

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

3 -----
4 THE DIRECT MARKETING ASSOCIATION,

5 Plaintiff,

6 v. Civil Action No.: 10-CV-01546-REB-CBS

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

10 Defendant.
11 -----

12
13 DEPOSITION OF F. CURTIS BARRY

14
15 October 19, 2010

16 Sandston, Virginia

17
18
19 HALASZ REPORTING & VIDEO

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23 Reported by: Mary L. Rosser, RPR
24
25

1 (Exhibit No. 1 was
2 marked for identification.)

3

4 BY MS. SCOVILLE:

5 Q All right. So why don't you quickly take a look
6 at Exhibit No. 1 and just make sure this looks like a
7 complete copy of your report, please.

8 A I believe it is.

9 Q Okay. Well, let's jump in and start on page 4,
10 if you would. On page 4, about halfway down the page,
11 you talk about external commercial programming rates --
12 or from external vendors, and you give a range of \$140 to
13 \$225 per hour. I need to understand how you arrived at
14 these numbers.

15 A Okay. Well, as I said, I deal with proposals
16 from vendors not every day, but, you know, much of the
17 time so I'm continually looking at what vendors have --
18 one, what they think the effort is to do something in a
19 narrative form, and then how much per hour they feel that
20 they will spend to do that modification. So it includes
21 all the steps required to develop and program the
22 modification, and they use different skill levels of
23 people to do that. There would be a project manager that
24 spends, say, 10 percent of their time, and then just
25 various levels of programming skills to do the work, and

1 then people who QC the change and people that document
2 and so forth. So there are all different skills and
3 salaries.

4 Q And did you refer to any particular request for
5 proposal when preparing this report and coming up with
6 this range?

7 A No. I mean, I've got it in my head. I have a
8 pretty good idea from one vendor to another what they
9 charge, and this is typical.

10 Q Did you look at any labor market surveys?

11 A No.

12 Q What about any other sort of market survey data
13 that would give programming rates?

14 A I deal with internal clients, programmers, and
15 we talk about cost all the time so I don't -- you know, I
16 have that in my head.

17 Q And how great would the variance in these rates
18 be based on geography?

19 A They really don't.

20 Q And can you provide any sort of what I would
21 call confidence interval for this range? You know, you
22 see surveys that are done and they say --

23 A Plus or minus five percent.

24 Q Plus or minus five percent. All right. And how
25 do you know that?

1 A Because I've been doing it for 25 years.

2 Q All right. Let's look at the top of page 5
3 where you give a range for internal IT systems'
4 development costs of \$24 to \$48 per hour. How did you
5 arrive at those numbers?

6 A Just from the work that I do with clients, I
7 know that those are representative of people that are in
8 companies I serve.

9 Q And did you look at any particular client
10 files?

11 A No.

12 Q Again, this is something that you had --

13 A Yeah.

14 Q -- in your head based on your experience? And,
15 actually, we just have gotten into a situation --

16 A Yes. We reverse, yes.

17 Q All right. Let's start over again.

18 A They're in my head, yes. It's what I deal with
19 all the time, and I have a high confidence that they're
20 within range.

21 Q And did you look at any Department of Labor
22 studies --

23 A No.

24 Q -- or other occupational studies? Refer to any
25 other literature in coming up with those numbers?

1 A No.

2 Q And how great is the variance in these numbers
3 based on geography?

4 A I wouldn't know. I don't think that they're --
5 I mean, I've got a difference here of 50 to 100 so, I
6 mean, it's a pretty big variation.

7 Q Right, but as I understand it, the labor costs,
8 the range would be based on experience --

9 A True.

10 Q -- is that right?

11 A But good IT people are in high demand. I'm sure
12 that southern California or downtown New York are going
13 to pay a lot more, but I can't talk to any particular
14 geographic variation to it.

15 Q And would you give the same confidence interval
16 for these numbers, plus or minus 5 percent?

17 A I would.

18 Q In the next paragraph, you talk about that a
19 25 percent benefit rate can bring the labor charges to
20 \$31 to \$62 per hour. How did you come up with a
21 25 percent benefit rate?

22 A By working with -- you know, my knowledge of
23 companies' P&Ls and talking with management about the
24 increase in cost of personnel and what it takes to be
25 competitive versus, say, banks or larger companies, and

1 that's typical.

2 Q And, I'm sorry, since this is not my field and I
3 don't talk the lingo, what is P&L?

4 A Profit and loss statement, the income report.

5 Q Did you look at particular client files to come
6 up with a 25 percent benefit rate?

7 A No.

8 Q Did you look at any studies or literature to
9 determine that rate?

10 A No.

11 Q And how great is the variance in that rate based
12 on geography?

13 A I think it's more -- I would say that it isn't.
14 This is an industry that's selling nationwide, so if you
15 want to attract good people you have to pay comparable.
16 It's hard -- you can't take somebody from a bank and make
17 them into a direct marketer of product generally, so
18 they're attracting people from around the county to help
19 them build their business.

20 Q So there would be little variance based on
21 geography?

22 A Yeah. This is for, you know, for -- it's not
23 the top of the line. There are companies that spend a
24 lot more, but this is what it takes to be running a
25 competitive business.

1 A Right.

2 Q And as I understand it, these are not pricing
3 models that would be publicly available?

4 A Right, no.

5 Q They would be in response to requests --

6 A Right, yeah.

7 Q -- for proposals? Okay. When was the last time
8 you personally reviewed a pricing model?

9 A We do a couple of them a year. We did one in
10 the spring of this year.

11 Q And were there any particular pricing models
12 that you relied on in forming your opinions in this
13 report?

14 A No.

15 Q So you're relying more on your general
16 experience with the pricing models?

17 A And on the -- there's two aspects. One is, as
18 we have in the exhibits, the cost of merge/purge, which
19 is certainly one of the smaller costs in this report, and
20 often -- and then the services. In other words, where
21 people are going to develop, you know, a reporting system
22 for you comes back to these same kinds of costs that we
23 talked about a couple of hours ago. So it's more that
24 than some complex model.

25 Q So before we get into the specifics of the three

1 categories, I just want to generally understand what you
2 did. And it's my impression from reading your report
3 that you didn't do particular studies to come up with a
4 cost for each one of the three regulation areas, that you
5 were relying on your general experience to come up with
6 the cost; is that right?

7 A That's true.

8 Q Did you do any sort of formal studies with
9 regard to your opinions in this report?

10 A Well, we did, from the mailing services point of
11 view, talk to some companies, three or four companies
12 about what the cost of insertion and postage and so forth
13 would be to actually mail the notice to the customer. I
14 just wanted to be sure of that. That, again, is a
15 smaller cost.

16 And I did -- the way it worked on this report
17 was, I put together what I thought the major costs were
18 back in the middle of September, and that was after
19 having read the statute and regulation, the complaint and
20 so forth. So I said, Okay, these are the costs that I
21 would think this would translate to a particular company,
22 and then I did talk to some other people in the industry,
23 and in most cases I did not mention at all anything about
24 this suit because I didn't want to in any way, in any way
25 bias what I was trying to learn. I was just looking to

1 crossfoot my assumptions, and that was helpful and it
2 ended up in some cases decreasing my initial estimates.

3 Q Okay. But other than kind of checking your
4 estimates against some folks in the industry, you didn't
5 do any more formalized studies --

6 A No.

7 Q -- of the costs?

8 A No.

9 Q Did you refer to any literature or existing
10 studies to determine the costs?

11 A No.

12 Q Now, you're aware, I believe, that the Act
13 exempts retailers with less than \$100,000 in gross
14 sales --

15 A Yes.

16 Q -- to Colorado residents?

17 A Right.

18 Q Did your analysis exclude that level of
19 retailers?

20 A Yes.

21 Q And how did you take that into account? How did
22 you exclude those folks?

23 A Well, I work primarily -- when I think about the
24 size of a business, I think about the size of the
25 12-month buyer file; in other words, how many customers

1 THE WITNESS: Okay. Yeah.

2 MS. SCOVILLE: Well, let's take about a
3 10-minute break then.

4 THE WITNESS: Thank you.

5 (Break.)

6

7 BY MS. SCOVILLE:

8 Q Right before our break, you mentioned that you
9 had talked to about 15 companies; is that right, to kind
10 of check your estimates?

11 A Right.

12 Q How did you select which 15 to speak with?

13 A They were just -- some were software vendors of
14 commercial systems. They were just people that I trust
15 their judgment. You know, I can give them an idea
16 quickly, I don't have to spend a week telling them what
17 I'm trying to do, and I can get a, Have you thought about
18 this or maybe this is a little bit high or this is low.
19 Just people I trust.

20 Q And did you also speak with actual retailers,
21 also?

22 A Well, I mean, yeah, they were -- you mean big
23 box retailers or --

24 Q No. I'm talking about actual multichannel
25 retailers --

1 A No.

2 Q -- as opposed to software vendors.

3 A No. Most of them were multichannel retailers.

4 Q And of the retailers, did they cover both
5 catalog and Internet?

6 A Almost every one of my clients does. There's
7 rarely one that isn't multichannel.

8 Q And did you speak with a range of small to
9 medium and large retailers?

10 A Mostly moderate, one large, one mega.

11 Q And how did you decide on the number 15?

12 A Well, we were trying to meet a date, and that's
13 about what I had time to do.

14 Q And did you keep any notes of your conversations
15 with them?

16 A Just one, which I've turned over to you that
17 had -- I didn't really -- you know, I wasn't trying to do
18 something methodically. I was just trying to check the
19 assumptions. It's in what you got last week, I think.

20 MS. SCOVILLE: Okay. Let's mark this as Exhibit
21 2, please.

22 (Exhibit No. 2 was
23 marked for identification.)

24

25 MR. SCHAEFER: A very minor point, they may be

1 that's it.

2 Q And what were the names of the companies with
3 whom you spoke?

4 THE WITNESS: Do I have to do that?

5 MR. SCHAEFER: Well, it's not privileged. Do
6 you want to step out and talk for one second?

7 THE WITNESS: Okay.

8 (Off the record.)

9

10 MR. SCHAEFER: Okay.

11 MS. SCOVILLE: Could you read back the last
12 question for me?

13 (The question was read by the court reporter.)

14

15 A Some of these I can't even tell you because I
16 didn't write the names on top of it. I was just
17 scribbling. Like this first one, I don't remember who
18 they are. The one that's marked ProS on the bottom of
19 101 is a software vendor called ProSource. I remember
20 that. And the one that's 100 that's got these circles on
21 it, I'm pretty sure is Wyland.

22 BY MS. SCOVILLE:

23 Q W-Y-L-A-N-D?

24 A Right.

25 Q And what kind of company is Wyland?

1 A They're a marketing service bureau company. And
2 these others, I can't tie it down to a specific company.

3 Q Okay. Well, why don't you give me a list of the
4 companies with whom you spoke.

5 A One would be D.M.insite.

6 Q And what kind of company is that?

7 A That's a web software company, web software
8 provider.

9 Q Okay.

10 A Let's see, I talked to CommercialWare, which is
11 a -- it's a software company. I had a short time to be
12 able to do this, so I'm thinking about the calls I made
13 versus the ones I got back, and I can't specifically say
14 which ones these represent.

15 Q Okay. But just generally, who else did you
16 speak with? Who are the other 15 companies?

17 A Well, as I said, I made a number of calls and
18 got a limited number of call-backs.

19 Q Okay. Do you remember the retailing companies
20 with whom you spoke?

21 A I don't. I'm giving you the ones that I
22 remember.

23 Q Do you have any other documents that would
24 reflect who the retailers with whom you spoke were?

25 A No.

1 even if he didn't specifically rely on this particular
2 phone call.

3 MR. SCHAEFER: Let me ask you -- it's clear the
4 witness has some sensitivity about it. The issue I have
5 is whether or not you can -- if you establish that the
6 information contained is relevant to the report or to the
7 opinion, that's fine. If he didn't rely on it or he
8 didn't consider it, it seems to me that the name is not
9 necessary, other than in an effort to identify someone
10 without, I think, a reason typed in the report.

11 MS. SCOVILLE: Okay. I think we've already done
12 that, but let me take another shot at it.

13 BY MS. SCOVILLE:

14 Q So, Mr. Barry, I understand that you in
15 mid-September came up with initial estimates of the costs
16 for companies to comply with the three categories of
17 Colorado regulations; is that right?

18 A Yes.

19 Q And then you spoke with 15, approximately,
20 companies, and then you made revisions of those
21 estimates; is that right?

22 A Well, I validated what I was thinking, not based
23 on what they were telling me that it was going to cost
24 them. Much of what I have in my report is what I have as
25 experience. All I was doing was -- I didn't ask them

1 what it would take them to do it. I was validating the
2 process. That's why I don't understand. I never asked,
3 I never asked them what it was going to cost them because
4 I didn't want to get but too far into it.

5 Q And why didn't you want to get too far into
6 it?

7 A Well, because I talked to Brann & Isaacson, and
8 they told me from the very beginning to be very careful
9 not to solicit any work on this account; in other words,
10 you know, don't -- be very objective, which is what I do
11 in all my work, and, you know, if you're going to talk to
12 people, don't, you know, don't make a point of being an
13 expert, just use it to validate your process, and that's
14 what I've done. The cost, I have no -- what it's going
15 to cost some company to do something is my estimate.
16 It's not what they've told me. They haven't estimated
17 something and given it to me.

18 Q So as I understand it, no company gave you an
19 estimate of what they have or have not done to comply
20 with the regulations?

21 A No.

22 Q What did you ask the companies?

23 A I would say -- for example, if we talked about
24 web, we talked, as the requirements -- or as the report
25 says, and it's going to require a change in, say, the

1 order path, I would ask them, you know, if you had to, if
2 you had to do some major change in the order path, how
3 much -- you know, what does that entail, and they'd
4 describe it to me, and then I'd say to myself, okay,
5 that's, you know, that's a moderate change or a small
6 change. But I never gave them any kind of a written
7 description so that I have any uniformity between
8 descriptions. It was really more to make sure that I
9 could say these were conservative estimates, that I
10 wasn't giving such a high number that we'd spend a lot of
11 time arguing whether it was 50,000 or 35,000.

12 Q And it's my understanding that you revised some
13 of your numbers after speaking with these companies; is
14 that right?

15 A Right.

16 Q Okay. And we'll get into the specific numbers
17 in a minute. As I understand it, you did not have a
18 formulated list of questions when you called these
19 15 companies?

20 A No.

21 Q You didn't use a questionnaire?

22 A No, no.

23 Q All right. And you didn't do anything to
24 methodically track their responses?

25 A No.

1 making a change to something that we think is
2 unconstitutional.

3 Q And as I understand it from your testimony
4 earlier this morning, you did not tell the folks with
5 whom you spoke --

6 A No.

7 Q -- that you were acting as an expert in this
8 case?

9 A That's true.

10 Q We're getting into a little bit of a pattern
11 where we're speaking over each other.

12 A Okay.

13 Q So to the extent you can, please let me try to
14 finish my questions --

15 A I will.

16 Q -- and I'll try and let you finish your answers.
17 It's much easier for our court reporter that way.

18 A Okay.

19 Q You have given me the names of four of the
20 15 companies, Wyland, D.M.insite, ProSource and
21 CommercialWare. And as I understand it, you spoke with
22 15. Am I correct in stating that you don't recall the
23 names of any of the other 11 folks with whom you spoke?

24 A Natural Solutions, which is a software
25 company.

1 Q Natural?

2 A Right. Let's see, the ones -- we've got
3 ProSource, Wyland, CommercialWare, D.M.insite, Natural
4 Solutions. I made a bunch of calls, and I really don't
5 remember exactly who called me back. I only had a couple
6 of days to do it.

7 Q Okay. So there are approximately 10 other folks
8 that called you back?

9 A Right.

10 Q And you don't remember any of those names?

11 A Not with certainty. I don't want to say
12 something and then have it be wrong.

13 Q Did you discuss the names of the companies that
14 you planned to call with the Brann Firm?

15 A No.

16 Q Did you discuss the names of the folks with whom
17 you spoke with the Brann Firm?

18 A No, not until they got my notes, and they
19 noticed there were a couple -- like the name on the top
20 of the one page.

21 Q And if you would look at Exhibit No. 2, page
22 FCB100.

23 A Okay.

24 Q I think you told me that these are the notes
25 from speaking with Wyland, the marketing service

1 the process, am I thinking correctly, and they said that
2 was fine, just don't slow down the report.

3 MS. SCOVILLE: Okay. This will be Exhibit 3,
4 please.

5 (Exhibit No. 3 was
6 marked for identification.)

7

8 BY MS. SCOVILLE:

9 Q Do you recognize Exhibit 3 as an e-mail that you
10 sent to Matthew Schaefer on September 16?

11 A Yes.

12 Q Okay. I'd like to ask you about the point that
13 you have numbered as "5". It says, "With a little
14 additional time should I refine cost to change the order
15 management systems? We could probably do with two major
16 vendors fairly quickly?" To what were you referring
17 there?

18 A I mean, precisely, I can't speak to it, but in
19 the general of trying to answer your question, you know,
20 I was interested in having the report about calculating
21 the Colorado tax, but not saving it, in other words, from
22 a customer -- helping a customer understand it.

23 Q I'm sorry, I think I was having trouble hearing
24 your answer. Could you say that again, please?

25 A What I'm saying to you is, I don't know

1 A Well, the three requirements. And all three did
2 not know anything about it, so now I have an indefinite
3 conversation.

4 Q So when you were talking about calling vendors,
5 you were talking about software vendors who would change
6 retailer systems comprehensibly to deal with the three
7 requirements?

8 A Yeah.

9 Q I see. And what you're saying is that when you
10 contacted D.M.insite, ProSource and CommercialWare, none
11 of them were familiar with the Colorado regulations; is
12 that right?

13 A No. I thought I said, I thought I said
14 ProSource, CommercialWare and Natural Solutions.

15 Q I see.

16 A Those are order management software companies.

17 Q And none of those three were familiar with the
18 Colorado regulations?

19 A No.

20 Q What about D.M.insite, was D.M.insite familiar
21 with the Colorado regulations?

22 A They were to a small degree. They hadn't really
23 thought about it, hoping it would be overturned. They
24 hadn't really done any detail thinking about it.

25 MS. SCOVILLE: Mark this as Exhibit No. 4,

1 A Just that they were not -- it wasn't on their
2 radar. It wasn't disconcerting for me or worrisome for
3 me because I had already written down what I thought, but
4 I was concerned for them and their clients.

5 Q When you talked to retailers, what did you learn
6 in terms of whether multichannel retailers were aware of
7 the regulations?

8 A About the same. You know, they had -- there had
9 been only, I think only one news story on this topic, and
10 it was back in July. It was in Multichannel Merchant
11 that DMA was suing the State of Colorado. They actually
12 had some errors in it. It was literally one 8 1/2 by 11
13 long that just said this is it, more later, but it did
14 have errors.

15 Q But of the retailers with whom you spoke, about
16 50 percent were aware of the regulations as I understand
17 it?

18 A Yeah, to some degree. It doesn't mean they were
19 doing anything about it. I would say, I would say with
20 high certainty nobody I talked to knew the details of the
21 three requirements.

22 Q And Wyland, the marketing service bureau with
23 whom you spoke, were they aware of the regulations?

24 A No.

25 Q The next sentence reads of this e-mail in

1 Exhibit 4, "So the impressions and costs were all over
2 the place. I took your advice and cut the costs down
3 considerably to avoid issues." What issues were you
4 trying to avoid?

5 A Well, as you know, if you looked at my drafts,
6 which I had in my -- I think it was the September 17th
7 draft or whatever the first one to Brann & Isaacson was,
8 I had pushed myself to think through what I thought it
9 was going to take typically and put a dollar on it, and
10 those are the costs that I, as I talked to some people
11 not about what it was going to cost them, but just the
12 effort and the process, that I changed, and I don't, I
13 mean, I don't remember which ones changed and which ones
14 didn't, but the -- what Matthew had asked me to do was to
15 just be conservative with it, don't try to do a study of
16 a bunch of different companies. That's not what we set
17 out to do.

18 Q And when this e-mail in Exhibit 4, the last
19 sentence of that paragraph says "I took your advice",
20 what was Mr. Schaefer's advice?

21 A I just said what it was. It was to be
22 conservative.

23 Q And that's the whole of his advice to you?

24 A Yeah. I mean, he's a lawyer, he doesn't know
25 anything about systems, and he trusted my judgment for

1 an e-mail, a time sheet that you prepared for Brann &
2 Isaacson detailing your time and what you did?

3 A Yes.

4 Q I'd like you to look at the second page of this
5 exhibit under Thursday, September 23rd, and that entry
6 says, "Contacted/interviewed 15 companies to validate
7 cost of changing", right?

8 A Yes.

9 Q And then on September 28, the following Tuesday,
10 you have two additional interviews; is that right?

11 A Yes, I do.

12 Q Okay. So there were 17 interviews in all, as I
13 understand it?

14 A I believe you're right.

15 Q Okay. Do you remember the names of the two
16 additional interviews on 9/28? I know that you've
17 identified one as Natural Solutions.

18 A I don't recall.

19 Q If we could go back to Exhibit No. 4, please.

20 And I see you tucking the exhibits into your
21 folder. We just need to be very careful that all the
22 original exhibits that have the sticker on them stay with
23 the court reporter today.

24 A Oh, okay.

25 Q So we just need to make sure that at the end of

1 the day we keep this on our radar screen so you don't
2 walk off with them.

3 A Okay.

4 MR. SCHAEFER: You can make a pile in front of
5 the laptop there. That's fine.

6 THE WITNESS: Okay.

7 BY MS. SCOVILLE:

8 Q Okay. So I would like you to go back to Exhibit
9 No. 4 for just a moment, and this is the e-mail where you
10 discussed -- oh, and I have the wrong one. I apologize.
11 It's not Exhibit 4. It's Exhibit No. 3. Pardon me.

12 I want to make sure that I asked you the
13 question that I had in mind earlier, which is, I
14 understand that you did not ask outside vendors to give
15 you actual estimates for changing order management
16 systems; is that right?

17 A That's true.

18 Q Okay. And you did not feel that that would be
19 helpful?

20 A I did not have the time to do that and make the
21 date and, secondly, without a lot of discussion and
22 probably giving them something in writing, I wouldn't
23 have uniformity.

24 Q All right. If vendors could provide you with
25 some sort of more uniform estimate of costs to change

1 order management systems, is that something that would be
2 helpful for your analysis?

3 A That wasn't the objective.

4 Q All right. That's not my question. My question
5 is whether or not it would be helpful for your analysis.

6 A I wouldn't know until I saw what they gave me.

7 Q And is it something that could be relevant to
8 your analysis?

9 A It's possible, but I don't know.

10 Q And I just want to make sure that I understand
11 your answers to the same questions as to retailers, that
12 you did not ask any retailers to provide you costs of
13 what they're doing or what they anticipate doing to
14 comply with the regulations?

15 A No.

16 Q And is that something that would be relevant to
17 your analysis?

18 A I would have to see what they provide for it to
19 be relevant.

20 Q Okay. So it's possible that those numbers would
21 be relevant?

22 A Yeah, but it wasn't the objective of this
23 opinion.

24 Q All right. Let's go back to page 2 of your
25 report, which is Exhibit No. 1, if you would, please. In

1 do exist, but you didn't rely on them to form this
2 opinion?

3 A It's something I understand, I believe is fact.

4 Q The last paragraph under 1(a) estimates that the
5 cost to modify the order path is conservatively estimated
6 at \$5,000; for older technologies and companies using
7 outside vendors, the estimated cost is up to \$10,000. On
8 what data did you base this cost estimate?

9 A Thinking through what I felt needed to be done
10 and using the numbers that we talked about this morning
11 that were back in the section about the data I've
12 considered. Want me to cite a paragraph?

13 Q No, that's all right. I think I understand
14 you're referring to the estimated in-house --

15 A Right.

16 Q -- programming costs versus outside programming
17 costs?

18 A Right.

19 Q Did you do any particular math to come up with
20 the 5- to \$10,000 number in terms of --

21 A Just roughly that outside -- sorry to interrupt
22 you.

23 Q No, go ahead.

24 A Just in a general rule of thumb that outside
25 companies, their costs are at least double. And, also,

1 this 5- and 10,000 also involves the discovery and
2 evaluation process.

3 MR. SCHAEFER: Stephanie --

4 MS. SCOVILLE: Yes.

5 MR. SCHAEFER: -- can we take a break just long
6 enough for me to check out?

7 MS. SCOVILLE: Oh, of course, of course. I'm
8 sorry, we are getting close. Let's go ahead and take a
9 break.

10 (Break.)

11

12 BY MS. SCOVILLE:

13 Q Okay. Right before our break we were talking
14 about your estimates for changing the web order path as
15 5- to \$10,000. Did you attempt to break that 5- to
16 \$10,000 into the components of designing the program
17 changes, developing, programming and testing?

18 A Not in writing, I don't have them in writing,
19 but I did sit down and kind of go through that
20 mentally.

21 Q Okay. And how would you divide up this
22 particular estimate of 5- to \$10,000 in terms of those
23 categories?

24 A Well, I think that at least half of the --
25 anywhere from half to 75 percent of the costs are in the

1 A I did with the ones that had a reasonable idea,
2 you know, an awareness. In other words, with half the
3 companies, if they weren't aware, then I wouldn't have
4 spent all my time trying to get them to know what to
5 do.

6 Q And what was the feedback you got from actual
7 companies about the cost to change the web order path?

8 A Well, I didn't ask anybody for a specific cost.
9 What I asked them was, am I thinking about the process
10 that you might have to go through, and then I put the
11 cost on it.

12 Q And have you had any similar experiences with
13 the clients of your firm in terms of assisting them with
14 changing web order paths to comply with a similar
15 regulation?

16 A With changing a web order path, yes, but not
17 with a similar regulation.

18 (Exhibit No. 10 was
19 marked for identification.)

20

21 BY MS. SCOVILLE:

22 Q Okay. Let's, if you would, take a look at
23 Exhibit No. 10. Do you recognize this as your draft
24 report dated September 15th?

25 A Yes.

1 Q If you would, take a look at page 4, please,
2 under C, Estimated Costs, 1, Order management, enterprise
3 and e-commerce systems.

4 A Let's see --

5 Q At the top of the page.

6 A Yes.

7 Q And in the underlined text, you have, "FCBCO has
8 not estimated the dollars but it could be a \$50,000 one
9 time cost. How the software vendor might charge for that
10 is obviously unknown as it would be a shared expense."

11 And then in the next paragraph, you say,
12 "Company website developers would have an equally
13 difficult time in making this change. This could be
14 another \$30,000 to \$50,000 charge to inform the
15 customer."

16 First of all, I want to confirm that this part
17 of your draft report is referring to the transactional
18 notice.

19 A Let me take a look at that.

20 Q Sure.

21 A I believe it does. I'm not sure there isn't
22 some overlap between one and two now, but --

23 Q Okay. How did you arrive initially at the
24 \$50,000 for external costs and 30- to 50- for internal?

25 A Just, as I said before, thinking through what I

1 thought the issues would be, trying to put what I would
2 consider to be a cost on there that I could then
3 validate, and that looking at -- you know, thinking about
4 other projects we've done that are similar in the same
5 parts of the system, like the order processing part or
6 the web path part, trying to be realistic because, as we
7 said hours ago, IT people don't estimate accurately, and
8 I didn't want to come in too low initially. So it was
9 kind of like this is a strawman figure, and then tried
10 to -- and then validate it and think further about it.

11 Q Okay. And you obviously changed your
12 estimates --

13 A True.

14 Q -- downward. And why did you change the
15 estimates downward?

16 A One, I wanted to make sure that I didn't --
17 since I don't have the details written down, that I could
18 talk through them and, you know, discuss them. With a
19 larger number like that, I think that's harder to do. I
20 think there are very real costs to this statute, and what
21 didn't change is most of the things I identified -- most
22 of the areas that I identified in the initial report are
23 in the final.

24 Q But just the dollar value changed?

25 A Yeah. And what I didn't want -- nobody likes --

1 I've never worked with anybody, whatever the issue is
2 that we're working on, if I come in and say, Well, I
3 think it's 5,000 and it ends up being 50-, nobody likes
4 that. But if I say it's some other number and I'm
5 bringing it down, that has always -- whether it's an
6 estimate of my time or software. So it's more of a
7 personal style kind of thing. I don't want to go back
8 with some huge increase.

9 Q Well, what is the most accurate number in your
10 professional opinion --

11 A In the report.

12 Q -- as to the actual costs?

13 A In the report.

14 Q The 5- to \$10,000?

15 A Yes.

16 Q Okay. And so I guess I'm still trying to
17 understand why you revised it downwards, other than just
18 not wanting to aim too high.

19 A Well, I think, I think they're realistic, and I
20 also think that if the statute stands, I think that those
21 are very conservative estimates, that those are small
22 numbers as estimates go for IT changes. They may look
23 big to a novice, but they're not a -- they represent true
24 costs, actual costs, and I believe that these will end up
25 being conservative.

1 MS. SCOVILLE: Let's take a look at Exhibit 11,
2 please.

3 (Exhibit No. 11 was
4 marked for identification.)

5

6 BY MS. SCOVILLE:

7 Q Do you recognize Exhibit 11 as another draft of
8 your report?

9 A Yes.

10 Q Okay. If you would take a look at page 4,
11 please, the top of page 4, and this is part of Exhibit A,
12 the transactional notice. And the first full paragraph
13 on page 4 says, "Estimated cost to modify order the order
14 path for the message is estimated from \$15,000 to
15 \$25,000." And is that another iteration of your estimate
16 of changing the web order path?

17 A Yes.

18 Q And that came after --

19 A As best I recall, yeah.

20 Q Okay. And that appears to have come after our
21 initial estimate of 50- or 30- to 50-?

22 A Right.

23 Q I guess I'm still trying to understand what you
24 did or what changed in your analysis to take it from 50-
25 or 30- to 50- to 15- to 25- down to 5- to 10-. What

1 changed along the way?

2 MR. SCHAEFER: Object to the form.

3 A Well, again, as I said, I originally put a high
4 number, a strawman on that, realizing I was going to have
5 a week to two weeks to develop it, develop it further and
6 to think about it, and, you know, this is all this is.
7 This is not meant to be any more than that, that these
8 are working notes, working drafts, I guess is a better
9 way to say it.

10 BY MS. SCOVILLE:

11 Q And what changed -- or why did you revise your
12 estimate downward from 15- to 25- in Exhibit 11 to 5- to
13 10- in your final report?

14 A To be very conservative with the costs. As I
15 said in the early part of this document, what flexibility
16 people have with systems, whether they use outside
17 companies to program them or they can maintain
18 themselves, whether their technologies are flexible, all
19 these things make some costs easier than others for
20 people to accommodate. Older technologies and outside
21 developers make it more expensive.

22 Q Sure. And your 5- to 10- estimate takes outside
23 developers and older technologies --

24 A Right.

25 Q -- into account?

1 A True.

2 Q Did you do any studies or any tests as you
3 revised the numbers downwards?

4 A No.

5 Q So you had initial estimates which were based on
6 your own experience of 50- or 30- to 50-?

7 A Right.

8 Q And then you had estimates of 15- to 25- based
9 on your experience?

10 A Based on thinking about it more.

11 Q And then you had your final estimate of 5- to
12 10- also based on your experience?

13 A Yes, and a limited outside validation.

14 Q Did anything that the 17 companies you
15 interviewed say to you factor into your decision to
16 revise these numbers downwards?

17 A I would say no. It was, again, a validation of
18 process, you know, what they think this means they'd have
19 to do. Obviously, I'm leading them through; you know,
20 you have to change the order path if that isn't true
21 then, you know.

22 Q And looking at Exhibit No. 11, can you tell
23 whether or not this draft was done before or after you
24 talked to the 17 companies?

25 A I have no idea.

1 printed; is that right, and that's what the 5- to 10-
2 estimate represents?

3 A All the invoices would look alike, but we'd have
4 sufficient size on the front of the invoice to
5 accommodate whatever it is the companies feel comfortable
6 with saying. Some might be one line long, and some might
7 have a friendly paragraph.

8 Q And how common is it right now, this Colorado
9 regulation aside, for retailers to have forms that are
10 specially generated for different states' requirements?

11 A Rare.

12 Q Okay. What are some of the other instances
13 where a separate form for a particular state would be
14 triggered?

15 A There may be in horticulture provisions that say
16 something about seeds, quarantined products. It's very
17 rare.

18 Q You include that the cost estimate for modifying
19 the invoice or packing slip would be 5- to \$10,000. On
20 what data did you base that conclusion?

21 A My experience in going through what I think
22 would have to be considered and the time to develop an
23 estimate, along with the time to develop a design and the
24 programming and testing.

25 Q And did you break this 5- to \$10,000 into

1 different categories and give hourly estimates for each
2 step in the process?

3 A Not as notes.

4 Q But it sounds like you did that in your head; is
5 that right?

6 A Yes. Right.

7 Q And can you recreate for me how you got to the
8 5- to 10-?

9 A Well, as I said this morning, I believe it would
10 cost a couple thousand dollars to evaluate the change.
11 In the case of something this complex, it could easily
12 cost \$5,000 if people aren't aware of it. I said before
13 that the program -- the system design and the program
14 design, not the programming, is more than half the cost
15 of every change.

16 Q Programming is more than half in this
17 instance?

18 A No. The design of what I have to do --

19 Q I see.

20 A -- as a programmer. We call that program
21 design. In other words, I'm going to take the statement,
22 the computerized statement, and I'm going to do this.
23 Well, I have to write all that down, I have to get
24 everybody to agree to it. That's more than half the
25 cost. So that's how I came up with it.

1 Q And did you estimate the number of hours and
2 then multiply it by hourly rates?

3 A Right.

4 Q Okay. And what hourly rates did you use?

5 A I used a blended rate between the \$32 -- let's
6 look at the page. If we look on page 4 of the final
7 report, we have \$24 and \$48 without benefits. If we put
8 benefits into it, we have \$31 and \$62. So I took a
9 blended average of those two.

10 Q And did you just do a straight average --

11 A Yes.

12 Q -- 31 plus 62, divided by half?

13 A Yes. Like 47 or something. So, again, trying
14 to be conservative, not trying to push it towards the
15 high side or the low side.

16 Q So if you take \$5,000 -- and I just did the math
17 right here -- divided by the blended rate, which is
18 actually 46.5, you get 107 hours of time to modify the
19 invoice. That would be the low end, right?

20 A Yes.

21 Q And then you could do the same math to determine
22 how many hours it would be to modify to get to the upper
23 range of \$10,000?

24 A Right.

25 Q And is that how you did the math --

1 A Yes.

2 Q -- to get to these numbers?

3 A Yes.

4 Q And did you come up with the amount of hours
5 first or did you come up with the numbers, the totals
6 first?

7 A I came up with the hours, you know, just how
8 many -- when you look at all the pieces to this and just
9 envisioning what most companies would have to do as they
10 figure out what they're going to do to meet this, if they
11 have to, and then I used the dollar averages.

12 Q Now, none of the figures in your final report or
13 your draft reports are expressed in terms of number of
14 hours. They're expressed in final costs.

15 A Right.

16 Q Do you have any notes or other documents that
17 would reflect your thinking in terms of hours?

18 A No, I don't.

19 Q Okay. And I'll tell you -- I did the math
20 sitting here -- that it would take 215 hours at the
21 blended rate to get to \$10,000.

22 A Okay.

23 Q How did you arrive at 215 hours?

24 A With some technology, I'm going -- you know,
25 with like mainframe technology or some of the older

1 technology, it takes two or three times longer to do the
2 same thing that it does on the technology of the last
3 couple of years, as much -- you know, there's more
4 documentation that's automated by the system. You know,
5 the systems are more flexible in terms of, you know,
6 being able to figure out where you have to change a
7 program.

8 Q And did you also do the 10,000 estimate in terms
9 of outside vendor costs, as opposed to using a blended
10 rate for internal costs?

11 A Let's take a look here. If we look at Exhibit
12 1A, my assumption, you know, based on -- my assumption
13 is, based on the numbers I have here on page 4, that for
14 an outsider to do the work, while they'll have more
15 skilled people, they'll charge more because of the profit
16 and so forth.

17 Q And did you use a blended rate of the external
18 programmers?

19 A I believe that the blended rate would be
20 somewhere like 150, 160, somewhere in there.

21 Q Okay. And how did you come up with that as the
22 blended rate?

23 A Just from experience and knowing what, you know,
24 people typically end up having to pay.

25 Q Okay. So what people would pay for external

1 programming is closest to 150 to 160 average?

2 A Yeah, somewhere in that. I mean, I don't
3 remember how it calculates out right now. I will say
4 that, and you can see this in my drafts, that I use the
5 computer a lot to capture thoughts, and then I refine
6 them. You can see things that I throw out or I typically
7 put them at the end of the document, and so I don't, I
8 don't write as many manual notes as I might have 15 years
9 ago. I kind of think with the computer and kind of
10 capture things that way and then write over them or
11 discard them.

12 Q So you don't have any documents that would
13 reflect how you did the math in terms of what blended
14 rate you used times how many hours to get to these
15 figures?

16 A No. I'm telling you how I remember doing it.

17 Q Okay. Did you do any tests or studies to come
18 up with the 5- to \$10,000 estimate for modifying the
19 invoice or packing slip?

20 A I didn't, but as I said before, I considered
21 those and I think my peers would consider those to be
22 conservative numbers, and that there will be costs the
23 companies will bear that are that or hirer, depending on
24 the technology and the skill levels and so forth.

25 Q Did you refer to any literature or published

1 studies in coming up with the 5- to 10,000 estimate?

2 A No.

3 Q And is that something you discussed with the
4 17 companies with whom you spoke?

5 A What is the "that"? Would you reword what the
6 "that" is?

7 Q Sure. Did you discuss your estimate of 5- to
8 \$10,000 to modify the packing and order slip with the
9 17 companies with whom you spoke?

10 A No. I was talking to them more about process,
11 what would you have to do if you had to do it.

12 Q If you could go back to Exhibit 5, which is one
13 of your earlier draft reports, on page 7. This is the
14 paragraph we discussed earlier that you said related to
15 catalog sales and, as I understand it, would apply more
16 to modifying the packing slip.

17 A What paragraph is it that you're looking at?

18 Q The first full paragraph.

19 A Right.

20 Q "Retailers we have talked to are looking at a
21 variety of solutions and workarounds including having the
22 sales person or Call Center rep input a short phrase
23 message that will print on the customer order and refer
24 the customer to the website for more details." Is that
25 something that companies are actually doing right now?

1 question, which is, would it be more or less expensive
2 than what you've estimated in your report?

3 MR. SCHAEFER: Same objection.

4 A I don't know. I don't know that it would be
5 acceptable.

6 BY MS. SCOVILLE:

7 Q All right. Going back to Exhibit 11, which is
8 also an earlier draft of your report, on page 4, you
9 initially estimated that to modify the invoice and
10 packing slip would cost 15- to \$20,000. I'd like to
11 know, I guess, what changed between your initial estimate
12 and your final estimate of 5- to 10-.

13 A Well, first off, I don't know the date of this
14 document and where I was in that thinking process. And
15 as I said, I started out with high numbers and brought
16 them to something that I felt was conservative as I
17 worked through it.

18 Q And as I understand it, you did not do any
19 studies or tests or any other specific --

20 A No.

21 Q -- analysis in changing those numbers?

22 A No.

23 Q Going back to your full and final report --

24 THE WITNESS: Can I ask you a question?

25 MS. SCOVILLE: Sure. And I don't know if I'll

1 be able to answer it, but go ahead.

2 THE WITNESS: I think you will. Are we going to
3 eat lunch today or are we working through lunch?

4 MS. SCOVILLE: I am going to need to eat lunch
5 at some point. Do you need to take a break now? It's
6 about 11:40.

7 THE WITNESS: Well, I'm just asking. I can sit
8 here all day, all night. I have brought an energy bar.
9 If you don't want to take a break, I may have a bite and
10 pass it to my new friend. What would you prefer to do?

11 MS. SCOVILLE: I would prefer to take a short
12 lunch. What about you, Matt, is that all right?

13 MR. SCHAEFER: Yeah. I think a short lunch
14 makes sense, try to keep it on the short side. I don't
15 know what our options are.

16 THE WITNESS: Go up to the Wawa.

17 MS. SCOVILLE: Okay. Well, let's push forward a
18 little bit before lunch, if you don't mind.

19 THE WITNESS: All right.

20 BY MS. SCOVILLE:

21 Q Let's go to your final report, the next section
22 of Exhibit A. I think it's at the bottom of your stack
23 there.

24 A Okay. So we're done with this. What page?

25 Q All right. Let's go to the next page, which

1 A Well, then it would take probably a week or so,
2 in a week's time.

3 Q And how did you come up with the \$40 to \$60 an
4 hour?

5 A I thought it was, from my experience, a good
6 average when you consider expensive management that's way
7 beyond that, where they would be more in the couple
8 hundred dollars an hour. A call center director might be
9 in the -- they pay them anywhere from 75- to \$100,000 a
10 year so figure that rate. We talked about IT. So I
11 think it represents a conservative number.

12 Q And did you refer to any literature or published
13 studies in coming up with 2- to 3,000?

14 A No.

15 Q And you didn't yourself do any studies or
16 tests?

17 A I thought through all the things that needed to
18 be done. I think that's doing my homework.

19 Q Okay. But other than thinking through the
20 steps, you didn't do any sort of more formalized tests?

21 A No.

22 Q Did you discuss the call center costs with any
23 of the 17 companies --

24 A No.

25 Q -- with whom you spoke?

1 A No.

2 Q So, again, the call center costs are based on
3 your experience, and these are your estimates based on
4 your experience?

5 A Yes.

6 Q Let's skip down to the second section, which is
7 B, Customer service call center costs to answer inquiries
8 and complaints. You estimate that an inquiry about the
9 Colorado regulation would result in a three to four
10 minute call. What is the three to four minute estimate
11 based on? What data did you consider?

12 A I've worked with a couple hundred call centers,
13 and I know that an average call for a customer service
14 issue is often in that range, and I think that this will
15 create a tremendous number, and I think I said in here
16 50 percent of the customers will call the call center and
17 I think it will be a major source of complaints.

18 Q Okay. Before we get to the 50 percent, just
19 sticking with the three to four minutes per call, are
20 there any published studies or literature that would
21 refer to the average call being three to four minutes?

22 A I'm sure there are, but it's just -- I'm working
23 with call centers all the time so I have a pretty good
24 idea of these numbers because we use -- you know, we
25 benchmark all the time and we know what people pay and,

1 you know, we have a pretty good idea that that's an
2 average for that length of time.

3 Q You also give the opinion that a fully loaded
4 cost per call is typically between \$1.50 and \$2.00 an
5 hour, and you define "fully loaded" as being wages,
6 management, benefits, space, telecom, et cetera. So that
7 would include overhead, right?

8 A Within the call center, not within general
9 management.

10 Q Sure.

11 A And it wasn't per hour. It's per call.

12 Q Oh, I'm sorry, per call. Okay. But your per
13 call cost includes overhead, right?

14 A Only the management of the call center. It
15 doesn't include the CFO, the general manager, the
16 president, the owner, IT, accounting, any of those
17 people, fulfillment. It just deals with managing the
18 call center.

19 Q And did you refer to any particular studies or
20 data or literature in determining that the fully loaded
21 cost per call is typically \$1.50 to \$2.00?

22 A I used my own experience and recall of many
23 customer studies -- many client studies that I've done of
24 call centers.

25 Q But you didn't refer back to the client studies

1 that you've done or at least any particular ones in
2 creating this opinion, right?

3 A No, just that I know that it's an accurate
4 conservative number.

5 Q Okay. Let's go to the September 15th draft,
6 which is Exhibit No. 10, and if you could take a look at
7 page 6. In the middle of the page, there's an open
8 bullet point, and in the paragraph below that it says,
9 "Fully loaded cost per call is between \$3.50 and \$4.00.
10 Fully loaded includes direct hourly wages, management,
11 employee benefits, space, telecom, etc. These are
12 industry benchmarks." How did you arrive at the \$3.50 to
13 \$4.00 estimate?

14 A That has an error in it.

15 Q Okay. What is the error?

16 A That's a conservative estimate of a phone order,
17 and the phone order in many companies includes the cost
18 of credit authorization. So when I was kind of working
19 through this, I realized that I had put the wrong number
20 in.

21 Q Okay. So just so I understand it, the \$1.50 to
22 \$2.00 that's in your final report is simply for a
23 customer service call center cost, whereas the \$3.50 to
24 \$4.00 would include credit card authorization and the
25 order processing portion of a call?

1 A Not the order processing. The \$1.50 to \$2.00 is
2 the management and the labor for the rep and the space
3 cost and the telecom. Okay? The \$3.50 to \$4.00, what it
4 includes additionally is the cost of the credit
5 authorization step, where there's no credit authorization
6 step in just answering a call. So there was a mistake on
7 my part.

8 Q Okay. Back to your final report, you estimate
9 that 50 percent of the customers will have questions
10 about the use tax as a result of the transactional
11 notice. How did you come up with 50 percent?

12 A I believe that, as I said before, this will
13 create a lot of uncertainty in the minds of Colorado
14 customers that have shopped with out-of-state retailers.
15 That will generate a phone call, and we'll be explaining
16 what it is that they should know; if they live in
17 Colorado, this is what they're going to have to do. And
18 I've got experience with issues that are not similar in
19 terms of legislation, but, for example, when we make
20 changes and we don't fully think them through and
21 customers have their first reactions or, for example, if
22 they're on backorder and they're on backorder more than,
23 say, a couple of days, we get a tremendous number of
24 inquiries when we create a problem for the customer.
25 This will create a problem.

1 Q What would an average percent of calls be if an
2 item is backordered?

3 A Probably 30 or 40 percent.

4 Q Okay. Can you think of other examples that
5 would generate a high number of calls?

6 A You know, periodically, there are billing
7 issues. For example, you read in a paper where, let's
8 say, a big bank processor has doubled billed credit card
9 customers. Well, that generates a tremendous -- you
10 know, everybody, whether they have it wrong in their bill
11 or whether they think they do because they're a
12 cardholder, it generates a call. There are certain
13 segments of the direct marketing public that are older
14 customers, not myself but older customers, they will call
15 because they think big brother is watching them; what am
16 I buying, how do I pay this. There's probably -- well,
17 first off, baby boomers are the largest segment of the
18 population, and there are catalogs, especially in women's
19 merchandise, that are fairly large where the average
20 customer is 60 or older, and they get something that
21 isn't worded well, isn't clear what they have to do,
22 they're going to call. That's the easy thing to do.
23 They're not going to call you. They're going to call
24 us.

25 Q So what data did you use to reach your estimate

1 of 50 percent?

2 A Best judgment.

3 Q And did you do any tests or studies?

4 A No.

5 Q And did you refer to any published literature?

6 A No.

7 Q We do have some e-mail correspondence. I think
8 it has already been marked Exhibit No. 3. This is your
9 e-mail with Matt Schaefer on September 16. Point No. 6
10 says, "To figure number of call center calls, etc. How
11 about if we figure 50 percent?" What was the Brann Law
12 Firm's response to your inquiry on that point?

13 A I don't remember. I would say that it sounded
14 reasonable, but I don't specifically remember.

15 Q Back to your final report, the next item in your
16 transactional notice calculation is professional
17 assistance, and you estimate that companies will need 3-
18 to \$5,000 worth of professional assistance to do the
19 transactional notice. How did you come up with the 3- to
20 \$5,000 number?

21 A Just from working through it, best judgment,
22 experience.

23 Q What accounting assistance would be needed to
24 comply with the transactional notice?

25 A Well, some people use their outside accountants

1 the questions. It wouldn't be in one sitting, but it
2 would be going back and looking at how they interpreted
3 what you told them and how they're going to proceed and
4 it's, I think, a conservative estimate.

5 Q Did you do any tests or studies yourself to
6 determine the 3- to 5,000 amount?

7 A Just that I know -- no.

8 Q And did you refer to any literature or published
9 studies?

10 A No.

11 Q And did you discuss this with any of the
12 17 companies with whom you spoke?

13 A No.

14 Q Okay. Going back to Exhibit 10, which is your
15 September 15th draft. On page 4, you initially put the
16 consulting and legal expertise costs at 5- to \$7,000.

17 A Okay. Where is -- right here.

18 Q It is right above No. 3.

19 A Okay.

20 Q Consulting and Legal Expertise for Compliance
21 Costs - \$5,000 to \$7,000. How did you come up with the
22 5- to \$7,000 estimate?

23 A Again, this was my original draft. Like some of
24 these others, they were strawman numbers. I revised them
25 down. I may have asked Matt what he thought as an

1 adviser, but, you know, they were a little too high.

2 Q And did Mr. Schaefer indicate he thought the
3 5- to 7- was too high?

4 A I don't remember specifically. I'm just saying
5 I think I remember that, but I'm sure if he did you'll
6 show me an e-mail.

7 Q Well, I don't have an e-mail.

8 A I don't either.

9 Q So that's why I'm wondering what your
10 discussions with him were.

11 A Well, what I do remember is when we helped two
12 clients work on shipping and handling, I remember what
13 that number was, and it was in that upper range and he
14 felt -- what I remember is, I think that he felt that
15 might be too high.

16 Q If you could look at Exhibit A.1.

17 A In this --

18 Q In your final report. Pardon me.

19 A The final report.

20 Q Exhibit No. 1.

21 A Okay.

22 Q I just want to make sure I understand. You've
23 got Basic statutory/regulatory requirements and Necessary
24 but not discretionary, and you've got the Totals for low
25 end first your compliance costs (sums of above), \$10,000.

1 basic data, so it varies. You know, how accurate it is,
2 it's accurate, but if you can't recombine it with
3 something, then what value -- you're not sometimes sure
4 what value it has.

5 Q In your experience, do retailers keep this data
6 for more than a year?

7 A I think most do.

8 Q Okay. What would be the outer limit in your
9 experience as to how long a retailer would keep the
10 data?

11 A I don't know if I could answer that. I mean, I
12 just -- you know, maybe a couple of years. As your
13 promotional schedule changes, then the history, it
14 changes. So, you know, unless you really plot every
15 promotion -- and companies have hundreds of promotions.
16 So you see the ups and downs. Big deal. What do you do
17 with it?

18 Q All right. So going back to your report, just a
19 couple more questions on the transactional notice. Still
20 on Exhibit A, page 2, at the bottom of page 2, onto page
21 3, you talk about on-going compliance costs, and you
22 estimate on-going compliance annual costs of \$1,500 to
23 \$2,000. What data did you use to reach the conclusion of
24 \$1,500 to \$2,000?

25 A Just because this is a sensitive customer

1 service area and it is potential state regulation, that
2 companies would use a day of professional time a year to
3 make sure they were doing what the law is currently
4 because things change. If you were to get this through,
5 you may find certain parts of it are not to your suit
6 so --

7 Q And so the \$1,500 to \$2,000 is based on
8 approximately one day per year?

9 A Right.

10 Q Okay. And what would need to be done in that
11 day?

12 A To review what the company is doing and to
13 compare it to what the current regulation is.

14 Q And did you do any tests or studies in reaching
15 that opinion?

16 A No.

17 Q Refer to any literature or published studies?

18 A No.

19 Q Discuss this with any of the 17 companies with
20 whom you spoke?

21 A No.

22 Q Okay. So this is, again, based on your
23 experience?

24 A Yes.

25 Q Okay. Underneath that, you've got -- and this

1 is back on the transactional notice -- Costs that are
2 discretionary but good business practice. Modify the
3 order processing system to calculate the sales tax
4 amount. Now, this is something that the regulations do
5 not require, right?

6 A That's true.

7 Q And is it your understanding that the
8 regulations are actually targeted at Colorado's use
9 tax?

10 A I'm not a lawyer so I don't -- I mean, I don't
11 know.

12 Q So you did not estimate what it would cost for
13 companies to comply with --

14 A No.

15 Q -- to estimate the use tax?

16 A No.

17 Q So you estimated what it would cost companies to
18 give customers an estimate of their sales tax?

19 A Yes.

20 Q All right. And is your estimate based on a
21 retailer providing an estimate of sales tax for every
22 sale or only if a customer inquires?

23 A I assumed for every sale.

24 Q And why did you make that assumption, as opposed
25 to providing it if a customer made an inquiry?

1 Q And what data did you consider in concluding
2 that this is going to be in the 5- to \$10,000 range to
3 provide those estimates?

4 A Well, I think there are other things that come
5 into it. You know, there may be some systems resources
6 that you need. For example, you may not be -- we are
7 definitely not charging Colorado sales tax so maybe you
8 have to go to a service, Vertex or Taxware, some service
9 and buy that. You know, maybe you have to learn more
10 about Colorado's approach to taxation, whether it's on
11 categories or not, as some states are. So I think that
12 while this is good practice, I think there are some
13 potential issues that you kind of have to play through if
14 you're the retailer to think those things out.

15 Q Would a software provider like Vertex or Taxware
16 already provide the categories of goods that would be
17 subject to taxation?

18 A Yes.

19 Q So if a company went with an external vendor,
20 that's not something they would have to do themselves?

21 A Right.

22 Q Of the 5- to \$10,000 cost estimate you made in
23 this category, what percentage of that would be
24 attributable to some sort of external software, like
25 Vertex or Taxware?

1 A I don't, I don't have an estimate there. One of
2 the concerns I have about calculating sales tax is that I
3 don't have anyplace to put it in the system so if I
4 wanted to refer back to it. See what I'm saying? If
5 it's a state I have nexus in and I'm calculating it, when
6 I tell the customer the merchandise is this, the services
7 is this, the shipping and handling is this, and the sales
8 tax is this, I'm saving all those pieces and I'm saving
9 the sales tax in a field. In this case, I'm not
10 collecting it and so I don't have anyplace to put it. So
11 I'm envisioning we're going to have to create a place to
12 store that so that, you know, I know what I've told the
13 customer from a customer service point of view because
14 the next person that touches the customer when they call
15 back, we want to know what they told them. So part of it
16 is that. Part of it would be if we need an outside sales
17 tax module or service.

18 Q Okay. Did you do any tests or studies in coming
19 up with your 5- to \$10,000 range on this cost?

20 A No.

21 Q Did you refer to any published literature?

22 A No.

23 Q Did you discuss it with any of the 17 companies
24 with whom you spoke?

25 A No.

1 A No.

2 Q Okay. Did you attempt to get quotes from Vertex
3 or Taxware as to what they charge for their software?

4 A No.

5 Q And why not?

6 A I felt I wanted to create a placeholder here
7 for, as I said this morning, a number that this
8 represented, and I think this has a fair number of
9 unknowns in it. I mean, companies that aren't Vertex --
10 or users, and there's a lot of people that aren't, now
11 we've got to buy a license. It's far more than \$5,000 or
12 \$10,000. So it varies by company.

13 Q What would it cost to buy a license for Vertex
14 or Taxware?

15 A Depends on the size of the company. You know,
16 it could be 30- or 40,000.

17 Q And would 30- or 40,000 be for a large company
18 or a small company?

19 A I say a moderate sized.

20 Q And for a company who didn't already use Vertex
21 or Taxware or a similar product, as I understand it,
22 their cost for modification would be much greater than
23 the 5- to 10,000 that you've estimated; is that right?

24 A I would expect so.

25 Q Let's take a look at Exhibit 11, if you would.

1 This is one of the earlier drafts of your report, and if
2 you would take a look at page 5. At the very bottom of
3 this page, you estimate the cost for providing sales tax
4 information to be \$20,000 to \$25,000. Do you see that?

5 A Yes.

6 Q How did you come up with the 20- to 25,000
7 number?

8 A Again, as I said this morning, I don't know when
9 this report was generated. My approach has been to put
10 that number in -- put a number in early that it
11 represented, whether you call it a strawman or a
12 placeholder or something, and then try to improve it.

13 Q And what did you do between your initial
14 estimate and your final estimate to improve the number
15 and arrive at 5- to 10,000?

16 A Well, what I chose -- originally, I was thinking
17 about including Vertex, and then I get into, well, is it
18 a small company, a big company, a moderate-sized company,
19 so I just chose to sidestep that issue and represent it
20 as a true cost, a smaller level. I'm not trying to build
21 a picture by size of company what the costs are going to
22 be, but I think they would vary depending on the
23 conditions.

24 Q For a company that already has Vertex or Taxware
25 or a similar product, what would you estimate that their

1 cost would be to provide the sales tax information to a
2 customer?

3 A I would say there's still the discovery process.
4 I would guess -- not guess, but I would think there would
5 still be 3- or \$4,000 of costs.

6 Q And what do you base the 3- to \$4,000 on?

7 A A couple days work.

8 Q And what would need to be done in those several
9 days?

10 A Well, I think the fact that there's a lot of
11 interpretation here. I think you have to go through that
12 discovery process. Just because somebody offers a
13 computation and they say they can do it in 20 minutes --
14 I'm skeptical of a lot of things vendors say, so I would
15 want to go through that whole process and see what do I
16 have to do, what do they have to do, and what part of
17 this does it answer and so forth.

18 Q And so we've got 3- to \$4,000 for a company who
19 already has the software to modify it.

20 A If the vendor's software can do it.

21 Q Right.

22 A Yeah.

23 Q And then we have 30- to \$40,000 if someone has
24 to go out and license the software for the first time.

25 A Right. Yes.

1 Q So I'm wondering how you took those two numbers
2 to get to 5- to 10- in the middle.

3 A Because I thought it was on the low end of the
4 range, and I think it's reasonable.

5 Q Okay. Let's go to Exhibit B, which is the
6 annual purchase summary.

7 A In the final?

8 Q Yes, please, in Exhibit 1. Under Subparagraph
9 1, the last full paragraph, it talks about there are two
10 potential sources for the detail order information, the
11 operational order processing system and the direct
12 marketing system. Can you explain to me the difference
13 between the two systems?

14 A Are we right here?

15 Q Yeah, exactly.

16 A Well, we talked this morning -- I think it was
17 this morning -- that, you know, the system, the part of
18 the system that we use for the call center to take the
19 order, service the customer, that's what we call the
20 operational part of it. The direct marketing is the
21 marketing part of it, in other words, if they were using
22 the same data, but formatted and analyzed differently
23 for, say, the RFM. So it's the marketing versus the
24 operations.

25 Q And do most retailers have both, the operational

1 Q All right. On page 3 of Exhibit B, we have
2 Costs of Initial Systems Modifications, and you have
3 Company internal development costs \$8,000 to \$10,000,
4 representing 175 to 225 hours. Does that represent both
5 computer programming and management time?

6 A No, just programming.

7 Q Just programming alone --

8 A Right.

9 Q -- would be the --

10 A Management time I think we included later.

11 Q Okay. So just the mechanics of writing the
12 software code to separate out the Colorado purchasers in
13 your opinion would take 175 to 225 hours?

14 A Right.

15 Q And on what data did you base that particular
16 conclusion?

17 A Well, I drew out all the steps, thought about
18 what it would typically take to do those. As I said
19 before, I think that more than 50 percent of it is
20 design, so I thought that was a reasonable estimate based
21 on working with vendors for 40 years.

22 Q And did you do any specific tests or studies to
23 come up with that estimate?

24 A No.

25 Q Refer to any literature or published studies?

1 A No.

2 Q Discuss that with the 17 companies with whom you
3 spoke?

4 A No.

5 Q Have you had similar experience with clients who
6 have attempted to create a similar report?

7 A All the time -- not a similar report, but create
8 a new type of reporting system operating off these same
9 files.

10 Q And is the 175 to 225 hours consistent with what
11 you've seen for other clients?

12 A Yes.

13 Q When you've had other clients who have attempted
14 to create a new reporting system from existing data, what
15 kinds of reports are they trying to create?

16 A It can be merchandising reports, you know, take
17 this same data and tell management, you know, what's
18 being bought and try to combine it with other internal
19 data. You know, we have reporting systems for finance
20 that aren't in necessarily the financial part of the
21 system. They want to sample this data for other
22 purposes. So anytime you get into reporting a system
23 like this, you have to, again, you know, define what the
24 objectives are and do the design work and get the
25 sign-off, and you may or may not do that, may or may not

1 proceed. Then you've got to program it and test it and
2 so forth.

3 Q Now, you also estimate if a company were to do
4 this by using an external marketing or software vendor it
5 would be \$15,000 to \$20,000, representing 100 to 135
6 hours. And your estimate there, does that mirror what
7 you did for the internal development costs?

8 A It would be as similar as you can make it.

9 Q Okay. So it only includes the programming
10 time?

11 A No. It would be including their design time.

12 Q Okay. Design and programming and testing?

13 A Yeah. Right.

14 Q And, again, this number was based on your
15 experience?

16 A Right.

17 Q Did not perform any tests or studies?

18 A No.

19 Q Didn't refer to any literature or published
20 studies?

21 A No.

22 Q Didn't discuss it with the 17 clients?

23 A No.

24 Q And have you had clients who have used external
25 vendors to create reports that would be similar to the

1 report required by the Colorado regulations?

2 A Yes, not necessarily financial, but, again,
3 various forms of marketing, merchandising reports.

4 Q And did you refer to any particular client files
5 in creating either the internal or the external
6 estimates?

7 A No. It comes from experience.

8 Q Would it be any different if the external vendor
9 already had the data? So if the external vendor already
10 had all of the data that they needed to crunch it in the
11 right way as to create this report, would the cost be any
12 different?

13 A I'm assuming that they'll have most of the data
14 because it's marketing data that we're sending monthly or
15 quarterly, so it's really the design of the reporting
16 system and the controls and so forth.

17 Q All right. So the external programming costs of
18 15- to 20- estimate that the -- sorry. Let me start
19 over.

20 Your external programming estimate of 15- to
21 \$20,000 assumes that the external marketing or software
22 vendor already has the data; is that right?

23 A Or most of the data, yes.

24 Q Okay. And the costs of these internal systems
25 modifications are not costs that have to be repeated

1 annually, right; these are one-time costs?

2 A That's true.

3 Q Okay. And we're back on Exhibit 1, Exhibit B to
4 your report, and under "C", you've got, Annual Costs to
5 Produce the Annual Purchase Summary Mailing, and you've
6 got several bullets here that factor into the annual
7 mailing cost. The first is, "Average order in dollars -
8 many businesses have less than \$100 average order."

9 A The first one I have is, Size of the 12-month
10 buyer --

11 Q Sorry. It's the second bullet. How do you know
12 that the average order is less than \$100?

13 A Just from experience, I know that many
14 businesses, more than a half are below \$100 per order.

15 Q Okay. And are there published studies that --

16 A I'm sure there are.

17 Q -- publish that data?

18 A Sorry.

19 Q But you didn't refer to any particular studies
20 in forming this opinion?

21 A No.

22 Q The next bullet states that, "The number of
23 times a customer purchases annually is often less than
24 2 times on average." How do you know that that is
25 true?

1 A By looking at my clients' data and understanding
2 repeat buying patterns.

3 Q And did you look at any particular clients'
4 data?

5 A No.

6 Q This is based on your broader experience?

7 A Yes.

8 Q And is there published literature that would
9 reflect the average number of customer purchases?

10 A I don't know. I assume there might be, but I
11 don't know.

12 Q And you didn't refer to that?

13 A No.

14 Q Is it the same for both catalog and Internet
15 retailers in terms of the average number of purchases?

16 A No.

17 Q What is the difference?

18 A Again, this is a generalization, but Internet
19 shoppers are often less apt to repeat purchase. They're
20 very opportunistic on price and so they may be more often
21 one-time buyers than catalog.

22 Q And in terms of the average dollar order, does
23 that vary between catalog and Internet retailers?

24 A Yes, it does.

25 Q What is the difference?

1 A It's all over the place. Many times it's less,
2 Internet is less than catalog. Sometimes it's higher.

3 Q Okay. And so then you used \$100 average orders,
4 somewhere that falls in the middle?

5 A No. A \$100 average order is a pretty healthy
6 order for any Internet or catalog.

7 Q Okay. And going back to the number of times a
8 customer purchases annually, why did you use an estimate
9 which, as I understand it, is more reflective of catalog
10 retailers than Internet retailers for your opinion?

11 A Well, because if Internet were less than two,
12 then I'm still conservative with what I'm telling you.

13 Q Okay. The final bullet point here says, "Most
14 businesses experience that 50% of all first time buyers
15 are opportunistic and never buy again." Is that true of
16 both catalog and Internet retailers?

17 A Yes.

18 Q How did you arrive at the 50 percent number?

19 A It's a number that I've learned for 15 or more
20 years looking at customers' marketing files and
21 results.

22 Q And is that something that would be reflected in
23 the published literature in your field?

24 A Possibly.

25 Q But you didn't rely on any published

1 literature --

2 A No.

3 Q -- for that number?

4 A No.

5 Q You conclude that 20 percent of Colorado
6 purchasers will buy \$500 or more per year from a
7 particular retailer. How do you know that?

8 MR. SCHAEFER: Objection. That's not what it
9 says. It says less than 20 percent.

10 BY MS. SCOVILLE:

11 Q Okay. Let me start over. You conclude that
12 less than 20 percent of Colorado purchasers will buy \$500
13 or more a year from a particular retailer. How do you
14 know that?

15 A Just taking the \$100 average order as being a
16 higher than average order in direct businesses and the
17 fact that they're going to buy two times or less on the
18 average, they won't reach the \$500. I know looking at
19 customers' results over the year, if you have somebody
20 that buys \$500, you've got a really premium buyer.

21 Q And did you do any particular studies to
22 determine that 20 percent is the right percentage?

23 MR. SCHAEFER: Same objection, but go ahead.

24 A Less than 20 percent. I think that's a very
25 conservative number. I think it could easily be 10 to 15

1 because it will be a premium buyer.

2 BY MS. SCOVILLE:

3 Q So it could be as low as 10 percent of
4 customers?

5 A Yes.

6 Q Okay. Did you do any studies yourself to
7 determine what percentage of folks would buy \$500 or
8 more?

9 A No. I just, as I said, know that from working
10 with clients' results and experience.

11 Q And did you refer to any published literature?

12 A No.

13 Q Did you discuss that with the 17 companies with
14 whom you spoke?

15 A No.

16 Q Is published literature available in your field
17 that would talk about the percentage of buyers who spend
18 more than a certain amount?

19 A There are just general surveys, which are hard
20 to apply because they often take in small start-up
21 catalogs and very large catalogs and they average things
22 together and they end up not sure how to apply the data.
23 So could be, but --

24 Q And did you try and estimate different
25 percentages based on small start-up catalogs versus

1 larger, established retailers?

2 A No, because the average price point -- the
3 average selling price point of the products determine
4 average order. In other words, if you have -- if you
5 look at a business that has, say, a \$100 average order,
6 you generally see -- and they're not doing a lot of price
7 promotions, you generally see that they have 1.2, 1.3
8 items on an order. Okay. So as price goes down, the
9 number -- as retail price goes down, the number of items
10 may go up, it might go to two or three, but the average
11 order is going to be -- also changes because the average
12 price point is different. So it's, you know, a company
13 by company merchandising kind of analysis you have to
14 do.

15 Q And so what you did was to create an average,
16 then, based on all types of merchandise and all kinds of
17 retailers, right?

18 A Yes, something I felt was conservative.

19 Q And is there any difference between catalog and
20 Internet retailers in terms of the percentage of people
21 who will spend a certain amount?

22 A I don't think there will be. I think the
23 Internet, depending on the average order, average order
24 value and the number of times that people buy, repeat
25 buy, that my opinion would be that they will end up under

1 A Well, because when it's -- it's not a metrix
2 that a lot of companies focus on. We're going to go back
3 to what we said this morning. People buy software, they
4 buy hardware. They may lease that or they may purchase
5 that, and that has a -- when you're using it for some
6 number of years, it has a cost per hour. And then you
7 have a people cost, the operational cost, which we
8 haven't delineated. You know, we may be paying somebody
9 \$25,000 a year to run a computer system. So there's some
10 cost per hour for the hardware, software and people, and
11 it's going to vary by company again.

12 Q Okay. You go on to estimate that a marketing
13 services bureau would charge a minimum setup charge and a
14 cost of \$2.00 per 1,000 names processed. And I just want
15 to see if the \$200 to \$300 is included when you reach a
16 .002 per piece cost or if those are two separate charges.

17 A It's going to vary by the marketing service
18 bureau. I feel most of the time they're going to be
19 separate.

20 Q Okay. So it's 2- to \$300, plus --

21 A Right.

22 Q -- .002 per piece cost?

23 A Right.

24 Q Did you talk to any marketing service bureaus
25 about what they actually charge for this kind of service

1 when you prepared this report?

2 A Those kinds of numbers are in quotes that we get
3 like we talked this morning. You know, it's in some ways
4 very commoditized. It's the number of records you're
5 passing, things like that.

6 Q So these would be very standardized --

7 A Right. Pretty much so.

8 Q -- and not very subjective charges?

9 A They are pretty low at .002, right?

10 Q Right. Plus the 2- to \$300, right?

11 A Right.

12 Q Your next bullet point talks about mailing
13 service costs, and you have a minimum set-up cost of \$100
14 to \$200 bundled into the per piece cost and a variable
15 cost for 500 to 1,000 customers mailed, and then based on
16 your experience you expect that cost to be \$1.25 to \$1.50
17 per piece. And you mentioned earlier today that you had
18 an assistant who had contacted some printing companies?

19 A Uh-huh.

20 MS. SCOVILLE: So let's mark these as exhibits.
21 This will be 12, and this will be 13.

22 (Exhibit Nos. 12 and 13 were
23 marked for identification.)

24

25

1 BY MS. SCOVILLE:

2 Q Actually, let's take these in reverse order, if
3 you don't mind, and start with Exhibit No. 13, which are
4 some handwritten notes. And it looks like these were
5 notes that were made by your assistant, right?

6 A Yes.

7 Q And as I read the notes relating to the
8 Printersmark quote, that this is a price per 500 pieces,
9 right?

10 A Yes.

11 Q And he quotes, basically, a total of \$400;
12 \$45 for the envelopes, \$105 for the fliers, \$90 for the
13 addressing, \$25 for the match mail, and postage of .27
14 times the 500, right?

15 A Yes.

16 Q And Printing For Less, their quote came in at
17 \$958.93?

18 A Yes.

19 Q And Exhibit 12 appears to be some e-mail
20 correspondence from your office manager, and Printing For
21 Less, on the last page of that exhibit, has their quote,
22 right?

23 A Yes.

24 Q And what they have done is, if I am reading this
25 correctly, the \$958.93 quote would cover 750 pieces; is

1 them with what sounds to you like the same job, it's
2 often higher. So that's been my experience.

3 Q And is there any variation in your experience in
4 terms of the mailing service cost based on geography
5 across the country?

6 A There very well could be, but this is such a
7 small cost compared to this total thing. I think it's
8 reasonable. Plus, this Printing For Less is a Montana
9 company so it's an Internet based printing company so --

10 Q And what about -- and, I'm sorry, Printing For
11 Less is Montana?

12 A That's my understanding.

13 Q Okay. And what about the Printersmark, where
14 are they from; do you know?

15 A They're here in Richmond, as far as I know.
16 Yeah, it's a local number.

17 Q So you ultimately conclude that the average cost
18 for the annual statement to customers will be \$2 to \$3
19 per customer --

20 A Yes.

21 Q -- is that right? Okay. And that includes the
22 minimums and the set-ups?

23 A Yes.

24 Q And on what data did you base that number, other
25 than the mailing piece?

1 A Well, one of the big pieces that we don't have
2 in here is what the production run cost is going to be,
3 and another factor is that we know from doing industrial
4 engineering studies for a long time that to generate a
5 piece of paper that people have to do something with,
6 that it can be typically in a range of \$2 to \$5. So we
7 thought that was reasonable because you can't -- without
8 knowing the specific individual companies and what
9 percentage -- what these four bullets on the prior page
10 are going to yield in terms of the number of customers,
11 the best that I think anybody can do is to say it's in
12 this range and we think that's conservative.

13 Q Okay. You said based on your experience in
14 industrial engineering, the range would be \$2 to \$5.
15 What kinds of situations included the cost of \$2 to \$5
16 per customer?

17 A Well, it's how people use a document that a
18 computer has produced, you know, how many people touch a
19 document. You know, it often has to do with the number
20 of touches. Every time you touch a document you add
21 costs to it.

22 Q And is that something that is published in
23 literature in your field?

24 A I'm sure it is. I don't -- you know, I can't
25 tell you what's there.

1 Q But you didn't rely on any of that literature
2 in --

3 A No. It's just experience.

4 Q And did you discuss the \$2 to \$3 per customer
5 estimate with any of the 17 companies with whom you
6 spoke?

7 A No.

8 Q Let's go back to your September 16th draft. I
9 have to grab the right exhibit number here. It's Exhibit
10 No. 9, and if you could look, please, at page 8. And I'm
11 sorry, I just told you the wrong page number. I'm sorry,
12 it's page 6. Exhibit 9, page 6.

13 Under Breakdown of Annual Costs, which is
14 underlined near the top of the page, you have, "Our
15 estimate is that on the average it will cost \$4 to \$5 per
16 customer disclosure with all costs." Was \$4 to \$5 your
17 initial estimate of the per customer cost for the annual
18 notice?

19 A That's my strawman, placeholder. That's what I
20 thought it would come out.

21 Q Okay. And then you moved down from there?

22 A After I got some quotes.

23 Q So your estimate changed based on the quotes
24 from the mailing houses?

25 A Primarily.

1 A It says, "The relevant systems development costs
2 for these steps were also included in Exhibit B." So the
3 costs are included for developing.

4 Q Okay. But not in the costs that you've
5 estimated for the customer information report?

6 A No, no.

7 Q The next paragraph talks about the
8 specifications that the Department of Revenue is going to
9 publish for transmitting the customer information report,
10 and you estimate that complying with the Department
11 specifications will add \$1,000 to \$3,000 to the costs.
12 How did you arrive at those numbers?

13 A Well, first off, if the Department of Revenue
14 specifies something that retailers don't use generally as
15 software, I felt that we should recognize some kind of a
16 placeholder. They would say we'd have to, you know,
17 purchase a piece of software to do that or a program --
18 you know, maybe change a series of programs that we have,
19 but certainly we've got to respond to it
20 electronically.

21 Q So those costs could be less, depending on the
22 software specifications that the Department of Revenue
23 releases?

24 A Yes.

25 Q Would that portion of the costs ever be zero?

1 A Potentially.

2 Q And in coming up with the 1,000 to 3,000 number,
3 did you refer to any literature or published studies?

4 A No.

5 Q Discuss that with any of the 17 companies with
6 whom you spoke?

7 A No. I used my own judgment.

8 Q The next paragraph indicates that, "Customer
9 information and purchase information is protected by
10 privacy statutes and the data is typically encrypted when
11 sent between locations. This is not specified in the
12 Colorado regulations and could increase costs." And I
13 was a little bit confused about that. What would
14 increase the costs?

15 A Encryption.

16 Q So the retailer company encrypting the data?

17 A Right.

18 Q And do the retailers already encrypt any of
19 their data?

20 A There are a variety of different methods of
21 encryption. We're dealing with something we don't know
22 from the Department of Revenue and, you know, we don't
23 know how to react to that until we see it.

24 Q Is it possible that depending on what the
25 Department ultimately specifies that that cost could turn

1 out to be zero?

2 A It's a possibility.

3 Q The second to the last paragraph on this page
4 says, "Companies will spend hundreds of hours of general
5 management, marketing, call center, IT and accounting
6 time interpreting and implementing this regulation in
7 their company business environment and systems." And you
8 go on to estimate that it will take between 150 and 200
9 hours or between \$7,500 and \$10,000, separate and apart
10 from additional systems costs. How did you come up with
11 the 150 to 200 hours?

12 A Well, as we talked about this morning, the types
13 of people, meaning call center, marketing, fulfillment,
14 the general management of IT, that will have to make up a
15 committee that will determine what their company's
16 interpretation of the regulation is, how they're going to
17 need it, and how they are -- you know, what they're
18 determination is for what they need to do in terms of
19 changing what they do. I think that's a conservative
20 estimate for the number of people and the salaries that
21 we see people paying.

22 Q And so what was the hourly rate that you used
23 here for those types of management jobs?

24 A Well, I don't exactly remember. We could divide
25 it out and see, but I think you'll find it's in the

1 ballpark.

2 Q Well, if we divide \$7,500 -- hang on, I can't
3 use my phone, this calculator apparently. All right. If
4 we divide \$7,500 by 150, you have \$50 an hour.

5 A And that's in line with what I said with the
6 call center training procedures. So that's pretty low
7 when you put general management into it and so forth, so
8 if you take the \$10,000.

9 Q And in determining the hourly rate, again, you
10 did that based on your own experience; you didn't refer
11 to any published studies?

12 A No.

13 Q And in determining the 150 to 200 hours, again,
14 you relied on your general experience and didn't refer to
15 published studies?

16 A Did not.

17 Q Or do any studies of your own?

18 A Did not.

19 Q Did you talk to any of the 17 companies with
20 whom you spoke about this?

21 A No.

22 Q Did you attempt to break down, in terms of the
23 150 to 200 hours, how much of that would be management
24 versus marketing versus call center versus IT?

25 A No, I didn't.

1 comply with the regulations; is that right?

2 A Yes.

3 Q All right. Let's go to Exhibit D. Your second
4 bullet point on Exhibit D talks about the high cost of
5 losing customers and losing sales, and you include, "We
6 anticipate that this statute's requirement will cause a
7 major percentage of the customers to abandon the shopping
8 cart or stop and call the Call Center." I think you've
9 already given the estimate that more than -- or at least
10 50 percent of customers will call the call center.

11 A Yes.

12 Q Have you made an estimate of how many customers
13 will abandon the shopping cart?

14 A No.

15 Q What would a major percentage of customers
16 abandoning the shopping cart be?

17 A I would say somewhere between 25 and 50
18 percent.

19 Q And on what data do you base your conclusion
20 that 25 to 50 percent of customers will abandon the
21 shopping cart?

22 A That a high percentage of the Internet
23 transactions are abandoned because of price or ease of
24 use -- lack of ease of use of the site, and this is a
25 very negative thing. You're telling the customer that

1 after the fact you're going to pay more for that product,
2 and there's no -- you know, it's not going to build
3 sales. It has to lose sales.

4 Q And are there published studies in your field
5 that talk about the percentage of Internet transactions
6 that are abandoned because of price or ease of use?

7 A Yes.

8 Q And did you refer to any of those?

9 A No. I just read them all the time and take
10 those into account.

11 Q And so the 25 to 50 percent is based on your
12 general experience then?

13 A Yes.

14 Q Did you discuss that with any of the 17
15 companies with whom you spoke?

16 A No.

17 Q And you haven't done any studies yourself?

18 A No.

19 Q You conclude that the regulations will cause
20 retailers to lose customers and sales, right?

21 A Yes.

22 Q Do you have any way to quantify how much
23 retailers will lose?

24 A I can't mathematically do it, but I think about
25 how competitive today's retail environment is and if

1 somebody is going to pay -- if a customer is going to pay
2 more from my -- as an out-of-state retailer than somebody
3 in state or someone else, then the person with the same
4 product, but a different price, the lower price often
5 gets the sale.

6 MS. SCOVILLE: Could you read back my initial
7 question? I'm sorry, I've already lost it.

8 (The question was read by the court reporter.)
9

10 BY MS. SCOVILLE:

11 Q So I understand that, you know, this is based on
12 the competitive environment, but do you have any way to
13 quantify?

14 A No.

15 Q And you haven't done any studies yourself in
16 that area?

17 A No.

18 Q Have you discussed it with any actual
19 retailers?

20 A No.

21 Q In your experience working with clients in your
22 company, are there clients you've had who have
23 implemented governmental regulations that have caused
24 them to lose sales?

25 A Not that I can think, no.