

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR TESTING.	Case No. 1:13-CV-01215
	. (TSC/DAR)
AND MATERIALS, ET AL.,	.
	.
Plaintiffs,	. Washington, D.C.
	. October 28, 2014
v.	.
	.
PUBLIC.RESOURCE.ORG, INC.,	.
	.
Defendant.	.
.

STATUS CONFERENCE
BEFORE THE HONORABLE DEBORAH A. ROBINSON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For American Society for Testing and Materials:	Morgan, Lewis & Bacchus, LLP By: J. KEVIN FEE, ESQ. EDWIN O. CHILDS, ESQ. 1111 Pennsylvania Avenue, N.W. Washington, DC 20004
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For National Fire Protection Association, Inc.:	Manger, Toles & Olson, LLP By: NATHAN M. REHN, ESQ. 560 Mission Street, 27th Far. San Francisco, CA 94105-2907
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For American Society of Heating, Refrigerating, and Air-Conditioning Engineers, Inc.:	King & Spalding, LLP By: MICHAEL ANDREW ZEE, ESQ. 101 Second Street, Ste. 2300 Room 2300 San Francisco, CA 94105
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For Defendant Public. Resource.Org., Inc.:	Fenwick & West, LLP By: ANDREW P. BRIDGES, ESQ. 555 California Street Suite 1200 San Francisco, CA 94104
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BOWLES REPORTING SERVICE
255 Route 12, Suite 1
GALES FERRY, CONNECTICUT 06335 - (860) 464-1083
brs-ct@sbcglobal.net

1 (Proceedings commenced at 3:30 p.m.)

2 THE CLERK: The Honorable Court resumes in
3 session.

4 THE COURT: Good afternoon.

5 MR. BRIDGES: Good afternoon, Your Honor.

6 THE CLERK: Please be seated.

7 The matter now pending before this Court is
8 American Society for Testing and Materials, et al. v.
9 Public.Resource.Org, Incorporated in Civil Action
10 Number 13-1215.

11 Kevin Fee and Edwin Childs are representing
12 Plaintiff American Society for Testing and Materials.

13 Nathan Rehn is representing Plaintiff
14 National Fire Protection Association, Incorporated
15 appearing by telephone.

16 Andrew Zee is representing Plaintiff American
17 Society of Heating, Refrigerating and Air Conditioning
18 Engineers, Incorporated, also appearing by telephone.

19 And Andrew Bridges representing Defendant
20 Public.Resource.Org, Incorporated.

21 We're here for the purpose of a motion
22 hearing.

23 THE COURT: Now, good afternoon to all of
24 you.

25 When we last convened a hearing, the time

1 that actually represented your first appearance before
2 me, the Court scheduled a hearing for today in order to
3 give counsel and the parties a further opportunity to
4 meet and confer in an effort to resolve the dispute.

5 It is my understanding that you have made
6 some additional progress. I certainly hope this is the
7 case.

8 Mr. Bridges, you are the Movant, or counsel
9 for the Movant, so I will hear from you first.

10 MR. BRIDGES: Thank you, your Honor.

11 We have indeed made some progress, not as
12 much as I think we all would like. We are at a point
13 where there is a lack of knowledge and information that
14 is currently the sticking point, so we can't tell
15 whether there is a conflict of willpower that would
16 impede resolution of it.

17 We're down to, I think, one issue for each
18 Plaintiff. Two Plaintiffs have the same issue.

19 The first issue that both ASTM and NFPA have
20 is the question of whether and how we get emails, non-
21 privileged emails regarding the litigation from the
22 general counsel of each organization. The difficulty
23 is we do not yet have information about the volume of
24 the emails at issue. Both ASTM and NFPA are still
25 trying to get a handle on that and report back to me,

1 but we don't have that in order to determine whether we
2 can somehow cut through it. So we don't really know,
3 at this point, the burden, and we don't know enough to
4 strategize as to whether there is a way to find a
5 compromise to ease the burden because we just don't
6 know what the burden is.

7 With ASHRAE it's a different issue, and if I
8 may give two minutes of substantive copyright law --

9 THE COURT: Of course.

10 MR. BRIDGES: -- then that will set it in
11 context.

12 When copyrighted works evolve and go through
13 multiple versions, each later version is called a
14 derivative work of the earlier version. And when you
15 have a later version, the copyright comes into that
16 work in increments, like a layer cake. And the
17 copyright on the current version extends to the work
18 that led specifically to that version. To know the
19 copyright of any version and to know what that extends
20 to, you need to know what the increment was, what the
21 new layer was in that particular version.

22 When we're talking about ASHRAE we're talking
23 about essentially a three-layer cake because the
24 current standards are based on at least two earlier
25 versions of the standards. There is a very, very real

1 question about the ownership of the copyright in these
2 standards because unusually, in my long experience of
3 practicing copyright law, these standards are
4 essentially offered by consensus. They are offered by
5 members of committees and members of the public who
6 contribute words, phrases to each standard.

7 So for ASHRAE to own the copyright in the
8 standards, it has to have received assignments from all
9 the contributors.

10 Now, the problem we have right now is that
11 for ASHRAE it's easy to give us the assignment
12 information, according to his counsel, for the current
13 version, but that's only one-third of the story.
14 They're saying it is a very difficult task for them to
15 come up with evidence that they acquired ownership of
16 the underlying versions that have been incorporated in
17 this one because unusually for copyright cases there is
18 a very, very live issue about whether they have
19 perfected chain of title and, in particular, for
20 example, whether the participation of Federal
21 Government employees in this process makes these works
22 in part government works, as to whether there is no --
23 as to which there is no copyright, we really need the
24 full chain of title.

25 So what we understand from ASHRAE is this:

1 They have not segregated out the assignment information
2 about the contributions to the earlier versions from
3 lots of other documents they have, and they believe it
4 would take them a lot of time to go through and sort
5 out which relevant documents to produce.

6 We still lack some information which ASHRAE's
7 counsel has promised to get, and let me give you an
8 analogy. If we're looking for almonds in the bowl of
9 mixed nuts, because some documents were mixed in with
10 all sorts of irrelevant documents, I think the choice
11 is between their going through the work of finding the
12 almonds and turning them over, or of just saying, "Here
13 are all the mixed nuts. You find the almonds."

14 Now, what we don't know is -- carrying the
15 analogy forward, we don't know what the volume of mixed
16 nuts is. If it's 50, 60 boxes, we'll do that, Your
17 Honor, but we just don't know.

18 THE COURT: What effort have the parties made
19 thus far, to confer in order to reach a consensus on
20 that question?

21 MR. BRIDGES: We have tried to confer, Your
22 Honor. We are at a point where there is just an
23 absence of information so that even our ability to
24 confer is stymied because I think ASHRAE's counsel
25 still needs to understand from his client, what that

1 volume of mixed documents is, he's not sure, but we
2 have been working on these issues, Your Honor, and
3 apparently a lot of the information on the other side
4 is harder for them to obtain than anticipated.

5 So -- And I'm in an awkward position because
6 I'm sort of waiting for each of the Plaintiffs to
7 articulate the scope of the burden so that I can try to
8 thread a way through it.

9 One of my concerns is that we have a
10 discovery cutoff, fact discovery cutoff of December 5,
11 and we are rapidly reaching a point where that's going
12 to cause some extreme pressure. Ideally, I would like
13 to be able to get a second round of written requests
14 out after seeing what we get, but we're running out of
15 time.

16 THE COURT: What is the protocol that the
17 parties proposed? I believe that one of you indicated
18 to the Deputy Clerk that at this time you had no need
19 for a hearing. That led me to conclude that you had
20 agreed upon a protocol for resolving the dispute or at
21 least preparing to narrow it.

22 MR. BRIDGES: Well, I think the protocol
23 consists now, of getting the information, the specific
24 information about the burdens on each of the three
25 Plaintiffs as quickly as possible, and I know that --

1 THE COURT: Have you agreed upon a means by
2 which to do that?

3 MR. BRIDGES: Well, I think they're just
4 trying to obtain it from their clients. So I think
5 it's a matter of how fast can they get it, but there's
6 nothing more that I can do until each of them gets that
7 information in hand.

8 THE COURT: So from the perspective of your
9 client, the Movant, is it the case that you believe
10 some additional time should be permitted for each of
11 the Plaintiffs to address that question?

12 MR. BRIDGES: Well, Your Honor, in the spirit
13 of hoping that we can resolve it, yes. If we're out of
14 time then I think we need a ruling, but I always try to
15 work with my colleagues to try to avoid that whenever
16 possible.

17 We certainly need, and this is why we filed
18 the motion to compel, we're running out of time and a
19 lot of these issues have been debated for a long, long
20 time.

21 It's a bit frustrating that we don't have the
22 actual burden information. I take opposing counsel at
23 face value when they say they can get it soon. I
24 certainly don't want to suggest that if the burden
25 information appears, we suddenly resolve the issues.

1 That means we then at least have identification of the
2 problem we're trying to solve to reach an agreement.

3 THE COURT: Is it your contention, or perhaps
4 I should rephrase my own question.

5 Are you prepared to acknowledge then, that
6 until you get the answer to this preliminary question,
7 there is nothing further that we can accomplish in
8 resolution of the pending motion?

9 MR. BRIDGES: Well, Your Honor, I mean the
10 Court can certainly simply decide the motion, and then
11 the question becomes, "Have the Plaintiffs sufficiently
12 articulated the burdens that underlie their arguments
13 for resisting discovery?", and if we move in a
14 contentious mode, then I certainly say it was their
15 burden when the issue is burden of producing documents.
16 It is the producing party's burden to articulate the
17 burden, and I don't think that we're there yet.

18 THE COURT: Very well.

19 Is there anything further with regard to the
20 proposal, Mr. Bridges?

21 MR. BRIDGES: I'm sorry, the proposal?

22 THE COURT: Is the proposal to -- Is it the
23 case that what you propose is additional time for the
24 Plaintiffs to answer the question, or to quantify the
25 answer --

1 MR. BRIDGES: Well, I --

2 THE COURT: -- to the question regarding
3 undue burden?

4 MR. BRIDGES: Your Honor, I -- we would like
5 the documents and we've been waiting. I think we're
6 content to have a ruling. I'm back here today for the
7 further motion.

8 Much of the last week has been spent waiting,
9 or 10 days or whatever, has been spent waiting for the
10 burden information that we don't have. I am willing to
11 keep at it if we can set some very, very firm
12 deadlines.

13 I'm concerned because when I was originally
14 speaking with the court staff about trying to push this
15 back a few days just to see if we could finally close
16 it, I think there were scheduling difficulties finding
17 any other time.

18 So I'd say we're prepared to seek a ruling.
19 I would like for the Court perhaps to hear from
20 Plaintiff's counsel how quickly they believe we can get
21 this resolved because at this point, Your Honor, the
22 ball is in their court.

23 THE COURT: Very well. Thank you, Mr.
24 Bridges.

25 We will proceed in the order in which the

1 Plaintiffs are named in the Complaint, and I believe
2 that would mean that you, Mr. Fee, you, Mr. Childs,
3 will begin.

4 MR. FEE: Good afternoon, Your Honor.

5 THE COURT: Good afternoon.

6 MR. FEE: So, I think first of all I'll start
7 with the good news.

8 THE COURT: For the record you are Mr. Fee.

9 MR. FEE: Yes. I apologize.

10 I'll start with the good news. In their
11 motion to compel they identified five issues that they
12 were concerned about. Four of those issues have been
13 resolved with respect to ASTM and I believe all the
14 other Plaintiffs.

15 The one issue that remains outstanding --

16 THE COURT: Let me interrupt just one moment.

17 Do you agree that that is the case, Mr.

18 Bridges?

19 MR. BRIDGES: Your Honor, I have --

20 THE COURT: At the moment the record does not
21 reflect that that is the case, and what we should do is
22 take a moment and look at the motion and, by reference
23 to a page and section number, please indicate what it
24 is that has been resolved so that the record can
25 reflect that that aspect of it is denied as moot.

1 MR. BRIDGES: Your Honor, I think I would not
2 say that it's finally resolved. We believe that we
3 have achieved an agreement in principle. What I've
4 asked each of the Plaintiffs to do, because there are
5 more of them than there are of me, and it's less of a
6 burden for each of them to write about their own
7 client, I've asked each of them to send me an email
8 outlining what they think the agreement is because we
9 do not have a writing establishing an agreement.

10 THE COURT: Can we do that this afternoon
11 while everyone is here? In other words, are you
12 prepared, Mr. Fee, and I'm happy to take a brief recess
13 if it will aid you in referring to the specific passage
14 or provision of the motion to compel, so that we can
15 determine now, whether it is the case that no further
16 consideration is needed of that?

17 Mr. Fee?

18 MR. FEE: Your Honor, I think we'd be happy
19 to try to memorialize what we think the agreement is
20 while we are here, if that's your preference.

21 THE COURT: I believe that would aid all of
22 you. It would certainly aid the Court, but it would
23 aid all of you in determining exactly what it is that
24 is still pending so you can quickly endeavor to resolve
25 that too, or if not, prepare to address it in greater

1 detail.

2 Before we take the recess, Mr. Fee and other
3 counsel, perhaps I will hear from you, Mr. Rehn, so
4 that you can indicate whether it is also the case that
5 you believe some aspects of the motion have been
6 resolved.

7 MR. REHN: Thank you, Your Honor.

8 Yes, our understanding was that we had
9 resolved at least 4 and probably 5 out of the 6 issues
10 that were raised in the motion with respect to NFPA.
11 We've had a couple of meet and confers since our prior
12 hearing, and I think we've reached an agreement in
13 principle on all of those, which we could reduce to a
14 writing in fairly short order.

15 We had a delay doing that because we were
16 hoping to get all of them resolved before this hearing
17 today, and unfortunately couldn't get the information
18 we needed as our opposing counsel indicated to you
19 earlier.

20 THE COURT: Is it your suggestion, Mr. Rehn,
21 that in lieu of taking a recess so that all of you may,
22 with reference to the motion to compel, identify what
23 it is that you believe has been resolved, and instead
24 prepare -- give you an opportunity to file a written
25 submission?

1 MR. REHN: My understanding was that you had
2 suggested that we attempt to reduce it to writing. We
3 are, I think, capable of doing that if that's what Your
4 Honor would prefer.

5 I think our thought, along with counsel for
6 the Defendant, had been that if we could get them all
7 resolved within a few days, we could do it all in one
8 writing, but we could try to do it piecemeal, as well.

9 THE COURT: I'm not suggesting that piecemeal
10 would be preferable, but at the moment I have no idea
11 of what it is you believe you have resolved. If you'd
12 rather take a few more days and determine whether all
13 of it can be resolved, I'm certainly prepared to give
14 you that opportunity.

15 Is that your preference, Mr. Rehn?

16 MR. REHN: I believe so. I had hoped I would
17 be able to get the information that the Defendant has
18 requested by today. I wasn't able to, but I believe I
19 will be able to get that final piece of information
20 very shortly, at which point I hope and anticipate we
21 will be able to either reach agreement or have a very
22 narrow disagreement for the Court to resolve.

23 THE COURT: Very well.

24 What about you, Mr. Zee? What is your
25 preference?

1 MR. ZEE: Thank you, Your Honor. On behalf
2 of ASHRAE we did send counsel for Public.Resource a
3 writing this morning setting forth our understanding of
4 the issues that have been resolved which, in our view,
5 is 4 of the 5 issues presented by the Defendant's
6 motion.

7 The one remaining issue, I believe, is the
8 one that Mr. Bridges identified a few moments ago, on
9 which we continue to attempt to obtain the information
10 that we understand the Defendant to be looking for.

11 We have no yet heard whether the writing that
12 we sent is agreed to by Public.Resource, by the
13 Defendant, as to the reservation of the other core
14 issues, but our understanding from prior conferences is
15 that is the case.

16 THE COURT: Are all of you prepared for the
17 court to enter an order scheduling a date for another
18 status conference? And perhaps more importantly,
19 providing that in the next, I would say, week or so,
20 depending on how much time you believe you need, you
21 will file a notice with a proposed order. The proposed
22 order will indicate which of the requests included in
23 the motion to compel may be denied as moot.

24 Does that appear to be reasonable, Mr.
25 Bridges?

1 MR. BRIDGES: Yes, Your Honor, and thank you.
2 My only concern is if -- is trying to
3 schedule the backup time for this to continue in court,
4 if necessary, because I understand the Court's calendar
5 is pretty full and it would take some juggling on my
6 part, but I think that process is correct, Your Honor.

7 THE COURT: Very well.

8 Let me ask you to look at your calendars,
9 please, for the first few days of December. That will
10 give you a week to 10 days and we'll set a firm date in
11 which to file the proposed order, and that will allow
12 you another two weeks or so to meet and confer in an
13 effort to resolve the remaining disputes, and should
14 you be unable to do so, you will return here during the
15 first day or two of the month of December.

16 MR. BRIDGES: Your Honor, I believe -- Let me
17 just check briefly. For myself, I do have colleagues
18 on the case. About the only day I can be here is
19 December 1, but if the Court needs a different day in
20 that week or the following week, one of my colleagues
21 will participate.

22 THE COURT: We can schedule the hearing for
23 December 1st as long as everyone else would be
24 available.

25 Mr. Fee?

1 MR. FEE: Your Honor, I'm available December
2 1st.

3 THE COURT: Mr. Rehn?

4 MR. REHN: Yes, Your Honor. I am available.

5 THE COURT: Mr. Zee?

6 MR. ZEE: I am available on December 1, Your
7 Honor.

8 THE COURT: Very well. Let's look at the
9 calendar for December 1st. I believe -- If you prefer
10 the same time, we can schedule it for 3 p.m.

11 MR. FEE: That's fine with me, Your Honor,
12 but I'm just walking down the street, so Mr. Bridges --

13 MR. BRIDGES: I do have a slight preference
14 for earlier in the day, if possible, because coming
15 from California I need to be here the night before
16 anyway, so I'll probably be having to fly here from
17 here so, but you know, my job is to do what the Court
18 wants me to do so we'll be here at any time you want.

19 THE COURT: Will everyone be available at
20 some earlier time then, for example, 11:00 a.m.?

21 MR. FEE: Again, that's fine with me, Your
22 Honor.

23 THE COURT: Because you're only down the
24 street.

25 MR. FEE: Yes. Easy enough.

1 MR. BRIDGES: Your Honor, I -- Let me see.
2 That would work. That would work great for me, but
3 I'll fit into whatever schedule works for the most.

4 I appreciate the accommodation of the
5 schedule, Your Honor.

6 THE COURT: And the rest of you, Mr. Zee and
7 Mr. Bridges, 11 a.m.?

8 MR. BRIDGES: It certainly works for me.

9 MR. ZEE: Your Honor, that time would work
10 for me, as well.

11 THE COURT: And, Mr. Bridges?

12 MR. BRIDGES: Yes, Your Honor.

13 MR. REHN: (Unintelligible.)

14 THE COURT: I apologize, Mr. Rehn. Very
15 well.

16 MR. REHN: This is Nathan Rehn. That would
17 work for me as well.

18 THE COURT: Very well. 11 a.m. on December
19 1st.

20 Now, how much time do you need to file the
21 proposed order? And when I say "the proposed order,"
22 I'm speaking of an order memorializing the agreements
23 that you have made thus far? That is so the Court will
24 know and also so that you will know what no longer
25 requires attention.

1 MR. FEE: Your Honor, I would suggest that
2 you give us a week to do that, with the hopes that
3 we'll be able to also clarify the one outstanding issue
4 at least with respect to ASTM by then. We just have
5 had a computer hiccup at ASTM; it's prohibited us from
6 getting the information we've needed so far, but I
7 certainly am optimistic that we'll have it in much less
8 than a week from today.

9 THE COURT: Very well. One week from today
10 is Tuesday, November 4th. Does everyone agree that that
11 is enough time or would you like a few more days?

12 Mr. Fee, I just heard from you.

13 Mr. Rehn?

14 MR. REHN: Yes, Your Honor. I anticipate we
15 will have all of the issues addressed by that date and
16 we can make that date.

17 THE COURT: Very well. I appreciate that.

18 Mr. Zee?

19 MR. ZEE: That date is fine for ASHRAE, Your
20 Honor.

21 THE COURT: Very well. The Deputy Clerk will
22 enter an order indicating that by no later than
23 November 4th counsel shall file a proposed order
24 indicating with reference to the motion to compel the
25 matters that have been resolved. And I'll ask that you

1 include in it a provision that with respect to those
2 issues the motion may be denied as moot.

3 You will continue to confer regarding
4 everything else and if you are unable to resolve it
5 then you will appear here on December 1st. Those of you
6 who have phoned in today, Mr. Zee and Mr. Rehn, you may
7 appear by telephone again as long as no one has any
8 objection to that. I assume you don't, Mr. Bridges?

9 MR. BRIDGES: No, Your Honor, I'm happy to
10 give a blanket consent.

11 THE COURT: Very well. Thank you very much.

12 MR. ZEE: Thank you, Your Honor.

13 THE COURT: Is there anything else that we
14 need to resolve this afternoon? Mr. Bridges?

15 MR. BRIDGES: No, Your Honor. Thank you.

16 THE COURT: Thank you very much.

17 Mr. Fee?

18 MR. FEE: No, Your Honor. Thank you.

19 THE COURT: Thank you, Mr. Fee.

20 Mr. Rehn?

21 MR. REHN: Nothing further, Your Honor.

22 Thank you.

23 THE COURT: And Mr. Zee?

24 MR. ZEE: No, Your Honor. Thank you very
25 much.

1 THE COURT: Very well. I thank you very
2 much. You may all be excused. Thank you.

3 (Proceedings concluded at 3:58 p.m.)
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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the electronic sound recording of the proceedings
in the above-entitled matter.

/s/ _____

December 1, 2014

Stephen C. Bowles