

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

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4 THE DIRECT MARKETING ASSOCIATION,

5 Plaintiff,

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

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

10 Defendant.
11 -----

12
13 DEPOSITION OF F. CURTIS BARRY

14
15 October 19, 2010

16
17 Sandston, Virginia

18
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23 Reported by: Mary L. Rosser, RPR
24
25

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 pop-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 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 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 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 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