



1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLORADO

3
4 Civil Action No. 10-CV-01546-REB-CBS

5
6 The Direct Marketing Association,

7 Plaintiff,

8 v.

9 Roxy Huber, in her capacity as Executive
10 Director, Colorado Department of Revenue,
11 Defendant.

12
13 DEPOSITION OF KEVIN LANE KELLER taken at Norwich,
14 Vermont, on October 21, 2010.

15
16 APPEARANCES:

17 Matthew P. Schaefer, Esquire
18 Brann & Isaacson
19 184 Main Street, Fourth Floor
20 P.O. Box 3070
21 Lewiston, Maine, 04243-3070, on behalf of the
22 Plaintiff, The Direct Marketing Association.

23 Jack Wesoky, Esquire
24 Senior Assistant Attorney General
25 1525 Sherman Street, 7th Floor
26 Denver, Colorado, 80203, on behalf of the Roxy
27 Huber in her capacity as Executive Director,
28 Colorado Department of Revenue.

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30 40 South Main Street
31 West Lebanon, New Hampshire 03784
32 (603)298-2987 tel (603)218-6633 fax (603)443-1157 cell
33 cjfoster71@aol.com

1 Q Let's take a look at your Declaration for a moment
2 if we could. Exhibit 16.

3 Correct me if I'm wrong, okay? It seems to
4 me that from reading your Declaration you had the,
5 I don't know if the word is opinion or feeling or
6 idea that the survey confirmed. Is that correct?

7 MR. SCHAEFER: Objection to the form but go
8 ahead.

9 A I would say that I, based on my analysis of the
10 case and the facts as I understood them and the
11 conclusions that I would draw from that that the
12 survey results were consistent with that. Largely
13 consistent with that.

14 Q So again, before you had the survey, you harbored
15 the belief, if that's the correct word, that a
16 large majority of people would think the Colorado
17 law was an invasion of their privacy?

18 A I wouldn't use the word harbored the belief. What
19 I would sort of characterize --

20 Q Tell me what you would --

21 A The way I would characterize it is based on the
22 analysis of the facts of the case that I felt that
23 privacy would be a big issue and potentially a

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1 major problem, the extent of which I wasn't sure.

2 Q By the same token, you again, using my words,
3 harbored the belief that the law would change
4 consumer behavior such that consumers would not
5 purchase from the retailer who had to turn over
6 the information pursuant to the law?

7 A My belief was that changing the law in the way
8 that it would have changed would have resulted in
9 consumers changing their behavior such that they
10 would not buy as much from those retailers.

11 Q What about buying, consumers buying at all from
12 those retailers?

13 A In some cases, it would be not at all.

14 Q What was your thought before the survey on that
15 issue?

16 A Well, the thought before the survey was it was,
17 that this would be a major problem and concern for
18 some consumers and potentially an inhibitor in
19 terms of their purchase behavior. In some cases,
20 that might involve them not buying at all or even
21 maybe buying, certainly shopping around more and
22 not buying at all, I guess is the way I'd put it.

23 Q Would you look at paragraph number, let's start

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1 appropriate.

2 Q Do you think there should have been some
3 open-ended questions where there was a "don't
4 know" box, if you will, available?

5 MR. SCHAEFER: Objection. Survey speaks for
6 itself.

7 A There's always opportunity to ask other kinds of
8 questions, but I felt in terms of being able to
9 address what the concern of the study was or the
10 objective of the study was that those questions
11 were more than adequate.

12 Q The objective of the survey what was you said in
13 paragraph 5 of your Declaration?

14 A Correct.

15 Q Let me look over my notes and get you out of here.

16 RECESS TAKEN

17 Q Just to follow up on a couple of things that I
18 might have missed, and pardon me for going over
19 plowed ground because I'm not sure if I understood
20 it exactly. If you were counseling a group of
21 internet and catalog retailers, when I say
22 counseling, I mean you were hired to consult, and
23 this law, this Colorado law was the subject, you

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1 would opine to them that -- I want to make sure I
2 got the numbers correct. That it was likely that
3 63 percent of Colorado consumers would decrease
4 their internet and catalog purchases. I'm sorry.
5 67 percent.

6 A That's where I wanted to make sure what number.

7 Q It's on page 6. That 67 percent of Colorado
8 consumers would decrease their purchase from
9 catalog and out of state retailers who have to
10 report?

11 A If I were consulting with those firms, based on
12 what I had learned from the survey, that's what I
13 would inform them of.

14 Q Okay. And what you've, and let's assume with me
15 hypothetically that you're now being hired by an
16 association of retailers, catalog and internet,
17 you would counsel them, advise them, that it's
18 likely you'll lose 67 percent or 67 percent of
19 Colorado consumers will decrease their purchases
20 from you?

21 A That's what I would inform them of. Correct.

22 Q And you'd be confident in that opinion?

23 A It would be my best estimate of that. Yes.

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1 Q And I'll give you a margin of error of 5 percent
2 one way or the other, okay?

3 A Okay. Actually, I think there's a formula with
4 samples and percentages to get margins of error,
5 I'm pretty sure.

6 Q And you would also in my hypothetical situation
7 counsel or advice my hypothetical group that 43
8 percent of consumers who purchased an item from a
9 internet or catalog retailer would purchase it
10 from a Colorado retailer as opposed to an internet
11 or catalog retailer, subject to the reporting
12 requirement?

13 A Yes. Based on the survey and based on that
14 question that you're referring to, then I would
15 advise that it would be likely that 43 percent
16 would do that.

17 Q And you would include in your decisional calculus
18 your experience and knowledge that you've gained
19 over the past many years?

20 A I would explain how the survey was done and so
21 there would be understanding of that. And based
22 on that, what those results were and what the
23 meaning of those were in terms of these

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1 percentages.

2 Q So again, you'd be confident in advising them that
3 it would be likely that 43 percent of the
4 purchasers would not purchase from an internet or
5 catalog retailer that had to report?

6 MR. SCHAEFER: Objection to form.

7 A I would be confident that I would, it would be
8 most likely that all else equal, these would be
9 the percentages you would see.

10 Q I don't understand what you mean by all else
11 equal. I'm sorry.

12 A There could be all kinds of other changes that
13 might occur that, other laws, other factors in the
14 environment that I don't know that might change
15 those result.

16 Q What do you mean by other factors in the
17 environment?

18 A Just could be anything that would change the
19 dynamics in internet purchasing, so if there's any
20 other regulation that came into place. There
21 could be within Colorado or outside some shifts in
22 the retail environment. So macro kinds of factors
23 is the way I'd characterize that.

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1 Q Not factors unique to a consumer or his or her
2 purchase situation at the time?

3 A Well, there are always going to be some things
4 that are going to happen in an micro consumer,
5 individual consumer sense. Adding them up, that's
6 what the survey does and nets those out. So I
7 wouldn't think those would change. It's more the
8 big macro effects that might change things.

9 Q Okay. Thank you.

10 A Thanks.

11 CROSS-EXAMINATION

12 BY MR. SCHAEFER:

13 Q Good afternoon, Professor Keller.

14 A Hello.

15 Q My name is Matt Schaefer. I'm one of the
16 attorneys for the Direct Marketing Association,
17 and I'm going to ask you a few questions. First,
18 if we could mark this set of documents and Jack,
19 I'll represent for the record that what I'm asking
20 to have marked is an another copy of his
21 Declaration, the final Declaration, simply
22 appending the two documents that were marked as
23 exhibits to it so Exhibit A, his CV, and Exhibit

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1 faculty have been University of California,
2 Berkeley, Stanford University, as a sitting
3 faculty member at the Australian Graduate School
4 of Management in Sidney, Australia.

5 MR. WESOKY: Let me see if I can cut this
6 short. Matt, if you want me to agree to the
7 admissibility of his CV, I will, and his
8 qualifications as listed thereon. If you want to
9 qualify him as an expert, his CV will come in.

10 MR. SCHAEFER: That will probably suffice.

11 Q One thing I'd like to ask in that regard though,
12 can you explain, there were a number of questions
13 regarding your textbook or at least that called
14 for references to your textbook. Can you explain
15 a little bit about that work and its status in the
16 industry?

17 A So the next book I'm referring to that I just
18 finished revising is titled Marketing Management.
19 It's coauthored with Philip Kotler from the
20 Kellogg School at Northwestern. I just finished
21 the 14th edition. I've been involved with the
22 book for about, I'd say, 8 to 10 years. Formally
23 in the last, for these last three editions. And

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1 it is the best-selling, number one marketing MBA
2 textbook in the world so it's used in business
3 schools all through the U.S. and different parts
4 of the world, and the book covers pretty much all
5 aspects of marketing to an MBA level, graduate
6 level.

7 Q Now, with regard to Exhibit 37, your Expert
8 Report, were you engaged by Brann & Isaacson as
9 counsel for DMA to offer certain opinions in this
10 days?

11 A Yes.

12 Q Did you in fact offer opinions?

13 A I did in the form of this Report and Declaration.

14 Q And those opinions are set forth in your Expert
15 Report and Declaration?

16 A Yes, they are.

17 Q Now, you're not an attorney, are you?

18 A No.

19 Q And you're not a tax attorney?

20 A The answer is no.

21 Q And it's your understanding that the law issue
22 here by its terms applies, imposes certain
23 requirements on retailers that do not collect

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KEVIN LANE KELLER
Errata Sheet

<u>Page/Line</u>	<u>Correction</u>
5/4	“Schaefer” to “Keller”
11/4	“emphasize” to “emphasis”
11/8	“have been involved” to “has involved”
12/19	after “RSG,” add “Knowledge Networks as”
12/22	Schaefer to Keller
14/2	Schaefer to Keller
24/1	after “actually” add “thinking”
26/21	add comma between “textbook” and “general”
36/5	delete Schaefer
50/3	delete Schaefer
64/12	change “record” to “sense”
65/17	Schaefer to Keller
71/9	“theese” to “these”
80/12	change “Not” to “No”
84/1	Schaefer to Keller
89/16	delete Schaefer
92/19	“so very” to “so we very”
107/12	delete Schaefer
131/17	“next” to “text”
132/10	“days” to “case”