

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
OFFICE OF THE CLERK

GREGORY C. LANGHAM, CLERK

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901 19TH STREET
DENVER, COLORADO 80294-3589
PHONE (303) 844-3433
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February 28, 2011

SEE NOTICE OF ELECTRONIC FILING

RE: Direct Marketing Association v. Huber

District Court Case No. 10-cv-01546-REB-CBS
Notice of Appeal Filed by Roxy Huber on February 25, 2011
Fee Status: Fees Not Paid
Other Pending Appeals: none

Attached are the following documents for the parties in connection with the notice of appeal: Copy of the notice of appeal and a copy of the docket sheet. The appellant only is directed to the U.S. Court of Appeals for the 10th Circuit website (<http://www.ca10.uscourts.gov>) to obtain the Notice of Transcript Order form, Docketing Statement form and Docketing Statement Instructions.

The appellant must carefully read the directions provided with the Notice of Transcript Order form. If a transcript is being ordered, the appellant and the court reporter must complete the Notice of Transcript Order. The appellant must complete a separate form for each court reporter and/or reporting service, indicating only the dates of the proceedings that reporter is being requested to transcribe. Please contact the reporter or reporting services directly to obtain information and make arrangements for the preparation of the necessary transcripts. Instructions and the names, addresses and telephone numbers for most of the court reporters and reporting services can be found on the attached list.

File one copy of the Notice of Transcript Order with the U.S. District Court on CM/ECF, one copy with the U.S. Court of Appeals on the Appellate CM/ECF and serve all parties pursuant to Fed. R. App. P. 10. If no transcript is being ordered, or all necessary transcripts are presently on file, the appellant must complete the Notice of Transcript Order, including Section A and file it as indicated above. If the entire transcript is not ordered by the appellant, the appellee should refer to Fed. R. App. P. 10.

If you have any difficulty accessing the necessary appeal documents please contact the appeals clerk at the U.S. District Court for the District of Colorado (303) 844-3433.

Sincerely,
GREGORY C. LANGHAM, Clerk

by s/ B. Reed Deputy Clerk

cc: Clerk, U.S. Court of Appeals (with copy of docket sheet, copy of notice of appeal and the preliminary record)

FURTHER INSTRUCTIONS FOR ORDERING TRANSCRIPTS:

Please review the enclosed docket sheet and locate the docket entry for the minutes of the proceedings you wish to have transcribed. In the entry will be either:

- the name of the court reporter,
- the name of the E.C.R. operator (meaning the proceeding was tape recorded before a District Court Judge),
- an indication of the tape number of the proceedings (meaning the proceeding was tape recorded before a magistrate judge) or
- "FTR" (meaning the proceeding was digitally recorded before either a District Court Judge or a Magistrate Judge).

If a name of a court reporter appears, please contact that reporter directly to make arrangements for the preparation of the transcript. The names, addresses and phone numbers for the court reporters and some of the contract reporters are on the attached sheet. If the name of the reporter is not on this list, please refer to the attached certificate of mailing.

If the proceedings was before a District Court Judge (other than Judge Richard P. Matsch) and was recorded by an E.C.R. operator or FTR, please contact Federal Reporting Service. Their address and phone number is on the attached list.

If the proceedings was before Judge Richard P. Matsch (either tape recorded (E.C.R) or digitally recorded (FTR) please contact Kathy Terasaki. Her address and phone number is on the attached list.

If the proceeding was held before a Magistrate Judge and was either tape recorded (E.C.R) or digitally recorded (FTR) please contact Avery Woods Reporting Service. Their address and phone number is on the attached list.

COURT REPORTERS

901 19th Street
Denver, Colorado 80294

Suzanne Claar
303-825-8874

Paul Zuckerman
303-629-9285

Gwen Daniel
303-571-4084

Therese Lindblom
303-628-7877

Kara Spitler
303-623-3080

Janet Coppock (fka Morrissey)
303-893-2835

Darlene Martinez
303-296-2008

Tracy Weir
303-298-1207

FTR OPERATOR

Kathy Terasaki
FTR Operator - (FTR-RPM)
901 19th Street
Denver, Colorado 80294
303-335-2095

DISTRICT COURT JUDGE - DIGITAL-FTR

Federal Reporting Service, Inc.
17454 East Asbury Place
Aurora, CO 80013
303-751-2777

MAGISTRATE JUDGE - DIGITAL-FTR

Avery Woods Reporting Service, Inc.
455 Sherman Street, Suite 250
Denver, CO 80203
303-825-6119

OTHER COURT REPORTERS

Adrienne Whitlow
8000 E. Girard Apt. 109
Denver, CO 80231
303-695-1121

APPEAL, NDISPO

**U.S. District Court
District of Colorado (Denver)
CIVIL DOCKET FOR CASE #: 1:10-cv-01546-REB -CBS**

Direct Marketing Association, The v. Huber
Assigned to: Judge Robert E. Blackburn
Referred to: Magistrate Judge Craig B. Shaffer
Cause: 42:1983 Civil Rights Act

Date Filed: 06/30/2010
Jury Demand: None
Nature of Suit: 950 Constitutional -
State Statute
Jurisdiction: Federal Question

Plaintiff

Direct Marketing Association, The

represented by **George Steven Isaacson**
Brann & Isaacson
P.O. Box 3070
184 Main Street
Lewiston, ME 04243-3070
207-786-3566
Fax: 207-783-9325
Email: gisaacson@brannlaw.com
ATTORNEY TO BE NOTICED

Matthew Peter Schaefer
Brann & Isaacson
P.O. Box 3070
184 Main Street
Lewiston, ME 04243-3070
207-786-3566
Fax: 207-783-9325
Email: mschaefer@brannlaw.com
ATTORNEY TO BE NOTICED

V.

Defendant

Roxy Huber
*in her capacity as Executive Director,
Colorado Department of Revenue*

represented by **Jack M. Wesoky**
Colorado Attorney General's Office-
Business & Licensing
1525 Sherman Street
5th Floor
Denver, CO 80203
303-866-5512
Email: jack.wesoky@state.co.us
ATTORNEY TO BE NOTICED

Karen Michelle McGovern
Colorado Attorney General's Office

1525 Sherman Street
 Denver, CO 80203
 303-866-5455
 Fax: 303-866-5395
 Email: karen.mcgovern@state.co.us
TERMINATED: 09/27/2010

Melanie J. Snyder
 Colorado Attorney General's Office
 1525 Sherman Street
 Denver, CO 80203
 303-866-5273
 Email: melanie.snyder@state.co.us
ATTORNEY TO BE NOTICED

Robert H. Dodd , Jr.
 Colorado Attorney General's Office-
 Business & Licensing
 1525 Sherman Street
 5th Floor
 Denver, CO 80203
 303-866-4589
 Fax: 866-5691
 Email: robert.dodd@state.co.us
TERMINATED: 08/30/2010

Stephanie Lindquist Scoville
 Colorado Attorney General's Office-
 Department of Law
 1525 Sherman Street
 7th Floor
 Denver, CO 80203
 303-866-5241
 Fax: 303-866-5443
 Email: stephanie.scoville@state.co.us
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/30/2010	<u>1</u>	COMPLAINT against Roxy Huber (Filing fee \$ 350, Receipt Number 29213) Summons Issued, filed by Direct Marketing Association, The. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Receipt)(jak,) (Entered: 06/30/2010)
07/01/2010	<u>2</u>	ORDER REFERRING CASE to Magistrate Judge Craig B. Shaffer, for non-dispositive matters, by Judge Robert E. Blackburn on 7/1/10. (rebsec,) (Entered: 07/01/2010)
07/07/2010	<u>3</u>	ORDER setting a Scheduling Conference on 9/23/2010 at 10:00 a.m., in Courtroom A 402, by Magistrate Judge Craig B. Shaffer on 7/7/10.

		(cbssec) (Entered: 07/07/2010)
07/09/2010	4	NOTICE of Entry of Appearance by Robert H. Dodd, Jr on behalf of Roxy Huber (Dodd, Robert) (Entered: 07/09/2010)
07/20/2010	5	SUMMONS Returned Executed by Direct Marketing Association, The. Roxy Huber served on 7/2/2010, answer due 7/23/2010. (Schaefer, Matthew) (Entered: 07/20/2010)
07/20/2010	6	CORPORATE DISCLOSURE STATEMENT by Plaintiff Direct Marketing Association, The.. (Schaefer, Matthew) (Entered: 07/20/2010)
07/20/2010	7	Unopposed MOTION for Extension of Time to File Answer or Otherwise Respond re 1 Complaint <i>and Leave to Extend Page Limitation</i> by Defendant Roxy Huber. (Attachments: # 1 Proposed Order (PDF Only)) (Scoville, Stephanie) (Entered: 07/20/2010)
07/20/2010	8	MEMORANDUM regarding 7 Unopposed MOTION for Extension of Time to File Answer or Otherwise Respond re 1 Complaint <i>and Leave to Extend Page Limitation</i> filed by Roxy Huber.Motions referred to Magistrate Judge Craig B. Shaffer by Judge Robert E. Blackburn on 7/20/10. TEXT ONLY ENTRY - NO DOCUMENT ATTACHED (rebsec,) (Entered: 07/20/2010)
07/21/2010	9	MINUTE ORDER granting 7 Motion for Extension of Time to Answer or Otherwise Respond. Defendant has up to and including 7/30/10 to file a responsive pleading, of no more than forty pages, to Plaintiff's 1 Complaint, by Magistrate Judge Craig B. Shaffer on 7/21/10.TEXT ONLY ENTRY - NO DOCUMENT ATTACHED (cbssec) (Entered: 07/21/2010)
07/23/2010	10	FIRST AMENDED COMPLAINT against Roxy Huber, filed by Direct Marketing Association, The.(Isaacson, George) Modified on 7/26/2010 to note that the document is the First Amended Complaint (sah,). (Entered: 07/23/2010)
07/26/2010	11	Docket Annotation re: 10 Amended Complaint. Entry modified on 7/26/2010 to note that the document is the First Amended Complaint. TEXT ONLY ENTRY - NO DOCUMENT ATTACHED (sah,) (Entered: 07/26/2010)
07/30/2010	12	Unopposed MOTION for Leave to File Excess Pages <i>in connection with motion for preliminary injunction</i> by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Proposed Order (PDF Only)) (Schaefer, Matthew) (Entered: 07/30/2010)
07/30/2010	13	MINUTE ORDER granting in part 12 Motion for Leave to File Excess Pages by Judge Robert E. Blackburn on 7/30/10. Plaintiff shall file their motion for preliminary injunction that shall not exceed THIRTY (30) pages. Defendant shall file a response to the motion for preliminary injunction that shall not exceed THIRTY (30)pages.TEXT ONLY ENTRY - NO DOCUMENT ATTACHED (rebsec,) (Entered: 07/30/2010)

07/30/2010	1 14	MOTION to Dismiss 10 Plaintiff's First Amended Complaint by Defendant Roxy Huber. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (McGovern, Karen) Modified on 8/2/2010 to create linkage (sah2,). (Entered: 07/30/2010)
08/13/2010	15	MOTION for Preliminary Injunction <i>with Incorporated Memorandum of Law</i> by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Isaacson, George) (Entered: 08/13/2010)
08/13/2010	16	DECLARATION of <i>Jerry Cerasale</i> regarding MOTION for Preliminary Injunction <i>with Incorporated Memorandum of Law</i> 15 by Plaintiff Direct Marketing Association, The. (Isaacson, George) (Entered: 08/13/2010)
08/13/2010	17	DECLARATION of <i>Jeana M. Petillo</i> regarding MOTION for Preliminary Injunction <i>with Incorporated Memorandum of Law</i> 15 by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G) (Isaacson, George) (Entered: 08/13/2010)
08/13/2010	18	DECLARATION of <i>Kevin Lane Keller</i> regarding MOTION for Preliminary Injunction <i>with Incorporated Memorandum of Law</i> 15 by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Exhibit A) (Isaacson, George) (Entered: 08/13/2010)
08/13/2010	19	DECLARATION of <i>Thomas J. Adler, PhD</i> regarding MOTION for Preliminary Injunction <i>with Incorporated Memorandum of Law</i> 15 by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Isaacson, George) (Entered: 08/13/2010)
08/13/2010	20	Unopposed MOTION for Extension of Time to File Response/Reply as to 14 MOTION to Dismiss <i>Plaintiff's First Amended Complaint</i> , and for <i>enlargement of page limitation for opposition</i> by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Proposed Order (PDF Only) for unopposed motion)(Schaefer, Matthew) (Entered: 08/13/2010)
08/19/2010	21	MINUTE ORDER. Plaintiffs Unopposed Motion For Extension of Time and For Leave To Exceed Page Limitation in Opposition To Defendants Motion To Dismiss Plaintiffs First Amended Complaint 14 , 20 is GRANTED in part. Plaintiff shall have until 08/27/2010 to file its response. The brief shall not exceed 36 pages. By Judge Robert E. Blackburn on 08/19/2010.(sah,) (Entered: 08/19/2010)
08/25/2010	22	NOTICE of Entry of Appearance by Jack M. Wesoky on behalf of Roxy Huber (Wesoky, Jack) (Entered: 08/25/2010)
08/27/2010	23	BRIEF in Opposition to 14 MOTION to Dismiss <i>Plaintiff's First Amended Complaint</i> filed by Plaintiff Direct Marketing Association, The. (Isaacson, George) (Entered: 08/27/2010)
08/30/2010	24	Unopposed MOTION to Withdraw as Attorney <i>for Defendant</i> by Defendant Roxy Huber. (Attachments: # 1 Proposed Order (PDF Only)) (Dodd, Robert) (Entered: 08/30/2010)
08/30/2010	25	MEMORANDUM regarding 24 Unopposed MOTION to Withdraw as

		Attorney <i>for Defendant</i> filed by Roxy Huber. Motions referred to Magistrate Judge Craig B. Shaffer by Judge Robert E. Blackburn on 8/30/10. TEXT ONLY ENTRY - NO DOCUMENT ATTACHED (rebsec,) (Entered: 08/30/2010)
08/30/2010	26	MINUTE ORDER granting 24 Motion to Withdraw as Attorney. Attorney Robert H. Dodd, Jr terminated, by Magistrate Judge Craig B. Shaffer on 8/30/10. TEXT ONLY ENTRY - NO DOCUMENT ATTACHED (cbssec) (Entered: 08/30/2010)
09/01/2010	27	(WITHDRAWN) Unopposed MOTION for Order to ON DEFENDANTS UNOPPOSED MOTION 1) FOR LIMITED EXPEDITED DISCOVERY, 2) TO CONSOLIDATE PRELIMINARY INJUNCTION PROCEEDINGS WITH A TRIAL ON THE MERITS ON PLAINTIFFS COMMERCE CLAUSE CLAIMS, 3) TO STAY PROCEEDINGS ON PLAINTIFFS REMAINING CLAIMS, AND 4) IN THE ALTERNATIVE, FOR AN EXTENSION OF TIME IN WHICH DEFENDANT MAY RESPOND TO PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION AND REPLY IN SUPPORT OF HER MOTION TO DISMISS by Defendant Roxy Huber. (Attachments: # 1 Proposed Order (PDF Only))(Scoville, Stephanie) Modified on 10/5/2010 pursuant to the Minute Entry dated 10/01/2010 (sah2,). (Entered: 09/01/2010)
09/16/2010	28	Unopposed MOTION for Extension of Time to File Response/Reply <i>in Support of her Motion to Dismiss</i> by Defendant Roxy Huber. (Attachments: # 1 Proposed Order (PDF Only))(Scoville, Stephanie) (Entered: 09/16/2010)
09/16/2010	29	Proposed Scheduling Order (<i>submitted jointly by the parties</i>) by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Schaefer, Matthew) (Entered: 09/16/2010)
09/16/2010	30	NOTICE re 14 MOTION to Dismiss <i>Plaintiff's First Amended Complaint (Partial Withdrawl of Motion to Dismiss)</i> by Defendant Roxy Huber (Scoville, Stephanie) (Entered: 09/16/2010)
09/17/2010	31	MINUTE ORDER. Defendants Unopposed Motion For Extension of Time in Which To Reply in Support of Her Motion To Dismiss 28 filed 09/16/2010, is GRANTED on the terms stated in this order. By Judge Robert E. Blackburn on 09/17/2010.(sah,) (Entered: 09/17/2010)
09/20/2010	32	MINUTE ORDER <i>sua sponte</i> resetting the 9/23/10 Scheduling Conference to 9/24/2010 at 2:30 p.m. in Courtroom A402, pursuant to a conflict on the court's calendar. All of the deadlines set forth in the Court's 3 Order filed on 7/7/10 remain unchanged, by Magistrate Judge Craig B. Shaffer on 9/20/10. TEXT ONLY ENTRY - NO DOCUMENT ATTACHED(cbssec) (Entered: 09/20/2010)
09/21/2010	33	NOTICE of Entry of Appearance of <i>Melanie J. Snyder</i> by Melanie J. Snyder on behalf of Roxy Huber (Snyder, Melanie) (Entered: 09/21/2010)
09/24/2010	34	COURTROOM MINUTES - Minute Entry for proceedings held before

		Magistrate Judge Craig B. Shaffer: A Scheduling Conference was held on 9/24/2010. ORDERED: A Further Scheduling Conference is set for 10/1/2010 at 08:00 AM before Magistrate Judge Craig B. Shaffer. Out of town counsel may appear via phone by calling 303.844.2117 at the scheduled time. (Court Reporter FTR - Linda Kahoe) (cbscd) (Entered: 09/24/2010)
09/27/2010	35	Joint MOTION to Withdraw as Attorney by Defendant Roxy Huber. (Attachments: # 1 Proposed Order (PDF Only))(McGovern, Karen) (Entered: 09/27/2010)
09/27/2010	36	MEMORANDUM regarding 35 Joint MOTION to Withdraw as Attorney filed by Roxy Huber.Motions referred to Magistrate Judge Craig B. Shaffer by Judge Robert E. Blackburn on 9/27/10. TEXT ONLY ENTRY - NO DOCUMENT ATTACHED(rebsec,) (Entered: 09/27/2010)
09/27/2010	37	MINUTE ORDER granting 35 Motion to Withdraw as Attorney. Attorney Karen Michelle McGovern is terminated as counsel of record, by Magistrate Judge Craig B. Shaffer on 9/27/10.TEXT ONLY ENTRY - NO DOCUMENT ATTACHED (cbssec) (Entered: 09/27/2010)
10/01/2010	38	Proposed Scheduling Order (<i>Plaintiff's Proposal</i>) by Plaintiff Direct Marketing Association, The. (Schaefer, Matthew) (Entered: 10/01/2010)
10/01/2010	39	Minute Entry for Scheduling Conference held before Magistrate Judge Craig B. Shaffer on 10/1/2010; Court enters a schedule for resolution of the Plaintiff's pending Motion for Preliminary Injunction and Incorporated Memorandum of Law 15 . Counsel for defendants makes an oral motion to withdraw the Unopposed Motion for Order. The oral motion to withdraw 27 Defendants' Unopposed Motion for Order is GRANTED and the motion is WITHDRAWN. See attached document for deadlines. (Court Reporter FTR - Monique Wiles) (klmcd) (Entered: 10/04/2010)
10/01/2010	40	SCHEDULING ORDER, by Magistrate Judge Craig B. Shaffer on 10/1/2010. (klmcd) (Entered: 10/04/2010)
10/01/2010	41	Minute Entry for Telephonic Status Conference proceedings held before Magistrate Judge Craig B. Shaffer on 10/1/2010; Defendants' Motion 22 to Stay Discovery is GRANTED. Discovery is stayed pending a ruling on the Defendants' Motion to Dismiss 5 . (Court Reporter FTR - Monique Wiles) (klmc,) (Entered: 10/04/2010)
10/04/2010	42	Docket Annotation re: 41 Status Conference, Minute Entry was docketed in the wrong case. TEXT ONLY ENTRY - NO DOCUMENT ATTACHED (sah,) (Entered: 10/04/2010)
10/12/2010	43	MINUTE ORDER setting a Telephonic Discovery Hearing on 10/14/2010 at 2:00 p.m., pursuant to an unopposed request made by counsel for Defendant. <i>Counsel shall coordinate to create a conference call among themselves before contacting the court (303.844.2117) at the scheduled time</i> , by Magistrate Judge Craig B. Shaffer on 10/12/10. TEXT ONLY ENTRY - NO DOCUMENT ATTACHED(cbssec) (Entered: 10/12/2010)

10/14/2010	44	COURTROOM MINUTES - Minute Entry for proceedings held before Magistrate Judge Craig B. Shaffer: A Telephonic Discovery Hearing was held on 10/14/2010. ORDERED: The court will apply the current Rule 26 that is in effect, WITHOUT PREJUDICE to the Plaintiff's right to withhold materials that they believe, consistent with the case law, Rule 501, and Rule 26, can be properly withheld. Consistent with Rule 26(b) (5), the Plaintiff is REQUIRED to provide a privilege log of any materials that are withheld. The court will allow the parties to decide whether or not the privilege is properly asserted. By Magistrate Judge Craig B. Shaffer. (Court Reporter FTR - Linda Kahoe) (cbscd) (Entered: 10/14/2010)
10/28/2010	45	Unopposed MOTION for Extension of Time to <i>Produce Final Expert Report</i> by Defendant Roxy Huber. (Attachments: # 1 Proposed Order (PDF Only))(Scoville, Stephanie) (Entered: 10/28/2010)
10/29/2010	46	MEMORANDUM regarding 45 Unopposed MOTION for Extension of Time to <i>Produce Final Expert Report</i> filed by Roxy Huber. Motions referred to Magistrate Judge Craig B. Shaffer by Judge Robert E. Blackburn on 10/29/10. TEXT ONLY ENTRY - NO DOCUMENT ATTACHED(rebsec,) (Entered: 10/29/2010)
10/29/2010	47	MINUTE ORDER granting 45 Motion for Extension of Time. Defendant has up to and including November 15, 2010 in which to produce a final expert report for its expert on the issue of compliance costs, by Magistrate Judge Craig B. Shaffer on 10/29/10. TEXT ONLY ENTRY - NO DOCUMENT ATTACHED (cbssec) (Entered: 10/29/2010)
10/29/2010	48	<u>AMENDED</u> MINUTE ORDER granting 45 Motion for Extension of Time. Defendant has up to and including <u>November 10, 2010</u> in which to produce a final expert report for its expert on the issue of compliance costs, by Magistrate Judge Craig B. Shaffer on 10/29/10. TEXT ONLY ENTRY - NO DOCUMENT ATTACHED(cbssec) (Entered: 10/29/2010)
11/08/2010	49	ORDER. This matter is before me on the Plaintiffs Motion for a Preliminary Injunction and Incorporated Memorandum of Law 15 filed 08/13/2010. The defendants response to this motion is due to be filed on 11/19/2010, and the plaintiffs reply is due to be filed on 11/29/2010. On or before 12/03/2010, the parties SHALL FILE a joint status report specifying the amount of time each party estimates she or it will need to present evidence and argument at any hearing on the plaintiffs motion for preliminary injunction; by Judge Robert E. Blackburn on 11/08/2010. (sah,) (Entered: 11/08/2010)
11/19/2010	50	RESPONSE to 15 MOTION for Preliminary Injunction <i>with Incorporated Memorandum of Law</i> filed by Defendant Roxy Huber. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, Part 1, # 8 Exhibit 7, Part 2, # 9 Exhibit 7, Part 3, # 10 Exhibit 7, Part 4, # 11 Exhibit 7, Part 5, # 12 Exhibit 7, Part 6, # 13 Exhibit 7, Part 7, # 14 Exhibit 8, # 15 Exhibit 9, # 16 Exhibit 10, # 17 Exhibit 11, # 18 Exhibit 12, # 19 Exhibit 13, # 20 Exhibit 14, # 21 Exhibit 15, # 22 Exhibit 16, # 23 Exhibit 17)(Scoville, Stephanie) (Entered: 11/19/2010)

11/23/2010	51	Unopposed MOTION for Leave to File Excess Pages <i>for Reply to Opposition to Motion for Preliminary Injunction</i> by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Proposed Order (PDF Only))(Schaefer, Matthew) (Entered: 11/23/2010)
11/23/2010	52	MOTION for Leave to File Excess Pages <i>for her Reply Brief in Support of Motion to Dismiss</i> by Defendant Roxy Huber. (Attachments: # 1 Proposed Order (PDF Only))(Scoville, Stephanie) (Entered: 11/23/2010)
11/23/2010	53	RESPONSE to 52 MOTION for Leave to File Excess Pages <i>for her Reply Brief in Support of Motion to Dismiss</i> filed by Plaintiff Direct Marketing Association, The. (Schaefer, Matthew) (Entered: 11/23/2010)
11/24/2010	54	MINUTE ORDER granting 51 Motion for Leave to File Excess Pages. Plaintiff is granted leave to file a reply brief to defendant's response in opposition to plaintiff's motion for preliminary injunction that shall not exceed fifteen 15 pages. By Judge Robert E. Blackburn on 11/24/10.TEXT ONLY ENTRY - NO DOCUMENT ATTACHED (rebsec,) (Entered: 11/24/2010)
11/24/2010	55	MINUTE ORDER granting 52 Motion for Leave to File Excess Pages. Defendant is permitted to file a reply brief in support of her motion to dismiss not to exceed twenty 20 pages. By Judge Robert E. Blackburn on 11/24/10.TEXT ONLY ENTRY - NO DOCUMENT ATTACHED (rebsec,) (Entered: 11/24/2010)
11/29/2010	56	REPLY to Response to 15 MOTION for Preliminary Injunction <i>with Incorporated Memorandum of Law</i> filed by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Affidavit Reply Exh A (Barry Decl.), # 2 Deposition Excerpts Reply Exh B (Barry Deposition), # 3 Deposition Excerpts Reply Exh C (Gable Deposition), # 4 Deposition Excerpts Reply Exh D (Keller Deposition), # 5 Affidavit Reply Exh E (Adler Decl.), # 6 Deposition Excerpts Reply Exh F (Adler Deposition), # 7 Affidavit Reply Exh G (Woock Decl.), # 8 Deposition Excerpts Reply Exh H (Fox Deposition))(Isaacson, George) (Entered: 11/29/2010)
11/30/2010	57	REPLY to Response to 14 MOTION to Dismiss <i>Plaintiff's First Amended Complaint</i> filed by Defendant Roxy Huber. (Attachments: # 1 Exhibit Exhibit 1)(Snyder, Melanie) (Entered: 11/30/2010)
12/03/2010	58	Joint STATUS REPORT <i>Regarding Hearing on Motion for Preliminary Injunction</i> by Plaintiff Direct Marketing Association, The. (Isaacson, George) (Entered: 12/03/2010)
12/06/2010	59	ORDER. The Joint Status Report Regarding Hearing on Motion For Preliminary Injunction 58 filed 12/03/2010, is APPROVED. The stipulations stated in the joint status report concerning the composition of the record relevant to plaintiffs motion 15 are APPROVED. The parties request for oral argument is GRANTED. The court SHALL HEAR oral argument relevant to the issues raised by and inherent to the plaintiffs motion 15 on 01/13/2011, commencing at 10:00 a.m. (MST). By Judge Robert E. Blackburn on 12/06/2010. (sah,) (Entered: 12/06/2010)

12/16/2010	60	Joint MOTION for Extension of Time to <i>File Joint Designations of Additional Deposition Testimony by One Day</i> by Defendant Roxy Huber. (Wesoky, Jack) (Entered: 12/16/2010)
12/16/2010	61	MINUTE ORDER granting 60 Motion for Extension of Time. Parties shall have until 12/17/10 to file their Joint Designation of Additional Deposition Testimony. By Judge Robert E. Blackburn on 12/16/10.TEXT ONLY ENTRY - NO DOCUMENT ATTACHED (rebsec,) (Entered: 12/16/2010)
12/16/2010	62	MOTION for Leave to File Excess Pages <i>for Motion to Exclude Plaintiff's Expert Witnesses</i> by Defendant Roxy Huber. (Attachments: # 1 Proposed Order (PDF Only))(Snyder, Melanie) (Entered: 12/16/2010)
12/16/2010	61 63	MOTION to Exclude <i>the Testimony of Plaintiff's Expert Witnesses F. Curtis Barry, Thomas Adler, and Kevin Lane Keller</i> by Defendant Roxy Huber. (Attachments: # 1 Exhibit A- Barry Dep., # 2 Exhibit B- Barry Report, # 3 Exhibit C- Barry Dep. Exhs., # 4 Exhibit D- Adler Report and Decl., # 5 Exhibit E-1of5- Adler Dep. Exhs, # 6 Exhibit E-2of5- Adler Dep. Exhs, # 7 Exhibit E-3of5- Adler Dep. Exhs, # 8 Exhibit E-4of5- Adler Dep. Exhs, # 9 Exhibit E-5of5- Adler Dep. Exhs, # 10 Exhibit F- Adler Dep., # 11 Exhibit G- Lichtenstein Decl. and Report, # 12 Exhibit H- Keller Dep., # 13 Exhibit I- Keller Report and Decl., # 14 Exhibit J- 1of3- Keller Dep. Exhs., # 15 Exhibit J-2of3- Keller Dep. Exhs., # 16 Exhibit J-3of3- Keller Dep. Exhs.)(Snyder, Melanie) (Entered: 12/16/2010)
12/17/2010	64	MINUTE ORDER. Defendants Unopposed Motion For Leave To Exceed Page Limitation For Her Motion To Exclude The Testimony of Plaintiffs Expert Witness 62 is GRANTED. Defendants Motion To Exclude The Testimony of Plaintiffs Expert Witnesses F. Curtis Barry, Thomas Adler, and Kevin Lane Keller 63 is accepted for filing. By Judge Robert E. Blackburn on 12/17/2010.(sah,) (Entered: 12/17/2010)
12/17/2010	65	DESIGNATION OF DEPOSITION TESTIMONY <i>Joint Designation of Additional Deposition Testimony Regarding Plaintiff's Motion for Preliminary Injunction</i> by Plaintiff Direct Marketing Association, The. (Schaefer, Matthew) (Entered: 12/17/2010)
12/17/2010	66	DESIGNATION OF DEPOSITION TESTIMONY <i>Excerpts from the Transcript of the Deposition of F. Curtis Barry and accompanying deposition exhibits</i> by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Exhibit Dep. Ex. 1, # 2 Exhibit Dep. Ex. 3, # 3 Exhibit Dep. Ex. 4, # 4 Exhibit Dep. Ex. 5, # 5 Exhibit Dep. Ex. 7, # 6 Exhibit Dep. Ex. 8, # 7 Exhibit Dep. Ex. 9, # 8 Exhibit Dep. Ex. 10, # 9 Exhibit Dep. Ex. 11, # 10 Exhibit Dep. Ex. 12, # 11 Exhibit Dep. Ex. 13, # 12 Exhibit Dep. Ex. 15)(Schaefer, Matthew) (Entered: 12/17/2010)
12/17/2010	67	DESIGNATION OF DEPOSITION TESTIMONY <i>Excerpts from the Transcript of the Deposition of Kevin Lane Keller and accompanying deposition exhibits</i> by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Exhibit Dep. Ex. 16, # 2 Exhibit Dep. Ex. 17, # 3

		Exhibit Dep. Ex. 18, # 4 Exhibit Dep. Ex. 19, # 5 Exhibit Dep. Ex. 20, # 6 Exhibit Dep. Ex. 21, # 7 Exhibit Dep. Ex. 22, # 8 Exhibit Dep. Ex. 23, # 9 Exhibit Dep. Ex. 24, # 10 Exhibit Dep. Ex. 25, # 11 Exhibit Dep. Ex. 26, # 12 Exhibit Dep. Ex. 29, # 13 Exhibit Dep. Ex. 30, # 14 Exhibit Dep. Ex. 31, # 15 Exhibit Dep. Ex. 32, # 16 Exhibit Dep. Ex. 33, # 17 Exhibit Dep. Ex. 34, # 18 Exhibit Dep. Ex. 35, # 19 Exhibit Dep. Ex. 36, # 20 Exhibit Dep. Ex. 37, # 21 Exhibit Dep. Ex. 38)(Schaefer, Matthew) (Entered: 12/17/2010)
12/17/2010	68	DESIGNATION OF DEPOSITION TESTIMONY <i>Excerpts From the Transcript of the Deposition of Thomas J. Adler and accompanying deposition exhibits</i> by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Exhibit Dep. Ex. 21, # 2 Exhibit Dep. Ex. 39, # 3 Exhibit Dep. Ex. 42, # 4 Exhibit Dep. Ex. 44, # 5 Exhibit Dep. Ex. 47, # 6 Exhibit Dep. Ex. 48, # 7 Exhibit Dep. Ex. 49, # 8 Exhibit Dep. Ex. 52, # 9 Exhibit Dep. Ex. 53, # 10 Exhibit Dep. Ex. 54, # 11 Exhibit Dep. Ex. 55, # 12 Exhibit Dep. Ex. 56, # 13 Exhibit Dep. Ex. 57, # 14 Exhibit Dep. Ex. 58, # 15 Exhibit Dep. Ex. 60, # 16 Exhibit Dep. Ex. 61, # 17 Exhibit Dep. Ex. 62, # 18 Exhibit Dep. Ex. 63, # 19 Exhibit Dep. Ex. 65, # 20 Exhibit Dep. Ex. 66, # 21 Exhibit Dep. Ex. 67, # 22 Exhibit Dep. Ex. 68, # 23 Exhibit Dep. Ex. 69, # 24 Exhibit Dep. Ex. 70, # 25 Exhibit Dep. Ex. 72, # 26 Exhibit Dep. Ex. 74, # 27 Exhibit Dep. Ex. 76, # 28 Exhibit Dep. Ex. 79, # 29 Exhibit Dep. Ex. 80, # 30 Exhibit Dep. Ex. 82, # 31 Exhibit Dep. Ex. 86, # 32 Exhibit Dep. Ex. 87, # 33 Exhibit Dep. Ex. 88, # 34 Exhibit Dep. Ex. 90, # 35 Exhibit Dep. Ex. 92, # 36 Exhibit Dep. Ex. 93) (Schaefer, Matthew) (Entered: 12/17/2010)
12/17/2010	69	DESIGNATION OF DEPOSITION TESTIMONY <i>Excerpts from the Transcript of the Deposition of William F. Fox and accompanying deposition exhibits</i> by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Exhibit Dep. Ex. 95, # 2 Exhibit Dep. Ex. 96, # 3 Exhibit Dep. Ex. 98, # 4 Exhibit Dep. Ex. 99, # 5 Exhibit Dep. Ex. 100, # 6 Exhibit Dep. Ex. 101)(Schaefer, Matthew) (Entered: 12/17/2010)
12/17/2010	70	DESIGNATION OF DEPOSITION TESTIMONY <i>Excerpts from the Transcript of the Deposition of Dieter G. Gable</i> by Plaintiff Direct Marketing Association, The. (Schaefer, Matthew) (Entered: 12/17/2010)
12/20/2010	71	Amended MOTION to Exclude Testimony of Plaintiff's Expert Witnesses F. Curtis Barry, Thomas Adler, and Kevin Lane Keller by Defendant Roxy Huber. (Attachments: # 1 Exhibit A, Barry Dep., # 2 Exhibit B, Barry Report, # 3 Exhibit C, Barry Dep. Exhs., # 4 Exhibit D, Adler Report and Decl., # 5 Exhibit E1of5, Adler Dep. Exhs., # 6 Exhibit E2of5, Adler Dep. Exhs., # 7 Exhibit E3of5, Adler Dep. Exhs., # 8 Exhibit E4of5, Adler Dep. Exhs., # 9 Exhibit E5of5, Adler Dep. Exhs., # 10 Exhibit F, Adler Dep., # 11 Exhibit G, Lichtenstein Decl. and Report, # 12 Exhibit H, Keller Dep., # 13 Exhibit I, Keller Report and Decl., # 14 Exhibit J1of3, Keller Dep. Exhs., # 15 Exhibit J2of3, Keller Dep. Exhs., # 16 Exhibit J3of3, Keller Dep. Exhs.)(Snyder, Melanie) (Entered: 12/20/2010)
12/22/2010	72	MOTION to Strike 71 Amended MOTION to Exclude Testimony of

		Plaintiff's Expert Witnesses F. Curtis Barry, Thomas Adler, and Kevin Lane Keller (as Untimely, Non-Conforming, and Additional, Surreply Briefing on Plaintiff's Motion for Preliminary Injunction) by Plaintiff Direct Marketing Association, The. (Schaefer, Matthew) (Entered: 12/22/2010)
01/05/2011	73	RESPONSE to 72 Plaintiffs Motion to Strike Defendants Additional, Surreply Briefing on Plaintiffs Motion for Preliminary Injunction, Filed by the Defendant As an Untimely and Non-Conforming Motion to Exclude the Testimony of Plaintiffs Expert Witnesses filed by Defendant Roxy Huber. (Wesoky, Jack) Modified on 1/6/2011 to create linkage (sah,). (Entered: 01/05/2011)
01/06/2011	74	REPLY to Response to 72 Plaintiff's Motion to Strike filed by Plaintiff Direct Marketing Association, The. (Schaefer, Matthew) Modified on 1/6/2011 to create linkage (sah,). (Entered: 01/06/2011)
01/10/2011	75	RESPONSE to 71 Amended MOTION to Exclude <i>Testimony of Plaintiff's Expert Witnesses F. Curtis Barry, Thomas Adler, and Kevin Lane Keller</i> filed by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Deposition Excerpts Ex A)(Schaefer, Matthew) (Entered: 01/10/2011)
01/13/2011	76	Minute Entry for Preliminary Injunction proceedings held before Judge Robert E. Blackburn on 1/13/2011. Taking under advisement 15 Motion for Preliminary Injunction. (Court Reporter: Suzanne Claar)(babia) (Entered: 01/13/2011)
01/24/2011	77	REPLY to Response to 71 Amended MOTION to Exclude <i>Testimony of Plaintiff's Expert Witnesses F. Curtis Barry, Thomas Adler, and Kevin Lane Keller</i> filed by Defendant Roxy Huber. (Attachments: # 1 Exhibit Exh K, Gable Rep and Ex, # 2 Exhibit Exh L, Keller Dep Cites, # 3 Exhibit Exh M, Keller Dep Cites)(Snyder, Melanie) (Entered: 01/24/2011)
01/26/2011	78	ORDER. Defendants Amended Motion To Exclude the Testimony of Plaintiffs Expert Witnesses F. Curtis Barry, Thomas Adler, and Kevin Lane Keller 71 filed 12/20/2010, is DENIED as moot. The Plaintiffs Motion to Strike Defendants Additional, Surreply Briefing on Plaintiffs Motion for Preliminary Injunction, Filed by the Defendant as an Untimely and Non-conforming Motion to Exclude the Testimony of Plaintiffs Expert Witnesses 71 72 filed 12/22/2010, is DENIED. By Judge Robert E. Blackburn on 1/26/2011.(sah,) (Entered: 01/26/2011)
01/26/2011	79	ORDER. Plaintiffs Motion for a Preliminary Injunction and Incorporated Memorandum of Law 15 filed 8/13/2010, is GRANTED. See order for details. By Judge Robert E. Blackburn on 1/26/2011.(sah,) (Entered: 01/26/2011)
01/26/2011	80	MINUTE ORDER setting a Telephonic Status Conference on 2/10/2011 at 10:00 a.m., in light of the 79 Order Granting Motion for Preliminary Injunction. <i>Counsel shall coordinate to create a conference call among themselves before contacting the court (303.844.2117) at the scheduled time</i> , by Magistrate Judge Craig B. Shaffer on 1/26/11. TEXT ONLY ENTRY - NO DOCUMENT ATTACHED(cbssec) (Entered: 01/26/2011)

01/28/2011	81	BOND <i>for Preliminary Injunction</i> posted by Plaintiff Direct Marketing Association, The. (Schaefer, Matthew) (Entered: 01/28/2011)
01/28/2011	82	RECEIPT (COX034787) for 5,000.00 by Plaintiff Direct Marketing Association, The re: 79 Order on Motion for Preliminary Injunction. (sah,) (Entered: 01/28/2011)
02/01/2011	83	MINUTE ORDER resetting a hearing pursuant to an unopposed request made by counsel for Defendant. ORDERED that a Telephonic Status Conference will be held on 2/14/2011 at 9:00 a.m. <i>Counsel shall coordinate to create a conference call among themselves before contacting the court (303.844.2117) at the scheduled time</i> , by Magistrate Judge Craig B. Shaffer on 2/1/11. TEXT ONLY ENTRY - NO DOCUMENT ATTACHED(cbssec) (Entered: 02/01/2011)
02/14/2011	84	COURTROOM MINUTES/MINUTE ORDER for proceedings held before Magistrate Judge Craig B. Shaffer: A Telephonic Status Conference was held on 2/14/2011. (FTR: Linda Kahoe) (cbscd) (Entered: 02/14/2011)
02/16/2011	85	Joint STATUS REPORT <i>and Proposed Order</i> by Plaintiff Direct Marketing Association, The. (Attachments: # 1 Proposed Order (PDF Only))(Schaefer, Matthew) (Entered: 02/16/2011)
02/25/2011	86	NOTICE OF APPEAL as to 79 Order on Motion for Preliminary Injunction by Defendant Roxy Huber (Wesoky, Jack) (Entered: 02/25/2011)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn**

Civil Case No. 10-cv-01546-REB-CBS

THE DIRECT MARKETING ASSOCIATION,

Plaintiff,

v.

ROXY HUBER, in her capacity as Executive Director, Colorado Department of Revenue,

Defendant.

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

Blackburn, J.

This matter is before me on the **Plaintiff's Motion for a Preliminary Injunction and Incorporated Memorandum of Law** [#15]¹ filed August 13, 2010. The defendant filed a response [#50], and the plaintiff filed a reply [#56]. Having considered the evidence, the parties' written arguments, the relevant law, and the oral arguments presented by counsel for the parties at a hearing held on January 13, 2011, I find and conclude that the motion for preliminary injunction should be granted.

I. JURISDICTION & STANDING

I have jurisdiction over this case under 28 U.S.C. § 1331 (federal question). Although the defendant challenges the plaintiff's standing to pursue certain of its claims in this case, the defendant does not challenge the plaintiff's standing to present its claims under the Commerce Clause. The plaintiff seeks a preliminary injunction based

¹ "[#15]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

only on its Commerce Clause claims. Therefore, I need not and do not address standing.

II. BACKGROUND

The plaintiff, The Direct Marketing Association (DMA), asks the court to enjoin the defendant from enforcing the notice and reporting obligations imposed on many out-of-state retailers under a new Colorado law, now codified at §39-21-112(3.5), C.R.S. (2010) (the Act), and under the concomitant regulations promulgated by the Colorado Department of Revenue (DOR) to implement the Act, 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) (the Regulations). A copy of the Regulations is attached to the DMA's motion [#15] as Exhibit 2. In general, the Act and Regulations require retailers that sell products to customers in Colorado, but do not collect and remit Colorado sales tax on those transactions, to report certain information about the customers' purchases from the retailer to each customer and to the Colorado Department of Revenue. DMA is an association of businesses and organizations that market products directly to consumers via catalogs, magazine and newspaper advertisements, broadcast media, and the internet. The Act and the Regulations will affect many members of the DMA. The defendant, Roxy Huber, is the Executive Director of the Colorado Department of Revenue, the state agency charged with enforcing the Act and the Regulations. The DMA alleges that certain requirements of the Act and the Regulations violate the constitutional rights of many members of the DMA. In its motion for preliminary injunction, the DMA relies on its allegation that the Act and the Regulations violate the rights of many of its members under the Commerce Clause of the United States Constitution. **U.S. Const.** art. I, § 8. The DMA asserts other claims in its complaint, but the DMA does not rely on those claims as bases for its motion for preliminary injunction.

The Act and the Regulations establish three new obligations for retailers who sell products to customers in Colorado, but do not collect and remit Colorado sales tax on those transactions. First, such retailers must notify their Colorado customers that the retailer does not collect Colorado sales tax and, as a result, the purchaser is obligated to self-report and pay use tax to the DOR (Transactional Notice). Second, such retailers must provide to each of their Colorado customers an annual report detailing that customer's purchases from the retailer in the previous calendar year, informing the customer that he or she is obligated to report and pay use tax on such purchases, and informing the customer that the retailer is required by law to report the customer's name and the total amount of the customer's purchases from that retailer to the DOR (Annual Purchase Summary). The Annual Purchase Summary must be provided only the customers who spend more than 500 dollars in the calendar year with a particular retailer. Third, such retailers must provide the DOR with an annual report concerning each of the retailer's Colorado customers stating the name, billing address, shipping addresses, and the total amount of purchases from the retailer by each of the retailer's Colorado customers (Customer Information Report). The Law exempts retailers with less than 100,000 dollars in gross annual sales in Colorado. In its motion for preliminary injunction, the DMA asks the court preliminarily to enjoin Huber from enforcing those provisions of the Act and the Regulations that require retailers to provide Transactional Notices, Purchase Summaries, and Customer Information Reports.

III. STANDARD OF REVIEW

FED. R. CIV. P. 65 authorizes federal courts to issue preliminary injunctions. Because a preliminary injunction is an extraordinary remedy, the plaintiff's right to such

relief must be clear and unequivocal. *See Federal Lands Legal Consortium ex rel. Robart Estate v. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999). The plaintiff is entitled to a preliminary injunction only if it proves (1) that there is a substantial likelihood that it will prevail on the merits; (2) that it will suffer irreparable harm unless the preliminary injunction is issued; (3) that the threatened injury to the plaintiff outweighs the harm the preliminary injunction might cause defendant; and (4) that the preliminary injunction is in the public interest. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001).

IV. ANALYSIS

A. LIKELIHOOD OF SUCCESS

To secure a preliminary injunction, the plaintiff first must establish a substantial likelihood that it is likely to prevail on the merits of the substantive claims that are the basis for its motion. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001). “The determination of a motion for a preliminary injunction and a decision on the merits are different.” *Valdez v. Applegate*, 616 F.2d 570, 572 (10th Cir. 1980). “It is not necessary that plaintiffs show positively that they will prevail on the merits before a preliminary injunction may be granted.” *Atchison, Topeka and Santa Fe Railway. Co. v. Lennen*, 640 F.2d 255, 261 (10th Cir. 1981). Rather, plaintiff need only establish “a reasonable probability of success, . . . not an ‘overwhelming’ likelihood of success[.]” *Id.*

The plaintiff asserts two claims under the Commerce Clause of the United States Constitution and argues that it has demonstrated a substantial likelihood of success on both of these claims. The Commerce Clause expressly authorizes Congress to “regulate Commerce with foreign Nations, and among the several States.” *U.S. Const.*

art. I, § 8. The Commerce Clause long has been read as having a negative or dormant sweep as well. The clause, “‘by its own force’ prohibits certain state actions that interfere with interstate commerce.” **Quill Corp. v. North Dakota By and Through Heitkamp**, 504 U.S. 298, 309 (1992) (quoting **South Carolina State Highway Dept. v. Barnwell Brothers, Inc.**, 303 U.S. 177, 185 (1938)). The negative Commerce Clause “denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.” **Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or.**, 511 U.S. 93, 98 (1994). A state law violates the discrimination aspect of the dormant Commerce Clause if it discriminates against interstate commerce either facially or in practical effect. **Hughes v. Oklahoma**, 441 U.S. 322, 336 (1979). If a law discriminates against interstate commerce, then the state has the burden to demonstrate a legitimate local purpose served by the law which cannot be achieved through reasonable nondiscriminatory alternatives. *Id.* at 336 - 337. If the law in question regulates evenhandedly among in-state and out-of-state interests, “and its effects on interstate commerce are only incidental, [the law] will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” **Pike v. Bruce Church, Inc.**, 397 U.S. 137, 142 (1970).

i. Discrimination Claim

In its first claim for relief, the DMA alleges that the Act and the Regulations discriminate against out-of-state retailers who do not collect Colorado sales tax, because the Act and the Regulations impose on those retailers notice and reporting obligations that are not imposed on Colorado retailers. Under Colorado law, all retailers doing business in Colorado and selling to Colorado purchasers must obtain a sales tax license and must collect and remit the sales tax applicable to each sale. §§39-26-103,

104, C.R.S. Under the Act and the Regulations, retailers who collect and remit Colorado sales tax are not obligated to provide the Transactional Notice, the Annual Purchase Summary, and the Customer Information Report otherwise required by the Act and the Regulations. Under the law established in **Quill** and related cases, Colorado may not impose any duty to collect sales and use taxes on out-of-state retailers whose only connection to Colorado is by common carrier or the U.S. mail. **Quill**, 504 U.S. at 315. Thus, out-of-state retailers that do not have a physical presence in Colorado generally are not obligated to collect and remit sales tax on their sales in Colorado. The plaintiff contends that the Act and the Regulations discriminate against this group of out-of-state retailers by imposing on those retailers burdens that need not be borne by in-state retailers.

In the context of the dormant Commerce Clause, a law discriminates against interstate commerce if it imposes “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” **Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or.**, 511 U.S. 93, 99 (1994). In **Oregon Waste Systems**, for example, the Supreme Court concluded that Oregon’s two dollar and twenty-five cent per ton surcharge on out-of-state solid waste brought into Oregon for disposal was discriminatory in violation of the dormant Commerce Clause, when compared to the eighty-five cents per ton surcharge imposed on in-state solid waste. **Id.** at 100. The **Oregon Waste Systems** Court noted that the degree of a differential burden or charge on interstate commerce “is of no relevance to the determination whether a State has discriminated against interstate commerce.” **Id.** at n. 4 (internal quotation and citation omitted).

The text of the Act and the Regulations does not explicitly target out-of-state

retailers as opposed to in-state retailers. The defendant argues that the plain language of the Act and the Regulations applies to all retailers, in-state and out-of-state, that sell to Colorado purchasers but do not collect Colorado sales tax. Accordingly, the defendant contends that the Act and the Regulations are not discriminatory. I note, however, that under Colorado law, in-state retailers long have been required to collect and remit Colorado sales tax and are subject to civil and criminal penalties if they fail to do so. §§39-26-103 (4); 39-21-118(2), C.R.S. Unless they defy these legal requirements, these retailers are not subject to the notice and reporting requirements of the Act and the Regulations. Evidence submitted by the defendant indicates that the Tax Compliance Section of the Colorado Department of Revenue discovers each year only a very small number of Colorado retailers who are not complying with their legal obligation to collect and remit sales tax. *Response* [#50], Exhibit 16 (Reiser Affidavit).

Under Colorado law, any retailer who is not subject to the statutory obligation to collect and remit Colorado sales tax necessarily is an out-of-state retailer. The Act and the Regulations impose a notice and reporting burden on these out-of-state retailers and that burden is not imposed on in-state retailers, except for the very few in-state retailers who defy their statutory sales tax obligations. Given these circumstances, I conclude that the plaintiff has shown a substantial likelihood that it will succeed in showing that the Act and the Regulations are discriminatory because, in practical effect, they impose a burden on interstate commerce that is not imposed on in-state commerce.

If the DMA succeeds in showing that the Act and the Regulations are discriminatory, then “the burden falls on the State to justify [them] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory

alternatives adequate to preserve the local interests at stake.” *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). However, it is exceedingly difficult to meet this standard. “If a restriction on commerce is discriminatory, it is virtually per se invalid.” *Oregon Waste Systems*, 511 U.S. at 99. In this case, the defendant asserts Colorado’s need to collect tax revenue as the local benefit that justifies the Act and the Regulations. Without question, this is a legitimate local interest. However, the DMA has noted the availability of non-discriminatory alternatives. For example, like other states, Colorado might collect use tax from Colorado taxpayers via the Colorado income tax form. Given this and other alternatives, I conclude that it is unlikely that the defendant will be able to show a lack of nondiscriminatory alternatives to the Act and the Regulations.

Regardless of the state’s salutary local purposes, its enactment of a statutory scheme and concomitant regulations that produce, in effect, a geographic distinction between in-state and out-of-state retailers discriminates patently against interstate commerce, *id.* at 100, which triggers the virtually per se rule of facial invalidity that has not been surmounted by a demonstration by the state of a legitimate local purpose that can not be served adequately by reasonable nondiscriminatory alternatives. *Id.* (internal quotation and citations omitted). Thus, on the current record, I conclude that the DMA has demonstrated a substantial likelihood of success on its discrimination claim under the dormant Commerce Clause.

ii. Undue Burden Claim

In its second claim for relief, the DMA alleges that the Act and the Regulations impose improper and burdensome regulation of interstate commerce. The DMA relies heavily on the law established in *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 309 (1992) to support its undue burden claim. In *Quill*, the

Court concluded that undue burdens on interstate commerce sometimes may be avoided by the application of a bright line rule. The **Quill** court concluded that the dormant Commerce Clause and the Court's earlier holding in **National Bellas Hess, Inc. v. Department of Revenue of State of Ill.**, 386 U.S. 753, 758 (1967) create a bright line rule with regard to the collection of sales and use tax. This law creates a "safe harbor for vendors whose only connection with customers in the [taxing] State is by common carrier or the United States mail. Under **Bellas Hess**, such vendors are free from state-imposed duties to collect sales and use taxes." **Quill**, 504 U.S. at 315 (internal quotation omitted).

The **Quill** Court examined and applied the quadripartite test enunciated in **Complete Auto Transit, Inc. v. Brady**, 430 U.S. 274, 279 (1977). Under **Complete Auto**, a state tax will be sustained against a Commerce Clause challenge as long as the tax (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. **Complete Auto**, 430 U.S. at 279. **Complete Auto** rejected the previously applied distinction between direct and indirect taxes on interstate commerce "because that formalism allowed the validity of statutes to hinge on legal terminology, draftsmanship and phraseology." **Quill**, 430 U.S. at 310 (internal quotation, citation, and brackets omitted). The **Complete Auto** test emphasizes the importance of looking past the formal language of a tax statute to its practical effect. **Quill**, 504 U.S. at 310. The first and fourth prongs of the **Complete Auto** test "limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." **Quill**, 504 U.S. at 313. The safe harbor

established in *Quill* is meant to delineate and define the limits of the substantial nexus requirement of the *Complete Auto* test to ensure that a state tax law does not impose an undue burden on interstate commerce. *Id.*

The Act and the Regulations do not require out-of-state retailers to collect sales and use taxes. However, they do require out-of-state retailers to gather, maintain, and report information, and to provide notices to their Colorado customers and to the defendant about their Colorado customers. The sole purpose of these requirements is to enhance the collection of use taxes by the State of Colorado. I conclude that these requirements likely impose on out-of-state retailers use tax-related responsibilities that trigger the safe-harbor provisions of *Quill*. Although the burden of the notice and reporting obligations imposed by the Act and the Regulations may be somewhat different than the burden of collecting and remitting sales and use taxes, the sole purpose of the burdens imposed by the Act and the Regulations is the ultimate collection of use taxes when sales taxes cannot be collected. Looking to the practical effect of the Act and the Regulations, I conclude that the burdens imposed by the Act and the Regulations are inextricably related in kind and purpose to the burdens condemned in *Quill*. The Act and the Regulations impose these burdens on out-of-state retailers who have no connection with Colorado customers other than by common carrier or the United States mail. Those retailers likely are protected from such burdens on interstate commerce by the safe-harbor established in *Quill*.

iii. Conclusion

I find and conclude that the DMA has demonstrated a substantial likelihood of success on both its discrimination claim and its undue burden claim under the dormant Commerce Clause. Thus, consideration of this first factor weighs in favor of the

issuance of a preliminary injunction.

B. IRREPARABLE INJURY

The parties dispute whether or not a deprivation of the Commerce Clause rights at issue here, without more, constitutes irreparable injury. In a recent case, the United States Court of Appeals for the Tenth Circuit indicated that violation of Commerce Clause rights constitutes irreparable injury. ***American Civil Liberties Union v. Johnson***, 194 F.3d 1149, 1163 (10th Cir. 2010) (citing ***American Libraries Ass'n v. Pataki***, 969 F.Supp. 160, 168 - 183 (S.D.N.Y. 1997)). Although the Tenth Circuit's statement in ***Johnson*** is dicta, I conclude that violation of the constitutional Commerce Clause rights of DMA's members constitutes irreparable injury.

In addition, it is undisputed that many DMA members will face compliance costs if they are required to comply with the Act and the Regulations in the future. The amount of those costs is disputed. Huber's expert concludes that the smallest retailers affected by the Act and the Regulations will incur first-year compliance costs ranging from about 3,100 dollars to 7,000 dollars. *Response* [#50], Exhibit 6 (Report of Dieter G. Gable), p. 2. If, in the end, the Act and the Regulations are found to be unconstitutional because they violate the Commerce Clause, the affected retailers would be unable to recover these compliance costs from the State of Colorado. Under the Eleventh Amendment, Colorado is immune from suit for such damages. Under these circumstances, the compliance costs faced by retailers subject to the Act and the Regulations constitute irreparable injury. ***Chamber of Commerce of U.S. v. Edmondson***, 594 F.3d 742, 770 - 771 (10th Cir. 2010) (compliance costs of more than a thousand dollars per year per business constitute irreparable injury if such costs cannot later be recovered because of sovereign immunity). Thus, consideration of this second

factor weighs also in favor of the issuance of a preliminary injunction.

C. BALANCE OF HARMS

When considering the balance of harms, a court must balance “the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Amoco Prod. Co. v. Gambill*, 480 U.S. 531, 542 (1987). The DMA argues that the need to protect the constitutional rights of certain of its members outweighs the interest of the State of Colorado in enforcing a law that likely is constitutionally infirm. In addition, absent an injunction, some DMA members will incur compliance costs that cannot later be recovered. Huber argues that these considerations do not outweigh Colorado’s interest in enforcing a state law that will provide revenue to its strapped coffers.

If, ultimately, the Act and the Regulations are upheld against the DMA’s challenge, the reports and notices required by the Act and the Regulations can be prepared and delivered. This might delay the state’s collection of some use taxes, but it will not prevent the ultimate collection of those taxes. On the other hand, preserving the status quo with a preliminary injunction will prevent the irreparable injuries discussed above while the issues raised by the DMA are resolved completely. Given these circumstances and considerations, I find and conclude that the balance of harms favors the DMA, and thus, the issuance of a preliminary injunction.

D. PUBLIC INTEREST

Generally, the public interest is served by enjoining the enforcement of a law that likely violates the Constitution. *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). Huber argues that it is not in the public interest to enjoin the enforcement of a law which has the primary goal of raising revenue to ensure the

fiscal well-being of the state. As Huber notes, a court of equity must “pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, ___, 129 S.Ct. 365, 376 -377 (U.S. 2008). I find and conclude that the public’s interest in revenue raising by the state will not be impaired substantially by the issuance of a preliminary injunction. At most, the state may suffer some delay in implementing its new technique for enforcing its use tax laws, if the Act and the Regulations are upheld against the DMA’s challenge. On the other hand, the enforcement of a law that likely is unconstitutional, even if the goal of the law is important and legitimate, does not serve the public interest. Thus, the public interest factor weighs in favor of the issuance of a preliminary injunction.

V. ORDERS

THEREFORE, IT IS ORDERED as follows:

1. That the **Plaintiff’s Motion for a Preliminary Injunction and Incorporated Memorandum of Law** [#15] filed August 13, 2010, is **GRANTED** on the following terms;
2. That effective forthwith defendant Roxy Huber, in her capacity as Executive Director, Colorado Department of Revenue, together with her agents, servants, employees, attorneys-in-fact, or anyone acting on their behalf, are **ENJOINED AND RESTRAINED** from enforcing the provisions of §39-21-112(3.5), C.R.S. (2010) (the Act) and the regulations promulgated thereunder, 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) (the Regulations), to the extent that the Act and the Regulations require
 - A. that a retailer must notify their Colorado customers that the retailer does not collect Colorado sales tax and, as a result, the purchaser is obligated to self-report and pay use tax to the Colorado Department of

Revenue (Transactional Notice); and

B. that a retailer must provide to each of its Colorado customers an annual report detailing that customer's purchases from the retailer in the previous calendar year, informing the customer that he or she is obligated to report and pay use tax on such purchases, and informing the customer that the retailer is required by law to report the customer's name and the total amount of the customer's purchases from that retailer to the Colorado Department of Revenue (Annual Purchase Summary); and

C. that a retailer must provide the Colorado Department of Revenue with an annual report concerning each of the retailer's Colorado customers stating the name, billing address, shipping addresses, and the total amount of purchases from the retailer by each of the retailer's Colorado customers (Customer Information Report);

3. That this preliminary injunction **SHALL LIMIT** the enforcement of the Act and the Regulations against retailers who sell to customers in Colorado, but whose only connection to the State of Colorado is by common carrier or the United States Mail;

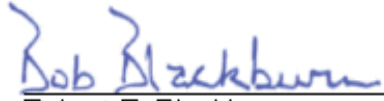
4. That this preliminary injunction **SHALL NOT LIMIT** the enforcement of the Act and the Regulations against retailers who do not fall into the class of retailers defined in paragraph three (3), above;

5. That under FED. R. CIV. P. 65(c), the plaintiff, the Direct Marketing Association, **SHALL POST** with the Clerk of the Court a bond in the amount of five thousand (5,000) dollars on or before Friday, January 28, 2011, at 12:00 p.m. (mountain standard time); and

6. That this preliminary injunction **SHALL REMAIN IN EFFECT** until modified or rescinded by further order of the court.

Dated January 26, 2011, at Denver, Colorado.

BY THE COURT:



Robert E. Blackburn
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 10-cv-01546-REB-CBS

The Direct Marketing Association,

Plaintiff,

v.

Roxy Huber, in her capacity as Executive Director, Colorado Department of Revenue,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that Roxy Huber, in her capacity as Executive Director, Colorado Department of Revenue, Defendant in the above named case, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Order Granting Motion for Preliminary Injunction entered in this action on the 26th day of January, 2011.

Respectfully submitted this 25th day of February, 2011.

JOHN W. SUTHERS
Attorney General

s/ Jack M. Wesoky

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*Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2011 I electronically filed the foregoing **NOTICE OF APPEAL** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-addresses:

gisaacson@brannlaw.com
mschafer@brannlaw.com

Attorneys for Plaintiff

s/ Jack M. Wesoky
