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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

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

The Direct Marketing Association,  
Plaintiff,

v.

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

DEPOSITION OF **KEVIN LANE KELLER** taken at Norwich,  
Vermont, on October 21, 2010.

APPEARANCES:

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

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

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1 KEVIN LANE KELLER, DULY SWORN

2 DIRECT EXAMINATION

3 BY MR. WESOKY:

4 Q MR. SCHAEFER, we've just met. My name is Jack  
5 Wesoky. I represent the state of Colorado,  
6 particularly the Director of the Department of  
7 Revenue, Roxie Huber, in this matter in which  
8 you've been endorsed to testify as an expert  
9 witness. I will be asking you some questions  
10 today, asking you to give me answers and I don't  
11 know if you've ever had your deposition taken, but  
12 I'm just going to go over a few rules of the way  
13 depositions are taken.

14 It's an oral exercise so please answer  
15 orally. No nods or shakes of the head or unh-unh  
16 or uh-huh because it's very difficult for our  
17 court reporter, Cindy, to make those notes, okay?

18 A Yes.

19 Q And I will ask a question and I'll ask you to  
20 answer it. I'll try not to jump on your answer.  
21 At the same time, please don't try to answer a  
22 question before it's over. Okay?

23 A Okay.

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1 A The time, yes, mental time where you're actually,  
2 yes.

3 Q And again, just to be sure I understand, in longer  
4 cases you might make notes of some time, but in  
5 the shorter cases you don't other than in your  
6 diary for phone calls?

7 A If it's a case that spans multiple years, then at  
8 some point I will stop and keep track of what I've  
9 done, if I haven't invoiced especially, before too  
10 much time elapses.

11 Q Have you done that in this case?

12 A I have not done that in this case as of yet.

13 Q Just to make sure I understand. You've not  
14 submitted an an invoice yet for your work in this  
15 case?

16 A I have not submitted an invoice yet.

17 Q To the best of your ability, could you tell me  
18 before preparing for this deposition and obviously  
19 our time in this deposition, how much time have  
20 you spent in this matter?

21 A Before the preparation of the deposition and the  
22 deposition, it would be approximately one day.

23 Q Eight hours?

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1 A Eight hours.

2 Q In preparation for this deposition, did you make  
3 any notes of any kind?

4 A I don't believe so.

5 Q In this case, to the best of your recollection,  
6 could you tell me what documents you reviewed to  
7 prepare your expert opinion?

8 A Well, they, I think, would be in the Declaration,  
9 I believe.

10 Q Okay.

11 A Because I was asked that question and then went  
12 back to my files and then reported those so the  
13 ones associated with my Declaration would be the  
14 ones that I've reviewed.

15 Q Okay. You've not reviewed any, I'll use the term  
16 literature, treatises, anything of that nature  
17 before giving your expert opinion?

18 A I'm actually finishing a 15-month project revising  
19 my marketing management textbook so over the last  
20 15 months I've reviewed a lot of material on  
21 consumers and on marketing dealing with lots of  
22 different topics. So I actually had a fairly rich  
23 background in general to sort of use as part of

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1 MR. SCHAEFER: For the record, we produced  
2 the press release. I know that's --

3 MR. WESOKY: I think I've seen that.

4 MR. SCHAEFER: The summary of complaint,  
5 unlike material that might have been otherwise  
6 work product which we have not withheld, we  
7 withheld nothing on work product grounds, that is  
8 an attorney/client communication. So for the time  
9 being because frankly I don't think it's a summary  
10 of a complaint that he received, so for the moment  
11 it's withheld on the grounds that it's an  
12 attorney/client communication.

13 MR. WESOKY: We'll cross that bridge when we  
14 get to it.

15 Q But if you retained it, it would be in your files,  
16 I assume?

17 A That's correct.

18 Q Did you read it or just read the Complaint?

19 A I believe I read everything that was probably sent  
20 to me.

21 Q Do you remember what it said?

22 A I don't remember specifically what it said.

23 Q This is to test your memory. How much time if you

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1 can recall did you spend reading the Complaint  
2 that was sent to you?

3 A How many times did I --

4 Q How much time did you spend reading it?

5 A I think the copy of the complaint, I have to think  
6 about it, but my guess is that's on the order of  
7 30, 40 minutes maybe.

8 Q Did you read it once, twice, three times?

9 (Off-the-record discussion)

10 A I believe it would be, it certainly would have  
11 been multiple times since that first time.

12 Correct.

13 Q So the 30 to 40 minutes would be the first time or  
14 all the times that you read the Complaint?

15 A The 30 or 40 minutes would probably be the initial  
16 time. I think subsequent times would not take  
17 nearly as long to go through.

18 Q And from your earlier testimony, I take it you  
19 made no notes on your copy of the Complaint or no  
20 separate notes about the Complaint?

21 A I'm almost certain that's the case but I'm not,  
22 you know, I'm almost certain that's the case.

23 EXHIBIT 24 MARKED FOR IDENTIFICATION

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1 Q Well --

2 A That I couldn't remember. This is the only one I  
3 could remember having seen.

4 Q Let's take a look at Exhibit 17, okay? If you  
5 turn to the second page of that exhibit, it has  
6 226 at the bottom. You have a couple markings on  
7 that page?

8 A Right.

9 Q Could you tell me what those mean?

10 A They don't mean a lot, to be honest. It's just a  
11 habit I have of when I read documents I mark them  
12 up in part just to, it's just a way I do just to  
13 process things so it's just to delineate or just  
14 something like that. I'll circle, I'll underline  
15 and put things on the side and in this case I did  
16 all three.

17 Q Did you have any issues or problems with those  
18 questions 2 and 3 that you kind of drew around?

19 A Not at all. This was just, literally, just the  
20 way I read things.

21 Q So I take it you had no problems with question 1,  
22 question 2, question 3, or question 4?

23 A That is correct.

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1 Q No problem with question 5?

2 A That's correct.

3 Q Okay. Now, question 6 you make some notes.

4 Perhaps you could tell me what they are.

5 A Question 6, I believe there's only one note there,  
6 and I think -- my guess is you can't read this.

7 Q You guessed correctly.

8 A And I actually am surprised that I can read this,  
9 but I'm pretty sure what it says is I would  
10 consider is those three words so I would consider  
11 reporting my name, billing address, shipping  
12 address and the amount of purchase so those are  
13 the three words I wrote there.

14 Q Do you know if that was adopted into the final  
15 version of the survey?

16 A I'd have to check to see.

17 Q Why don't we do that if we can.

18 A It was not. So it remained as reporting my name.

19 Q And then you have some notes also with regard to  
20 question 7.

21 A That's correct.

22 Q Perhaps again you can interpret those for us?

23 A Oh, boy. I can get some of this. I'll tell you

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1           what I can get, and I'll tell you what I'm having  
2           trouble, what -- I actually have trouble reading  
3           my handwriting, but what I can guess it says and  
4           it's just wording, it's nothing I would consider  
5           as substantive, is if you were to make this type  
6           of purchase again under similar circumstances but  
7           assuming this new disclosure requirement were in  
8           place, what would you most likely try to do? And  
9           then what I can't read is what's on that bubble  
10          above the 7 on the right there. There's something  
11          I added there, and I can't tell what it is, and I  
12          can't infer it either. I just don't know. I  
13          can't read that. It would be easier, it might be  
14          easier if I had the original but maybe not.

15        Q     I don't have the original.

16        A     I don't think I could, I really, I'm pretty good  
17          about reading what I write and that one's just,  
18          but I can't, I'm not perfect, and that's one I'm  
19          having a hard time. I can get the word to. Looks  
20          like ask but I doubt I would write ask there so I  
21          think it's got to be maybe assess, but it doesn't  
22          make sense so I don't know what that is.

23        Q     What about the bubble at the bottom?

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1 A Bubble at the bottom basically just says try to,  
2 attempt to, so it was just a restatement of that  
3 in that try that I mentioned before in the  
4 question.

5 Q And the next page, part C?

6 A Yes. I think, again, I just put physical, I think  
7 physical store located in Colorado. Instead of  
8 from a store. I think in a physical store. I  
9 think that's what that refers to.

10 Q Do you know if those recommendations were or  
11 changes were adopted?

12 A I mean, I think there was some editing that went  
13 on. I don't know whether the, some of the  
14 specific wording was adopted. I think the, there  
15 was some editing that happened there.

16 Q But if you compare that to the final survey, can  
17 you tell if your edits were adopted?

18 A Not those specific edits, I don't believe so.

19 Q Okay. Let's look at moving down to question 8.  
20 The circle is just for your, to catch your own  
21 eye?

22 A Just, and the check mark is also just the way I  
23 read things.

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1 Q And then on the bottom of the page it says a  
2 result of this law. What are those notes?

3 A Says here, so the question is that statement there  
4 is as a result of this law, how would your  
5 internet and catalog purchases from out of state  
6 retailers who must report your name, address and  
7 amount to the Department of Revenue likely be  
8 affected over the coming year. There's several  
9 things. One is these and that's just wording. I  
10 put question mark there because as these other  
11 comments were all line editing kind of comments,  
12 they're just wording suggestions. And then the  
13 question I had here was on the right, the bottom,  
14 sorry, the bottom left of the page says makes it  
15 seems as if there are some that do not have to  
16 report versus given that all of retailers under  
17 the law -- and I can't read the rest. I think it  
18 just stops there kind of. So it's more of a kind  
19 of query or note, if you will, about the use of  
20 the word who.

21 Q Was that change adopted?

22 A Yes. Yes. The those retailers. Out of state  
23 retailers. Yes. That change was adopted.

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1 Q The reason you wanted that change was because it  
2 would be inclusive for all out of state retailers  
3 because that's who the law affected? All out of  
4 state retailers?

5 MR. SCHAEFER: I'm confused by the question.  
6 The word they suggested was these and the word I  
7 think that he was saying was inserted was those.  
8 Not all.

9 A Actually, I think I suggested those.

10 MR. SCHAEFER: Okay.

11 A I don't think that's a these, but I'm not  
12 positive.

13 Q And you do note that --

14 A I might have said these.

15 Q -- that the question made it seem like some don't  
16 have to report or the law requires that all have  
17 to report. Is that an interpretation, a fair  
18 interpretation of your note at the bottom of the  
19 page?

20 A I believe so, but, again, it's hard to remember  
21 the context, but it was to add the word those I  
22 thought was, at the time I thought would be more  
23 accurate or clearer, I guess is maybe the way to

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1 received the August 9th version of the survey?

2 A It would seem if this e-mail was August 10th that  
3 he, I would think that's when I would have  
4 received that.

5 Q And do you also receive Mr. Adler's Declaration at  
6 that time?

7 A I believe that the e-mail seems to indicate that.

8 Q From my recollection, you had not received a copy  
9 of his Declaration before this time?

10 MR. SCHAEFER: Objection.

11 A Again, the time line is hard to remember as to  
12 when I got something. It refers to the final  
13 versions and so I can't be specific about that in  
14 particular.

15 EXHIBIT 32 MARKED FOR IDENTIFICATION

16 Q I hand you what's been marked as Exhibit 32. It's  
17 an e-mail from Mr. Schaefer to you dated September  
18 10th.

19 A Correct.

20 Q And it discusses certain requirements for this  
21 lawsuit.

22 A That seems to be correct.

23 Q Is that the first time that you became aware of

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1 put it.

2 Q And then let's go to the last page on that exhibit  
3 which is your page of notes. Would you tell me  
4 what they say?

5 A They're going to be hard. Okay. The top part has  
6 DMA and NYC for New York City and it looks like it  
7 has the name of a Senior Vice President perhaps.

8 Q Did you speak with that individual?

9 A No. And then it says Colorado legislation, state  
10 revenue department, and looks like remote sales  
11 and March 1.

12 Q Do you know why you wrote those down?

13 A I think there was some description of the case,  
14 and I was just writing down words, I think, from  
15 that description.

16 Q Would that have been on your initial contact with  
17 Mr. Isaacson and Mr. Schaefer? Because these  
18 notes are undated. That's why I'm asking.

19 A They are undated, and that would be my guess, but  
20 I can't say for sure when and I also unfortunately  
21 can't say that this was all from one phone  
22 conversation. This could have been from multiple  
23 phone conversations because it was in the file.

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1 Q Taking notes, Colorado legislation, state revenue  
2 department, so forth. Then you have the word  
3 nexus and something below that and I can't make  
4 that out. Could you tell me what that is?

5 A I got nexus, too. But below it it's really hard  
6 to tell. So I'm sorry about that. It looks like  
7 it could be high, but, you know, the first word,  
8 but I'm not sure. It could be ruling or  
9 something. You know, R, even though it doesn't  
10 look like it, that second word underneath there,  
11 it could be R U Y because a lot of times when  
12 you're on a phone conversation you just don't have  
13 time to get full words. You're just trying to get  
14 as many of the letters as you can.

15 Q Then I see over to the right there it's a little  
16 arrow, physical presence, employees/facility?

17 A Facilities, I think probably.

18 Q And below that agents and then an arrow pointing  
19 down, economic pressure?

20 A Presence.

21 Q Okay. Economic presence. State?

22 A Tried.

23 Q State tried. What does that mean?

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1 A I think these are just notes about the background  
2 to the case and just talking about different, the  
3 development of the case through, that they were  
4 giving me as general background and I just was  
5 taking notes that related to that.

6 Q They meaning, I'll use your words, George and  
7 Matt?

8 A George and Matt. Correct.

9 Q Giving you background about the case and what it  
10 was about?

11 A Descriptive background, correct.

12 Q Could it be that they were describing their theory  
13 of the case to you?

14 MR. SCHAEFER: Objection to the form. Go  
15 ahead.

16 A No. I think this was very much sort of an  
17 historical account of what had happened in the  
18 development in the case. As I recall it was very  
19 historical and like a reporter kind of descriptive  
20 account.

21 Q Over on the right it says Tom Adler, RSG,  
22 something below that?

23 A Unbiased sample from and what I can't read is, it

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1           may, from Colorado. Probably should be of  
2           Colorado. That's CO, I think, in the bottom  
3           right. So unbiased sample from Colorado. That  
4           was going to be a survey that was going to be  
5           conducted, I guess.

6           Q     So you were told by George and Matt that Tom Adler  
7           from RSG was going to conduct an unbiased survey  
8           from Colorado?

9           A     All I know is, I don't know when I was told this  
10          because I don't know when I wrote this, but it is  
11          just the fact that Tom Adler RSG and I've got  
12          something about an unbiased sample from Colorado.

13          Q     And you knew Mr. Adler before this?

14          A     I don't think we actually ever met in person, but  
15          I know of him.

16          Q     Then you have a line, it appears, and below that  
17          are more notes?

18          A     Right. Right.

19          Q     Can you tell me what those notes are?

20          A     Looks like it says talks about noncollecting  
21          retailer.

22          Q     And the one next to that looks like, is it  
23          collecting retailer?

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1 A Yes. That's correct. In parentheses, yes.

2 Q And over on the right the preliminary  
3 injunction/damages, what does that mean?

4 A Again, that's part of the chronicle I believe I  
5 got about the, whether initially or subsequent  
6 time about the nature of the case.

7 Q And the terms noncollecting retailer and  
8 collecting retailer were given to you by George  
9 and Matt?

10 A Yes.

11 Q There's, it looks like a little chain on the  
12 right-hand side. I'm sorry. On the left-hand  
13 side.

14 A A list or --

15 Q Looks like there's, on the far left, a chain?

16 MR. SCHAEFER: Do you want to indicate it to  
17 him?

18 Q With an arrow?

19 A Oh, yes. There's a name, there are two names  
20 circled that go down, and one, there's an arrow  
21 that goes down that says the word survey.

22 Q What are those names?

23 A Those were names of two other academics who also

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1           serve as experts so I suspect I wrote those down  
2           in the context of thinking about other experts  
3           that they may want to use.

4       Q     Who are they? Can you give me their names?

5       A     Eric Joachimsthaler. It's a German name so it's a  
6           little hard. Actually was with him yesterday. J  
7           O A C H I M S T H A L E R.

8       Q     And the other one below that?

9       A     That's actually hard, too. Dhruv, D H R U V, and  
10           I believe the last name is Grewal. It's an Indian  
11           name. G R E W A L.

12      Q     And you suggested them as experts to George and  
13           Matt or you just wrote them down as possible  
14           people to talk to?

15      A     I think, I'm not sure exactly the context. They  
16           are ones who have, I know are experts on consumers  
17           and retailing and certainly the facts of the case.

18      Q     You didn't consult with them regarding your expert  
19           opinion, did you?

20      A     I did not.

21      Q     And you didn't refer them any work on this case, I  
22           take it?

23      A     I don't believe so.

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1 Q Next is much of consumer privacy or something like  
2 that?

3 A It looks like invasion of consumer privacy.

4 Q And whose words are those? Yours or George and  
5 Matt's?

6 A Could be mine.

7 Q Could be. Could be George and Matt's then?

8 A Well, I don't know at that point in time where we  
9 are in terms of these notes. That's part of the  
10 problem. As we go farther down, they may be, it's  
11 harder to say exactly where they come from.

12 Q Okay. And then there's a list of three things.

13 A Correct.

14 Q And are those notes you got from the statute or  
15 are those notes that you got from your  
16 conversation with George and Matt?

17 A My guess is the conversation with George and Matt.  
18 But whether I had the statute or read the statute  
19 and I don't know where that fits into the picture.

20 Q Over on the right, under preliminary  
21 injunction/damages, threatened irreparable harm?

22 A Threat of or threat of irreparable harm or  
23 something like that. Yes.

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1 Q And the reason that's down there, is it because  
2 that's what Matt and George wanted you to focus  
3 on, that there would be irreparable harm to  
4 retailers?

5 A I don't know the exact context of that. My belief  
6 it would be there's discussions about different  
7 legal aspects and the implications and, again,  
8 background context to the case.

9 Q With regard to that exhibit, the survey  
10 questionnaire, did you provide a copy of that to  
11 anybody with your notes on it?

12 A Not, I don't believe so.

13 Q Did you discuss your editorial comments with  
14 anybody?

15 A I did.

16 Q And who would that be?

17 A I believe it would be someone from RSG and could  
18 have also included, but I don't remember if it  
19 did, I'm not sure it did, anyone from, Matt or  
20 George from Brann & Isaacson.

21 Q Was that a telephone conference?

22 A Yes.

23 Q Do you remember the person at RSG?

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1 Q I hand you, MR. SCHAEFER, what's been marked  
2 Exhibit 24, and it's an e-mail from Mr. Isaacson  
3 to you, and it states that we, meaning his firm,  
4 anticipates having a draft for your review of the  
5 Affidavit in support of preliminary injunction.  
6 Do you remember receiving this e-mail, Exhibit 24?

7 A I mean, generally so, yes.

8 Q So I take it from the content of this e-mail that  
9 you didn't draft the Affidavit. It was drafted  
10 for you by Brann & Isaacson?

11 A The first draft was drafted based on our  
12 conversations and my input that I then got a  
13 chance to review.

14 Q And you say your input. I assume that was in  
15 phone conversations?

16 A Correct.

17 Q How long would you guess or guess is a bad word.  
18 Would you estimate that you spent on phone  
19 conversations with either Mr. Isaacson or  
20 Mr. Schaefer or both in discussing the contents of  
21 your Affidavit or Declaration?

22 MR. SCHAEFER: Objection to the form but go  
23 ahead.

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1 A It's hard to say. My guess is we easily would  
2 have spent an hour or two, I think, having gone  
3 through this material.

4 Q And again, from your earlier testimony, you made  
5 no notes as to what you wanted in your Declaration  
6 or Affidavit and you made no notes as to what  
7 either Mr. Isaacson or Mr. Schaefer said regarding  
8 what would be in that Declaration or Affidavit,  
9 correct?

10 A That's correct.

11 EXHIBIT 25 MARKED FOR IDENTIFICATION

12 Q Let me hand you what's marked as Exhibit 25, and  
13 that is an e-mail to you from Mr. Schaefer dated  
14 July 30 in which he references attaching a draft  
15 of a Declaration for use in this case, and it also  
16 attaches a draft of Mr. Adler's Declaration and  
17 the RSG's report of the survey. I take it this  
18 was the first time then, first, let me ask you.  
19 Did I state that correctly what Exhibit 25 states?

20 A I believe so in terms of that e-mail. Yes.

21 Q Then I take it this was the first time you saw a  
22 draft of your Declaration to be used in this case?

23 A I believe that's true.

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1 Q Okay. From your memory, can you tell me how that  
2 differed from your final Declaration, if at all?

3 A I know there were comments that were made and  
4 discussion that occurred, but I can't specifically  
5 state exactly how the two versions differed.

6 EXHIBIT 26 MARKED FOR IDENTIFICATION

7 Q I hand you what's been marked Exhibit 26. And I  
8 will represent to you that it is a document I  
9 received from Mr. Schaefer from your file, I can  
10 tell because it's marked KLK at the bottom and  
11 this is a draft of the Declaration because on page  
12 6 there's in bold, Kevin, let's discuss.

13 A Yes.

14 Q So this Exhibit 26 is a draft of your Declaration.

15 A Correct.

16 Q Do you know if this was the draft that came with  
17 Exhibit 25 or if that was a different draft?

18 A I can't say for sure. I mean I can't, it's hard  
19 to know what an attachment was, whether or not it  
20 was or not. I'm sorry.

21 Q Let me call your attention to page 3. There is a  
22 blank in paragraph 4?

23 A Yes. I see that.

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1 correct?

2 A Yes.

3 Q For August 6th it's the final in the chain?

4 A Yes. That's what I was trying to -- okay.

5 Q And you responded to the August 3rd e-mail which  
6 we looked at a moment ago, exhibit, I believe 28?

7 MR. SCHAEFER: 28 I think, is it dated August  
8 3rd? It's not 28. Because 28 was the one about  
9 the survey link.

10 Q Okay. I'm sorry. 27?

11 MR. SCHAEFER: Might be as far back as 25  
12 because 27 was also about the link.

13 Q In any event, let's move on. Thank you. The  
14 first in that chain was an e-mail of August 3rd to  
15 you attaching the draft of the Declaration. And  
16 you responded with some suggested revisions.

17 A Um-hum.

18 Q Is that correct?

19 A That's correct.

20 MR. SCHAEFER: Jack, for purposes of clarity  
21 this thing is set up a little funny. The August  
22 3rd e-mail you see was from Kevin so he's  
23 capturing some language from another e-mail. He's

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1 writing from August 3rd. Do you see that in the  
2 middle of the page?

3 Q Right. And he is responding to the e-mail.

4 A We don't know the original date of the, although  
5 maybe we do actually.

6 Q Thank you very much. It's July 30th.

7 A Exactly. And then I'm August 3rd. And then  
8 Matt's August 6th.

9 Q And August 6 is the response.

10 A It's the weird -- Dartmouth e-mail system is  
11 really goofy that way because it goes to the  
12 bottom and it just throws people off.

13 Q Thank you.

14 A Yes.

15 Q But you're responding to the e-mail where the  
16 draft of your Declaration was attached. You  
17 responded with some suggestions. Is that correct?

18 A That's correct.

19 Q And then you got a reply which talked about your  
20 suggestions to the draft; is that correct?

21 A That's correct.

22 Q And you state in your response to the July 30  
23 e-mail, be sure Adler report aligns. What do you

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1 mean by that?

2 A Well, there was a passage that talked about the  
3 survey questionnaire and its development, and  
4 Adler talked about the input that he got and it  
5 was my recollection that that was something that  
6 I'd also provided input on and I just wanted to be  
7 clear that that was the case. That that had  
8 happened, one, and that the two reports were  
9 consistent about that if that was in fact what had  
10 happened.

11 Q And then the reply to that was to reject that  
12 because you were reviewer of the survey whereas  
13 Tom Adler was the draftsman?

14 MR. SCHAEFER: Objection.

15 A I think the way I'd characterize it was they  
16 wanted, the response basically just pointed out  
17 how they wanted to handle that issue in terms of  
18 draftsmen and reviewers. So it was more of the  
19 language and how to best kind of present that.

20 EXHIBIT 30 MARKED FOR IDENTIFICATION

21 Q Let me hand you what's been marked an Exhibit 30  
22 and at the top it's dated August 9th.

23 A Hope your weekend went well. Okay. Sorry.

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1 Q In appears to be your response to the e-mail we  
2 just talked about where they sent you a revised  
3 Declaration?

4 A Yes.

5 Q And you talk about followup conversation? Did  
6 that occur?

7 A I believe so.

8 Q Do you remember when that occurred?

9 A I don't know specifically.

10 Q Do you remember what was discussed?

11 A I suspect, think this was all as part of the  
12 review and just making sure that in terms of the  
13 report that it had been, was finalized.

14 EXHIBIT 31 MARKED FOR IDENTIFICATION

15 Q Exhibit 31 is an e-mail to you dated August 10  
16 from Mr. Schaefer attaching the final version of  
17 your Declaration with the minor edits we  
18 discussed. Do you remember what those minor edits  
19 were?

20 A I don't right now. I'm sorry.

21 Q And I attach the final version of the RSG final  
22 documents and Tom Adler's Declaration referenced  
23 in your report. So I take it that's when you

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1           what the requirements were with respect to your  
2           expert opinion in this case?

3       A     I can't say exactly what I learned when. I'm sure  
4           there were conversations early on about my role in  
5           the case as an expert witness and what would be  
6           expected and required from me.

7       Q     Let me amend that by saying the requirements which  
8           are mandated by the rules as opposed to what they  
9           expected in your opinion. They meaning Brann  
10          Isaacson.

11               MR. SCHAEFER: And the question with regard  
12               to those?

13               MR. WESOKY: Pardon me?

14               MR. SCHAEFER: I don't think that was  
15               actually a question so I just wanted to make sure.

16               MR. WESOCKY: Well, I was modifying the last  
17               one. I will start again.

18               MR. SCHAEFER: Okay.

19       Q     Is the e-mail of September 10th, Exhibit 32, the  
20           first time that you received information from  
21           Brann & Isaacson regarding what the legal  
22           requirements were for your expert opinion? When I  
23           say legal requirements, those required by the

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1 rules?

2 A It may be the first time I got e-mail and that I  
3 can't be sure of, but there may have been phone  
4 discussions that would have reviewed this early on  
5 or any point in that process. I can't say for  
6 sure right now.

7 Q Do you remember what you did when you read this?  
8 When I say did, I mean with respect to this case?  
9 I don't mean you went and had lunch. I mean what  
10 you did with respect to your opinion in this case?

11 A I don't know. I would have thought I would have  
12 replied back to this e-mail one way or another at  
13 some point in time. This is a Friday afternoon  
14 e-mail, 4 p.m., Matt Schaefer working late into  
15 the week, so actually I don't know. It was going  
16 into the weekend. To be honest, I'm not sure  
17 exactly when I read and replied back to this.

18 EXHIBIT 33 MARKED FOR IDENTIFICATION

19 Q I hand you what's been marked as Exhibit 33. It's  
20 identified at KLK 294 and ask if that is an e-mail  
21 chain reflecting a setting up of a telephone call  
22 to discuss Exhibit 32.

23 A I believe so. I mean the timing is, it's the

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1 Tuesday after that weekend. So my guess is that's  
2 what that was referring to.

3 Q Okay. Did you have that phone conversation?

4 A I believe so. It's only like a month ago. Seems  
5 like a long time ago.

6 Q Do you remember anything about it?

7 A I remember, I just remember again going, reviewing  
8 the process and what was involved in the  
9 Declaration, I believe, and it was going through  
10 it. So I think pretty much went through the  
11 e-mail as I recall, but I don't remember all the  
12 specifics.

13 Q Okay.

14 EXHIBIT 34 MARKED FOR IDENTIFICATION

15 Q Let me hand you what's been marked as Exhibit 34.  
16 This is an e-mail from Mr. Schaefer to you dated  
17 the 15th of September of this year. Do you recall  
18 receiving this?

19 A I think. Yes, I believe so.

20 Q And you remember discussing it with Mr. Schaefer  
21 at a subsequent phone conversation?

22 A I believe so.

23 Q Do you remember what you discussed?

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1 A I believe this was just talking about the, in  
2 terms of principles and methods it was just sort  
3 of the, what was the sort of methodology, if you  
4 will, that I would use in analysis kind of  
5 approach that were involved in coming, in arriving  
6 at my Expert Report, written report, and that was  
7 I think we discussed those.

8 Q What did you tell him about the principles,  
9 methods and so forth that you just referenced in  
10 that e-mail?

11 A I can't remember specifically the whole, that  
12 whole conversation on that.

13 Q And do you remember generally?

14 A I think, generally, I think would have talked  
15 about, I think we talked some about sort of  
16 experiences and knowledge that I've gained on  
17 consumer behavior and consumer privacy and  
18 retailing and loyalty relationships in my academic  
19 work and consulting work, and we talked about  
20 that, but I don't remember all the specifics.

21 Q And I take it from your past testimony and your  
22 habit, you didn't make any notes of this  
23 conversation?

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1 deposition and every second of your preparation  
2 time. You're not going to give me a gift, are  
3 you?

4 A Well --

5 MR. SCHAEFER: If you had a phone call, you  
6 might get one. This one is too easy to know.  
7 There will be a transcript that tells us when we  
8 started and when we finished.

9 A Very well defined.

10 Q Okay. Let me hand you the next exhibit in order.

11 EXHIBIT 35 MARKED FOR IDENTIFICATION

12 Q MR. SCHAEFER Keller, I handed you what's been  
13 marked Exhibit 35. It's an e-mail, the top date  
14 is September the 19th, 2010. And it appears, it's  
15 an e-mail from Mr. Schaefer to you and then a  
16 response. Using the Dartmouth e-mail system, the  
17 response is at the bottom?

18 A That's correct.

19 Q Now, this e-mail attaches a draft of your Expert  
20 Report. Is that the first time you saw a draft of  
21 your Expert Report, differentiating it from your  
22 Declaration?

23 A I believe so. But again, I can't be certain of

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1 all the different correspondence.

2 Q Okay.

3 EXHIBIT 36 MARKED FOR IDENTIFICATION

4 Q Let me hand you what's marked as Exhibit 36, and  
5 that's a draft of your Expert Report in this  
6 matter, is it not?

7 A Yes, it is.

8 Q And if you'd look at the last page there's a  
9 blank, to date my fees in this matter are blank.

10 A Correct.

11 Q And the final version didn't have that in it. Did  
12 it?

13 A I'd have to check the final version.

14 Q Assume with me it didn't. Would that be because  
15 you hadn't totaled up fees as of that date?

16 A Haven't invoiced yet.

17 Q So you don't know as you sit here today what your  
18 fees to date are?

19 A I know --

20 MR. SCHAEFER: Well, asked and answered  
21 earlier, but go ahead.

22 A I know roughly what those are.

23 Q But as of September 19th, 20th, you didn't know

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1           what they were?

2       A     I hadn't invoiced it so I hadn't done any  
3           calculations.

4       Q     Okay. That's fair enough.

5                       EXHIBIT 37 MARKED FOR IDENTIFICATION

6       Q     I think it's the final version of your Expert  
7           Report. Is that correct? I want you to read that  
8           and be sure that it is.

9       A     I believe so. Looks like the final report.

10      Q     Now, again, those words were provided to you by  
11           Messrs. Schaefer and Isaacson after talking to you  
12           on the phone, is that the way that worked?

13      A     That's correct.

14      Q     And again, you didn't draft anything up to send to  
15           them? They provided you with the document after  
16           discussion?

17      A     Yes. Based on my input. Correct.

18      Q     Let's take a short break.

19                       RECESS TAKEN

20      Q     In your Declaration, Exhibit 16, I believe? Let's  
21           take a look at paragraph 2, please.

22      A     Yes.

23      Q     You say in the first sentence that much of your

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1           what I did.

2           Q     Again, just so I understand what you're saying,  
3                 because of this ongoing project revising your  
4                 textbook, you didn't find it necessary to refer to  
5                 any specific treatises or literature but just your  
6                 general knowledge from revising that textbook you  
7                 used in connection with formulating your expert  
8                 opinions, is that correct?

9           A     What I did was in the process of revising this  
10                textbook there were lots of different topics that  
11                would be relevant to the case that I certainly had  
12                a chance to read about and think about and write  
13                about as part of the revision of the textbook.

14          Q     But as I understand it, you didn't go to the  
15                revisions of that textbook, specifically, in  
16                connection with your expert opinion, but it was  
17                just the knowledge that you accumulated in doing  
18                that that you transferred to this expert opinion,  
19                is that right?

20          A     There was enough before the revision of the  
21                textbook general knowledge that I already had, and  
22                then the updating that occurred with the actual  
23                revision of the textbook, that gave me a good

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1 foundation going into the preparation of the case.

2 Q But again, just so I can understand. You didn't  
3 in preparation for your expert opinion say oh, I  
4 need to refer to my notes on the textbook or the  
5 material on the textbook. It was just your  
6 knowledge gained from doing that that helped you  
7 with your expert opinion?

8 A It was the knowledge gained but there was, when  
9 you talk about general knowledge, general  
10 knowledge is the accumulation of a lot of specific  
11 articles and readings that you do so even though  
12 it's general knowledge it's based on a lot of  
13 specific articles and material that you read and  
14 review which then, which in some cases would be  
15 relevant to this particular case.

16 Q As you sit here today, could you give me just a  
17 few of those articles that you think would, that  
18 you've accumulated over the last years that would  
19 be relevant to this expert opinion?

20 A They would be ones that would be referenced in the  
21 textbook or included in my files associated with  
22 the different chapters in the textbook.

23 Q Would you tell me today what some of those are?

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1 A Couldn't give you the specific names and authors,  
2 if you will, of those articles because I've got,  
3 there are literally thousands that I review and  
4 maybe even reference. I don't know. Certainly  
5 the hundreds that I reference.

6 Q In your textbook, you mean?

7 A In my textbook and then or included in my files,  
8 too. So it's all part of that set of material, if  
9 you will.

10 Q And again, just so I understand, you didn't go to  
11 those files for particular reference for this  
12 expert opinion?

13 A Well, and again, it's one of those where I've gone  
14 through those files as part of the textbook so  
15 it's not as if I didn't have access to that  
16 because I'd already reviewed and worked through a  
17 lot of that as part of the textbook.

18 Q But again, you didn't say oh, I could look at  
19 Jones & Brown, to name a fake article, that will  
20 help support my opinion. I think that's relevant.  
21 There was no thinking along that line?

22 A The thinking would be more along the lines that  
23 there's a set of material that I've used that

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1 inform my decision or my judgments as I kind of go  
2 through this, and the time that this was done,  
3 whether I could remember the specific titles, I'm  
4 not sure. I certainly could remember what those  
5 were about because that's what I would have  
6 reviewed and be included into the textbook.

7 Q What were some of those, to use your words, about?

8 A They talked a lot about consumers and consumer  
9 behavior, talked about issues on privacy and  
10 consumers' opinions about privacy. Relationships  
11 with retailers, relationships with brands,  
12 purchase decision factors. So it's kind of a  
13 range of topics.

14 Q But you can't think of any specifically today,  
15 correct?

16 A Specific articles?

17 Q Yes.

18 A I can think of the body of work that I used that  
19 related to that. I can't remember the specific  
20 authors and titles of those papers. I can  
21 remember having consulted those and included and  
22 incorporated some of that material into the  
23 textbook.

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1 of being an expert in this case?

2 MR. SCHAEFER: Objection to form. Go ahead.

3 A I would say that probably the most pertinent is  
4 just the Ph.D. in marketing with emphasize on  
5 consumer marketing that I received in the mid  
6 '80s. And then the second thing I would say would  
7 be all of the work that I've done since then that  
8 have been involved consumer marketing and research  
9 and writing in the last 25 years, I guess.

10 Q I take it from your Declaration that you're an  
11 expert in consumer behavior, is that correct?

12 A That's one of my areas of focus.

13 Q And that's what, one of your areas of expertise in  
14 this case, is that correct?

15 A That's correct.

16 Q And what other area of expertise are you bringing  
17 in this case?

18 A Branding.

19 Q Okay. How about survey methodology and  
20 technology?

21 A Survey methodologies is another area that I've  
22 emphasized since 1979, I guess, or 1980.

23 Q But you didn't design the survey in this case; is

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1           that correct?

2           A     I did not design the survey.

3           Q     Are you familiar with the methodology used?

4           A     I am.

5           Q     So you're familiar with what Knowledge Networks  
6           did in this case for this survey?

7           A     Yes.

8           Q     And what is that? Could you tell me?

9           A     Survey involved an online panel that was assembled  
10          and involved an online questionnaire that asked a  
11          sample of respondents some questions that were  
12          relevant to the matters in this case.

13          Q     Do you know about their weighting and calibration?

14          A     I believe that is part of the sample composition  
15          that involved some weighting in terms of  
16          representativeness of the sample population.

17          Q     Do you know how that was done or are you just  
18          relying on Knowledge Networks?

19          A     I'm relying on Knowledge Networks and RSG,  
20          supplier to the RSG firm.

21                         EXHIBIT 18 MARKED FOR IDENTIFICATION

22          Q     MR. SCHAEFER, I've handed you Exhibit 18 which is  
23          Knowledge Networks Field Report Colorado Tax

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1 Policy Survey. Simple question. Did you ever see  
2 that before today?

3 A I don't believe so.

4 Q Okay. You can set that aside.

5 EXHIBIT 19 MARKED FOR IDENTIFICATION

6 Q I hand you what's been marked as Exhibit 19, and  
7 it's called Knowledge Networks Project Statement  
8 CO Tax Policy Project number blank. Have you ever  
9 seen that document before?

10 A I don't believe so.

11 MR. SCHAEFER: Jack, just to make sure, I  
12 think this one has sequential but appended I think  
13 is this and I don't know whether it's part of the  
14 same document literally or not. I don't recall  
15 specifically, but there's a Knowledge Panel  
16 Calibration document that begins at page RSG  
17 00316.

18 MR. WESOKY: I don't know if it was appended  
19 either because it came, you know, one page at a  
20 time, but let's attach them for purposes of this  
21 question.

22 MR. SCHAEFER: I don't have any problem with  
23 it. I just thought I would mention it.

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1 MR. WESOKY: Thanks. I appreciate that.

2 Q So MR. SCHAEFER, I assume that you've not seen  
3 that appendix, if we can, called Knowledge Panel  
4 Calibration?

5 A I have not.

6 Q So then it's, you didn't read that or consider  
7 that when you reviewed the survey results and gave  
8 your opinion, correct?

9 A Correct.

10 Q Let me ask you, do you think it would be important  
11 to review these documents and learn about  
12 Knowledge Networks and their calibration function,  
13 if that's the correct word, with respect to the  
14 results of the survey?

15 A I've known Knowledge Networks --

16 Q Simple yes or no question.

17 MR. SCHAEFER: No. He can answer the  
18 question.

19 MR. WESOKY: No. I can ask the question. He  
20 can answer it. If you want him to elaborate on  
21 it, then you can examine him.

22 MR. SCHAEFER: No --

23 Q The question is, do you think, I'm sorry. Would

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1 Q Do you think in your opinion that with all those  
2 advantages that the behavior change attributed to  
3 the loss of privacy by the survey is overstated  
4 based on these other advantages to consumers that  
5 the internet has?

6 MR. SCHAEFER: Objection to the form. Go  
7 ahead.

8 A No. I don't. I don't think it's overstated.

9 Q So you think the concern of loss of privacy will  
10 drive a large number of consumers away from using  
11 the internet to make purchases?

12 MR. SCHAEFER: Objection to the form.

13 A Well, there are many ways to purchase over the  
14 internet and so I think that the loss of privacy  
15 will affect those retailers who are associated  
16 with that.

17 Q Associated with the Colorado --

18 A The loss of privacy.

19 Q With the Colorado law, you mean?

20 A Colorado law.

21 Q Let's take a look at the survey for a minute.

22 Okay?

23 EXHIBIT 21 MARKED FOR IDENTIFICATION

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1 necessarily an open-ended question. I think it's  
2 more understanding respondents and how they may be  
3 thinking as they respond to a survey and phrasing  
4 questions that give you the clearest understanding  
5 of that.

6 Q From the survey, we can't tell how important the  
7 consumers' belief, consumers' negative reaction,  
8 let me put it that way, to the reporting of their  
9 name, address and purchases to the State is in  
10 their hierarchy of concerns about internet  
11 purchases, do we?

12 MR. SCHAEFER: Objection to form.

13 A Well, we know that, we know two things and we know  
14 that they consider the Act to have negative  
15 effects on their privacy and we also know that  
16 they would subsequently be less likely to purchase  
17 from retailers, and from that you can draw the  
18 conclusion of the relationship between the privacy  
19 and the ultimate, and its importance in their  
20 decisions to purchase from a retailer outside the  
21 state.

22 Q But we don't know where that importance is on  
23 their scale, if you will, of concerns about the

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1 MR. SCHAEFER: Objection to the form.

2 A There's a whole host of concerns that consumers  
3 have with privacy and certainly one would be how,  
4 what, how information could be used, whether it's  
5 family members or other personal relationships  
6 that might result in unwanted outcomes.

7 Q Now, did you see a copy of any Colorado statute  
8 that deals with the confidentiality and privacy of  
9 information given to the Colorado Department of  
10 Revenue?

11 A Could you be more specific?

12 Q Sure. Did you see any Colorado statute other than  
13 the law in question in this case concerning the  
14 reporting by retailers to the Department of  
15 Revenue and to their customers?

16 A I'm not sure.

17 Q Do you remember seeing any Colorado law which  
18 dealt with the obligation of the Department of  
19 Revenue to keep material and information that they  
20 received confidential and not to disperse it to  
21 anybody?

22 A I'm not, again, I'm not sure.

23 Q I'm correct, am I not, in stating that consumer

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1 behavior is driven by many factors?

2 A Correct.

3 Q Price is one certainly?

4 A Correct.

5 Q Product is another?

6 A Correct.

7 Q A brand is certainly another?

8 A Correct.

9 Q Quality of the product is certainly another?

10 A Correct.

11 Q Convenience is certainly another?

12 A Correct.

13 Q Past experience with a merchant, be it a web site  
14 or a catalog, is another?

15 A Correct.

16 Q And certainly Internet shopping is influenced by  
17 its ability to save time for a consumer?

18 A Certainly one of the benefits of internet shopping  
19 is saving time.

20 Q And you certainly you have an ability to research  
21 and compare products and prices?

22 A Internet, that's one of the advantages of the  
23 internet is you can compare prices more easily.

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