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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

The Direct Marketing Association,
Plaintiff,

v.

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

DEPOSITION OF **THOMAS J. ADLER, Ph.D.** taken at
Norwich, Vermont, on October 22, 2010.

APPEARANCES:

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

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

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1 THOMAS J. ADLER, Ph.D., DULY SWORN

2 DIRECT EXAMINATION

3 BY MR. WESOKY:

4 Q Dr. Adler, my name is Jack Wesoky. We chatted a
5 bit exchanging some pleasantries a few minutes
6 ago. I want to reintroduce myself for the record.
7 As you know, you've been sworn to tell the whole
8 truth, full truth and nothing but the truth so I
9 expect that you will give me your honest answers
10 to the best of your ability, and I can count on
11 that, right?

12 A Yes.

13 Q Please answer the question that I ask, not what
14 you think I'm asking. For example, if I ask you
15 if X is possible, you might think it's probable
16 and say well, X is probable, but my question is
17 possible so I'll have to reask it, and we don't
18 want to do that so you'll answer the question that
19 I ask, okay?

20 A Yes.

21 Q And this is an oral exercise so please always
22 answer verbally rather than with a shake or nod of
23 the head, okay?

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1 ourselves, yes.

2 Q Okay. After you undertook the project, there were
3 survey questions drafted, is that correct?

4 A Yes.

5 Q And who did the initial draft of the survey
6 questions?

7 A Well, I did the draft of our survey questions.

8 EXHIBIT 42 MARKED FOR IDENTIFICATION

9 Q I show you what's been marked as Exhibit 42, and
10 it's an e-mail to you from Mr. Schaefer dated the
11 11th of May of this year. And just to make sure
12 that I'm correct with that identification.

13 A It was May 11th, 2010. Yes.

14 Q And at the bottom it says RSG 696?

15 A Yes.

16 Q And that e-mail, Mr. Schaefer says to you and
17 Mr. Whipple, I attach two versions of survey
18 questions we offer for your consideration.

19 A Yes.

20 Q Was that the first time you got any survey
21 questions related to this case?

22 A That was the first time we received anything from
23 Mr. Schaefer with questions suggested.

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1 Q And had you drafted any questions before receipt
2 of the survey questions from Mr. Schaefer?

3 A I don't recall whether we had begun drafting.
4 Nelson and I, I believe, had talked over the phone
5 about it, but I'm not sure that we'd put anything
6 on paper yet.

7 MR. WESOKY: Again, my apologies, Matt. Some
8 of these didn't get copied as I have asked so I
9 only have one copy.

10 MR. SCHAEFER: Okay. I'll be looking on with
11 the witness.

12 EXHIBIT 43 MARKED FOR IDENTIFICATION

13 Q Let me show you Exhibit 43 which shows
14 DMA/Colorado: Possible Survey Questions, Version
15 1 for Discussion, document RSG 676. Is that one
16 of the versions of the draft survey questions you
17 received from Mr. Schaefer along with the e-mail?

18 A Yes.

19 EXHIBIT 44 MARKED FOR IDENTIFICATION

20 Q I show you what's marked as Exhibit 44 called
21 DMA/Colorado: Possible Survey Questions, Version
22 2 for Discussion. Is that the second version of
23 the questions you received from Mr. Schaefer in

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1 connection with the e-mail we just discussed?

2 A Yes.

3 Q Now, my question is had you, you meaning RSG, not
4 you personally, drafted any survey questions
5 before receiving documents 43 and 44 related to
6 the Colorado survey that you eventually did?

7 A I don't recall whether we had anything on paper at
8 that time. We had certainly discussed over the
9 phone with Mr. Schaefer the form of the
10 questionnaire and the kinds of questions we might
11 ask.

12 Q Did you provide him any specific questions during
13 those conversations?

14 A I don't recall whether we provided specific
15 questions during those conversations. We
16 certainly did at the later date.

17 Q Would your notes reflect whether you provided
18 specific questions to Mr. Schaefer before receipt
19 of Exhibits 43 and 44?

20 A Probably not. If you're referring to the phone
21 notes, probably not. That's usually the other
22 side of the conversation rather than my side.

23 EXHIBIT 45 MARKED FOR IDENTIFICATION

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1 Q Takes surveys of various kinds; of consumers,
2 users of products, whatever, right?

3 A Yes.

4 Q I take it then it's your habit to receive draft
5 questions from your clients to use in your
6 surveys, is that correct?

7 A It's not necessarily our habit. In some cases, we
8 draft with little more than a sentence or two from
9 our client about what their objectives are. In
10 some cases, we have clients who provide what I
11 would consider to be close to a complete draft of
12 a full questionnaire.

13 EXHIBIT 48 MARKED FOR IDENTIFICATION

14 Q I show you what's marked as Exhibit 48 for
15 identification. It's an e-mail chain. The top
16 date is 17th of May, and it's RSG 749 at the
17 bottom.

18 A Yes.

19 Q And the middle e-mail there is yours to
20 Mr. Whipple saying that you were going to develop
21 a first questionnaire that you'll send out for
22 review, is that correct?

23 A Yes.

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1 Q Did you develop a first questionnaire and send it
2 out for review later that morning?

3 A I couldn't say that I sent it out later that
4 morning, but I definitely developed that first
5 draft.

6 Q And that first draft is not Exhibits 43 or 44?

7 A No.

8 EXHIBIT 49 MARKED FOR IDENTIFICATION

9 Q I show you what's marked as Exhibit 49. It's
10 called DMA/Colorado: DRAFT Questionnaire, Version
11 3 RSG for Discussion bearing numbers at the bottom
12 starting with page 612 and ending with 616. Is
13 this document the draft you referred to in the
14 prior exhibit?

15 A I believe so. The only question, I don't recall
16 whether those comments were embedded at the time
17 that I initially transmitted this. They may well
18 have been. I'd have to read more in detail.

19 Q Those comments are TGA. I assume that is you?

20 A That is. Yes.

21 Q For this Version 3, did you use any material from
22 Exhibits 43 and 44 which are the drafts 1 and 2?

23 A I'd have to check, but I believe I did copy and

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1 paste the descriptions of the law and some other
2 pieces.

3 Q You can look at 43 and 44 and maybe that will help
4 you.

5 A So it appears that question 10, the elements of
6 it, the description of the law I believe I copied
7 out of Version, well, it's not exact, but it's
8 copied out of the pieces, pieces of the text are
9 copied out of these two versions.

10 Q Okay. Thank you. Who is Karyn?

11 A Karyn Dossinger is a senior associate in our
12 Chicago office.

13 Q Where Mr. Whipple is?

14 A That's correct.

15 Q Did she work on this project at all?

16 A I believe that she was involved in some way.
17 She's under the direction of Mr. Whipple, and I'm
18 not sure what the full extent of her role was.

19 Q Would Mr. Whipple know what the extent of her role
20 was?

21 A Yes.

22 Q But whatever role she had, he never shared that
23 with you?

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1 A Sorry.

2 MR. WESOKY: I'm glad.

3 MR. SCHAEFER: In fact, I intended to take it
4 out as unrelated.

5 EXHIBIT 51 MARKED FOR IDENTIFICATION

6 Q I show you Exhibit number 51. It's an e-mail
7 chain dated the 18th of May from you to
8 Mr. Schaefer and Mr. Schaefer to you. It's
9 designated by numbers RSG 750 and 751.

10 A This is 778, 779.

11 MR. SCHAEFER: Could be the same document.

12 Q Yes. They're actually the same.

13 MR. SCHAEFER: So at least for the one that's
14 been marked for the record is 778 and 779.

15 Q And I have another copy with a different number so
16 that's why. Referring to the middle e-mail in
17 that chain?

18 A Yes.

19 Q It says attached is a first draft of the
20 questionnaire that I built around the core
21 questions that you sent last week?

22 A Yes.

23 Q That refers to the questions in number Exhibits 43

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1 and 44?

2 A Yes.

3 Q And is that first draft the Version 3 that you
4 had?

5 A I believe it would be Version 1. Sorry. It would
6 be, there would be a Version 1. This is Version
7 3. And I'm not sure what happened to Version 1,
8 but --

9 Q I will represent to you that the Version 1 and
10 Version 2 that I have are Exhibits 43 and 44.

11 A All right. Okay. So this is, so Version 3, I
12 guess, I didn't recall that I started numbering
13 from the version numbers that Matt had provided,
14 but this does appear to be something close to what
15 I would have drafted as the first draft.

16 Q That would be the draft you referred to?

17 A As Version 3.

18 Q As Version 3 which is Exhibit 49.

19 A 49.

20 Q So in Exhibit 51, you refer to Exhibit 49 as the
21 questionnaire that you drafted?

22 A Yes. I believe so.

23 Q Also it refers to notes and annotations in the

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1 e-mail?

2 A Yes, it does.

3 Q So does that coincide now with Version 3?

4 A Version 3 does have the notes and annotations,
5 yes.

6 Q So we're confident that this e-mail refers to
7 what's been called Version 3 of the survey?

8 A I believe it does, but it's also possible that
9 there is another version. Certainly there were
10 internal versions before this one.

11 EXHIBIT 52 MARKED FOR IDENTIFICATION

12 Q Exhibit 52. Sir, I've handed you what's been
13 marked as Exhibit 52, and it's also an e-mail
14 chain. The top one is from Nelson Whipple to you?

15 A Yes.

16 Q Dated the 18th of May and it's RSG 759-760?

17 A Yes.

18 Q And it talks about phone conversation or trying to
19 set up a phone conversation.

20 A Yes.

21 Q Did you have that conversation with Mr. Whipple?

22 A I don't recall for certain. I know I had a
23 conversation with him, but I'm not sure it was at

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1 the time that was described here.

2 Q If you remember the conversation, what was
3 discussed between you and Mr. Whipple?

4 A I don't remember that conversation.

5 EXHIBIT 53 MARKED FOR IDENTIFICATION

6 Q I show you what's marked as Exhibit 53. It's an
7 e-mail chain, you to Mr. Schaefer, then
8 Mr. Schaefer to you, the last date being May 21st,
9 2010. It's RSG 846.

10 A Yes.

11 Q Looking at the earlier of the two e-mails, the May
12 20th from you to Mr. Schaefer, you talk about a
13 revised draft that responds to your, meaning
14 Mr. Schaefer and Mr. Isaacson's, comments and
15 addresses some of the remaining issues?

16 A Yes.

17 Q Do you remember what those comments and issues
18 were that, using the terms as in this e-mail Matt
19 and George raised?

20 A Well, let me see. I'm not sure that -- it
21 responds to your comments address some of the
22 remaining issues that we had. So we certainly
23 responded to marginal comments that I had on

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1 Exhibit 49 that we were posing back to them, and I
2 don't recall the details of that conversation well
3 enough to recall what George and Matt had raised
4 at that time.

5 Q Would you have made notes of that?

6 A Probably.

7 EXHIBIT 54 MARKED FOR IDENTIFICATION

8 Q I hand you what's marked as Exhibit 54 called
9 DMA/Colorado: DRAFT Questionnaire, Version 4 RSG
10 for Discussion.

11 A Yes.

12 Q Is that Version 4 which I just handed you the
13 draft that is described in the previous Exhibit
14 53?

15 A I believe it is, but since I don't have a file
16 date on this, I couldn't say for sure that this is
17 referring to 4 rather than 5, for example.

18 Q And I think you said you don't remember the
19 comments Matt and George made?

20 A No.

21 Q Which led to this version?

22 A No. I don't recall the specific comments.

23 Q You also say in the e-mail, Exhibit 53, that you,

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1 meaning Matt and George, may have other issues
2 that we will need to address.

3 A Yes.

4 Q Do you remember if they had other issues?

5 A I don't recall.

6 Q Okay. Look at the top of that e-mail. The first
7 part. And it's from Mr. Schaefer to you, correct?

8 A Yes.

9 Q It contains suggestions or comments regarding your
10 latest draft of the survey, correct?

11 A Yes.

12 EXHIBIT 55 MARKED FOR IDENTIFICATION

13 Q I show you what's marked Exhibit 55. It's
14 DMA/Colorado: DRAFT Questionnaire, Version 5 for
15 Discussion.

16 A Yes.

17 Q Does that refer or is that the version that's
18 referenced in the last or next to last sentence of
19 the top half of the e-mail of May 21st?

20 A Again, I couldn't say for sure that this is the
21 version because it doesn't refer to a version
22 number.

23 Q If you look in the marginal notes, for example, on

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1 page 00625, does that say MS?

2 A Yes.

3 Q Can we assume that's Matt Schaefer?

4 A I believe it is, yes.

5 Q So it's likely then that this Exhibit 55 is the
6 document referred to in e-mail of May 21st which
7 is Exhibit 53?

8 A Exhibit 53. Yes. And I also see just from my own
9 recollection the attachment is Version 5. So I
10 believe that's correct then, yes.

11 Q Okay.

12 EXHIBIT 56 MARKED FOR IDENTIFICATION

13 Q I show you what's marked as Exhibit 56, sir. It
14 is another e-mail chain. The top date is the 24th
15 of May, 2010. It's designated with the numbers
16 RSG 733 and 734.

17 A Yes.

18 Q In the middle e-mail, it talks about a newly
19 revised draft that I, meaning you, put together
20 over the weekend.

21 A Yes.

22 EXHIBIT 57 MARKED FOR IDENTIFICATION

23 Q Does it refer to Exhibit 57 which I just handed

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1 you, DMA/Colorado: DRAFT Questionnaire, Version 6?

2 A It refers to a later draft than 5, and I'm not
3 sure whether, in this e-mail I don't refer to the
4 version number so I'm not certain that it's 6.
5 Likely is.

6 Q And at the top of that e-mail which is 56?

7 A Yes.

8 Q Matt Schaefer writes to you that we, assuming,
9 meaning his firm, had a couple of additional
10 thoughts. So I will send you an e-mail with the
11 next possible version. Now, would that next
12 possible version be number 6 that I handed you or
13 is it a different version?

14 A I couldn't say for certain. It could have been a
15 marked-up version of 6. I think that RSG was
16 creating the successive version numbers.

17 EXHIBIT 58 MARKED FOR IDENTIFICATION

18 Q I hand you what's marked as Exhibit 58, and it's
19 DMA/Colorado: DRAFT Questionnaire, Version 8 for
20 Discussion. I note that the number 7 is deleted
21 in the first marginal note. I will represent to
22 you that I do not have a Version 7. Do you know
23 if this Version 8 is what was referred to in the

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1 After a brief discussion with Counsel off the
2 record, it was his belief that Version 7 of the
3 survey is embedded in the e-mail and not produced
4 because it wasn't saved as such as a separate
5 document, but he believes he can obtain a copy.
6 Is that a fair statement?

7 MR. SCHAEFER: Yes, that is a fair statement.
8 It wouldn't have been saved in the drafts folder
9 maintained by RSG but should be something that can
10 be extracted from the e-mail, and I'm happy to do
11 that.

12 Q So with that caveat that you just heard, sir?

13 A Yes.

14 Q Is Version 8, which you have, the version which
15 your firm would have edited or changed after
16 receipt of a version from Mr. Schaefer's office as
17 referred to in Exhibit 59?

18 A Yes. And because it appears that I have made
19 comments that appear after Mr. Schaefer's comments
20 referring to either changes that were made or not
21 made based on our review of this draft.

22 Q Okay. So Version 8 then appears to be Version 7
23 edited by you or your firm?

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1 A Yes.

2 Q Okay. Thank you.

3 (Off-the-record discussion)

4 EXHIBIT 60 MARKED FOR IDENTIFICATION

5 Q Exhibit 60, sir, is another e-mail chain. The top
6 is Mr. Whipple to you on May 24th, 2010, and the
7 bottom is Mr. Schaefer on May 24th, 2010. RSG 697
8 and 698. In it Mr. Whipple says the attached
9 Version 8 includes my responses to comments and
10 corresponding changes.

11 A No. That's actually from me to Matthew.

12 Q Yes. I am sorry. It's from Mr. Whipple's --

13 A Right.

14 Q -- e-mail, but it's a copy?

15 A Yes.

16 Q Thank you for pointing that out. I appreciate it.
17 The attached Version 8 includes my responses --

18 A Yes.

19 Q -- to comments and corresponding changes. So if
20 we look at Version 8, that confirms that Version 8
21 is what you edited from the Version 7 that you
22 received, correct?

23 A Yes. I believe so. Yes.

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1 Q Thank you.

2 A And somehow I removed the RSG piece, but it's
3 clearly an RSG draft at that point.

4 EXHIBIT 61 MARKED FOR IDENTIFICATION

5 Q Sir, I've handed you what's marked as Exhibit 61.
6 It's another e-mail chain from you to Messrs.
7 Isaacson and Schaefer, and then a response to you
8 from Mr. Schaefer May 25th of 2010, RSG 762. And
9 you e-mail saying attached is a final version of
10 the questionnaire reflecting our discussions over
11 the past week. Do you know if what you're
12 referring to in that e-mail is survey Version 9 --

13 EXHIBIT 62 MARKED FOR IDENTIFICATION

14 Q -- which I'm handing to you as Exhibit 62? It's
15 DMA/Colorado: Questionnaire Version 9 for Final
16 Review.

17 A It would appear that this is the next version
18 that's referred to in this e-mail, yes.

19 Q And that final version reflects, as you say, our
20 discussions over the past week. Did you make
21 notes of those discussions?

22 A I may have. I don't recall whether I had them in
23 my notebook or not.

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1 Q But if you had made notes, you would have produced
2 them?

3 A Yes.

4 Q And again in Exhibit 62, Mr. Schaefer responds to
5 you with some quick edits?

6 A 61? Exhibit 61.

7 Q So I'm sorry. Thank you for pointing that out.
8 Exhibit 61.

9 A Yes. He does.

10 Q And did you make changes or was Version 9 the
11 final?

12 A The changes were just a matter of lettering of the
13 subitems and so I don't recall whether we made
14 another version of the questionnaire or just went
15 from there. Those aren't pieces that would have
16 appeared in the final questionnaire anyway.

17 Q I'm sorry. I don't understand what you mean.
18 Those wouldn't have been pieces.

19 A So it refers to the lettering of subbullets under
20 number 7. The subbullet or, sorry, the response
21 choices began with letter D rather than letter A,
22 and that was just because of the way Microsoft
23 Word handled those items.

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1 A We had conversations with SSI about their
2 address-based sampling product, and it didn't
3 appear to us to be ready for use. They had
4 advertised it, but it didn't appear that they were
5 ready to begin using it. We had had conversations
6 with Knowledge Networks over a period of a couple
7 of years about their product and felt that it was
8 the best alternative for this kind of project.

9 EXHIBIT 65 MARKED FOR IDENTIFICATION

10 Q I hand you what's been marked as Exhibit 65, and
11 it's an e-mail addressed to you from Mr. Schaefer
12 of May 27th and it's RSG 880, and it attaches a
13 redline of the questionnaire with a few final
14 proposed edits and comments for your consideration
15 flowing from our discussions with DMA and Kevin
16 Keller. And I assume -- first of all, I
17 identified that correctly, did I not?

18 A Yes.

19 Q I assume, sir, that you didn't have conversations
20 with DMA or Kevin Keller referenced in this
21 e-mail?

22 A I did not have those conversations directly.

23 Q At the top it says survey questions Version 9 B,

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1 and if you look back at the exhibits, there is a
2 version, I think, 9 A?

3 A Exhibit 63.

4 Q But I did not see a Version 9 B.

5 MR. SCHAEFER: Could be consistent with our
6 earlier conversation, and I'm happy to extract 9 B
7 as well if it's embedded.

8 MR. WESOKY: Thank you.

9 EXHIBIT 66 MARKED FOR IDENTIFICATION

10 EXHIBIT 67 MARKED FOR IDENTIFICATION

11 Q Sir, I hand you what's been marked as Exhibit 66,
12 and I'm going to also hand you at the same time
13 Exhibit 67.

14 If we could just take a look at Exhibit 67
15 first, that is an e-mail chain between yourself
16 and Mr. Schaefer, and you appear to be sending him
17 the final script for the survey; is that correct?

18 A Yes.

19 Q And Mr. Schaefer responds, this appears to capture
20 all the changes we discussed. You see that?

21 A Yes.

22 Q Do you remember what those changes were?

23 A I don't remember the substance of them. They were

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1 in response to the comments that were received
2 from Mr. Keller and DMA, I believe.

3 Q But again, you didn't speak directly with
4 Mr. Keller or with any member of DMA, correct?

5 A No. That's correct.

6 Q Take a look at Exhibit 66. Is that the Version 10
7 that we're talking about? Or is there another
8 one?

9 A This is Version 10. I don't know if there's
10 another one.

11 EXHIBIT 68 MARKED FOR IDENTIFICATION

12 Q Show you what's marked as Exhibit 68. It's
13 DMA/Colorado: Questionnaire Version 10, Final
14 Script.

15 A Okay.

16 Q Would that be the document you're referring to in
17 the e-mail 67?

18 A I don't know which of these two I was referring to
19 for sure. I'd have to compare them word for word
20 and see where they're different, but -- I'm not
21 sure. It could be either one of those two. I
22 don't know which I was referring to in the e-mail.

23 EXHIBIT 69 MARKED FOR IDENTIFICATION

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1 A Oh, but that's not page 18.

2 Q No. I said a qualifying question is like are you
3 over the age of 18. Did you buy on the internet
4 in the last six months. Those are qualifying
5 questions?

6 A We call them screener questions.

7 Q Okay. And what do you call the meat and potatoes
8 questions? Like question 8, like the question
9 appearing on page 18, what term of art do you use?

10 A This is an opinion question.

11 Q Okay. Now, this opinion question, if you look at
12 the second part of that?

13 A Yes.

14 Q The second, it says I do not mind the state of
15 Colorado knowing the kinds of products I buy, from
16 whom I buy them, where I have them shipped and how
17 much I spend. Did I read that correctly?

18 A Yes.

19 Q Now you know, do you not, that the Colorado law
20 doesn't require a reporting to the Department of
21 Revenue of the kinds of products that an
22 individual buys, correct?

23 A I know that it's not the specific item that was

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1 purchased. It's the amount and so forth. Yes.

2 Q And then if you look at the first question, it
3 says reporting my name, billing address, shipping
4 address and amount of my purchases is an invasion
5 of my privacy?

6 A Yes.

7 Q So that correctly states what the requirements of
8 the reporting law are, doesn't it?

9 A Yes.

10 Q The second one doesn't correctly state the
11 requirements of the reporting law, does it?
12 Because it says kinds of products. And there's no
13 reporting requirement for the kinds of products,
14 is there?

15 A Not directly, but the reporting does include the
16 entity from which the product is purchased from
17 which a kind of product can be inferred.

18 Q So if I buy from Lands End, are you familiar with
19 that company?

20 A Yes, I am.

21 Q Lands End, I could buy a briefcase?

22 A Yes.

23 Q Or I could buy a pair of socks?

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1 A That's correct.

2 Q Are they similar kinds of products?

3 A They're hard goods. Yes.

4 Q So a briefcase is like an article of clothing?

5 A I didn't say it was an article of clothing. I
6 said it was a hard good.

7 Q A good as opposed to a service?

8 A As opposed to a service, that's correct, or as
9 opposed to food or other kinds of consumables.

10 Q Do you know if I could buy food from Lands End?

11 A I don't know.

12 Q So you don't think this question adds a piece,
13 quote, kinds of products, that is unnecessary?

14 A No. Because -- no.

15 Q That's fine.

16 A If you'd like me to explain?

17 Q No. I don't need you to explain. Why did you add
18 that in there, kinds of products I buy, when it's
19 not in the first half of that question?

20 A It's to rephrase the question in an affirmative
21 form so that we can check consistency between the
22 two questions.

23 Q So you could not have said I do not mind the state

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1 of Colorado knowing from whom I make purchases, my
2 name, billing address and shipping address? You
3 couldn't have said that?

4 A You could say that. I don't understand.

5 Q Would that be more in line with what the law is?

6 A It's a phrasing that is more consistent with the
7 literal phrasing of the law.

8 Q Do you think, sir, that the inclusion of the words
9 "kinds of products" in that question had any
10 residual effect on the survey respondents for the
11 following questions?

12 MR. SCHAEFER: Objection to the form.

13 A No.

14 Q You don't think that it was possible that a survey
15 respondent would have that in mind that they have
16 to report the kinds of products when answering the
17 following questions?

18 A No. First of all, the heading is very clear as to
19 what's being collected and reported; and second of
20 all, as described on page 20, there's a more
21 literal reporting of what the law looks like.

22 Q With respect to that question on page 18 that we
23 talked about, the question at the top of the page,

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1 the assumptions, talk about reporting to the
2 Colorado Department of Revenue.

3 A Yes.

4 Q Do you think that the mention of the Colorado
5 Department of Revenue caused any of the
6 respondents to think in terms of an increase in a
7 product price because the Department of Revenue is
8 the tax man?

9 MR. SCHAEFER: Objection to form.

10 A No.

11 Q Okay. Fair enough. And you don't think there are
12 people that responded knowing that the reporting
13 was to Colorado Department of Revenue because many
14 people are just tax averse?

15 MR. SCHAEFER: Objection to the form.

16 A No. I don't think that would be the reason for
17 the responses that were given, no.

18 Q Do you think that could have influenced any
19 responses?

20 A It's conceivable.

21 Q But you don't think it did?

22 A I don't think it was a material effect, no.

23 Q Are you familiar with the term reactivity bias?

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1 A Reactivity bias, no.

2 Q Maybe I'm using the wrong term, but it's where a
3 question puts a response in the head of the
4 respondent. For example, I go to buy a car or I'm
5 surveyed about buying a car and they ask me how
6 important is the location of outside turn -- is an
7 outside turn signal indicator important to you.
8 And I would never have thought of that. And all
9 of a sudden, I think, well, it's a little
10 important. In other words, the question suggests
11 an answer. Do you think any of that occurred in
12 your questionnaire?

13 A No.

14 Q Why not?

15 A It's the kind of questions that we've used
16 previously in quantitative surveys. We've also, I
17 personally have done many focus groups dealing
18 with issues of privacy, and I find that
19 individuals who have concerns about privacy bring
20 those up of their own. It's not something that's
21 suggested to them from outside. And there are
22 others who simply don't react to the issue of
23 privacy, for example. So I've done a significant

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1 Q What is this?

2 A This was the transmittal of the report describing
3 the results of the survey that we conducted.

4 Q When you say the report, it was not the report
5 that was ultimately generated which was attached
6 to your Declaration, was it?

7 A It was an earlier, there were portions of this
8 that presumably made it into that report, but that
9 was essentially the Dec describing the results of
10 the study.

11 Q It wasn't in the report form that we see as an
12 exhibit to your Declaration; is that what you're
13 saying?

14 A It was a Power Point Dec and I don't think, the
15 Dec was later expanded to include the full set of
16 materials as indicated in that exhibit.

17 Q What's the date of that e-mail that you just --

18 A July 22nd.

19 Q Okay. Thank you.

20 EXHIBIT 74 MARKED FOR IDENTIFICATION

21 Q I hand you what's marked as Exhibit 74. It's an
22 e-mail transmittal from Mr. Whipple to
23 Mr. Schaefer, copy to you, which essentially says

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1 here is our report. Is that correct?

2 A Yes.

3 Q And it's RSG 00869 for identification?

4 A Yes.

5 Q Is the report he refers to the one which I have
6 just handed to you --

7 EXHIBIT 75 MARKED FOR IDENTIFICATION

8 Q -- marked Exhibit 75, Colorado Consumer Survey,
9 Final Results, July 23rd, 2010, RSG, Inc.,
10 designated on the first page was RSG 00575.

11 A I believe that that's the one. I wouldn't know
12 for certain, but it appears to be dated correctly
13 and appears to be the content that I had a chance
14 to look at, yes.

15 Q Let me represent to you I received several copies
16 of Colorado Consumer Survey Final Results with
17 different dates, and this is the one.

18 A Yes.

19 Q The pages that follow are those that came with the
20 one marked July 23rd, 2010.

21 A Okay.

22 Q And you have no reason to think otherwise, do you?

23 A No.

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1 those changes are?

2 MR. SCHAEFER: Objection to form, but go
3 ahead.

4 A Yes.

5 EXHIBIT 76 MARKED FOR IDENTIFICATION

6 Q Let me hand you what is marked, sir, as Exhibit
7 76. It's an e-mail chain identified RSG 00842,
8 and it's between Mr. Schaefer and Mr. Whipple
9 where Mr. Whipple submits the report to Matt
10 Schaefer, and Mr. Schaefer responds he wants to
11 make revisions to tailor and streamline the
12 document. Correct?

13 A Yes.

14 MR. SCHAEFER: For the record, it goes on
15 from there, but it speaks for itself.

16 Q When you do your survey work for other clients, do
17 they tailor and streamline the reports that you
18 send them?

19 A Yes, typically with our review and approval.

20 Q So you let the client change your report to tailor
21 and streamline it?

22 A We work with the clients to tailor and streamline
23 a report and typically accept comments and

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1 suggestions from our clients to do it to meet
2 their purposes, yes.

3 Q Do you ever reject comments?

4 A Yes.

5 Q Did you reject any in this case?

6 A I don't recall.

7 EXHIBIT 77 MARKED FOR IDENTIFICATION

8 Q Exhibit 77 is an e-mail. The top one is from
9 Mr. Whipple, I believe. Would you identify it
10 with the RSG number at the bottom, please?

11 A RSG 722.

12 Q And in that e-mail, Mr. Whipple's responding to
13 Mr. Schaefer's comment about tailoring and
14 streamlining the documents, correct?

15 A Yes.

16 Q And he's saying that the information is there; is
17 that what he's saying?

18 A Yes. The information is in the report, yes. And
19 also indicating that it may not be clear.

20 EXHIBIT 78 MARKED FOR IDENTIFICATION

21 Q I show you what's marked as Exhibit 78. It's an
22 e-mail chain identified with RSG 704 and 705. And
23 it also looks like it's a response to the e-mail

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1 regarding tailoring and streamlining the report?

2 A Yes.

3 Q With regard to the e-mail that appears in the
4 middle of the first page?

5 A Yes.

6 Q Is that Mr. Schaefer instructing you as to what
7 needs to be put in the report?

8 MR. SCHAEFER: Objection to form.

9 A It's actually an instruction for what would be
10 included in the Declaration.

11 Q Okay. Then Mr. Whipple at the top of the e-mail
12 comments on Matt Schaefer's e-mail, correct?

13 A Yes.

14 EXHIBIT 79 MARKED FOR IDENTIFICATION

15 Q I hand you, sir, what's been marked as Exhibit 79.
16 It's an e-mail chain identified with RSG 769
17 through 717. And the first e-mail in that chain
18 talks about a revised deck. Is that another
19 revised report similar to the July 23rd that we
20 saw earlier?

21 A Yes. If you're referring to the reference to the
22 bottom of 770?

23 Q Yes. Appears to be the first e-mail in that

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1 chain?

2 A Yes.

3 EXHIBIT 80 MARKED FOR IDENTIFICATION

4 Q And that was dated July the 28th so would that
5 have been the final results that are reflected in
6 Exhibit 80 called Colorado Consumer Survey Final
7 Results July 26, 2010 which I'm handing you marked
8 as Exhibit 80?

9 A I'd say probably. It's dated July 26th. The
10 e-mails are dated July 28th. But it may well be
11 the same Dec.

12 Q And then Mr. Schaefer responds in the next e-mail
13 in the chain acknowledging receipt?

14 A Yes.

15 Q Saying it looks good, but Mr. Isaacson, he refers
16 to him as George, has not had a chance to review
17 it and make changes that he thinks should be made?

18 A Or suggest changes. Proposed changes which is the
19 way changes were discussed.

20 Q Also in that e-mail chain, Mr. Schaefer talks
21 about in the next one in the chain to see if you
22 had any revisions to the draft of the Declaration.
23 Do you see that? It's at the top of page 770?

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1 A Yes.

2 Q Did you have any changes?

3 A It appears that I did find some typos.

4 EXHIBIT 81 MARKED FOR IDENTIFICATION

5 Q And there's also another Final Colorado Consumer
6 Survey Final Results dated July 29th which appears
7 in Exhibit 81 which I've just handed you. That's
8 another revision to your report of survey results?

9 A Yes.

10 Q That's still not the final one. The final one was
11 dated August 9th, correct?

12 A Yes.

13 Q And that was Exhibit 21, I believe.

14 A Yes.

15 Q So July 29th was not the final?

16 A That's correct.

17 Q August 9th, Exhibit 21, was -- what was the final?

18 A Exhibit 21 is the final version.

19 Q Right. Okay. And the other versions that we've
20 looked at, the 23rd, the 26th and the 29th were
21 all changed as they went along based on
22 suggestions of Brann & Isaacson?

23 MR. SCHAEFER: Objection.

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1 A They were modifications made that were reviewed
2 with, both Nelson and I reviewed those changes and
3 made a number of, I would consider them to be
4 minor changes.

5 Q But they were the suggestion of Brann & Isaacson,
6 yes or no?

7 A Most of them, yes. Some of them typos and so
8 forth that were my suggestions.

9 EXHIBIT 82 MARKED FOR IDENTIFICATION

10 Q Sir, I'll hand you what's Exhibit 82, e-mail chain
11 designated with RSG 775 through 777.

12 A Yes.

13 Q Referring to the last two e-mails in the chain,
14 you are sending documents to Mr. Schaefer which
15 includes the revised copy of the Declaration,
16 correct?

17 A You mean the top two?

18 Q Yes.

19 A So the ones on page --

20 Q The most recent?

21 A 775. Yes.

22 Q The latest in that chain?

23 A Yes.

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1 Q Do you remember the revisions that you made?

2 A I don't remember them offhand, no.

3 Q Do you remember if they were large revisions,
4 major revisions or just kind of tweaking words?

5 MR. SCHAEFER: I'm going to object to form
6 just because he's not looking at a copy of it.

7 A Yes. I don't recall, but certainly they were, the
8 Declaration was based on the results that we had
9 presented to Brann & Isaacson and that we had
10 discussed with Mr. Schaefer and Mr. Schaefer, I
11 believe, for the most part accurately reflected
12 the opinions that we had discussed over the phone
13 in the Declaration. So I don't recall any
14 significant changes in substance.

15 Q Fair enough. Okay. Then the top e-mail in that
16 chain or the latest in that chain, looks like
17 Mr. Schaefer further revises the Declaration?

18 A Yes.

19 Q And it appears he's revising it, tell me if this
20 is your impression as well, that he's revising it
21 to comport to what Professor Keller said in his
22 Declaration?

23 A Well, I think the intent was to revise it so that

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1 it was consistent with the facts which was that
2 Professor Keller did review the survey.

3 Q So it would be consistent, your Declaration would
4 be consistent with his?

5 A So that my Declaration would be consistent with
6 the facts.

7 EXHIBIT 83 MARKED FOR IDENTIFICATION

8 Q Let me hand you what's been marked as Exhibit 83,
9 and it's an e-mail from Mr. Schaefer to you dated
10 September 10th, bearing RSG 00936 and 937.

11 A Yes.

12 Q Do you recall receiving this?

13 A I don't recall receiving this specific e-mail, but
14 I do recall the request, yes.

15 Q Was that the first time you had been told about
16 the requirements that are set forth in this
17 e-mail?

18 A It was the first time that they were listed out.
19 We may have had a prior phone conversation. I
20 don't recall.

21 Q Would you look at the second page of that?

22 A Yes.

23 Q And I think to capsulize it, Mr. Schaefer's

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1 Q About Professor Keller commenting on the survey?

2 A Yes.

3 Q And that Mr. Schaefer will file the Keller
4 affidavit and the survey report?

5 MR. SCHAEFER: Objection. Mischaracterizes
6 the document.

7 A Yes.

8 Q Well, you were not going to file a Keller
9 affidavit, were you?

10 A No.

11 Q I didn't think so. It says May 2 in effect. What
12 does that mean? May 1 in effect.

13 A My recollection was that the law was in effect on
14 May 1.

15 Q Okay. Next is May 19th. Can you tell me what
16 that note is?

17 A So this looks like kind of a repeat of the
18 specific objectives, what we wanted to find out.

19 Q So you wanted to find out whether turning over the
20 information will cause people to not purchase?

21 A Right, versus not paying taxes. We wanted to
22 avoid getting into the issue of people not liking
23 to pay taxes because we know nobody does.

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