have to buy about six pre-owned games in a year to offset that cost. A \$100 membership to Restoration Hardware gets you 25 percent off any full-priced item, an amount you could likely offset with just a few pieces of furniture.

**Will a membership cause you to spend more than you should?** Buying things you don't need just to get rewards or a

Join

Or, Sign In

Yarrow. Amazon Prime customers spend an average of \$1,200 per year on the site, compared with just \$600 spent on Amazon by non-Prime members, according to CIRP.

“Once you make the commitment with a membership, you become a little bit lazy about comparison shopping,” says Yarrow.

**Will you use the extra perks?** Many retailers offer additional benefits beyond discounts. Restoration Hardware, for example, provides members with a complementary one-on-one consultation with an interior designer, which may not be valuable to you if you’re a do-it-yourselfer or you’re already working with a design pro.

“It’s really no different than taking out a golf club or gym membership,” says Doug Stephens, author of the book "Re-Engineering Retail." “You have to ask yourself at the outset, what’s the likelihood that you’ll actually use these services? You may join with the best of intentions, and then after a while look back and see that you only went golfing twice.”

**Do you know how the retailer might use your data?** To become a member, you’ll likely have to share your name, address, phone number, and other information in exchange for membership. Some membership programs, such as the one offered by the hat seller Lids, ask for your date of birth with a promise to send you a “birthday present” when the day comes.

Join

Or, Sign In

“If you feel that you’re getting a good deal with the membership, you’re probably giving up something,” Stephens says. “Often, that’s information about your habits, tendencies, and behavior.”

Stephens says to be sure to read through the terms of the membership agreement before signing up to find out how your data can be shared.

**Is it simple to end a membership?** Most membership programs auto-renew and many are nonrefundable. Still, the terms of each retailer are different. Newegg, for example, will provide a full refund if you haven’t used any benefits in the current annual membership term; Barnes & Noble allows members to opt-out of auto-renewal and will provide a refund within 30 days of a membership renewal if it hasn’t been used.

To avoid cancellation problems, set a calendar reminder to evaluate your membership a few weeks before it renews, so that you can opt out if you choose. Also, before renewing check whether the terms of the membership program have changed or whether your needs have changed. A Restoration Hardware membership, for example, might be a great deal for a new homeowner but less worthwhile after you’ve finished decorating.

RETAILER

MEMBERSHIP  
COST

SELECT BENEFITS

Join

Or, Sign In

AMC Stubs  
Premier

\$15/year

3 million items; free two-day delivery on over 100 million items

- Video streaming from Amazon Prime library

- Prime music streaming

- Unlimited photo storage

- Access to the 800,000-book Kindle Lending Library

- 100 rewards points per \$1 spent (\$5 reward for every \$5,000 points)

- Free upgrades on popcorn and fountain drinks; free large popcorn refill

- Priority lanes at box office and concession stands

- Waived online ticketing fees

- Reduced prices on Tuesdays

- Birthday gift

Join

Or, Sign In

## Membership

		<ul style="list-style-type: none"> <li>• 40 percent off hardcover best sellers; 10 percent off most other items</li> <li>• Free express shipping in 1 to 3 days</li> </ul>
Bed Bath & Beyond Beyond +	\$29/year	<ul style="list-style-type: none"> <li>• 20 percent off all purchases</li> <li>• Free shipping</li> </ul>
Boxed Up	\$49/year	<ul style="list-style-type: none"> <li>• Free shipping on all orders</li> <li>• 2 percent cash back</li> <li>• 30-day free trial</li> </ul>
CVS CarePass	\$5/month or \$48/year	<ul style="list-style-type: none"> <li>• Free shipping from CVS.com where offered</li> <li>• Free 1-2 day prescription delivery on qualifying prescriptions</li> <li>• 24/7 pharmacist hotline</li> <li>• 20 percent off CVS Health brand</li> </ul>

[Join](#)

Or, [Sign In](#)

GameStop  
PowerUp  
Rewards Pro

\$14.99/year

- 20 rewards points for every dollar spent
- Birthday offer
- Buy 2 get 1 free pre-owned games welcome offer
- 10 percent off pre-owned games and accessories
- 10 percent extra trade credit on games, accessories, and tech
- One-year subscription to Game Informer magazine
- Access to exclusive sales

GNC Pro  
Access

\$39.99/year

- 1 reward point per \$1 spent; \$5 cash back for 150 rewards
- Free birthday gift
- Exclusive access to sales events, giveaways
- Free expedited shipping

Join

Or, Sign In

Lids  
AccessPass

\$5/year

- \$10 for \$100 spent
- Birthday present
- Early access to new products, special offers
- 20 percent off hats and embroidery
- 10 percent off apparel and novelties

Newegg  
Premier

\$19.99/3  
months or  
\$29.99/six  
months or  
\$49.99/year

- Free 3-day shipping, and free returns
- Friends & family membership for up to four people
- No restocking fee on returned items
- Dedicated customer-service line
- Exclusive deals, early notice of events

REI Co-op  
membership

\$20 (lifetime  
membership)

- 10 percent "dividend" (cash back) each year based on eligible purchases

[Join](#)

[Or, Sign In](#)

Restoration Hardware RH Members	\$100/year	<ul style="list-style-type: none"> <li>• 25 percent off all full-price items</li> <li>• 20 percent off sale items</li> <li>• Design consultation</li> <li>• Early access to clearance events</li> </ul>
Sephora Flash	\$15/year	<ul style="list-style-type: none"> <li>• Free two-day shipping</li> </ul>
Wayfair MyWay	\$29.99/year	<ul style="list-style-type: none"> <li>• Free shipping on all orders</li> <li>• 25 percent off assembly</li> <li>• Exclusive sales offers</li> <li>• Membership applies to sister companies AllModern, Joss &amp; Main, Birch Lane.</li> </ul>

**Editor's Note:** Amazon, Bed Bath & Beyond, and Wayfair participate in the shopping program on CR.org. When you shop through their retailer links on our site, we may earn

Join

Or, Sign In

Join

Or, [Sign In](#)

# **Exhibit B**

## Blog

# Why Paid Memberships Are the New Loyalty



By Doug Stephens

Spending on loyalty programmes is through the roof.

In 2016, the consumer loyalty management market was valued at \$1.93 billion. By 2023 that figure is expected to reach nearly \$6.95 billion — an annual compounded growth rate of nearly 21 percent. In the US alone, consumers now collectively hold more than 3.8 billion loyalty program memberships!

And who could blame retailers for wanting loyal customers? It's a well-worn fact that retaining a customer costs a fraction of that of finding a new one. Returning customers also spend more than first-time customers — up to 67 percent more! And if that weren't enough, even a small drop in loyalty can be enough to kill a business. No one disputes the intrinsic value of loyalty. Which brings us to an inconvenient truth.

## The loyalty lie

Most loyalty programmes don't generate loyalty. In fact, a 2012 benchmark study from Edgell Knowledge Network, which surveyed the loyalty programmes of 60 retailers, found that customers of retailers that offer a loyalty programme were not recognisably more loyal than customers of those that don't. What's worse, according to the same study, is that 81 percent of loyalty programme members don't even understand what their rewards entitlements consist of or how they're redeemed. And this shouldn't come as a surprise considering the average household belongs to eighteen loyalty schemes!

Retailers are spending mountains of money to retain the very customers they had the least chance of losing to begin with.

These findings were echoed in a 2017 study by Accenture, which also suggested almost a quarter of consumers actually have either a "negative or non-existent response" to loyalty programs.

Here's the real punch in the gut though: According to a 2015 study by Colloquy, only 42 percent loyalty programme members are even active or engaged. Further research shows that as consumers, we are most likely

Search the blog...

### CATEGORIES

#RetailVSCorona / 6

Advertising / 38

Articles & Podcasts / 14

Behavioral Marketing / 15

Big Data / 7

[MORE](#)

### ARCHIVE

August 2020 / 2

May 2020 / 2

April 2020 / 6

March 2020 / 2

February 2020 / 2

[MORE](#)

This website uses cookies to improve your experience. We'll assume you're ok with this, but you can opt-out if you wish. [Accept](#)

[Reject](#) [Privacy Policy](#)

So, while it pays to have loyal customers, you can't simply pay customers to be loyal.

But what if a business could turn transient loyalty into something deeper, more committed and more monogamous? What if the relationship between the retailer and the consumer could go from being transactional to being transformational and best of all, what if instead of paying customers to be loyal, those same customers actually paid the retailers they want to be loyal to?

It's a concept Amazon understands only too well. In its latest quarter, Amazon reported growing its paid Prime membership ranks by 47 percent. Prime consumption junkies spend 250 percent more each year than non-members. In fact, an astonishing 82 percent of US households with incomes over 110 thousand dollars per years are Prime members. And while standard loyalty programmes tend to bleed engagement over time, Prime members actually become more engaged. Consumer Intelligence Research Partners noted that 73 percent of 30-day trial subscribers end up paying for the first full year of Amazon Prime, 91 percent of first-year paid subscribers renew for a second year and 96 percent of second-year paid subscribers renew for a third year.

Amazon is merely the tip of a growing spear of retailers awakening to the power of paid membership.

The difference of course is that Prime is not merely a points or rewards system but rather a carefully curated ecosystem of value, service and content. It's the veritable key to the kingdom of all Amazon has to offer. Special pricing, promotions, streaming music, on-demand video and of course, fast, free shipping are among the benefits members are willing to spend \$99.00 per year to access. And Amazon is merely the tip of a growing spear of retailers awakening to the power of paid membership.

For ten dollars annually, Sephora's Flash programme offers members unlimited free two-day shipping with no minimum purchase requirements. GameStop's Power Up Pro and Elite membership programmes, \$14.99 and \$29.99 per year respectively, offer members a select set of special gifts, discounts, benefits and privileges. Restoration Hardware's RH Member programme costs \$100 per year to join and offers members a range of perks and privileges including free interior design services and early access to promotional events.

## What's love got to do with it?

What Amazon, GameStop, Sephora and Restoration Hardware understand is that there's a difference between loyalty and love. Loyalty simply means you've managed to put a card in the customer's wallet. Paid membership means you've secured a place in the customer's heart. Membership — even for a small fee — forms a sense of exclusivity and transforms the customer experience in a way that traditional loyalty programmes simply cannot. Getting a customer to lay down a membership fee forms an entirely new degree of mutual commitment. Even a small sunk cost will make a customer implicitly more engaged with a brand.

Membership fees are true and present revenue a retailer cannot afford to lose.

This website uses cookies to improve your experience. We'll assume you're ok with this, but you can opt-out if you wish. [Accept](#)

[Reject](#) [Privacy Policy](#)

cannot afford to lose, unlike the potential future revenue stream that loyalty programmes hope to realise.

Perhaps the most compelling reason of all to consider membership over loyalty is that consumers clearly want it. Research by Loyalty One suggests "sixty-two percent of consumer respondents said they would consider joining a fee-based rewards programme if their favourite retailer offered one." Among Millennials, the numbers were even more compelling with "75 percent of 18-24 year-olds and 77 percent of 25-34 year-olds saying they'd pay to belong."

Lastly, for retailers with a genuine interest in understanding their customers across channels, membership is the Holy Grail. A membership is true and unfiltered permission to engage and eliminates any ambiguity about the relationship. Paying members are more inclined to share personal information because they inherently understand that doing so contributes to shaping their experience with a brand. It's this level of consumer transparency that allows brands to more clearly understand customer actions throughout their ecosystem and across channels.

So if you're serious about creating truly loyal customers, I suggest you put their money where your mouth is. Paid membership is the new loyalty.

For an audio version of this article click here!

TAGS

Amazon Prime / Loyalty Management / Loyalty marketing / Marketing / Retail / strategy

AUTHOR



Doug Stephens

Doug Stephens is one of the world's foremost retail industry futurists, authors and speakers. His intellectual work and thinking have influenced many of the world's best-known retailers, agencies and brands. Doug is the author of two ground breaking books; The Retail Revival and Reengineering Retail: The Future of Selling in a Post-Digital World. Doug is also the syndicated retail columnist for CBC Radio and sits on multiple corporate and academic advisory boards.

ABOUT

CLIENTS

SIGN UP

info@retailprophet.com

SPEAKING

ADVISORY SERVICES

Enter your email address

CONTACT

BOOKS

© COPYRIGHT RETAIL PROPHET INC. ALL RIGHTS RESERVED.

This website uses cookies to improve your experience. We'll assume you're ok with this, but you can opt-out if you wish. Accept

Reject Privacy Policy

# Exhibit C



BUDGETING & SAVINGS > BUDGETING

# 3 Reasons Costco Has Membership Fees

By [VANESSA PAGE](#) | Updated Jan 28, 2020

## ☰ TABLE OF CONTENTS

Loyalty

Reducing Shrinkage

EXPAND+

Costco Wholesale ([COST](#)), the members-only big-box discount retailer, charges \$60 annually for its lowest level membership, the Gold Star. For \$120 per year, Executive membership offers additional savings, perks and benefits, as well as cash back on qualified purchases.<sup>[1]</sup> These fees may seem steep, but Costco relies on a subscription model for three reasons.

Advertisement

Feedback



Costco has found a way to deter theft in its stores: charge people to shop. It's unlikely that shoplifters will spend \$60 a year for the opportunity to steal. By controlling entrances and exits in addition to the membership format, Costco believes its [shrinkage](#) is "well below those of typical retail operations."<sup>[2]</sup>

## Income Stream

In the volatile world that is the grocery business, membership fees provide a stable source of income. In the company's fiscal year 2019, [revenue](#) from membership fees grew 7% to \$3.35 billion. When you consider that net income was \$3.66 billion, you can see why the company relies on membership fees to stay in business.<sup>[3]</sup>

Revenues from membership fees are great. Aside from a few minutes of an employee's time, plus the cost of the card and subsequent promotional mailings, managing membership isn't too costly. As such, Costco's billions of dollars in membership fee revenue is almost entirely profit.

## The Bottom Line

Costco has consistently low prices with a strong consumer following. With the company expanding both domestically and internationally, as well as profits increasing year over year and its sophisticated logistics network, the company looks poised to become a retail giant that rivals Walmart. Many Americans believe that Costco has membership fees solely for the cash they provide, but direct profit is only one of the three reasons.

## Find the Right Financial Advisor For You

SPONSORED

Finding the right financial advisor that [fits your needs](#) doesn't have to be hard. SmartAsset's free tool matches you with [fiduciary financial advisors](#) in your area in 5 minutes. Each advisor has been vetted by SmartAsset and is legally bound to act in your best interests. If you're ready to be matched with local advisors that will help you achieve your financial goals, [get started now](#).

ARTICLE SOURCES ▼

## Related Articles

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable John D. McLeod, Administrative Law Judge

---

Case No. 16-ALJ-178-0113-CC  
Appellate Case No. 2017-001519  
Opinion No. Op. 5721 (S.C. Ct. App. filed April 29, 2020)  
Supreme Court Case No. 2020-001102

**RECEIVED**

**Sep 21 2020**

**SC Court of Appeals**

---

Books-A-Million, Inc.

Petitioner,

v.

South Carolina Department of Revenue

Respondent.

---


PROOF OF SERVICE

---

This is to certify that the foregoing Petitioner's Reply to Respondent's Return to Petitioner's Petition for Writ of Certiorari, has been served upon Respondent, South Carolina Department of Revenue and the South Carolina Court of Appeals via electronic mail, this 21<sup>st</sup> day of September, 2020:

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

Sean G. Ryan, Esquire  
Adam Neil, Esquire  
South Carolina Department of Revenue  
PO Box 12265  
Columbia, SC 29211

  
\_\_\_\_\_  
Melinda White

Burnet R. Maybank, III  
Member  
Admitted in SC

September 21, 2020

VIA ELECTRONIC DELIVERY

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
1231 Gervais Street  
Columbia, SC 29201

**RECEIVED**  
**Sep 21 2020**  
**SC Court of Appeals**

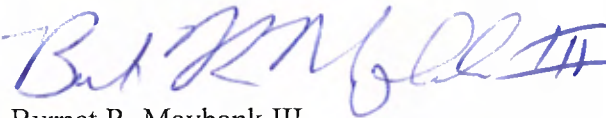
Re: *Books-A-Million, Inc. vs. South Carolina Department of Revenue*  
Docket No.: 16-ALJ-17-0113-CC  
Court of Appeals Opinion No. 5721

Dear Mr. Shearouse:

Enclosed for filing is the Appellant's Reply to Respondent's Return to Petition for a Writ of Certiorari and Proof of Service of same on counsel for South Carolina Department of Revenue in the above-referenced matter.

Thank you for your assistance in this matter.

Best regards,



Burnet R. Maybank III

Enclosures

cc: The Honorable Jenny Abbott Kitchings  
Sean G. Ryan, Esq.  
Adam Neil, Esq.

Charleston  
Charlotte  
**Columbia**  
Greensboro  
Greenville  
Hilton Head  
Myrtle Beach  
Raleigh