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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

The Direct Marketing Association,

Plaintiff,

v.

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

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

APPEARANCES:

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

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

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1 Q Well --

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

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

8 A Right.

9 Q Could you tell me what those mean?

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

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

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

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

23 A That is correct.

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1 put it.

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

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

8 Q Did you speak with that individual?

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

12 Q Do you know why you wrote those down?

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

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

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

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

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

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

17 A Facilities, I think probably.

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

20 A Presence.

21 Q Okay. Economic presence. State?

22 A Tried.

23 Q State tried. What does that mean?

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

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

8 A George and Matt. Correct.

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

11 A Descriptive background, correct.

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

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

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

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

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

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

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

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

13 Q And you knew Mr. Adler before this?

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

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

18 A Right. Right.

19 Q Can you tell me what those notes are?

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

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

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

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

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

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

10 A Yes.

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

14 A A list or --

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

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

18 Q With an arrow?

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

22 Q What are those names?

23 A Those were names of two other academics who also

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

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

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

8 Q And the other one below that?

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

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

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

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

20 A I did not.

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

23 A I don't believe so.

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

3 A It looks like invasion of consumer privacy.

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

6 A Could be mine.

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

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

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

13 A Correct.

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

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

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

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

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

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

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

12 A Not, I don't believe so.

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

15 A I did.

16 Q And who would that be?

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

21 Q Was that a telephone conference?

22 A Yes.

23 Q Do you remember the person at RSG?

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