

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

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THE DIRECT MARKETING ASSOCIATION,

Plaintiff,

v.

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

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

Defendant.

---

DEPOSITION OF F. CURTIS BARRY

October 19, 2010

Sandston, Virginia

HALASZ REPORTING & VIDEO

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Reported by: Mary L. Rosser, RPR

1 we call non-featured, news kinds of things, periodically  
2 that could just be things that are commonly happening or  
3 here's a tip or things like that.

4 Q When you submit a longer feature article, who  
5 reviews or edits the article?

6 A The editor, her name is Melissa Dowling.

7 Q And is it formally peer-reviewed in any way? Is  
8 it sent out to anyone else in the industry?

9 A No.

10 Q How long are the longer feature articles?

11 A Today they're about 2,000 words.

12 Q And when you write the articles, do you  
13 generally write them based on your broad experience or  
14 are you doing more targeted studies to write these  
15 articles?

16 A Both.

17 Q Do you or your company have a financial interest  
18 in Multichannel Merchant?

19 A No.

20 Q Have you published any articles regarding  
21 retailers' compliance with regulations?

22 A No -- well, I might have done something on  
23 shipping and handling, but nothing on this topic.

24 Q And I know that you also have a book. In your  
25 book do you discuss retailers' compliance with

1 regulations?

2 A I haven't -- to be honest with you, I don't  
3 think so, but I don't read my book. I use it as a  
4 handout to get business.

5 Q Sure. So let's talk about the company that you  
6 have right now. When was it founded?

7 A 1985.

8 Q And how many employees do you have?

9 A Six.

10 Q And describe your business for me, if you would.

11 A It's about 40 percent systems work, like what  
12 we're talking about here, 40 percent warehousing and what  
13 we call distribution, benchmarking call centers, and the  
14 remainder of it is strategic planning with customers and  
15 what -- you know, things like should they have a West  
16 Coast warehouse presence, helping them build their  
17 business. Today our business is changing fairly quickly  
18 because we're co-developers of a software product called  
19 Manage Metrix, which is in --

20 Q I'm sorry, could you say that again?

21 A Manage Metrix.

22 Q Managed Metrix?

23 A No, Manage, with an E, Metrix, M-E-T-R-I-X,  
24 which is in the CV.

25 Q Okay. So let's break that down a little bit.

1 The 40 percent of time that the company spends on systems  
2 work, what does "systems work" mean?

3 A Helping clients understand what their  
4 requirements are, helping them develop RFPs to vendors,  
5 helping them select vendors, answering vendor questions  
6 about the RFP and what the client wants, helping them  
7 stage demonstrations of the systems, which is a  
8 couple-day effort for each vendor, helping them make  
9 final decisions, helping them estimate costs, which is a  
10 big piece of this because often, even though the  
11 processes are uniform, meaning not identical, but uniform  
12 what they're doing, how companies want that process and  
13 system tailored or modified is a continual kind of thing  
14 that we deal with.

15 Q And when you're talking about helping customers  
16 understand what the requirements are and select the right  
17 system, are you talking about hardware or software?

18 A Applications software.

19 (Interruption.)

20

21 MS. SCOVILLE: Yeah, I'm having a little bit of  
22 trouble hearing, also. Thank you.

23 BY MS. SCOVILLE:

24 Q And then the part of your business that helps  
25 clients deal with warehouse and distribution issues,

1 benchmarks in call centers, tell me a little bit more  
2 about that. What does that involve?

3 A Well, in the call center area, it involves  
4 primarily customer service issues. Because one thing  
5 about most of this industry is they're very sensitive to  
6 changes in customer service that will either positively  
7 or negatively affect their business so we spend a fair  
8 amount of time, you know, talking about -- for example,  
9 today customer service is downsizing in terms of the  
10 number of people because of the Internet so it's kind of  
11 like, Okay, how do I deal with this. You still have to  
12 have the presence; how much time does it take, what are  
13 the costs. We hold benchmarking share groups since 1996  
14 periodically on call centers and fulfillment and  
15 management issues so we're, you know, a leading source of  
16 that kind of information.

17 Q So are most of your clients then retailers, as  
18 opposed to software vendors?

19 A They're both.

20 Q Both? Okay.

21 A They're multichannel.

22 Q Okay. What would the mix of your clients be in  
23 terms of retailers versus software vendors versus  
24 others?

25 A Well, almost every -- I can't think of any

1 client that doesn't have multichannel. Okay? In other  
2 words, Internet is big and growing. Most of them have  
3 catalog, and some are also either companies that are  
4 building a retail presence or they're a big retail  
5 company that's looking to go into direct. So, you know,  
6 90 percent are multichannel.

7 Q And what kind of multichannel retailers do you  
8 work with? Are they in a specific merchandise  
9 category?

10 A No.

11 Q So that I can get a scope of what your business  
12 is, how many clients would you have at any given time?

13 A We would do probably, you know, somewhere like  
14 30 assignments a year so, you know, two or three, four.

15 Q And in terms of the employees that you have, of  
16 the six employees, how many spend their time working on  
17 projects for clients versus administration of your  
18 company?

19 A Four are consultants.

20 Q Including yourself?

21 A Yes.

22 Q So when you work with a client, how closely do  
23 you get to know that client's operations?

24 A Intermittently because that's part of what we  
25 sell, is -- we don't sell it with a partner and then give

1 them a junior. We have no juniors. The least  
2 experienced person is 16 years in this industry.

3 Q So do you get to understand your clients' -- the  
4 systems that they use and -- is that right?

5 A Yes.

6 Q And that would include their IT operations,  
7 right?

8 A Right, but it's very much feature function and  
9 orientation, how do their internal systems today provide  
10 information to the user community and to the management,  
11 how will the changes that they want to make longer term  
12 affect the systems, or how do we have to affect the  
13 systems to achieve what management wants to do in terms  
14 of growth. We look at continually, you know, vendor  
15 estimates. You know, a number of our -- probably half of  
16 our clients internally develop their own systems and the  
17 other half are buying commercial systems so, you know,  
18 it's a combination of really trying to help them  
19 understand the cost, the effort. You know, IT has -- I  
20 think across a lot of industries doesn't have a really  
21 good track record in terms of delivery within budget and  
22 on time, and so, you know, that's what we try to help  
23 people do, is improve that success rate.

24 Q So then you get to know your clients' IT  
25 infrastructure very well, I take it?

1           A     Yes.

2           Q     And do you also get a sense of what their IT  
3 costs and what their IT budgets are?

4           A     Yes.

5           Q     And what kinds of documents would you usually  
6 see or how would you get an understanding of what their  
7 IT budgets are?

8           A     Well, you know, we're often looking at  
9 proprietary profit and loss statements for the company  
10 so, you know, we'll take and understand what those costs  
11 are as a percent of net sales. You know, and it's not  
12 just one line. You're kind of interpreting half a dozen  
13 to a dozen lines. You know, the studies we do where  
14 we're looking to replace a system, we often want to -- we  
15 often have to determine what the change in the IT  
16 Department is going to be, just like we have to determine  
17 what the return on investment is going to be for a  
18 system. The systems are fairly expensive, and how  
19 they're going to get that money back is important or  
20 they're not going to spend the money unless they have to.  
21 And so we -- you know, sometimes you're going from a very  
22 old system that might be 15 or 20 years old that works  
23 well, but it's kind of reaching its limit, and you're  
24 implementing it, say, with a totally new technology that  
25 is maybe more flexible and more -- requires less



1 hand-holding or people time to manage it. So we  
2 understand those and help clients work through what those  
3 costs are and so forth.

4 Q So by the end of the process, you have a very  
5 good understanding of the company's financials and how  
6 their IT costs fit into the overall business?

7 A Not always the total financials, but we have a  
8 pretty good idea of -- we know exactly what -- not  
9 exactly. We know what we have projected the total cost  
10 to either develop and install a system is going to be as  
11 best as we can, or if they're buying a commercial system  
12 we know what the costs of the various stages through this  
13 process are going to be, and we know the modifications  
14 that are going to be required, and the services, meaning  
15 training and conversion and implementation. And the  
16 services part of the project is often 50 percent or more  
17 of the total cost because of the cost of the professional  
18 people that a vendor uses.

19 Q As the president of your company, how much time  
20 do you spend consulting versus on the general management  
21 of your company?

22 A When you have six people, you don't have a lot  
23 of general management. My wife is involved with the  
24 business part time, and she takes care of everything. So  
25 I spend a hundred -- not a hundred, but 95 percent, 90

1 percent of my time consulting.

2 Q And do you personally do consulting in the three  
3 areas we discussed earlier, the systems and then the  
4 warehouse and distribution and strategic planning?

5 A I do. Most of it is in systems.

6 Q Do you have any software programming experience  
7 yourself?

8 A I do.

9 Q And tell me about that experience.

10 A Well, you see in my CV I started at NCR in 1970  
11 through '73. And at that point, NCR was going from being  
12 a mechanical cash register company with no electronics  
13 and had very -- had a couple of models of computers, but  
14 it was just the beginning of the electronic age for  
15 information systems. And so what I did was, I was on a  
16 regional team that implemented the first point of sale  
17 systems and computer systems in this area of the country  
18 between Pittsburgh, Philadelphia and Richmond,  
19 Washington, D.C. So I installed the first point of sale  
20 for NCR in the world.

21 Q And did you do any of the actual programming?

22 A No, no. I have tried programming in the late  
23 '60s, but it wasn't my forte. I've learned to manage  
24 programmers better than programming.

25 Q All right. So do you do any actual programming

1 yourself now?

2 A No.

3 Q Okay. What is Manage Metrix, the software  
4 product you mentioned earlier?

5 A Okay. Could I answer -- come up forward on  
6 this?

7 Q Sure.

8 A So NCR through '73. Then from '74 through -- or  
9 '73 through '83, I worked for Garfinckel, Brooks  
10 Brothers, Miller & Rhoads, which was one of the leading  
11 department store and specialty store companies in the  
12 country, and when that was acquired by Allied Stores in  
13 like '82 or '83, it was a half a billion dollar business.  
14 I was responsible for all the programming and  
15 implementation of systems for that company, and I had 50  
16 programmers working for me through project managers.

17 And then after that I spent two years -- I  
18 formed a company, which was kind of a predecessor to what  
19 I'm doing now, with two other individuals, and we  
20 designed and programmed fulfillment and customer service  
21 and marketing systems for catalog retailers, and we had  
22 Tiffany and Henri Bendel and DH Holmes, which is now part  
23 of Dillard's, as clients, and we operated their data  
24 centers for them.

25 And then I started this company.

1 selling Manage Metrix to clients?

2 A No. We have one, one of the four consultants  
3 that's doing that, and I'm involved with, you know,  
4 status calls once a week, but, you know, I'm saying long  
5 term it will be quite a bit different we're hoping.

6 Q And what is your vision for how it will be  
7 different in the future?

8 A One thing about consulting is, when you do large  
9 projects -- for example, you know, if we were to do an  
10 entire project for a small company, it might be a  
11 \$100,000 project, plus software. Our biggest project was  
12 \$820,000 over three years. So when you do those --  
13 companies, when they buy systems or they build a  
14 warehouse or they expand a warehouse, they're not doing  
15 that every year, so we have, you know, every year one or  
16 more big projects that we're working on and then a bunch  
17 of smaller ones that are research. So we're hoping that  
18 that will provide a more continual kind of revenue from  
19 maintenance and support and so forth.

20 Q I see. Do you assist clients right now in  
21 complying with -- or implementing processes to comply  
22 with regulations, federal and state, local regulations?

23 A We do.

24 Q And what kind of work do you do in that area?

25 A Well, every client should have the Federal Trade

1 Commission, FTC, notifications for backorders, and it  
2 continually surprises us with companies that don't. And  
3 as I said at the beginning, we also advise people on  
4 shipping and handling, and over the years that became  
5 kind of a hotly contested issue as to whether that would  
6 be -- how much shipping and handling is too much, we  
7 think about it, because it is an offset called a -- you  
8 know, some kind of an income.

9 (Interruption.)

10

11 A Shipping and handling income, and the offset of  
12 the shipping expense. In the last couple of years, it  
13 hasn't been an issue, but it was prior to that.  
14 Customers are sensitive to changes in costs, so if you  
15 over- -- if they feel like you've overcharged them, the  
16 perception of being overcharged, then you're going to  
17 inhibit the sales or lose sales.

18 BY MS. SCOVILLE:

19 Q So other than in the areas of notifications for  
20 backorders and shipping and handling, do you do other  
21 work assisting clients in complying with regulations?

22 A Well, every system has sales tax reporting so,  
23 you know, how they're -- what their nexus is, how they're  
24 going to collect that and report it, whether they're  
25 going to use a commercial system or they're going to do

1 that internally. You know, the systems have the ability  
2 to do it internally, not necessarily always the best way,  
3 but it can get the job done.

4 The other thing, the other area in the last  
5 couple of years has been PCI compliance, which is a huge  
6 cost to companies.

7 Q And as I understand it, that is the protocols  
8 for keeping credit card information secure?

9 A That's the root of it, yeah.

10 Q Okay. Any other areas in which you assist  
11 clients in complying with regulations?

12 A I think that's about it.

13 Q So as part of your business, do you become  
14 familiar with how much companies spend per customer, if  
15 it's a catalog company, to produce and send their  
16 catalogs?

17 A Very much so.

18 Q Okay. And do you become familiar, if it's an  
19 Internet company, on how much the on-line retailers spend  
20 to market to new customers?

21 A Yes.

22 Q Can you give me an average range of a per  
23 customer cost that a catalog company would spend to  
24 market and send their catalogs?

25 A In my report, I said \$10 to \$15 to acquire a

1 customer.

2 Q Let's find that. I have a recollection of it  
3 being 10 to 25?

4 A 10 to 25?

5 Q But let's find that.

6 A Let's double-check.

7 Q It's actually in Exhibit D.

8 A Exhibit D? Right.

9 Q And your opinion says, "The cost to acquire a  
10 customer can be \$10 to \$25 --

11 A Yes.

12 Q -- because of the low response nature of direct  
13 marketing."

14 A That's true.

15 Q And is the 10 to 25 the same for both catalog  
16 companies and Internet companies --

17 A No, it isn't.

18 Q -- or is there a difference? What is the  
19 difference?

20 A The difference is that Internet companies often  
21 do not have catalog so the cost that they incur can be,  
22 in some Internet operations, can be actually much higher.  
23 In the early years of this millennium, it wasn't uncommon  
24 for companies to spend \$80 to \$100 to acquire a customer  
25 because they were running very expensive media, like

1 inner ads and things like that. So the costs that go  
2 into acquisition today are people in merchandising,  
3 search engine optimization, affiliate marketing, so those  
4 costs are -- depending on the makeup of that within a  
5 company, it's almost always higher when you sit down and  
6 you look at how many new customers they bring on board  
7 than this number, but it varies by company.

8 Q So the average Internet company, if I could just  
9 try and encapsulate what you just said, the average  
10 Internet company would spend more than \$10 to \$25 --

11 A That's my opinion.

12 Q -- is that right?

13 A Yes.

14 Q Can you give me a range of a per customer  
15 estimate for Internet companies?

16 A I would say it would be -- you know, you will  
17 always find some that are in this range, so it may be \$10  
18 to \$15, but it's often as high as \$30 to \$35.

19 Q And then would the 10 to 25 represent the cost  
20 to acquire a customer for a catalog company?

21 A Yes.

22 Q Okay. And the way your report is phrased, this  
23 is the cost to acquire a customer, and I guess my initial  
24 question had been a little bit different and maybe  
25 there's no functional distinction. My question was a



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 Q Okay. And would you provide the same confidence  
2 interval of 5 percent for those estimates?

3 A Yeah.

4 Q Later in the same paragraph, you say, "Well-run  
5 companies carefully budget internal IT projects." So  
6 that I can get a sense of the industry, what would the  
7 range of an IT budget be for a small retailer versus a  
8 large retailer?

9 MR. SCHAEFER: Just for clarity, do you mean the  
10 entire IT department or do you mean --

11 MS. SCOVILLE: I mean, the entire IT department.  
12 Exactly.

13 A If it's a shop that doesn't do anything new,  
14 they're just kind of maintaining what they're doing, it  
15 might be 1 to 1 1/2 percent of net sales. An average  
16 shop might be, you know, where they're doing some new  
17 things, might be 2 percent. And if it's a fast-growing  
18 company doing a lot of things where they have to trade  
19 out their systems or they have to build, say, a West  
20 Coast fulfillment center, it's going to be above that,  
21 above 2 percent.

22 BY MS. SCOVILLE:

23 Q And would that range be the same for small  
24 retailers versus large retailers?

25 A No, but it's -- it sounds logical that it should

1 moderate, large, mega. Can we break it down in that way  
2 in terms of the industry?

3 A I think we can, but I'm not sure -- I'm not  
4 trying to anticipate your question, but I'm not sure --  
5 when you ask me what the cost is for, say, a small or a  
6 moderate-sized company, again, it's going to vary by, you  
7 know, what the technology is they have and how new it is  
8 and how many people on staff that it takes to hold it  
9 together. And I just said that I have learned that it  
10 doesn't vary -- you can't make large companies always be  
11 more efficient, so I'm not sure -- I'll do whatever you  
12 want me to do --

13 Q Sure. No, that's fine.

14 A -- but I don't know where you're going.

15 Q I'm just trying to get a sense in absolute  
16 dollar terms. So let's start with a small company, one  
17 with, you know, under \$5,000,000 in net sales. What  
18 would an average range be for their IT support costs in  
19 dollar terms?

20 A Under \$5,000,000, can I --

21 Q Sure. Of course.

22 A You don't mind if I write down here. So I would  
23 say -- well, first off, if they were going to buy a new  
24 system, they're going to replace that, they would  
25 spend -- under \$5,000,000, they might spend anywhere from

1 \$30,000 to \$100,000 to replace it. And then internal  
2 staff, let's see, costs, they would have, I say, anywhere  
3 from 50- to 100,000 annually on an ongoing basis as a  
4 minimum.

5 Q Sure, sure. And so the 50- to \$100,000 annually  
6 would be a minimum?

7 A Yeah.

8 Q Okay. And a small company, the size that we're  
9 discussing, how many IT staff people would a company like  
10 that employ on average?

11 A Anywhere from zero to one. A lot of the systems  
12 are designed in a way that pure IT people aren't  
13 necessary. Some people hire them so that they can be  
14 more flexible with what they need.

15 Q And is that because they're relying on outside  
16 vendors?

17 A When they need to. And they're paying, in many  
18 cases they're paying a support fee, which can be -- you  
19 know, the typical support fee is 18 to 20 percent of  
20 whatever the purchase price is, so when you talk about  
21 what's the total cost, and I'm doing it off the top of my  
22 head, it's not just people. It's support fees, it's  
23 hardware maintenance, it's --

24 Q And would the support fees be part of the 50- to  
25 \$100,000 minimum that you estimated earlier?



1           A     No. I would --

2           Q     Put the support costs on top of that?

3           A     Yeah.

4           Q     So once you added support costs into a small  
5 company's IT costs in terms of dollar values, what would  
6 a small IT -- sorry, what might a small retailer be  
7 spending annually on support costs?

8           A     See, I always try to equate it to percent of net  
9 sales so I would guess from what I know -- you know, from  
10 what I've been doing for many years, it's going to be in  
11 a -- you know, from 1 to 2 percent of net sales. You  
12 know, management, when they're looking at costs, they  
13 know these numbers too so, you know, if they were  
14 presented with a deal that costs 3 percent of net sales,  
15 it's going to get thrown out the window.

16          Q     Sure, sure. Now, what about for a  
17 moderate-sized company, one that you said would be in the  
18 20- to \$40,000,000 a year in net sales, what would they  
19 be spending on their IT systems annually?

20          A     Well, they're, on the low end, they're going to  
21 be spending, say, 200- to 400,000.

22          Q     And what would that include?

23          A     It would include -- may include, say, one  
24 programmer, an operator or an operator and a half to take  
25 care of the operations, again, software support, that

1 18 to 20 percent, the hardware maintenance. There's not  
2 a uniform way of necessarily tracking all costs --

3 Q Sure.

4 A -- and you can't just say that every company  
5 tracks the costs the same.

6 Q Right. No, I'm just trying to get a sense of  
7 the industry --

8 A Yeah.

9 Q -- and how it works.

10 A Okay.

11 Q And when we were talking about support fees and  
12 18 to 20 percent, let me just confirm that 18 to 20  
13 percent is the percentage of the cost of the initial  
14 software purchase, right?

15 A True, the license fees.

16 Q The other range of companies that you gave me  
17 was the mega of \$250,000,000 in a year up in annual net  
18 sales.

19 A Right.

20 Q Is there a category between moderate and mega  
21 that we should be discussing?

22 A Well, again, it's going to vary. What I've said  
23 here is three. There's everybody in between, right --

24 Q Sure.

25 A -- and it's going to vary. Just like we said,

1 if they're not doing anything, 1 to 1 1/2, if they're  
2 doing something, 1 1/2 to 2, and if they're doing some  
3 great things, it's over 2. It's all on a continuum.

4 So just to go back to one thing.

5 Q Sure.

6 A We talked about the purchase of a new system for  
7 the low end, and so purchase for a \$20,000,000 to  
8 \$40,000,000 business, that might be more in a 400- to  
9 \$700,000 purchase. So if you take the mega, mega can be,  
10 you know, probably the low end, \$2,000,000. Obviously,  
11 we don't know the upper end of the megas. You know, I've  
12 had projects that cost 8- or \$9,000,000.

13 Q But that would be on a single project for a mega  
14 retailer --

15 A Right.

16 Q -- not their total IT support costs?

17 A True.

18 Q Do you have any sense of what total IT support  
19 costs would be for a mega retailer?

20 A Well, again, the same thing, 1 to 1 1/2 if  
21 they're not doing much, 1 1/2 to 2 if they're doing  
22 something, and above 2 if they're replacing. You know, a  
23 mega -- I've had clients that will have 200 people in  
24 their IT center in a mega company. Probably the typical  
25 would have maybe at least a dozen on the low end, but big

1 companies have a lot of people.

2 Q And if a mega company were to purchase a new  
3 software system, what kind of numbers would we be talking  
4 about there?

5 A That's what I was just saying.

6 Q I see.

7 A 2,000,000 on the low end, 8- or 9,000,000 on the  
8 upper end.

9 Q I see. Okay. Back to the report. At the  
10 bottom of page 5, you have in the last paragraph Cost to  
11 Evaluate Requested Systems Changes, and you say, The IT  
12 industry best practice is to conduct an evaluation of  
13 proposed changes. And you go on to estimate that a  
14 detailed evaluation can be \$1,000 to \$5,000 on the low  
15 end, to much higher costs for complex changes and new  
16 subsystems. How did you arrive at the \$1,000 to \$5,000  
17 figure for the low end?

18 A Just from what I do every day. In some cases,  
19 we actually help clients set up what we call the change  
20 management systems, in other words, the way the users  
21 request changes to systems and how to cost it out and  
22 things like that, or another case is, you know,  
23 management, when I'm there, may say, Well, let's look  
24 at -- you know, we often look at like a multiple year  
25 backlog of changes. Because they never have enough

1 people so we sit down and we look at it and we say, Well,  
2 you know, if you had a new system, we could get rid of  
3 half of these changes. Maybe we could convince the users  
4 of the other half that we cannot do these or push them  
5 out into the future. So, you know, we're helping  
6 companies research the change sometimes.

7 Q And if a company were to evaluate the changes  
8 required by the Colorado regulations, where in this scale  
9 that you provided would an evaluation for the Colorado  
10 regulations fall?

11 A This is a fairly new area, as you can imagine.  
12 My concern is that probably for half the people, it's not  
13 on their radar yet. My guess is that because it's not  
14 something we've ever dealt with, if it were a statute  
15 that remains a law, that it will be in the 5,000 number  
16 because there will be a lot of concern and haste to get  
17 something done. If we don't understand something, we're  
18 apt to spend more to do something.

19 Q And the estimate of \$5,000, is that built into  
20 the cost in Exhibits A through C or is that separate and  
21 on top of?

22 A Well, what I did with the estimates in A through  
23 C was, I said, you know, let's assume it's just a couple  
24 of thousand dollars. I didn't use a \$5,000 number. I'm  
25 just saying when somebody doesn't understand something, I

1 can see spending a lot more --

2 Q Sure.

3 A -- a couple thousand.

4 Q What I'm trying to understand is if the  
5 evaluation costs are built into --

6 A They are.

7 Q -- the numbers that you've already provided in  
8 the exhibits.

9 A They are, yes.

10 Q Okay. Let's see, on page 7, subparagraph 2  
11 there, you talk about the Cost for Marketing Service  
12 Bureaus --

13 A Right.

14 Q -- and I need to understand, first of all,  
15 exactly what a marketing service bureau is.

16 A Most companies use marketing service bureaus in  
17 a -- in anywhere from one to four different ways. When  
18 they rent and exchange lists -- that's a premise of much  
19 of direct marketing, that the way you build your business  
20 is you rent and exchange similar kinds of product lists  
21 or service lists. So you may not be doing it directly  
22 with a competitor, but certainly a list that you think is  
23 going to respond because, as we said before, it's a low  
24 percent response industry. So when we do that, we might  
25 have anywhere from 50 to thousands of different segments

1 of lists that have to be merged and purged against your  
2 internal file because you don't want to mail the same  
3 book to --

4 Q And lists, you're talking about customers'  
5 names --

6 A Yes.

7 Q -- and addresses?

8 A Yes.

9 Q Okay.

10 A So we don't want to mail -- let's say, if we  
11 back up, the best customers are on many people's lists,  
12 okay, because that's where -- they're a good customer.  
13 They like to shop this way. So we don't want to -- if  
14 you're on four lists, which is not uncommon, there can  
15 be -- you know, we actually develop a lot of numbers for  
16 companies from the service bureaus so we know how many  
17 people shop once, twice, three times, four times, up  
18 through like ten times, plus. So we don't want to send  
19 multiple catalogs or promotions so we want to get those  
20 down, so we call that merge/purge. So that's one way.  
21 Most people would use service bureaus for that.

22 Another way is that even though they have  
23 internal marketing files -- every company has internal  
24 operational files, in other words, when a customer calls  
25 in, they say, where is my backorder or you shipped me

1 this and it's broken or can I get another widget just  
2 like this one. That's an operational file. You go in  
3 and -- now, some people also take their operational files  
4 and make those internal marketing files, and there may be  
5 more data that's added or it looks different than just  
6 operational data.

7 Q And would a service bureau do the transformation  
8 from an operational file into a marketing file or would  
9 the companies do that and then send a bureau the  
10 marketing file?

11 A No. A low percentage of the companies will try  
12 to do that internally by themselves. They may do the  
13 merge/purge outside and then have that sent back. But  
14 most, most mailers will use the service bureau also to  
15 develop the mailing, in other words, what's going to be  
16 mailed. And the reason is, is that the -- how data is  
17 organized and analyzed is fairly complex. It's not just,  
18 you know, a bunch of names and addresses and Janie bought  
19 this and Bill bought that. You know, it's tracking, over  
20 a longer period of time, it's tracking response rates by,  
21 you know, how many are one-time buyers and maybe we've  
22 sent the one-time buyers reactivation notices to try to  
23 get them to buy again. And so we track what marketing  
24 data -- or, excuse me, what marketing promotions an  
25 individual customer actually got, okay, and then we



1 determine through the service bureaus are we spending too  
2 much or too little to get that response. So it becomes  
3 fairly, it becomes fairly data intensive and data rich.

4 Q So the marketing service bureaus, as I  
5 understand what you just said, are the firms that are  
6 doing the data crunching --

7 A Yes.

8 Q -- to determine that I am a woman of a certain  
9 age, who has small children, who only shops when she has  
10 free shipping offers or something like that --

11 A True.

12 Q -- is that right?

13 A That's exactly right.

14 Q Okay. So the marketing service bureaus are the  
15 people who crunch all the numbers to make sense of it for  
16 the retailers?

17 A And sometimes analyze it for them, meaning the  
18 human, you know, here's the report, but this is what it  
19 means.

20 Q Okay.

21 A Then you have another use is for actually  
22 developing models, in other words, data models. How do I  
23 find more of Stephanie. Stephanie is a type of  
24 shopper -- is a good shopper for kids under six years old  
25 or five years old.

1 through, say, marketing models to reduce that or keep it  
2 in line, to keep that cost in line.

3 Q And those five big database companies, would  
4 those be like the Experians and the Datalogics and the  
5 Acernos?

6 A NextAction, Abacus. Abacus is the biggest in  
7 the thing.

8 So the fourth kind of thing, they, obviously,  
9 since they have your data, they will do special projects,  
10 you know. And as we said in the report, there may be  
11 some people who rely on one of those -- either their  
12 service bureau or these marketing providers. They may --  
13 if they had to, they would possibly engage them to do the  
14 compliance.

15 Q Now, do you in your business receive requests  
16 for proposals from marketing service bureaus?

17 A We do. It's not as commonplace for us as the  
18 system stuff, but we, you know, help primarily smaller  
19 mailers that are trying to expand their knowledge to make  
20 the right choices in terms of who do you use and what the  
21 costs are going to be. You know, you can get carried  
22 away and spend too much doing it and not materially end  
23 up with a higher sales number.

24 Q So when your report indicates that you have  
25 knowledge of a number of marketing service bureaus'

1 pricing models for building, updating and analyzing  
2 customer purchases -- I guess, first of all, I better  
3 break this down. What do you mean when you say for  
4 building, updating and analyzing customer purchases?

5 A Well, that would be the process from taking the  
6 mailers' orders and then sending those to the marketing  
7 service bureau and updating and going through the various  
8 steps of hygiene and merge/purge and, you know, the data  
9 models that they are advising to use. And some of it is,  
10 when you say the pricing models, some of it is standard,  
11 somewhat standard. Like the cost of merge/purge has  
12 become kind of a commodity, where other things, like the  
13 data modeling, they have -- you know, often companies  
14 will have minimums of how much they are going to charge  
15 to build a model, and it's really as much about  
16 negotiation and can I afford to not do it or do I have to  
17 do it. And marketing data modelers are expensive  
18 people.

19 Q So when you say that you have knowledge of a  
20 number of marketing service bureaus' pricing models, as I  
21 understand it, your opinions of the costs in these three  
22 categories of regulation requirements are based on what  
23 you know about --

24 A Yeah.

25 Q -- the service bureaus' pricing models, right?

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 test them to see if they're important to the topic and  
2 drop them out if they're not.

3 MS. SCOVILLE: This will be 6.

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

7 BY MS. SCOVILLE:

8 Q Do you recognize Exhibit 6 as an e-mail that you  
9 sent to Mr. Schaefer on Tuesday, September 28?

10 A Yes.

11 Q This says, I just had a person call that I  
12 wanted to interview earlier. Do you remember who you  
13 spoke with on September 28?

14 A I'm not entirely certain, but I'm pretty sure it  
15 was Natural Solutions. It's a software vendor.

16 Q And what did you ask Natural Solutions on  
17 September 28?

18 A Same thing, process. You know, just talking  
19 about their order management system.

20 MS. SCOVILLE: Let's mark this as Exhibit 7.

21 (Exhibit No. 7 was  
22 marked for identification.)  
23

24 BY MS. SCOVILLE:

25 Q Exhibit 7 appears to be an e-mail -- sorry, not

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 the bottom of the first paragraph on page 2, you talk  
2 about the relative size of the Colorado market as a  
3 percentage of the national market, and I think you gave  
4 me that figure earlier this morning as 1.6 percent?

5 A Right.

6 Q And how did you arrive at 1.6 percent?

7 A I believe that what I went to was the last  
8 census on the Internet and took the numbers off of that,  
9 but, I mean, I don't remember which year and I don't  
10 remember -- I don't have the numbers written down.

11 Q Okay. And when you say the relative size of the  
12 Colorado market as a percentage of the national market,  
13 are we talking about the national market for all goods?

14 A No. As kind of a general principle, that Direct  
15 Marketing customers are in proportion to the population.  
16 They're not skewed to a region, they're not necessarily  
17 skewed to certain income levels so, you know, generally  
18 as a principle, they're in proportion to the  
19 population.

20 Q Okay. But there could be particular retailers  
21 where Colorado was a higher percentage of their market,  
22 for example, outdoor and camping gear; is that right?

23 A Right.

24 Q And retailers where it would be less, surfing  
25 gear?



1           A    True.   But you'd have to look at an individual  
2 company basis.

3           Q    Okay.   But you aggregated nationally based on  
4 the percentage of Colorado's population to the national  
5 population?

6           A    Right.   The example you gave would be a far, far  
7 exception.

8           Q    Okay.   So in your professional experience, as I  
9 understand it, in the majority of companies, the  
10 proportion of Colorado shoppers would be proportionate to  
11 Colorado's population --

12          A    Yes.

13          Q    -- as a percentage?

14          A    Yes.

15          Q    Okay.   A little further down on page 2 of your  
16 report, the second bullet point from the bottom indicates  
17 that, "The Colorado statute and the regulation will  
18 require that a considerable effort be spent on IT  
19 systems.   IT costs will vary between retailers and  
20 software vendors depending on the age of the order  
21 processing and website technologies."   And I'd like to  
22 get a sense based on your professional experience of how  
23 old the average retailer's website technology is.

24          A    Website, probably -- I would say it's maybe two  
25 to five years.

1 Q And what about their order processing?

2 A It would be typically longer. It might be three  
3 to five or something.

4 Q And what would the average life span be of a  
5 website's technology? How often would an e-commerce  
6 retailer have to upgrade their technology?

7 A Well, it's upgraded every month. I mean, it  
8 changes. Whether it's traded out for a new system is a  
9 different issue, but it's maintained and changed all the  
10 time.

11 Q Okay. What would the typical life span be for  
12 trading up to a new system, as opposed to just tweaking  
13 and modifying monthly the others or the current system?

14 A I'd be -- I don't have statistics in my head.  
15 You know, it depends on how fast the company is growing  
16 and whether it can be cost justified and --

17 Q What would a range be in your professional  
18 opinion?

19 A Can you say the question again, please?

20 Q Sure. What would the range be for a company to  
21 upgrade their website technology to a new system, as  
22 opposed to doing a monthly software update?

23 A I would think they'd want to -- you know,  
24 typically, people want to keep a web platform, you know,  
25 three or four years.

1 opposed to modifying the order path, to notify the  
2 customer before they hit the checkout button?

3 A I believe that the way I remember this is  
4 that -- there's a couple of things. One is, you're  
5 dealing with just -- you segregated out e-commerce. I  
6 was going to give you something about a call center, but  
7 let me -- well, I think that the way that I interpreted  
8 that after I talked to Matt was that the prudent thing to  
9 do from this regulation was to modify the order path to  
10 do that.

11 Q Okay. Did your opinion take into account that  
12 the e-commerce retailer would not have to necessarily  
13 change the order management path electronically, but  
14 could do something in terms of even just putting a slip  
15 of paper into the package sent to the customer?

16 A I didn't think that that was a possibility.

17 Q Okay. Why didn't you think that that was a  
18 possibility?

19 A Well, I had asked Matt whether that was a  
20 workaround, and he told me, as best I can remember, that  
21 it had to be in the order path and an insert in a box  
22 would not fulfill the statute.

23 Q And if an insert in the box would be an  
24 acceptable way for companies to comply with the  
25 transactional notice, would that be a cheaper alternative

1 than modifying the order path electronically?

2 A Only if that fully meets the State of Colorado's  
3 regulation.

4 Q Okay. But assuming that it did meet the  
5 regulation, that would be a less expensive alternative,  
6 right?

7 A Yes.

8 Q What would you estimate, if you can, it would  
9 cost for companies to meet the transactional notice by  
10 including a flier in the package?

11 A I don't think I can do that just sitting here  
12 and kind of grabbing at a number.

13 Q Are you familiar with what companies are  
14 actually doing to comply right now with the transactional  
15 notice?

16 A I am with -- if you go back to what've I said,  
17 in these 17 companies that I talked to, half of them were  
18 unaware so, yes, I understand unaware. There were a  
19 couple that I talked to, and I don't remember their names  
20 specifically, that were working through how to think  
21 about it, and I think that's all I can say with some  
22 certainty.

23 Q Okay. Are you aware that some companies are  
24 complying with the Colorado regulations by inserting a  
25 single sheet of paper or a flier into packages?

1 A No.

2 Q Are you aware of any other instances where  
3 retailers would comply with a regulatory requirement by  
4 including a single sheet of paper, a flier in a package?

5 A There may be with California, maybe people doing  
6 something with lead. You know, they certainly have to  
7 notify the customer of that, the presence of a certain  
8 percentage of lead in product, you know, and ship certain  
9 plants to certain states, so that would just be a total  
10 non-shipment.

11 Q Okay. So that would not be an example --

12 A No.

13 Q -- of an instance where a retailer is complying  
14 by doing this?

15 A No. I can't think of any others just off the  
16 top of my head.

17 MS. SCOVILLE: All right. This will be No. 9,  
18 please.

19 (Exhibit No. 9 was  
20 marked for identification.)

21

22 BY MS. SCOVILLE:

23 Q Okay. Do you recognize Exhibit No. 9 as being a  
24 draft of your opinion, dated September 16th?

25 A Yes.

1 Q I'd like you to take a look at page 2, please.  
2 And there is a highlighted box of text right in the  
3 middle of the page talking about the transactional  
4 notice, and the highlighted box says, "This is required  
5 on every purchase. It can be done by inserting a  
6 disclosure in the outgoing package, attached to the  
7 computerized order form or printed on the order." And  
8 then you have underneath that a Note to Brann Law: "If  
9 you notify the customer when they place a web order do  
10 you need to print and disclose on order?"

11 Did you initially think that it would be  
12 possible for retailers to comply with the transactional  
13 notice by putting a flier in the package?

14 A As best I remember, yes.

15 Q Okay. And as I understand it, you removed that  
16 reference from your draft because the Brann Firm told you  
17 that would not meet the regulations; is that right?

18 A That's to the best of my memory.

19 Q Going back to Exhibit No. 8, which is the text  
20 of the regulations, are you aware of anything in the  
21 regulations that would require that the transactional  
22 notice be given in the order path before the transaction  
23 is completed?

24 A I wouldn't know where to find it. I mean, I  
25 can't --

1 Q Okay. So it could be an icon or a URL?

2 A Right, or just a hot link, if you know -- you  
3 know, like the words "Colorado sales tax".

4 Q Highlighted and underlined --

5 A Right. Yeah.

6 Q -- you click on that, and then it takes you  
7 somewhere else?

8 A Yes.

9 Q And you assume that the linking notice would  
10 send customers to a retailer's FAQs; is that right?

11 A It's one way to do it.

12 Q Okay. What would another way to do it be?

13 A Just to have a -- when you do that hot link, to  
14 be able to go out to a place either in the web system or  
15 in the order management system where you have company  
16 policies so that, you know, we could put out there in a  
17 user-friendly way what the statute said and what the  
18 customers' options were, and that they would be required  
19 to pay the sales tax if, as you know better than I, all  
20 the possibilities. So just, you know, we have places in  
21 the systems that allow us to do that for both call center  
22 and e-commerce.

23 Q So it would be possible then for the linking  
24 notice to take a customer not to the frequently asked  
25 questions page, but to like the terms and conditions

1 section of the offer?

2 A Yeah. We don't call it that, but it would be  
3 just like, you know, our company policies. It could be  
4 on returns or product damage. And on the surface of it,  
5 it probably wouldn't be visible to the customer without  
6 clicking that maybe.

7 Q And in terms of the cost that it would take  
8 companies to create this path, is the cost any different  
9 if it takes -- if the linking notice takes the customer  
10 to frequently asked questions, as opposed to the  
11 company's policy page?

12 A No.

13 Q Okay. What about a pop-up window, would a  
14 pop-up window work as an alternative?

15 A Yes.

16 Q And would programming the order path for a  
17 pop-up window be more or less expensive than a linking  
18 notice?

19 A It might be, it might be somewhat more, but a  
20 small amount of money. A question would be, you know, do  
21 you want the customer to click on that, that they accept  
22 that or not, which is kind of a negative, you know,  
23 customer service issue.

24 Q And when you said that it might be somewhat more  
25 but a small amount of money, tell me what you mean by



1 that. I'm not sure I understand that.

2 A Well, I mean, it's going to vary by company. It  
3 might be a couple thousand dollars more, it might be  
4 less.

5 Q To program a prop-up window --

6 A Yeah.

7 Q -- as opposed to a linking notice?

8 A It's not a huge amount, but it would be more  
9 than just hitting an FAQ.

10 Q You mentioned in the last paragraph under  
11 1(a) -- we're back on Exhibit 1, your report here -- that  
12 you have used the assumption that companies adopt a  
13 linking notice, rather than some form of "work around".  
14 What would a "work around" be?

15 A "Work around", generally the way the term is  
16 used, is something that may be less desirable, but gets  
17 it done without major programming.

18 Q And what would be some examples of "work  
19 arounds" in this particular context?

20 A I don't have any.

21 Q Let's go back to Exhibit No. 5, if you would,  
22 which is one of the earlier drafts of your report. Okay.  
23 If you would look at page 7, please. The second full  
24 paragraph says, "Retailers we have talked to are looking  
25 at a variety of solutions and workarounds including

1 having the sales person or Call Center rep input a short  
2 phrase message that will print on the customer order and  
3 refer the customer to the website for more details."

4 I guess my first question is, the workaround  
5 that involves having a salesperson or call center rep  
6 input a short message that will print on the customer  
7 order and referring the customer to the website, is that  
8 more for phone sales and catalog companies or is that  
9 referring to an e-commerce situation?

10 A Phone sales.

11 Q Okay. And did the 15 to 17 companies that you  
12 spoke with give you any other examples of workarounds  
13 that they were using?

14 A Not that I can recall.

15 Q Okay. The first sentence here says, "Retailers  
16 we have talked to are looking at a variety of solutions  
17 and workarounds", and then you list one example.

18 A Right.

19 Q And then actually there's another example in the  
20 following sentence. Do you recall any other solutions or  
21 workarounds that the 17 companies discussed with you  
22 other than what's listed here?

23 MR. SCHAEFER: Objection, just to the extent  
24 that he didn't say that all 17 talked about it.

25 A The only one that I remember was the insert that

1 did come up, and I told them I didn't think that would  
2 work.

3 BY MS. SCOVILLE:

4 Q Okay. The second sentence of this paragraph  
5 says, "Another is that e-commerce customers to force the  
6 Colorado customer, when they enter their delivery  
7 address, to have to click a button before proceeding with  
8 the sale that they understand their sales tax  
9 obligations." Is this something that's actually being  
10 done by a company?

11 A No. I don't remember -- no, but it goes back to  
12 what I just said a couple of minutes ago. It has some  
13 negative customer service ramifications. People just  
14 kind of threw this up.

15 Q Okay. So it was an idea --

16 A Right.

17 Q -- that was thrown out by one of the people that  
18 you talked to?

19 A Right.

20 Q All right. The next paragraph says, "There are  
21 a variety of workarounds that we have heard discussed  
22 which probably do not meet the regulation. One is using  
23 e-commerce trigger e-mails to inform the Colorado  
24 customer after the order is accepted by the system." Is  
25 that something that companies are actually doing?

1           A    No.  It's an idea again.

2           Q    And did you believe that that option for  
3  complying with the regulations would be acceptable?

4           A    No.

5           Q    Okay.  And is that based on your conversations  
6  with the Brann Law Firm?

7           A    I don't, I don't think so.  It just seemed to be  
8  when using a trigger e-mail, it's after the fact rather  
9  than before.

10          Q    Okay.  So in your opinion, that would not meet  
11  the Colorado regulations?

12          A    That's my opinion.

13          Q    If it did meet the Colorado regulations, would a  
14  trigger e-mail be less expensive than changing the web  
15  order path?

16          A    Assuming that everyone can identify a Colorado  
17  order -- a Colorado customer and trigger an e-mail may  
18  mean some changes there, but --

19          Q    Would it be less expensive, I guess is my  
20  question.

21          A    Than what, what we're assuming here?

22          Q    Than changing the web order path.  And let's  
23  actually start over so we've got a clean question.

24          Sorry.

25                    Would a trigger e-mail after an order is placed

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 design and what management wants to do and whether it  
2 meets, whether it meets the -- not just this, but does it  
3 meet the need, and the programming part, the physical  
4 change hopefully is smaller than the design.

5 Q So programming and testing might be just a  
6 quarter --

7 A Yeah.

8 Q -- of the estimate?

9 A Right. It's going to vary on, you know, what  
10 kind of a change, but --

11 Q And I apologize if I'm repeating myself from  
12 five minutes ago. I'm already having trouble remembering  
13 exactly what we covered, but I don't think I've asked you  
14 this yet. Did you do any tests or studies to actually  
15 program a change like this?

16 A No.

17 Q And did you refer to any literature or published  
18 studies about what the cost might be?

19 A Of making the Colorado change?

20 Q For the transactional notice.

21 A I'm not aware of any.

22 Q So this is based on your experience?

23 A Right.

24 Q And did you discuss changing the web order path  
25 with the 17 companies with whom you spoke?





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 talks about costs that are necessary but not  
2 discretionary. We're still on the transactional notice.  
3 And you first estimate call center training and  
4 procedures, and you estimate that companies will need to  
5 invest \$2- to \$3,000 for developing call center  
6 procedures.

7 A Uh-huh.

8 Q What data did you use to reach the conclusion  
9 that those costs are 2- to 3,000?

10 A I think, first off, companies will consider this  
11 to be a major customer service policy that they need to  
12 work through and to identify what it is that they'll tell  
13 a customer, where in the process, whether it's part of  
14 the statute or not. They'll have to work through what  
15 they say to the customer in terms of their liability for  
16 sales tax. They'll have to assure them that one  
17 purchase, if it's under \$500, you don't have to do  
18 anything; if it's over \$500, you have these  
19 responsibilities. It's all part of the integrity that  
20 most people will feel they have a responsibility with  
21 their customers. And I think that it will take some time  
22 for management and procedure writers and call center  
23 managers to work through what this means to their  
24 company, what it means to their customer, and then put  
25 those drafts together and everybody reviews them and



1 changes them and adopts them and puts them out on the  
2 call center system or the web. So it's a lot of steps in  
3 there.

4 Q And how did you arrive at the 2- to 3,000  
5 figure? I guess I'm trying to understand what data you  
6 considered in reaching that particular figure.

7 A Well, just the things that I just mentioned and  
8 knowing that when you have something like this you  
9 involve a lot of different people. You'd be involving a  
10 call center manager, maybe some of the lead managers in a  
11 call center, certainly senior management would be  
12 involved, maybe the CFO, you know, to be sure that what  
13 they're saying is -- how they're interpreting the statute  
14 is right, maybe the fulfillment manager in terms of how  
15 he's going to change the computerized order, and probably  
16 the IT manager. It's pretty easy to chew up a bunch of  
17 time. I figured it would take -- you know, if you figure  
18 just conservatively \$40 to \$60 an hour, it's easy to chew  
19 up \$2- to \$3,000 pretty quickly. That's a conservative  
20 estimate.

21 Q Okay. And did you do any studies or particular  
22 calculation to get to the \$2- to \$3,000?

23 A Just kind of the number of hours and then  
24 multiplying by, you know, \$40 to \$60 an hour.

25 Q Uh-huh. How many hours would it take?

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 THE WITNESS: Could we take a break? I need to  
2 use the rest room.

3 MS. SCOVILLE: Absolutely. You know, let's go  
4 ahead and break for lunch. It's noon. And we can go off  
5 the record.

6 (Break.)

7

8 BY MS. SCOVILLE:

9 Q Mr. Barry, this morning we just touched very  
10 briefly on how on-line retailers -- and let's just focus  
11 on on-line retailers for a moment -- collect and keep  
12 information about their customers. And so in your  
13 professional experience, it is common for on-line  
14 retailers to keep track of what it is that customers buy,  
15 right?

16 A Yes.

17 Q And retailers, on-line retailers would also  
18 track what customers spend annually?

19 A Yes.

20 Q And would they also track what customers spend  
21 in their lifetime?

22 A Some do and some don't.

23 Q Okay. What about whether or not on-line  
24 retailers track how long a customer spends on a  
25 particular website?

1 A You mean how long physically they're on the  
2 website?

3 Q Right.

4 A Yes.

5 Q So they would know that I searched, you know,  
6 landsend.com for 30 minutes or something like that?

7 A If I were Lands End.

8 Q Yes, if you were Lands End.

9 A Yes.

10 Q Okay. Do on-line retailers also track how many  
11 times a particular customer visits their site?

12 A Yes.

13 Q Do they track which Internet browser customers  
14 use?

15 A Yes.

16 Q Do they track which items customers are  
17 interested in?

18 A To the degree that they can.

19 Q Okay. And to what degree can they do that?

20 A I think most can.

21 Q Beyond more than just what is ultimately  
22 purchased --

23 A Right.

24 Q -- they can determine which items I, as a  
25 customer, viewed?

1 A What they looked at and so forth.

2 Q Okay. Do they track what country customers are  
3 from?

4 A Yes.

5 Q What ZIP Code they're from?

6 A Yes.

7 Q Which computer they use or which IP address?

8 A Yes.

9 Q Whether or not customers use discount codes?

10 A Yes.

11 Q Whether or not they visit a site after receiving  
12 an e-mail?

13 A Yes.

14 Q What about whether or not customers buy after  
15 receiving a special offer?

16 A Yes.

17 Q Okay. What other kinds of metrics do retailers  
18 use to track customers?

19 A Well, I mean, there's literally -- this is a  
20 creative marketing thing so the list isn't endless, but  
21 it's pretty large. You know, can you reactivate this  
22 customer with a certain type of message, meaning they  
23 haven't shopped in a while; the time sensitivity of the  
24 message, in other words, if they bought a week ago and  
25 you send them some special offer, do they buy again right

1 away; the purchasers or customers who buy "X" also buy  
2 "Y", so it can serve up to the customer some purchase  
3 preferences. That's kind of endless.

4 Q Okay. And as I understand it, catalog companies  
5 would, to the extent that they can, track similar  
6 metrix?

7 A Right.

8 Q Okay. And that's how it is that retailers can  
9 identify me as a woman of a particular age, who has  
10 children, and buys certain kinds of good when I have a  
11 free shipping offer?

12 A It might not be on-line, though. It might be  
13 sometime after. It doesn't have to be on-line.

14 Q Okay. Sure, sure. And then what do retailers  
15 do with all of the data that they collect?

16 A Number one, they're looking for, you know, how  
17 promotions work -- do promotions work and under what  
18 circumstances, what facts they work; what merchandise,  
19 meaning what products; how can I liquidate overstock  
20 products; you know, effectiveness of various promotions  
21 and how -- you know, that versus another. We call that  
22 A/B testing. You know, here is Offer A versus Offer B,  
23 which one responds better.

24 Q Okay. And then do they also use the data to  
25 improve their marketing to a particular customer?

1           A     Yes.

2           Q     And do they provide the data that they track to  
3     the marketing service bureaus?

4           A     Generally, what they provide is the raw data,  
5     the transactions, the returns, not necessarily -- they  
6     may provide, you know, findings, but, you know, how many  
7     click throughs they had, that probably wouldn't go to the  
8     marketing service bureau.

9           Q     What about to the database companies we talked  
10    about, the four or five large ones?

11          A     I think it's the same. I don't think it goes  
12    generally beyond the company in most cases.

13          Q     So in your professional experience, the data  
14    that companies collect, that retailers collect, such as  
15    how much is spent annually, on what kinds of items, after  
16    how many visits to the website, you're saying that most  
17    retailers keep that information in-house?

18          A     No, no. What I meant was, they don't -- the  
19    first two you said, the marketing service bureau would  
20    take the same data and develop their own data. If you  
21    want to read back what those first two were just to -- so  
22    those two, you know, I pass the raw data. I may have it  
23    inside, but I'm really using the outsider to kind of use  
24    that and validate it and put it together with other data.  
25                The third one was more like clickstream data.

1 exchange for a reduced fee for their services in  
2 crunching the data, or neither?

3 A The client company always pays.

4 Q Okay. What about with the database companies?  
5 We discussed four or five of them this morning,  
6 Datalogics --

7 A NextAction, Abacus.

8 Q Thank you. All of those. Who pays who in that  
9 sort of relationship?

10 A The client always pays.

11 Q Okay. And, you know, I think there's a popular  
12 concern among consumers that companies sell their data,  
13 and in your professional experience do retailers sell  
14 their data to others?

15 MR. SCHAEFER: Objection. Which data?

16 MS. SCOVILLE: The marketing data they collect  
17 about how much customers spend and what they buy and that  
18 type of thing.

19 A Could I define "sell" for you just for a minute?

20 BY MS. SCOVILLE:

21 Q Sure.

22 A They don't sell it like one time here it is.  
23 They rent it or they exchange it.

24 Q And what do they exchange it for?

25 A For money. In other words, it's like a -- it's



1 an intellectual asset they own so they don't want to --  
2 most people don't want to just get a one-time income from  
3 it because, as we said this morning, renting and  
4 exchanging lists is how people build their businesses.  
5 And so you wouldn't just use it one time and give it away  
6 or sell it because you wouldn't -- it's hard to figure  
7 out what the value is. You can figure it if it's -- if  
8 I'm renting it to you, I can find a number that sounds  
9 good, but --

10 Q And when companies are renting their data to  
11 someone else, are they renting only names and addresses  
12 or are they renting the richer customer information about  
13 who bought what and how much and what kinds of  
14 products?

15 A First off, the whole thing is blind. I don't  
16 know that I'm renting Stephanie's name. Okay? I could  
17 be renting just the fact that you shopped from this  
18 catalog without regard to any categories or anything. I  
19 could, and more sophisticated now is, I could possibly  
20 tell them it's camping gear versus women's apparel versus  
21 some form of gifts. So what I'm definitely renting is  
22 what we call RFM, Recency, Frequency and the Monetary  
23 Value. In other words, I take -- I know all the  
24 purchasers -- let me back up. I can ask for, from  
25 someone who I'm renting from, whether it's a list owner

1 or a service bureau or a marketing database, can I have  
2 all the women shoppers that bought in the last 30 days.  
3 So I've got sex, I've got recency. I could say if they  
4 bought twice in 30 days. That would be a real small  
5 number, but I can try to rent those. Now, that's what a  
6 marketing service bureau is doing, is it's taking --  
7 that's one of the things, and that's 80 percent of the  
8 value, is recency, frequency, monetary value. And we  
9 know how much they spend, so I can put combinations  
10 together; 30-day shoppers that spent from \$1 to \$20,  
11 30-day shoppers that spent from \$21 to \$40, 30-day  
12 shoppers over \$100, and I can combine that with  
13 frequency.

14 Q And in your professional experience, how common  
15 is it for retailers to rent some variation of their  
16 data?

17 A For catalog companies, it's fairly common.

18 Q Okay. What about for Internet companies?

19 A It's rare.

20 Q Do Internet companies in your professional  
21 experience use marketing service bureaus?

22 A Not nearly what catalogs do. Because of the age  
23 of the industry, they're not as sophisticated in some  
24 ways, and in other ways they're more sophisticated than a  
25 cataloger because they may be able to do what we said a

1 little while ago, you know, when somebody buys "A", they  
2 also buy "C". You know, so there's a lot of variations  
3 and how good a marketer they are.

4 Q When a retailer is using a marketing services  
5 bureau, how often in your experience would the retailer  
6 update their information with the marketing services  
7 bureau?

8 A They would do it before each catalog so it  
9 depends on the size of the company. Probably the  
10 smallest companies -- the smallest businesses are doing  
11 one or two catalogs a year. Most catalogs get to four or  
12 five times a year, and then they use -- they get to their  
13 best customers' mailboxes a couple times a month. So  
14 they take these segments of really better customers and  
15 they continually mail them because they get a high  
16 response.

17 Q The data that we talked earlier that companies  
18 collect, particularly Internet companies, in terms of  
19 what customers buy, how much they spend, how long they're  
20 on sites, those types of pieces of data, how long would a  
21 retailer keep that information in your opinion?

22 A It varies. You know, I don't think there's any  
23 consistency. On any size business, from Google Analytics  
24 you can get that data. So you can look at it, you know,  
25 daily, weekly, annually against last year for some of the

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           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 order processing system and the direct marketing  
2 system?

3 A It's in the same system. It's just how you view  
4 the data. There are different reports and things.

5 Q Okay. I guess what I'm trying to understand is,  
6 all retailers would hold this data, and would most  
7 retailers be able to view it through both lenses, through  
8 the operational lens and through the marketing lens?

9 A Catalog companies can. Again, e-commerce may  
10 not be as sophisticated at the marketing side of it.

11 Q Okay. So e-commerce retailers would be more  
12 likely to view their data through the operating lens?

13 A Right.

14 Q Okay. I see. But the data already exists,  
15 right?

16 A Yes.

17 Q One of the costs that you list in your report,  
18 and this goes on to page 2, in terms of the steps that  
19 are necessary on the annual report, are, No. 6, for the  
20 accounting department to check the file to determine if  
21 any corrections are necessary. What work would the  
22 accounting department need to do?

23 A Well, what I'm envisioning is, we're not just  
24 going to run this and then pump out the data. It was  
25 something that is very customer sensitive and now reports

1 to a state in terms of compliance. We're going to have a  
2 point where we stop, look at the data, make sure we are  
3 handling the data the right way. As we talk later, you  
4 know, how we handle householding, how we handle customers  
5 with multiple names. I think there are those steps that  
6 are prudent.

7 Q And so in your opinion, it would be the  
8 accounting department who would have to go through and  
9 check for householding issues or name issues?

10 A Well, somebody has to do it. I was just  
11 thinking that, you know, as I was writing this, generally  
12 systems which are finance in nature and have some  
13 regulatory kind of steps to them, accounting often does  
14 that. I think I said in here it could be marketing, it  
15 could be other departments.

16 Q Okay. So Step No. 6 and 7 then could possibly  
17 be performed by a department other than the accounting  
18 department?

19 A Right.

20 Q Okay. Other than checking for the householding  
21 issues and the name issues, what other sorts of checking  
22 would the accounting or other department need to do?

23 A Well, I think, you know, probably what you end  
24 up doing is running kind of a first pass to see how the  
25 scores or notices are generated and what the reports look

1 like. So you're doing more QC. It's not that you're  
2 adding up the balances on the file or anything. It's  
3 more are they still the legitimate people you should  
4 report.

5 Q And are you envisioning that someone from an  
6 accounting or other department would have to, if annual  
7 reports are being printed to Matt and Curt and Stephanie,  
8 go through and check Matt's file and go through and check  
9 Curt's file and check Stephanie's file; they're going to  
10 have to go in and individually check every person's name  
11 on that list? Is that what you're envisioning?

12 A What I was getting at is, you'd probably run  
13 a -- I'll call it a pro forma. In other words, if my  
14 program thinks I'm a Colorado customer or a ship-to or a  
15 gift -- and, see, those things get pretty harry, and so I  
16 might run a pro forma just to see who falls out. In  
17 other words, are they all over 500? What happens -- do I  
18 generate any that are for customers that are under 500?  
19 I'm taking a quality check to make sure I'm not doing  
20 something that's erroneous or --

21 Q Okay. But the quality check would not  
22 necessarily entail going into each person's file --

23 A No.

24 Q -- to ensure that that person is on the list?

25 A No.

1 Q Towards the bottom of page 2, the last full  
2 paragraph, you've got, "If the company chooses to run the  
3 new Colorado system at an outside service bureau, then  
4 the service would process the year end file of  
5 purchasers. If the company has not done marketing system  
6 updates earlier in the year this would need to take place  
7 first. In many companies these updates take place  
8 monthly or quarterly."

9 And so it's my understanding that if the  
10 marketing services bureau already had the information or  
11 is regularly getting any information, there wouldn't be  
12 an additional step necessary there, right?

13 A To update the records, but it would be to do all  
14 of the Colorado reporting.

15 Q But that would be done by the marketing services  
16 bureau, as opposed to in-house or --

17 A No, I'm saying that's an option. Some may  
18 choose to have it done in the marketing service bureau.  
19 My guess is that -- or not my guess, but I think a lot of  
20 people will try to do it internally off of the  
21 operational file.

22 Q And do you have an estimate as to what  
23 percentage of retailers would do it internally versus  
24 using an external source?

25 A No.

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 20 percent by some serious difference. It may be in that  
2 10 percent range again. But I would say generally the  
3 odds are pretty high that they won't be over 20  
4 percent.

5 Q Continuing on the bottom of page 3, the next  
6 sentence says, This yields a relatively small number of  
7 customers for most out-of-state retailers (perhaps  
8 between 50 and several hundred such customers annually,  
9 although larger retailers will have substantially more).

10 The small number of customers of between 50 and  
11 several hundred, what size retailer are you referring to  
12 there?

13 A Well, again, it's going to depend on these  
14 variables that we just talked about, the four of them.  
15 In my draft, I think you saw in Exhibit E that didn't get  
16 into the final where I was doing just some rough  
17 calculations of, you know, the 12-month buyer's count and  
18 the Colorado percent and, you know, that's where I come  
19 up with, you know, a smaller business of, say, 10- to  
20 12,000,000 might only have 50, if it had a low average  
21 order value, where somebody in a 20- or 30,000,000 might  
22 have 1,000 or 800. It all depends on these variables.

23 Q When you say that most out-of-state retailers  
24 will have between 50 and several hundred, can you  
25 estimate for me what percentage of retailers would have

1 between 50 and several hundred?

2 A This comes back to how many businesses there are  
3 out there and various sized companies. I think all but  
4 the very largest -- the very largest businesses will have  
5 more than several hundred customers. I think all the  
6 small businesses, which there are tens of thousands of  
7 them, will have on the lower end of this range, and that  
8 couple hundred, several hundred customers probably falls  
9 in that, you know, 15- or 20,000,000 and up to something  
10 else. But, again, it comes back to these four factors,  
11 and that's why I didn't include it in the final report  
12 because then I would be trying to put out eight different  
13 possibilities.

14 Q So I feel like I've heard talk about the top 500  
15 Internet retailers. In your experience, would the top  
16 500 folks be the really large ones or would the top 500  
17 extend down to those in a more moderate range?

18 A Well, the top 500 would push down past the  
19 moderate range. And, again, there's not a lot of  
20 published data on Internet companies. There's a lot of  
21 published data on catalog companies.

22 Q Okay. Going onto page 4 of Exhibit B, the first  
23 sentence at the top of the page says, "The costs of the  
24 annual IT production processing, the mailing house  
25 insertion, the postage and mailing of the customer

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 that right?

2 A Yes.

3 Q And if you move to the Product column, under  
4 Collate/Insert/Seal, it looks like, #10 envelope and  
5 three pieces, are they assuming three pages inside each  
6 envelope?

7 A We told them up to three. In other words, if  
8 we're going to pay 40 cents, which is very high because  
9 it's first-class, we want to put as much as we can in  
10 there, you know, maybe, say, a web promotion this week  
11 or, you know, some explanation of the Colorado law maybe  
12 on a separate piece of paper.

13 Q Uh-huh. So the mailing service cost piece of  
14 this is an estimate for providing both the annual report  
15 and a piece of marketing?

16 A Not the annual report to the Colorado Department  
17 of Revenue.

18 Q No, the annual report to customers.

19 A Yes.

20 Q Okay. So your mailing cost estimate, this \$1.25  
21 to \$1.50 per piece, includes both the piece of paper  
22 that's the annual statement and a marketing piece?

23 A Right.

24 Q And that's why you assume two pages, right, up  
25 to two inserts?

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 Q What else?

2 A But, also, I couldn't tie down this production  
3 run time cost very well.

4 Q In your opinion, how much would the annual  
5 notice to customer cost be reduced if companies were  
6 permitted to do that notice electronically, as opposed to  
7 doing it via first-class mail?

8 A Well, if I understand the question, you're  
9 saying if all of this could be done, all of this that we  
10 just talked about on page 4, these four bullets, could be  
11 done electronically?

12 Q If retailers were permitted to do that by an  
13 e-mail, say, instead of doing it by a first-class  
14 mailing.

15 A I would assume it all -- well, the run time  
16 wouldn't go away, but the mailing service, supplies and  
17 the postage would go away.

18 Q So there would be a significant difference then;  
19 is that right?

20 A This is also the smallest part of the costs so,  
21 yes, there would be a difference.

22 Q Now, is it your understanding that the  
23 obligation that retailers have under the Colorado Act is  
24 to provide notice to the customers, not to actually  
25 calculate the tax that customers owe?

1           A     That's my understanding.

2           Q     On page 4 of your report, you list several  
3 complications to tracking and notification programming,  
4 and the first one you list is business to business, and  
5 you give this school district example. Is it your  
6 understanding that the regulations would permit a  
7 retailer to send a notice to everyone who purchased  
8 without trying to work out the business-to-business  
9 issues?

10          A     My concern was, would there be -- my concern  
11 would be, on the part of the Department of Revenue,  
12 whether we've done the best we can do to resolve these  
13 multiple site issues. The question is, who is the buyer,  
14 who is the purchaser.

15          Q     And what is your understanding about what the  
16 regulations require? Do the regulations require  
17 retailers to sort out who the purchaser is or can the  
18 retailer just send a notice to every person that  
19 purchased, regardless of the business-to-business  
20 complication that you discuss?

21               MR. SCHAEFER: Objection to form.

22          A     I wasn't sure whether we could just send those  
23 out without trying to at least consolidate those down and  
24 identify the purchaser more clearly. I wasn't sure of  
25 that.

1 BY MS. SCOVILLE:

2 Q Okay. And it's my understanding that of the  
3 complications to tracking and notification programming,  
4 and you list several here, have those complications --  
5 are those factored into the costs that you estimate in  
6 Exhibit B?

7 A Let me just read this, if you don't mind.

8 Q Sure, of course.

9 A I did not include them. I didn't know how to  
10 put a dollar value on it.

11 Q And so you don't know whether or not the  
12 regulations would permit retailers to send out the annual  
13 notices without worrying about the business-to-business  
14 issue that you describe?

15 A I don't.

16 Q Do you know whether the regulations would permit  
17 retailers to send out the annual notices without worrying  
18 about the concept of householding that you mention?

19 A I don't.

20 Q Do you know whether the regulations would permit  
21 retailers to send out the annual notices without checking  
22 for the use of different names?

23 A I don't.

24 Q On page 5 of your report, you have Costs that  
25 are necessary but not discretionary, and you talk about

1 the need to draft the notice in customer-friendly  
2 language, right?

3 A Yes.

4 Q Is it possible that customers could lift the  
5 language for the annual notice essentially straight from  
6 the regulations?

7 A I would say it's possible. I don't think people  
8 would do that.

9 Q At one point in the report, and I don't believe  
10 it's in this paragraph -- oh, yes, it is. I'm sorry.  
11 Let me start over.

12 The first sentence says, "Regarding the language  
13 of the Annual Purchase Summaries, we would expect that  
14 the required information would need to be carefully  
15 crafted and disclosed, similar to bank card and accounts  
16 receivable notices." In your experience, are retailers  
17 doing extensive wordsmithing, so to speak, regarding bank  
18 card and accounts receivable notices?

19 A I would say most don't.

20 Q Okay. And why would they need to do it for the  
21 regulations, but not bank card and accounts receivable  
22 notices?

23 A Because I think this will -- if they don't do  
24 this, they have no chance of saving the sale. I think  
25 it's very much about you're going to lose sales, and I

1 think that they can say what the State of Colorado  
2 expects, but we can do it in a way that minimizes damage  
3 hopefully.

4 Q Are you aware of any studies or published  
5 literature that would suggest that sales would be lost if  
6 people are anticipating paying use tax?

7 A I don't know anything about use tax. You know,  
8 I don't know the legal definition of that. I will say  
9 that anytime customers are going to pay more for the same  
10 thing, they will generally change their purchasing  
11 behavior, and my opinion is that this will reduce sales  
12 by a considerable number.

13 Q Okay. I know that those opinions are in  
14 Exhibit D so we'll get to those in a minute. You  
15 estimate in this paragraph 2 that, "There will be  
16 professional fees and creative/development costs that may  
17 be substantial (i.e., several thousand dollars) in  
18 reviewing and finalizing the language of the notice."  
19 How did you come up with the estimate of several thousand  
20 dollars?

21 A Again, anytime you ask an outside professional  
22 to come in, I would expect that they would spend a day  
23 helping you to make sure that you're doing it the most  
24 customer sensitive way, and that may be a low number.

25 Q Under paragraph 3, you have Costs that are

1 discretionary but good business practice, and say, first,  
2 "We believe that it would be prudent to have an internal  
3 person on site at mailing service to assure privacy when  
4 running and inserting the Annual Purchase Summary." Is  
5 it standard industry practice to send a person physically  
6 to a mailing service?

7 A If you're dealing with privacy information.

8 Q What other situations have you experienced that  
9 that's true?

10 A We've had situations where, you know, if we were  
11 using outside services to do notifications to customers  
12 where we're changing, say, account numbers and everybody  
13 gets a new card or some kind of change in billing, you  
14 know, somebody that's there while those are being  
15 produced.

16 Q All right. The next page of your report, which  
17 is Exhibit B.1, at the bottom you list the Annual  
18 Purchase Summaries having a variable cost of \$2.00 to  
19 \$3.00 per customer statement mailed each year, and you  
20 say if a retailer has 250 customers who purchase in  
21 excess of \$500, the mailing costs would be \$500 to \$750.  
22 And that number would obviously be less for the retailers  
23 who -- you had said most retailers -- will have fewer  
24 than 250 customers, right?

25 A Right.

1 Q All right. Exhibit C, the Customer Information  
2 Report. Now, is it your understanding that the  
3 regulations do not require any sort of customer  
4 information report if no customer spends more than \$500  
5 annually?

6 A That's my understanding.

7 Q Under Costs incurred to satisfy basic statutory  
8 and regulatory requirements, you have steps 11 and 12,  
9 which involve IT running a file of customers with a  
10 Colorado ship-to address, and IT performing quality  
11 control and formatting for transmission of the report.  
12 What kind of quality control would IT need to do at this  
13 stage?

14 A To make sure that, you know, they loaded the  
15 right file, that it was transmitted, that they got back  
16 some kind of confirmation that it was accepted. Just  
17 some basic steps to ensure that, you know, they did it on  
18 time and it was accepted, at least in part by the  
19 Department of Revenue.

20 Q And is that included in your total estimated  
21 costs for the customer information report of \$8,500 to  
22 \$13,000?

23 A The line underneath No. 12 says that, I think,  
24 right.

25 Q I see.



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.

1 purchasers, and that number is going to be lower once you  
2 take the four bullet points --

3 A Right.

4 Q -- in Exhibit B into account?

5 A Right.

6 Q Okay. If you could take a look at the first  
7 page of Exhibit 10. You have under "A. Conclusions", you  
8 have, "The initial start up costs may be \$34,000 to  
9 \$46,000 for small to moderate sized companies", and those  
10 numbers were eventually revised downward, right?

11 A Yes.

12 Q And then if you would take a look at the  
13 September 16th draft, which is Exhibit No. 9.

14 A It's right here, I think.

15 Q Thank you. All right. On page 4, you have  
16 Initial cost to set up internal company program, Total  
17 estimated costs, \$28,000 to \$38,000 per company. Do you  
18 see that?

19 A Yeah.

20 Q And those costs were also reduced down, right?

21 A True.

22 MS. SCOVILLE: Why don't you-all give me just  
23 two or three minutes to check my notes, but I think I'm  
24 done.

25 (Break.)



1 MS. SCOVILLE: Okay. Very quickly, could you  
2 mark this as Exhibit 14, please.

3 (Exhibit No. 14 was  
4 marked for identification.)

5

6 BY MS. SCOVILLE:

7 Q This is an e-mail from Matthew Schaefer to you  
8 on Wednesday, September 22nd, and in the last paragraph  
9 on the first page, Mr. Schaefer says, "On the substance,  
10 I have few concerns, except that I want to be careful on  
11 the Transactional Notice expense. I have not asked any  
12 client if they have calculated the cost of implementing  
13 the website notice, or of modifying the invoice, but I  
14 may want to validate if the expense is on the order of  
15 \$20,000."

16 Now, your estimates ultimately came in in the  
17 range of \$10,000 to \$18,000. Did you have any  
18 discussions with Mr. Schaefer about whether he did  
19 actually check those costs or talk to any DMA members  
20 about your cost estimates on the transactional notice?

21 A I did not.

22 Q And do you know whether he, in fact, did contact  
23 any members?

24 A I don't know.

25 MS. SCOVILLE: Then I think -- actually, I do

1 want to mark one other exhibit. This will be 15.

2 (Exhibit No. 15 was

3 marked for identification.)

4

5 BY MS. SCOVILLE:

6 Q This is an e-mail from Mr. Schaefer to you on  
7 September 23rd. The first little square bullet point  
8 says, A very first bullet point in the Statement of  
9 Opinions that reads something like -- and then there's a  
10 long quote. And then he says, "Curt, if you feel on  
11 solid ground, we might even add: 'Indeed, the initial  
12 and ongoing expense may be so significant, that some  
13 retailers may determine that it is cost-prohibitive to  
14 continue marketing to Colorado consumers.')

15 That statement, the one that Mr. Schaefer  
16 suggested, does not appear in your final report, at least  
17 in that form. Can you tell me why you decided not to  
18 include that statement in your initial statement of  
19 opinions?

20 A I had -- well, I told you --

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

22 A I told you through today, I believe, in being  
23 objective, and I talked to him and I didn't feel I could  
24 support it.

25

1 Q -- word for word? All right. And then the last  
2 sentence --

3 A Not word for word because word for word down at  
4 the bottom here says he wanted to know what the hours  
5 were as a range and what the costs were so I had to work  
6 through that.

7 Q Okay. And that language appears on the next  
8 page of Exhibit C of your report, right, at the top of  
9 the second page where it starts, Even making a very  
10 conservative estimate of the additional time --

11 A Yes.

12 Q -- for preparing such a file, the time required  
13 for such quality control/quality assurance tasks would be  
14 between [x] and [y] hours, and in your report you  
15 inserted the numbers, or between [z] and [zz] dollars,  
16 and in your report you inserted \$7,500 and \$10,000 --

17 A Right.

18 Q -- separate and apart from additional systems  
19 costs?

20 A Yes.

21 Q And that language also came from Mr. Schaefer  
22 then, right?

23 A Right.

24 MS. SCOVILLE: Okay. I have no further  
25 questions. Thank you.

1 Q Okay. There will be a range of companies  
2 affected of different sizes?

3 A Yes.

4 Q And as a consequence, there will be a range of  
5 different costs depending upon the particular  
6 companies?

7 A Yes, there will.

8 Q Was it your effort to identify a range of costs  
9 in that regard?

10 A In most cases, I have -- you have to deal with a  
11 range of costs. I wasn't trying to come up with a  
12 specific individual company picture, and I didn't have  
13 the specifics of, you know, average order, repeat buyers  
14 and so forth, so we had to deal with general  
15 principles.

16 Q Were you asked to provide your opinion with  
17 regard to the cost of compliance for companies affected  
18 by the law?

19 A Yes, I was.

20 Q And are your opinions set forth in the expert  
21 report of F. Curtis Barry that's marked as Exhibit 1?

22 A They are.

23 Q And are they contained in the statement of  
24 opinions that appears on pages 1 through 3?

25 A They are.

1 Q Do you have an opinion as to whether companies  
2 that are required to comply with the new Colorado  
3 statute, House Bill 101193, and the regulations that were  
4 adopted pursuant to that law, will incur costs to satisfy  
5 those requirements?

6 A I think they will have to incur significant  
7 costs, which I have generally summarized on page 2, and  
8 in each of the Exhibits A, B, C, and I have generalized  
9 potential expenses in Exhibit D.

10 Q So you've evaluated the cost of compliance, as  
11 you indicate, in regard to each of the broad requirements  
12 of the new law?

13 A Yes.

14 Q And I think Ms. Scoville asked you questions  
15 about the transactional notice requirement, the annual  
16 purchase summary and the annual report to the  
17 Department?

18 A And I have broken the report down in that way.

19 Q Now, with regard to the transactional notice  
20 requirement, Ms. Scoville asked you a number of questions  
21 about that, and turn to Exhibit A.1 of your report that's  
22 marked as Exhibit 1. The first item with a cost figure  
23 attached to it at the top of the page indicates Modify  
24 the e-commerce order path, and you made a range of costs  
25 associated with modifying the e-commerce order path?

1           A     I did. It was 5- to \$10,000.

2           Q     And it indicates that that cost or another cost,  
3     which is described as printing statement on invoice or  
4     packing slip, would be a required cost. Did you estimate  
5     a cost for printing?

6           A     I did. It was 5- to \$10,000.

7           Q     Now, Ms. Scoville asked you about other possible  
8     alternatives that she suggests might satisfy the  
9     regulation. The first of them is a packing insert,  
10    separate from the invoice that would be placed in a box  
11    with the product delivered to the customer. Do you  
12    recall those questions?

13          A     I do.

14          Q     First of all, is it your understanding that  
15    either the words or the concept of a package insert are  
16    anywhere within the regulation published by the  
17    Department of Revenue?

18          A     I don't believe they are.

19          Q     Look at Exhibit 8.

20          A     Exhibit 8?

21          Q     Exhibit 8, which is a copy of the regulation.  
22    If you turn to the page that's Bates stamped FCB 00016,  
23    in the middle of the page, it's Item 2, Obligation to  
24    give notice with each purchase, and then under Heading A,  
25    it indicates that, "A non-collecting retailer must give

1 A Yes.

2 Q So the notice is supposed to appear with the  
3 price, according to the regulation?

4 MS. SCOVILLE: Object to the form.

5 BY MR. SCHAEFER:

6 Q In close proximity to the price?

7 A That's my understanding from reading this.

8 Q Okay. I'm just talking about how that price on  
9 a web order typically appears in the order path; on a  
10 catalog order, it will appear on the invoice.

11 A Or the customer service rep telling a  
12 customer.

13 Q Now, if we assume for the moment that a packing  
14 insert would nevertheless satisfy the various  
15 requirements of the Colorado regulation, is a packing  
16 insert going to be an additional packing insert over and  
17 above the invoice, presumably; that's what we were  
18 talking about?

19 A Yes.

20 Q Is that going to be no cost to the retailer?

21 A It is not no cost.

22 Q It will be costs associated with putting in a  
23 packing insert?

24 A Yes.

25 Q Have you had experience in working in

1 fulfillment systems with packing inserts in the past?

2 A All the time.

3 Q What, on average, does a simple packing insert  
4 cost to place in an individual package?

5 A Under 10 cents.

6 Q In this case, it needs to be provided with every  
7 order?

8 A From Colorado.

9 Q So this would be something south of a dime, but  
10 for every single order placed?

11 A Yes. And then with gifts and ship-to's, because  
12 the package isn't going -- since the package is not going  
13 to the purchaser, you'd have to have a separate notice  
14 mailed to the purchaser. In other words, we're not going  
15 to put a notice in the box that this gift -- your  
16 purchaser is going to have to pay the sales tax. We're  
17 not going to do that. So we're going to have to take  
18 that fact, whether it's a ship-to or a gift, and send  
19 that to the purchaser. Then the question I would think  
20 would be, does it have to go first-class or can it go  
21 bulk.

22 Q So that would be an additional cost with the  
23 ship-to's and gifts?

24 A Yes.

25 Q Ms. Scoville asked you questions as well about



1 Q Now, you also indicated in your report, as  
2 represented here in Exhibit A.1 under the category  
3 Necessary but not discretionary, that there will be costs  
4 associated with call center training and procedures; is  
5 that right?

6 A Yes.

7 Q And you've estimated those costs to be 2- to  
8 \$3,000?

9 A Yes, not including the actual cost to train the  
10 representatives, so that could be anywhere from 10 people  
11 to 2,000.

12 Q Whatever that measure, is it your opinion there  
13 will be costs with regard to training call center  
14 personnel?

15 A Definitely will.

16 Q Will there be costs associated with fielding  
17 customer service calls regarding the Colorado  
18 regulations?

19 A Yes, there will.

20 Q Do you have an opinion as to the amount of that  
21 cost?

22 A That's going to vary, again, on the number of  
23 Colorado buyers, the number of, you know, people that  
24 actually call the call center. As I said in the report,  
25 I thought it was about 50 percent of the Colorado

1 purchasers will call. So the size of the file, the  
2 percent of people that call.

3 Q Did you do an estimate of a per call basis as we  
4 talked about earlier?

5 A I did, and it's a dollar and a half to two  
6 dollars a call.

7 Q And is it your opinion that there will be a cost  
8 associated with obtaining the advice of professionals  
9 regarding how to comply with the transactional notice  
10 requirement?

11 A I believe there will.

12 Q Have you estimated that cost?

13 A I have. It's here in the report. Initially,  
14 3- to \$5,000, and then on an ongoing basis from Year 2  
15 forward of \$1,500 to \$2,000.

16 Q Is there any question in your mind that  
17 companies will incur these sets of costs, these types of  
18 costs in order to comply with the transactional notice  
19 requirement?

20 A No question whatsoever.

21 Q With regard to the annual purchase summary, we  
22 talked briefly about just the cost of the mailing. If  
23 you will look at Exhibit B of your report at page 4.

24 Page 4 of Exhibit B.

25 A Okay.

1 Q You spent some time talking with Ms. Scoville  
2 about the four bulleted items there toward the top of the  
3 page.

4 A Yes.

5 Q I believe your testimony was essentially the sum  
6 of these costs was something you used to calculate the  
7 total per piece mailing cost?

8 A Yes.

9 Q If we do that just briefly, starting at the  
10 bottom bullet, how much will first-class mail postage  
11 cost per piece?

12 A 44 cents if the company doesn't add more inserts  
13 than can go for that per piece cost.

14 Q And if we take the next bullet up, the low end  
15 of supplies, just for now the low end of supplies per  
16 piece?

17 A 10 cents.

18 Q So 44 cents, plus 10 cents. The mailing service  
19 costs, what's the low end of the range?

20 A \$1.25.

21 Q So if we add that into the mix as well. There  
22 is in the same bullet an estimate of about \$100 to \$200  
23 set-up cost?

24 A Yes.

25 Q And you've used, I think, an estimate of 1,000

1 names processed as a basis for evaluating this; is that a  
2 fair characterization?

3 A Yes.

4 Q Taking the low end of that of \$100 per 1,000,  
5 what's the per piece additional cost for those set-up  
6 charges?

7 A The low end would be \$2.00, if I understand your  
8 question.

9 Q Well, is it \$100 over 1,000 pieces?

10 A Yes. I'm sorry. 10 cents.

11 Q 10 cents?

12 A Yes.

13 Q So another 10 cents. And then in your top  
14 bullet, production run time, there's another set-up fee.  
15 Taking the low end, \$200 --

16 A Yes.

17 Q -- per 1,000 pieces?

18 A Right. So that would be another 20 cents.

19 Q 20 cents. Add those up, 44 cents, 10 cents,  
20 \$1.25, 10 cents and 20 cents, if you trust my math, by my  
21 calculation that's \$2.09?

22 A Okay.

23 Q Now, you indicated, I think, production run time  
24 costs you weren't able to quantify per se?

25 A No.

1 Q But they would add some additional costs to that  
2 per piece?

3 A They may be the biggest cost on this page. They  
4 may be something -- not the biggest. Excuse me. They  
5 will be a significant cost. For example, when we do FTC  
6 notices, Fair Trade Commission notices, on backorders, we  
7 have done cost studies that we're using backorder cost  
8 studies that it costs 50 cents to \$1.00 to produce that  
9 kind of notice. So it's not an insignificant cost.

10 Q Without quantifying the per piece cost, when you  
11 add it to \$2.09 per piece, does that form the basis for  
12 your estimate of the per piece cost overall?

13 A It does, \$2 to \$3.

14 Q Now, Exhibit B, pages 1 to 2, at the bottom of  
15 page 1 over to page 2, summarizes these 12 steps that you  
16 indicated --

17 A Right. Yeah.

18 Q -- a company will be required to execute in  
19 order to generate a data file for purposes of creating  
20 the annual purchase summary and the information report to  
21 the Department. Is that a fair characterization?

22 A Yes.

23 Q Can you talk for a moment, just generally, about  
24 direct marketers' customer files? I think there's a  
25 perception that this data is simply sitting there and

1 easily manipulated, and if you can tell us something  
2 about what the file is like, I think it would help  
3 explain your opinion.

4 A Okay. In the customer part of the system, there  
5 are literally dozens of data elements, maybe in some  
6 systems hundreds, because if they -- depending on how  
7 many years of data they hold at once. So companies are  
8 very careful about what they do and who has access to  
9 these files in terms of manipulating and using that  
10 information.

11 Q When you say "data elements", what do you  
12 mean?

13 A Customer name, address, the date of a purchase,  
14 if they use a category, the item description, the retail  
15 price, whether it was a personalized item, you know, when  
16 it shipped, if it went on backorder, what the total costs  
17 of the various elements as we talked about, the  
18 merchandise, the services, the tax, any fees.

19 Q Some of these data elements, in fact, require  
20 multiple fields. For example, address has multiple  
21 fields; is that --

22 A Right, four or five lines. You think of it as  
23 lines, but it may actually be 8 or 10 different fields,  
24 for like a title, meaning Mr. and Mrs., or a suffix like  
25 Sr. or Jr. You know, if there's an apartment or a suite,

1 those might be in separate fields.

2 Q And you've indicated in response to questions  
3 just a little while ago that some companies have as many  
4 as millions of one-year buyers?

5 A That's true.

6 Q Even small companies may have 80,000 to 100,000  
7 one-year buyers?

8 A Yes.

9 Q For each of those buyers, there are these dozens  
10 of data elements?

11 A Right.

12 Q So these are massive data files?

13 A They are.

14 Q In order to manipulate those data files, in  
15 order to extract information to create an annual purchase  
16 summary or extract information in order to create an  
17 annual disclosure report, can you explain from your  
18 experience what will be involved?

19 A Well, the person doing that -- we're talking  
20 about writing programs so we don't just have some extract  
21 that we can pull that information out, so we have to, you  
22 know, we have to design the total system of what we want  
23 this system to do, as I've outlined here in these 12  
24 steps, and we have to decide how are we going to -- if we  
25 were to do this, how are we going to meet the three basic

1 parts to the regulation, and then design at a detailed  
2 level, what does that look like. For example, it may --  
3 you know, it definitely will be how the customer  
4 disclosure looks. You have to literally outline it with  
5 put this field there, put this field there, put this  
6 field there. You have to understand the database or the  
7 file system and how big those fields are so that you're  
8 designing something that when you go to print it, it  
9 doesn't truncate or, even more importantly, that you  
10 don't accidentally do something to that customer file by  
11 updating it when you didn't intend to. You know,  
12 companies treat that as really highly proprietary data.  
13 It's a major asset of the company.

14 Q Is that process complicated at all if you have,  
15 for example, multiple customer names for an individual  
16 customer?

17 A You can, and that's why, as I cited in this  
18 report, complications, in terms of the school system  
19 example that I used, is a very real business-to-business  
20 problem where you want to make sure that you are  
21 identifying the purchaser in the proper manner. In terms  
22 of householding, the reason that that's an issue is that  
23 often marketers will determine that they don't want to  
24 send multiple promotions, the identical promotion to more  
25 than one person in a household. So some companies will



1 say send it to everybody that used a name to buy in a  
2 household. Others will say because of the cost of, say,  
3 a catalog, just send one, or make it say to the residence  
4 at this address. So it varies by company. That's why it  
5 becomes more complex. It's not just the straight file  
6 that we print off of.

7 Q If you look at Exhibit 8, the regulation, page  
8 FCB 00018 -- it's the regulation.

9 A Oh, regulation. I'm sorry. 18? Okay.

10 Q Subheading 3 there says, Obligation to give  
11 Colorado purchasers notice of Colorado purchases. Do you  
12 see that?

13 A Yes.

14 Q And Item A then describes what must be contained  
15 within the notice to Colorado purchasers?

16 A Yes.

17 Q First, other than the words "important tax  
18 document enclosed", does this purport to actually provide  
19 the specific language that would be contained?

20 A It does not.

21 Q If you look at (ii), it indicates the notice  
22 must summarize the dates of purchases, a description of  
23 the type of items purchased, and the dollar amounts of  
24 those purchases?

25 A Yes.

1 Q So is it your understanding that the annual  
2 purchase summary has to contain information about each  
3 particular purchase string?

4 A My understanding is that it has to summarize --  
5 the regulation doesn't use the word "categories of  
6 merchandise", but it says description of the type, that  
7 it's somehow summarizing, and many small direct marketers  
8 don't use categories so they may have to actually -- they  
9 may best provide the customer with the individual  
10 transactions, even though that wasn't the intent. Let me  
11 give you an example. Even in big businesses, meaning  
12 people doing, say, \$200,000,000 a year, they might only  
13 have, say, 25 different categories of product. They  
14 might have 50,000 different products in a year. So many  
15 times they use categories in ways that are meaningful to  
16 them from a merchandising point of view, but meaningless  
17 to the customer. You know, you could have camping  
18 equipment that has backpacks and accessories. When a  
19 customer gets this at the end of the year, he may say,  
20 Well, I bought, you know, tent stakes. I didn't buy what  
21 camping equipment. It may not register. So it's not,  
22 it's not a -- in my opinion, it's not a very good way to  
23 communicate to customers if you don't use that in your  
24 business.

25 Q The annual report to the Department, by

1 contrast, does not require the listing by date; is that  
2 your understanding?

3 A That's my understanding.

4 Q Does that mean, in effect, it is a different  
5 file than the file that will be used to create the annual  
6 purchase summary?

7 MS. SCOVILLE: Object to the form.

8 THE WITNESS: Could you restate the question?

9 BY MR. SCHAEFER:

10 Q The output of this process of extracting data  
11 from the retailer's customer file, in the case of the  
12 annual purchase summary, that output needs to include  
13 this detail by date, by description?

14 A Yes.

15 Q The output for the annual purchase summary  
16 doesn't need to include those same elements?

17 A Right. So we're going to have to manipulate it  
18 in some way. It's not just identical.

19 Q There's a recipient of the annual disclosure  
20 report file, correct?

21 A Yes.

22 Q And who's that, the recipient?

23 A The annual disclosure --

24 Q Report.

25 A -- report is the Department of Revenue.