

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN EDUCATIONAL	.	
RESEARCH ASSOCIATION, INC.,	.	
et al.,	.	
	.	CA No. 13-1215 (TSC)
Plaintiffs,	.	CA No. 14-0857
	.	
v.	.	
	.	Washington, D.C.
PUBLIC.RESOURCE.ORG, INC.,	.	Wednesday, November 4, 2015
	.	10:35 a.m.
Defendant.	.	
.	

TRANSCRIPT OF STATUS HEARING
BEFORE THE HONORABLE TANYA S. CHUTKAN
UNITED STATES DISTRICT JUDGE

APPEARANCES

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1 P R O C E E D I N G S

2 THE DEPUTY CLERK: Your Honor, these are civil cases
3 14-857 and 13-1215, American Educational Research Association
4 Incorporated, et al., versus Public.Resource.Org, Inc. Counsel,
5 please come forward and state your appearances for the record.

6 MR. HUDIS: Your Honor, in the 14-857 case, AERA,
7 Jonathan Hudis for plaintiffs, and I'm here with my colleague,
8 Kathleen Cooney-Porter, also for plaintiffs.

9 THE COURT: Good morning.

10 MR. BECKER: Good morning, Your Honor. Matthew Becker
11 for the defendant, and I'm here with David Halperin, also for
12 the defendant.

13 THE COURT: Good morning. Thank you.

14 All right. I've had a chance to review the -- oh.

15 MR. KLAUS: I'm sorry, Your Honor. Should we
16 introduce ourselves?

17 THE COURT: Yes, please.

18 MR. KLAUS: In the 13-1215 case, I'm Kelly Klaus from
19 Munger, Tolles & Olson, and I'm here for the National Fire
20 Protection Association.

21 THE COURT: Good morning, Mr. Klaus.

22 MR. FEE: Good morning, Your Honor. I'm Kevin Fee on
23 behalf of ASTM, and I'm joined by Jordana Rubel, who is standing
24 right behind me.

25 THE COURT: Hello. Good morning.

1 MR. CUNNINGHAM: Good morning, Your Honor.

2 Blake Cunningham on behalf of ASHRAE.

3 THE COURT: All right, everyone. Sorry about that.

4 Okay. So I've reviewed the joint report on proposed
5 summary briefing schedule, and I have some thoughts. It appears
6 that -- well, if you have anything to add beyond what's in the
7 status report as to why you think you're entitled to the
8 schedule, but I kind of have my notion. I can hear you.

9 Yes, Mr. Hudis.

10 MR. HUDIS: So, Your Honor, on behalf of the
11 plaintiffs in the 14-857 case, we filed the case nine months
12 after the ASTM case. We slogged through discovery, and we
13 finished before they did. We had our final pretrial -- sorry --
14 post end-of-discovery conference before the other case. So
15 we're ready to go.

16 We believe that our case is more streamlined, has a lot
17 less issues. We believe that we should not have to sit on our
18 hands for a few months as Public Resource would like. We are
19 agreeable to any staggered schedule Your Honor will order, so
20 long as we don't have to sit on our hands, and then have a
21 briefing schedule later.

22 We also don't want to risk that Your Honor is going to
23 decide these cases separately. We've fought like the dickens
24 so that we could have all these summary judgment motions before
25 Your Honor and we could decide all of these issues at one time.

1 THE COURT: I agree.

2 MR. HUDIS: And that's what we have to say.

3 THE COURT: Okay.

4 MR. BECKER: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. BECKER: Matthew Becker for the defendant.

7 It appears that Public Resource and the AERA plaintiffs can
8 agree that we should have a staggered schedule, and the AERA
9 plaintiffs have said that they would agree to any staggered
10 schedule.

11 If we could have a staggered schedule that would allow for
12 Public Resource to have adequate time to respond and fully brief
13 for motions for both cases, as well as, if possible, according
14 time for counsel to visit family on the holidays, that would be
15 greatly appreciated, Your Honor.

16 THE COURT: All right. I've reviewed both parties'
17 proposals, and I have come up with a schedule of my own that is
18 in between the two.

19 One of the things that I have started to prefer is, I don't
20 have a love of simultaneous briefing. I find things can get
21 confusing. I generally prefer sequential briefing. I do think
22 that the proposal that plaintiffs have put forward is a two and
23 a half month long briefing schedule, which some of these
24 deadlines, by my calculation, provide for even less time than
25 the local rules, and I think given the holidays, it's too tight.

1 So I'm not going to issue that schedule.

2 On the other hand, defendants' proposed schedule is four
3 months long, also contemplates simultaneous briefing, which I
4 think is also a little long. So I'm rejecting both suggested
5 schedules. I don't think that plaintiffs have a particularly
6 compelling ground to compress a schedule in this case,
7 especially in light of the defendant's assertion that they have
8 taken down documents from the website that plaintiffs were
9 complaining of having up. I see you standing up.

10 MR. FEE: Your Honor, may I say something?

11 THE COURT: Yes, absolutely.

12 MR. FEE: They did the other way, of course, to make
13 the point that they took down the standard that was the issue in
14 the AERA case, but that is not true for the ATSM case. Part of
15 the reason we're so anxious to get this thing teed up is, as
16 recently as the past month they've posted 14 or 15 new --

17 THE COURT: I was going to ask you to articulate your
18 prejudice.

19 MR. FEE: So that's our harm. They're delaying this
20 forever and putting up more of our materials at the same time.

21 THE COURT: All right. Let me hear from defendants.
22 I did want to hear from you on the prejudice issue regarding the
23 delay, and if that's the case, you can't ask for a longer
24 schedule which gives you longer to allegedly violate their
25 copyright.

1 MR. BECKER: Your Honor, most of the standards at
2 issue in this case have been posted years prior to when the case
3 was ever filed, and it appears that the plaintiffs in the ASTM
4 case had contemplated litigation for years prior to filing this
5 case. There isn't any reason that it seems that they need to
6 have a resolution of the case immediately whereby an extension
7 of one month would --

8 THE COURT: But they filed a case. They filed a case,
9 and they're alleging harm, and the harm they're alleging is
10 having those documents up on a website. To the extent that the
11 longer this case goes and the longer those documents are up
12 there, the greater the harm that they allege they're suffering.
13 I mean, that is prejudice, as prejudice can be articulated.

14 Now, in the joint status report, you said that you had
15 taken down some of the documents?

16 MR. BECKER: Yes. In agreement with the AERA
17 plaintiffs, that standard had been taken --

18 THE COURT: What about the other ones?

19 MR. BECKER: No. There hadn't been any agreement with
20 the plaintiffs in the --

21 THE COURT: Why can't you take them down during the
22 time for the briefing schedule?

23 MR. BECKER: We have not contemplated that, Your Honor.

24 THE COURT: Can you contemplate it now?

25 MR. BECKER: I could contemplate it now, Your Honor.

1 As Your Honor is probably aware of the background of this case,
2 these are documents that have been incorporated by reference
3 into the law and are therefore themselves --

4 THE COURT: That's the whole ball of wax. I mean,
5 that's what the case is about, right? We're going to decide
6 whether those documents have fallen into the public domain or
7 whatever the argument is. But right now, the plaintiff's
8 argument is that the longer those documents are up there, the
9 greater the harm they are suffering, and if you've agreed to
10 pull some pending briefing, why can't you pull the others?
11 What's the problem?

12 MR. BECKER: It would be possible to pull the other
13 standards if that is what Your Honor believes is necessary in
14 order to have a longer briefing schedule.

15 THE COURT: I do. All right. Okay.

16 MR. HUDIS: Your Honor, just so the record is clear,
17 the AERA plaintiffs, we agreed with Public Resource at the very
18 beginning of the case because we had asked on whom we would
19 serve a preliminary injunction motion. So Mr. Becker's boss and
20 lead counsel, Andrew Bridges, called me and said, we want a full
21 hearing on the merits; we don't want a partial record based upon
22 a preliminary injunction motion.

23 So upon his and his client's agreement to take our one
24 standard down during the pendency of the case, we did not file a
25 preliminary injunction motion. So I just want to make sure the

1 Court is not confused.

2 In the ASTM case, as of right now, all of their standards
3 are still up on Public Resource's website, and as I understand
4 from speaking with counsel, they're still being added. Our only
5 concern, as I said before, is that we have a staggered schedule
6 and a joint hearing before Your Honor.

7 THE COURT: Okay. I can tell you right now we're
8 going to have a joint hearing, and I can tell you right now that
9 the schedule I'm proposing is only -- it's a 3.5 month briefing
10 schedule. Plaintiffs have proposed a 2.5 month briefing
11 schedule, defendants have proposed a four-month briefing
12 schedule. So this is not a huge amount of time difference.

13 All right. I do find that defendants are going to need
14 some more time, the holidays and family obligations, plus they
15 just have fewer lawyers to respond. So I do think that Public
16 Resource makes a strong case for giving it some more time. So
17 I'm going to do that.

18 So my proposal is, it adapts the parties' six-briefs,
19 simultaneous cross-motions schedule, but it changes it to four
20 sequential briefs in each case. So rather than describe it,
21 I've done a little chart, and I'm going to have my clerk give it
22 to you so you all can see the dates that we're talking about.
23 Look at it and let me know if this is doable.

24 (Counsel viewing document.)

25 MR. KLAUS: I think I get from the time schedule is

1 the idea that one side would move first, the other side would
2 respond, and I suppose the question is who's on the blank there
3 on blank's motion for summary judgment. Is it our motion and
4 their consolidated motion and opposition, or reverse?

5 THE COURT: That's a good question.

6 MR. KLAUS: If I'm understanding it correctly,
7 Your Honor, it's like a cross-appeal where there are four
8 briefs --

9 THE COURT: Right.

10 MR. KLAUS: -- which I think makes, quite frankly,
11 reducing the number of briefs that Your Honor is going to be
12 inundated with make a tremendous amount of --

13 THE COURT: It does to me.

14 (Laughter)

15 MR. KLAUS: But I think that notwithstanding the -- as
16 you said, there is a ball of wax. It's a fairly defined ball of
17 wax, and so I think you'll see a lot of the same arguments and
18 cases more than once in the briefing.

19 THE COURT: I think we would have plaintiffs' motion
20 first since that sort of seems to make logical sense to me.

21 MR. KLAUS: Yes.

22 THE COURT: Now, why don't we start filling in the
23 blanks here. So plaintiffs' motion for summary judgment in the
24 ASTM case, when would you want that to be due?

25 MR. KLAUS: We had suggested November 19, Your Honor,

1 and obviously, if our standards are coming down during the
2 pendency of the briefing, then I think all the time schedule
3 here makes a good amount of sense. But November 19 would be
4 fine with us.

5 THE COURT: Okay.

6 Defense? What's your position on this?

7 MR. BECKER: November 19 is fine, Your Honor.

8 THE COURT: Okay. That doesn't impose a deadline on
9 you. So before we start putting in dates, does anybody have any
10 objections or questions or concerns about this proposed
11 schedule?

12 MR. HUDIS: I guess, Your Honor, before we start
13 filling in the other dates, I think maybe we start with the
14 initial summary judgment motion in the AERA case, and then it
15 starts to get easier to fill in the rest of the dates.

16 THE COURT: We could do that, because that was filed
17 -- is it because it was filed first?

18 MR. HUDIS: No. The ASTM was filed first.
19 We finished first.

20 THE COURT: Oh, I see.

21 MR. KLAUS: I had understood under your schedule,
22 Your Honor, that Mr. Hudis's opening motion would be filed the
23 same day as Public Resource's opposition to our motion.

24 THE COURT: Right. Right.

25 MR. KLAUS: And we think that's exactly --

1 THE COURT: Yeah. That's what it's going to be.
2 So if the plaintiff's motion in ASTM would be filed November 19,
3 on December 19 -- that's a Saturday, so let's say the 18th?

4 MR. KLAUS: Friday, or the Monday?

5 THE COURT: We can do the Monday.

6 MR. KLAUS: Let's do the Monday.

7 THE COURT: So that's the 21st. The defendant's
8 opposition to the motion for summary judgment and combined
9 cross-motion for summary judgment in the ASTM case would be due,
10 and then plaintiffs' motion for summary judgment in the AERA
11 case would also be due. Okay? Then a month later, which would
12 be January -- what's January 21?

13 MR. KLAUS: That's a Thursday.

14 THE COURT: So January 21, plaintiff's reply in
15 support of summary judgment and the combined opposition to the
16 cross-motion for summary judgment in the ASTM would be due, and
17 defendant's opposition to motion for summary judgment and
18 combined cross-motion for summary judgment in AERA would be due
19 as well. Then two weeks after that, which would take us to
20 what, Ms. Moser?

21 THE DEPUTY CLERK: February 4.

22 THE COURT: Defendant's reply in support of a
23 cross-motion for summary judgment in the ASTM case would be due,
24 and that would give the defendant an additional two weeks.
25 All right? So that's February 4. And is that a weekday?

1 THE DEPUTY CLERK: Thursday.

2 THE COURT: Okay. And then two weeks after that...

3 THE DEPUTY CLERK: The 18th, which is also a Thursday.

4 THE COURT: Okay. February 18, plaintiff's reply in
5 support of the motion for summary judgment and combined
6 opposition to cross-motion for summary judgment in the AERA
7 case. Two weeks after that...

8 THE DEPUTY CLERK: March 3.

9 THE COURT: And I'm going to issue an order with all
10 these. Defendant's reply in support of the cross-motion for
11 summary judgment in the AERA case.

12 Then as far as the amicus briefs, those are due whenever
13 you all want them to be due, but they need to be obviously done
14 well before argument on motions. Frankly, if they could be done
15 by March 3 as well, that would be great, but well before the
16 argument. And then we have to decide a combined motions
17 argument dates.

18 MR. KLAUS: If I could just add, on the amicus
19 briefs -- and I think this probably holds for both sides -- I
20 would imagine that each side would like at least one opportunity
21 in one of the rounds of briefing that we've got here if they're
22 going to take a shot at something that an amicus has said.

23 THE COURT: Okay. What do you suggest?

24 MR. KLAUS: So it may be that slotting in the amici
25 briefs sometime in January may make the most sense.

1 THE COURT: Okay. So amicus briefs in ASTM, can you
2 give me a proposed date?

3 MR. KLAUS: I would propose, Your Honor, the 11th.

4 THE COURT: January 11?

5 MR. KLAUS: January 11.

6 THE COURT: All right. And responses?

7 MR. KLAUS: I think the response should be folded in.
8 By my lights, we'll have another brief to file on January 21.

9 THE COURT: So we just have that due then, too?

10 MR. KLAUS: I would say that unless the parties think
11 they will need additional briefing, I would imagine that on the
12 amici point, there doesn't need to be a whole pile of opposition
13 briefs, provided we have page limits.

14 THE COURT: Yeah, we're going to get to that.

15 MR. KLAUS: Understood. But I think within those,
16 given that each side will be having a final word after an amicus
17 brief is filed, unless there is something that is truly
18 extraordinary that justifies a separate opposition, those
19 arguments can probably be folded into the final brief.

20 THE COURT: What's your position, Mr. Becker? I think
21 that makes more sense. I mean, I think you can address any
22 arguments the amici make in your oppositions.

23 MR. BECKER: All right.

24 THE COURT: And amicus briefs in AERA?

25 MR. HUDIS: So, Your Honor, I'm just going on the

1 initial summary judgment motions. There's a four-week gap.
2 Do you want to do a four-week gap so ours would be due like the
3 second week of February?

4 THE COURT: So between the 4th and the 18th, you mean?

5 MR. HUDIS: Yeah.

6 THE COURT: Sure. Give me a date.

7 MR. KLAUS: How about the 11th?

8 MR. HUDIS: February 11?

9 THE COURT: Okay.

10 MR. HUDIS: That's a Thursday.

11 THE COURT: All right. Great.

12 Now, ASTM had originally asked for extra pages, which was
13 made under the expectation of simultaneous cross-motions. In
14 light of my sequential briefing schedule, how many pages do you
15 think you'll need?

16 MR. KLAUS: We will need, I think, the 60 that we
17 asked for, because we've got three different plaintiff groups,
18 and while we are going to consolidate our arguments, our common
19 arguments, there are some issues that will be different for each
20 of us. So we would still propose that the briefs be 60 pages.

21 THE COURT: Okay. I think that's right. So opening
22 motions, 60 pages.

23 MR. HUDIS: Is that both cases, Your Honor?

24 THE COURT: Yeah, unless you can make your case.
25 Do you need more for your case? I was going to say combined

1 oppositions on cross-motions would be 80 pages and opening briefs
2 60, but if you can make your case for more, I'll consider it.

3 MR. HUDIS: On my opening brief, if you're going to
4 give us 60 pages, I'll take it.

5 THE COURT: All right. Don't feel the need to use all
6 the pages.

7 MR. HUDIS: Of course not, but if we have room.

8 THE COURT: Fine. I don't want you to leave out an
9 argument that... Okay, so opening motions would be 60 pages;
10 combined oppositions and cross-motions, 80 pages; combined
11 replies and oppositions, 50 pages; and replies, 30 pages.
12 Again, I'll put this all in the order.

13 MR. HUDIS: So, Your Honor, the dates I have
14 running down the right-hand column are November 19, December 21,
15 January 21, February 4, February 18, March 3. On the amicus,
16 January 11, February 11.

17 THE COURT: That's right.

18 MR. HUDIS: Thank you, Your Honor.

19 THE COURT: That's what I have.

20 All right. Who wants to -- well, okay, we got the opening
21 of the briefing. Great.

22 Joint motion hearing. It seems like that's what you're
23 asking for anyway, because I have a note to myself saying to get
24 the parties to agree to a joint motion hearing. So that's the
25 easy one. All right. Do you want to set a date now since we

1 have you all here?

2 MR. KLAUS: It's obviously a lot of briefing,
3 Your Honor, but we'd be happy to set a date now.

4 THE COURT: I mean, obviously, if there's motions for
5 -- I don't even want to raise the issue of motions for extension
6 of time, but in an abundance of caution, let's set a date with
7 the understanding that we may have to push it.

8 Is that fine, Mr. Becker?

9 MR. BECKER: Yes. I don't know the schedule of
10 Andrew Bridges, the lead on this case, Your Honor, so I couldn't
11 necessarily say that if we --

12 THE COURT: Well, I'm going to do this. Let's pick a
13 motions-hearing date. If there's some reason that's bad, confer
14 with the other side, come up with a mutually agreeable date, and
15 we'll set it.

16 MR. HUDIS: So, Your Honor, the last date I have on
17 the schedule, the last brief would be March 3.

18 THE COURT: Okay.

19 MR. HUDIS: So if you want to put in some wiggle room
20 sometime during the week of the 21st?

21 THE COURT: Is there a date you would both prefer?

22 MR. HUDIS: What's your favorite day of the week?

23 (Laughter)

24 THE COURT: I'm wide open that week, so Mr. Becker?

25 MR. HUDIS: Tuesday the 22nd?

1 THE COURT: Tuesday the 22nd, Mr. Becker?

2 MR. BECKER: Yes, Your Honor.

3 THE COURT: All right. So why don't you check as
4 early as possible and find out if that is a good date for
5 Mr. Bridges. As you heard, that's wide open for me, and it
6 sounds like it may be open for the other side.

7 So, motions hearing Tuesday, March 22. Let's block off a
8 morning.

9 MR. HUDIS: What time would you like to start,
10 Your Honor?

11 THE COURT: 9:30.

12 MR. HUDIS: 9:30.

13 THE COURT: All right?

14 MR. HUDIS: Very gracious, Your Honor. Thank you.

15 THE COURT: You're very welcome. I'm glad all the
16 discovery issues are resolved and we're moving forward.

17 Mr. Becker?

18 MR. BECKER: Your Honor, may I ask a question of the
19 Court?

20 THE COURT: Yes.

21 MR. BECKER: With regards to the standards in the ASTM
22 case, are you instructing that the standards in that case should
23 be taken down pending the outcome of this case?

24 THE COURT: Well, there's no request for preliminary
25 injunction, and I'm not going to order that. One of the reasons

1 that the plaintiffs articulated for wanting a more compressed
2 briefing schedule was this prejudice they were suffering because
3 these documents were up, and you had said in the joint status
4 report that -- let me just find it. Hold on.

5 Right. Where defendants state that the only standard at
6 issue in the AERA case has been taken off-line by Public
7 Resource after agreement of the parties pending the outcome of
8 that case, so there's no rush to reach a judgment.

9 Counsel for the plaintiffs pointed out that that was not
10 the case in the ASTM case and there had been some issues.
11 I don't want to order anything that doesn't have a preliminary
12 injunction. You were asked if you would be willing to do it, at
13 least during the briefing schedule, and you agreed to do it
14 during the briefing schedule. We can revisit the issue after
15 the briefing schedule. Is that agreeable?

16 MR. BECKER: Okay. So in that case, Public Resource
17 would take the standards down during the briefing schedule.

18 THE COURT: Yes.

19 MR. BECKER: My understanding is that this would
20 include -- this would be the standards at issue in this
21 litigation but not any documents that the plaintiffs have not
22 filed suit over. Is that...

23 THE COURT: I don't have any jurisdiction over those.

24 MR. BECKER: Thank you, Your Honor.

25 THE COURT: Maybe not. Yes? I'm sorry.

1 MR. FEE: On that last point, part of our concern is
2 they keep putting up new documents that we haven't made part of
3 this case yet. Once this case is resolved, obviously, it's
4 going to deal indirectly with all those standards as well.

5 THE COURT: It will.

6 MR. FEE: So if we're going to stretch this thing out
7 for months and months, I do think that they should not be able
8 to keep up the standards that they've posted recently as well.

9 THE COURT: I mean, there's no injunction, there's no
10 restraining order, but to the extent that you are engaging in
11 repetitive behavior, Mr. Becker, that's going to affect this
12 case, I can't order you to stop.

13 Well, I could tell you that if you're putting up similar
14 documents, you are giving plaintiffs an opportunity to come in
15 here and move for preliminary injunction and derail this and
16 have you stopped. If you're willing to stop while at least the
17 briefing schedule is pending, then yes, you should do that.

18 MR. BECKER: Thank you, Your Honor.

19 MR. KLAUS: Was that an agreement by Mr. Becker?

20 THE COURT: Yeah, let us have a cease-fire until the
21 motions argument.

22 MR. BECKER: Okay, Your Honor.

23 MR. KLAUS: Thank you, Your Honor.

24 THE COURT: Thank you. I'll see you all in March.

25 (Proceedings adjourned at 11:03 a.m.)

* * * * *

CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

Bryan Wayne

BRYAN A. WAYNE