

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

AMERICAN EDUCATIONAL	.	Case No. 1:14-CV-00857
	.	(TSC/DAR)
RESEARCH ASSOCIATION, INC.,	.	
	.	
ET AL.,	.	Washington, D.C.
	.	January 22, 2015
Plaintiffs,	.	
	.	
v.	.	
	.	
PUBLIC.RESOURCE.ORG., INC.,	.	
	.	
Defendant.	.	
.....	.	

HEARING ON PLAINTIFFS' AMENDED MOTION TO COMPEL  
(DOC. #27)  
BEFORE THE HONORABLE DEBORAH A. ROBINSON  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs:	Oblon, McClelland, Maier & Neustadt, LLP By: JONATHAN HUDIS, ESQ. KATHLEEN COONEY-PORTER, ESQ. 1940 Duke Street Alexandria, VA 22314
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For the Defendant:	Fenwick & West, LLP By: MATTHEW B. BECKER, ESQ. 801 California Street Mountain View, CA 94041
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1 (Proceedings commenced at 9:47 a.m.)

2 THE CLERK: The matter now pending before  
3 this Court is American Educational Research  
4 Association, Incorporated, et al. v.  
5 Public.Resource.Org, Inc., in Civil Action Number 14-  
6 857.

7 Kathleen Cooney-Porter and Jonathan Hudis is  
8 representing the Plaintiff.

9 Matthew Becker is representing the Defendant.

10 We're here for the purpose of a motions  
11 hearing.

12 THE COURT: Now, again, good morning to all  
13 of you, and I will again apologize to all of you for  
14 the scheduling conflicts on my calendar, which led to  
15 the continuance of this matter until this morning.

16 As far as I'm able to determine, although I'm  
17 not suggesting that your hearing should span hours,  
18 there is nothing that will prevent us, this morning,  
19 from addressing the pending matter.

20 I do have a concern that I would like to  
21 share with you before I hear argument with respect to  
22 the pending motion, and that is, as I think all of you  
23 know, the case that is a related case that is also on  
24 the calendar of District Judge Chutkan, is also  
25 referred to this Court. Indeed, those parties will

1 return on February 4th at 10:00, and I've already  
2 conducted a hearing in that case, and there have been  
3 some agreements, there is still some matters in  
4 dispute.

5 One of the concerns I have is whether or not  
6 there is a need for, at least for discovery purposes,  
7 for the two matters to be consolidated. I know they  
8 are not consolidated cases, they are considered related  
9 cases, I believe, because the identity of the Defendant  
10 is the same in both cases. I believe that is the  
11 reason that, for clerk's office purposes, they are  
12 assigned to this same district judge.

13 I would like for you to address, as you  
14 enlighten me regarding the status of this case, whether  
15 or not, for discovery purposes, there is any overlap of  
16 the issues, there are -- or whether for any other  
17 reason, discovery should be consolidated in the cases.

18 I am also concerned in this case, as I was in  
19 the other, though nothing I had done in the other is  
20 necessarily binding in this matter. That is that there  
21 appears to be an absence of a genuine effort to meet  
22 and confer with an end toward resolving some of these  
23 disputes. The matter is referred to me to resolve them  
24 but that does not relieve the parties of the  
25 obligation, or counsel of the obligation to meet and

1 confer as the rules require, in an effort to at least  
2 narrow the areas of disagreement.

3 This should not turn into -- As is true in  
4 any case, discovery should not turn into whole new  
5 litigation, or the discovery dispute should not.  
6 Discovery is a part of the litigation process, it is  
7 not litigation in and of itself.

8 It is anticipated by the drafters of the  
9 rules, that the parties will conduct discovery without  
10 the need for micromanagement by the Court. So I am  
11 concerned in this case, as I am in the related case,  
12 that there appears to be an absence of any meaningful  
13 understanding of the need to meet and confer to resolve  
14 these disputes.

15 While we are clearly some time away from  
16 addressing the merits of the case, I also think it is  
17 important that the parties, in their efforts to meet  
18 and confer and manage discovery, bear in mind what it  
19 is you are actually trying to accomplish. I cannot  
20 answer that question, of course, but if your goal, for  
21 example, is to reach a point that dispositive motions  
22 can be filed, then discovery should be tailored to that  
23 which is necessary to enable you to file such motions  
24 or oppose such motions. If there is some other manner  
25 in which the litigation will proceed, then discovery

1 should be tailored toward that goal.

2 I believe I will hear from -- Because I do  
3 want to hear from you regarding the status of the  
4 litigation, I believe it is appropriate for me to hear  
5 first, from counsel for Plaintiffs.

6 Before I hear anything about the pending  
7 motions, I would like to know more about exactly what  
8 it is you are doing, what you contemplate with regard  
9 to discovery, what your objectives are, and what you  
10 anticipate with regard to the course of further  
11 litigation. So I will hear first from Plaintiffs'  
12 counsel.

13 And for the record, bear in -- we have a  
14 record -- we have no court reporter here, which is why  
15 I may ask, when you approach, that you state your name.

16 MR. HUDIS: Good morning, Judge Robinson.  
17 Jonathan Hudis --

18 THE COURT: Mr. Hudis, good morning.

19 MR. HUDIS: -- for Plaintiffs, American  
20 Educational Research Association, AERA; and the  
21 American Psychological Association, the APA; and the  
22 National Council on Measurement in Education, NCME v.  
23 Public.Resource. If the Court wouldn't mind if we  
24 referred to the parties, we will refer to their  
25 acronyms.

1 Your Honor, --

2 THE COURT: That is fine.

3 MR. HUDIS: -- before we do address the  
4 merits of the motion to compel --

5 THE COURT: And again, just so the record is  
6 clear, the first named Plaintiff will be referred to as  
7 "AERA"?

8 MR. HUDIS: Correct, Your Honor.

9 THE COURT: And the second, APA?

10 MR. HUDIS: Correct, Your Honor.

11 THE COURT: And the third, NC --

12 MR. HUDIS: ME.

13 THE COURT: -- ME?

14 MR. HUDIS: Yes, Your Honor.

15 Your Honor, before we address the merits of  
16 the motion to compel, we would like to answer the  
17 Court's questions.

18 First, on the matter of consolidation. Lead  
19 counsel for Defendants is Andrew Bridges, and when he  
20 and I were here for the initial pretrial conference  
21 before, at the time it was Judge Cooper, we did not  
22 want a consolidation of the cases. They are related  
23 insofar as there is a similar Defendant. There is no  
24 overlap of Plaintiff parties.

25 Also, --

1 THE COURT: I am aware, and that is why I  
2 indicated for clerk's office purposes it appears that  
3 the matters were assigned to the same U.S. district  
4 judge, because the Defendants are the same.

5 MR. HUDIS: Yes, Your Honor.

6 Now, in terms of consolidation. The matter  
7 was referred, on substance, from Judge Cooper to Judge  
8 Chutkan because she already had the other case. The  
9 lead Plaintiff is ASTM. We call that the "ASTM case."  
10 That case involves standards and codes. Our case only  
11 involves standards, the difference being one is a  
12 suggestion of best practices, codes being test that is  
13 ultimately enacted into law. We do not have codes in  
14 our case.

15 As we understand, what is remaining at issue  
16 between the parties in the ASTM case has to do with  
17 discovery over licenses. Our Plaintiffs, AERA, APA,  
18 NCME do not license our standards, we sell them for a  
19 modicum amount per copy. There is no licensing.

20 What is at issue in the ASTM case are  
21 technical standards and technical codes. We are  
22 regulatory standards.

23 For example, technical standards could be  
24 fire, safety, building. We are not that. We are a  
25 suggestion of best practices for testing purposes.

1           What the two cases have similarly in common,  
2 is that the principal of Public.Resource has taken  
3 these matters, and for reasons that Mr. Becker will  
4 explain, either took them in their original digital  
5 form or, if they were in paper form, had them digitized  
6 and uploaded them to the Internet. That is where the  
7 similarities between the cases basically ends.

8           One other similarity, as a meta-procedure, is  
9 that in neither case are the Plaintiffs asking for  
10 monetary damages. In both cases, our case as well, all  
11 Plaintiffs are asking solely for injunctive relief, and  
12 in both cases Public.Resource is asking for a  
13 declaratory judgment of no liability based upon certain  
14 substantive defenses.

15           All right, so --

16           THE COURT: How do the Plaintiffs intend to  
17 reach the merits of their claim for injunctive relief?

18           MR. HUDIS: That was your next question. So,  
19 I took notes as the Court was speaking.

20           THE COURT: Very well. I appreciate that.

21           MR. HUDIS: Not at all, Your Honor.

22           All right. As far as we can tell, subject to  
23 a factual surprise that comes out between now and the  
24 end of discovery, this is a legal matter. At the end  
25 of the day we do not believe there's going to be a



1 dispute as to what Public.Resource did with our  
2 standards. The question becomes, as a matter of law,  
3 given that our standards are copyrighted, "Was  
4 Public.Resource and its principal, Mr. Carl Malamud,  
5 allowed to do that without our authorization and  
6 consent?" That should be a legal matter decided by  
7 Judge Chutkan on summary judgment.

8 THE COURT: Well, what discovery -- You may  
9 have anticipated this question, as well.

10 What discovery is needed in order to permit  
11 you, Mr. Hudis, on behalf of your clients, to address  
12 that issue?

13 MR. HUDIS: Your Honor, so this is going to,  
14 in part, get into the merits of the motion to compel,  
15 and I'm resisting the temptation to go there so, --

16 THE COURT: Very well.

17 Proceed with your discussion of the overall  
18 status --

19 MR. HUDIS: All right.

20 THE COURT: -- and your objectives --

21 MR. HUDIS: All right.

22 THE COURT: -- in the litigation.

23 MR. HUDIS: Sure.

24 So the overall status is it's a copyright  
25 case, a case of direct infringement and a case of

1 contributory infringement.

2           The direct infringement is Mr. Malamud took  
3 our standards, he uploaded it to his own company's  
4 website, but what he also did is he uploaded a digital  
5 version of our standards to another website called  
6 "Internet Archive."

7           Your Honor, if you or your chambers has ever  
8 done any factual research on the history of the  
9 Internet, one thing that is commonly used is something  
10 called the "Way Back Machine," so you can see what a  
11 website looked like a year, five years, ten years ago.

12           Internet Archive are the people who operate  
13 the Way Back Machine. Their cause for existence is to  
14 capture the Internet as it moves along in history, and  
15 also its other mission is to be a digital library.  
16 They not only upload materials themselves, but they  
17 take materials offered to them by other people such as  
18 Public.Resource.

19           Public.Resource took a digital copy of our  
20 standards, uploaded it to Internet Archive, and now  
21 its, "Everybody come one; come all." So if you're not  
22 looking for the standards for free on Public.Resource's  
23 website, you can also go to Internet Archive's website.  
24 So that's the other part of our case, contributory  
25 infringement.

1           Now, what are we doing to get there? We've  
2 already taken, by way of a subpoena deuces tecum and a  
3 deposition subpoena, the deposition of Internet  
4 Archive. We've gotten documents from Internet Archive.  
5 So that part of our case, we have taken discovery.

6           Now, so what is left is to clean up the  
7 little of the documentary discovery that we served on  
8 Public.Resource, and then take Mr. Malamud's deposition  
9 by way of a 30(b)(6) deposition. From our perspective,  
10 subject to maybe cleanup, depending upon what we hear  
11 from Mr. Malamud, we're done.

12           We then go to summary judgment, all right?

13           The status of the case. Discovery right now,  
14 according to the initial pretrial conference -- the  
15 scheduling order, discovery closes on March 16th, all  
16 right? We're less than two months away from that now.

17           So we've given you a picture of, at least  
18 from our point of view, what discovery looks like, what  
19 our goals are, and where we want to go.

20           Your Honor, if we have answered your  
21 questions, now we'd like to turn to the merits of the  
22 discovery motion.

23           Is that okay with the Court?

24           THE COURT: Yes, I would appreciate that, and  
25 one of my concerns is the extent to which -- one of my

1 questions is the extent to which, since this motion was  
2 filed in December, have any of the matters that you  
3 identified with the bullet points beginning on page 1,  
4 been resolved by the parties?

5 MR. HUDIS: Yes, Your Honor. So --

6 THE COURT: Which ones can we delete from our  
7 consideration?

8 MR. HUDIS: Your Honor, what is left are the  
9 matters raised in our reply papers.

10 (Pause.)

11 THE COURT: Very well.

12 MR. HUDIS: And that's all I'm going to  
13 address today.

14 To the extent that we have resolved matters  
15 with Public --

16 THE COURT: Are we looking -- Just so our  
17 record is clear, you're referring to the bullet points  
18 beginning at the bottom -- well, on the bottom of page  
19 2 of the reply?

20 MR. HUDIS: Yes, Your Honor. Indeed, that is  
21 true.

22 THE COURT: Very well.

23 MR. HUDIS: Your Honor, so just to summarize,  
24 this is a simple case. I've described what the  
25 copyright infringement and contributory infringement

1 are, the nature of the infringement, which was from  
2 paper, making a digital copy of the standards, and then  
3 publishing them in two area.

4 Public.Resource defends its actions as fair  
5 use because our standards were allegedly incorporated  
6 by reference into law, and we do not agree with this  
7 premise.

8 The case does not involve money damages, only  
9 injunctive relief.

10 Now, discovery opened in this case on  
11 September 25th, after the parties had their Rule 26(f)  
12 conference.

13 We served interrogatories, admissions and  
14 production requests on October 1st.

15 Public.Resource served their responses on  
16 November 3rd, and their initial disclosures on November  
17 14th.

18 Now, your last question, when we opened this  
19 hearing today, Your Honor, is the good faith efforts of  
20 the parties. Between October 10th and December 30th we  
21 wrote seven letters to Mr. Bridges and his colleagues.  
22 Each one of those letters were answered by Mr. Bridges  
23 or one of his colleagues.

24 We had two telephone conferences, a lengthy  
25 one on November 20th with Mr. Bridges. He describes

1 his version of the telephone conference in his papers,  
2 and then we had another one after the motion was taken  
3 off, and then we had to re-file it. We wanted to make  
4 sure that there was no change in Defendant's position  
5 and, as far as we understand, there wasn't. So off we  
6 go with the motion.

7 We received amended responses shortly after  
8 we filed the amended motion, but apart from those  
9 amended responses, Defendant has not seen itself  
10 inclined to go any further, and that was on December  
11 15th.

12 December 19th, we were given 78 documents,  
13 totaling 10,000 pages of materials, with no  
14 identification as to what interrogatories or document  
15 request to which these materials were responsive.

16 Now, why so many pages of 78 documents?  
17 Because we got, in the majority, mostly whole volumes  
18 of the California Code, when probably two or three  
19 pages were relevant.

20 THE COURT: What was -- What is your  
21 understanding now, of the discovery request to which  
22 the documents were responsive?

23 MR. HUDIS: That they deal with the defense  
24 of incorporation by reference.

25 Should I elaborate, Your Honor?

1 THE COURT: Yes.

2 MR. HUDIS: All right.

3 So, for example, the Department of Education  
4 has a set of regulations that outside vendors, if they  
5 are going to provide a testing package to any one of  
6 the parts of the agency, they have to follow a certain  
7 protocol. The protocol suggested, is a referral to our  
8 standards. The standards say what questions should  
9 look like in terms of not being biased and being valid,  
10 how you account for the answers, and then there are  
11 suggestions by way of commentary, of how that can be  
12 handled.

13 So, it is a guidepost of generally how  
14 testing companies should prepare their testing  
15 packages, what the questions look like, what the  
16 proposed answer should be, and how they are validated.

17 Well, if the Federal Government had to do  
18 that every single time they ordered a testing package,  
19 you would have whole parties of people in various  
20 agencies of the government, having to do this over and  
21 over and over again. So what they do is they use a  
22 shortcut, and they say, "Standards testing company, if  
23 you want to provide a testing" -- And by the way, these  
24 testing companies, they can be paid a lot of money for  
25 promulgating these tests, 30, 40, \$50,000.

1           So, the Federal Government does not want to  
2 go through a set of best practices every single time a  
3 testing company promulgates a package, and they said,  
4 "Go follow the standards that have been written up by  
5 these three expert organizations: APA, AERA and NCME."

6           Now, so it is the position of the defendants  
7 -- Defendant, as we understand, that when that happens  
8 we lose our copyright, and that's what this is all  
9 about. We disagree with that because if that were  
10 true, that would be a government taken (phonetic).

11           So, Your Honor, if there's no copyright, it  
12 is Defendant's position that they can do whatever they  
13 want with standards, including put them up on the  
14 Internet and, well, if it's free they don't have to pay  
15 us.

16           So --

17           THE COURT: Very well. You may continue.

18           MR. HUDIS: Thank you, Your Honor.

19           So, we got the amended responses, we got  
20 their documents, and then we just had an exchange of  
21 word games as to what things meant, and you'll see when  
22 I get into the specifics, what we're talking about.

23           And so, we were working with defense counsel  
24 all the way until we -- even after the motion was  
25 filed, even during the last time we were here before



1 Your Honor and we had to be rescheduled, you asked us  
2 to go into the antechamber and talk about it and we  
3 did.

4 Mr. Becker cogently expressed his client's  
5 position. It is no different than, and I suspect  
6 today, than it was when we closed briefing on this  
7 motion.

8 Now, let's do a little bit of general  
9 housekeeping before we get into the specifics.

10 Part of our motion says that there are a host  
11 of general objections, several pages of them, in fact,  
12 that precede Defendant's answers to our discovery, and  
13 then what they say, before they get into any substance  
14 or any specific objections, we take all of these  
15 objections and we incorporate them by reference in each  
16 one, and we're left to guess which objections apply and  
17 which don't.

18 We briefed for you, to a fare thee well,  
19 judges and magistrate judges throughout the country  
20 saying, "That's not the way you assert objections."

21 Defendant, in their opposition papers, did not  
22 brief this issue. In our reply we say that issue has  
23 been waived.

24 Your Honor, we're asking for a ruling that  
25 the general objections not specifically addressed in

1 each interrogatory, document request, admission, are  
2 waived.

3 Now to the substance of what's left and, Your  
4 Honor, truly, we have worked to reduce the number of  
5 issues to be decided by the Court.

6 So, Interrogatory Number 5 and its  
7 accompanying document, Request Number 7, asked for and  
8 -- documentation supporting the number of views and  
9 accesses of the standards.

10 Well, in an amended response, and by the way,  
11 we agreed to these definitions which were proposed the  
12 end of November by Defendant, and we agreed to these  
13 definitions.

14 Sorry, Your Honor, I'm going dry.

15 THE COURT: Please feel free, all of you,  
16 when you need to take a sip, to do so. The air in here  
17 is very dry, --

18 MR. HUDIS: Thank you.

19 THE COURT: -- and you'll see that I have my  
20 own little cup of water --

21 MR. HUDIS: Appreciate it.

22 THE COURT: -- right next to me, so I  
23 understand.

24 MR. HUDIS: So the amended response we got,  
25 Judge Robinson, were the number of each HTTP requests,

1 the number of FTP requests, and the number of rsync  
2 requests of Public.Resource's website.

3 We agreed to the definitions of "viewed" and  
4 "access," and we got an amended answer that's techno-  
5 jargon, and here's the problem, and this goes back to  
6 your question of what goal do we have at the end of the  
7 case to get it resolved? That's a motion for summary  
8 judgment. Failing a motion for summary judgment, a  
9 judge trial.

10 By the way, there's still a pending motion  
11 before Judge Chutkan, as to whether Defendant's jury  
12 demand was proper. A motion to strike has been made in  
13 the ASTM case and a motion to strike has been made in  
14 our case as well.

15 So --

16 THE COURT: Very well.

17 Let me ask you to proceed with your  
18 discussion of the concerns you have regarding the  
19 parties' agreements of definitions, and --

20 MR. HUDIS: Uh-huh.

21 THE COURT: -- we're still considering  
22 Interrogatory 5 and Request Number 7.

23 MR. HUDIS: Seven. Right.

24 So, we asked the question, "Please give us  
25 the number of views and access." We got techno-jargon

1 back. We want an answer in English, and the response  
2 to us, when we discussed this with Mr. Bridges is, "You  
3 don't understand the Internet. You don't understand  
4 how the Internet works, and you don't understand how  
5 our client's server works." Well, that's very nice.  
6 If we don't understand it, Judge Chutkan certainly is  
7 not going to understand it.

8 So, what we'd like is an amended answer that  
9 is in English, that is according to what we asked and  
10 according to the definitions the parties agreed to.

11 THE COURT: Let me ask you to expand upon  
12 your contention that what you received is "techno-  
13 jargon."

14 MR. HUDIS: It is. Http request means you  
15 are asking for -- to see data, -- an FTP request -- All  
16 these definitions, by the way, are in our papers. We  
17 gave them to you. -- is to download a file by file  
18 transfer protocol.

19 Rsync, as we understand, is that -- is the  
20 transfer of data so that a file -- that the source and  
21 the file, at the destination, are always the same, all  
22 right?

23 So, Your Honor, we would like to know, "Well,  
24 what does that mean in terms of what we asked you,  
25 Public.Resource? How many people viewed the content?"

1 This standard's up on your website? How many people  
2 accessed this content on your website, as we asked?"  
3 And we said, "All right, fine then, we'll figure it out  
4 by your server logs." This will give us an accounting  
5 of how, because Mr. Bridges says we don't understand  
6 how the Internet works, and we don't understand how, in  
7 particular, Public.Resource's web server works. Well,  
8 give us the server logs. He absolutely refuses. He  
9 says "privacy" and "it's too difficult." We need a  
10 ruling.

11 Moving on, Interrogatory --

12 THE COURT: Before you do, --

13 MR. HUDIS: Sure.

14 THE COURT: -- let me ask a question.

15 When you indicate you simply want an answer  
16 in plain English, did you mean a number of views --

17 MR. HUDIS: And -- Right.

18 THE COURT: -- and accesses?

19 MR. HUDIS: Right, and why do we want it?

20 That's your question? Because I'm going back --

21 Well, the question has two parts. Is that  
22 your request? In other words, it's an answer which is  
23 a number.

24 MR. HUDIS: Yes. Okay.

25 Now, the next question --

1 THE COURT: And the next question?

2 MR. HUDIS: All right, is when we want it?

3 Your Honor, one of the defenses of  
4 Public.Resource is lack of irreparable injury, because  
5 ultimately we want a permanent injunction. We have to  
6 quantify that injury. Even though we're not asking for  
7 damages, we have to find out how many people viewed,  
8 how many people accessed, how many people downloaded  
9 our standards from Public.Resource's website for free.  
10 That would quantify our damages and go to our proof of  
11 irreparable harm. That's why we need it. That's why  
12 we asked for it, Interrogatory 6 and its accompanying  
13 Request for Production Number 1.

14 Now, Your Honor, Request for Production  
15 Number 1 is in the event documents were identified in  
16 the interrogatory answers, we want them produced.

17 Interrogatory 6 says:

18 "We would like you to identify how many  
19 downloads of the standards there have been  
20 from Public.Resource's website."

21 In their initial answer before we filed the  
22 motion, they said that they would -- they,  
23 Public.Resource, said they would give us a report after  
24 we agreed to the definition of "download." In their  
25 amended answer Public.Resource says there's no

1 information because they can't get it.

2 Well, that's very nice except we have, as  
3 part of their document production, two very large  
4 spreadsheet files that have a column of the number of  
5 downloads from Public.Resource's website, of not only  
6 our standards, but all of the other copyrighted works  
7 that have been uploaded to Public.Resource's website.  
8 So which is it, you have a document that doesn't mean  
9 what it says, or you haven't given us a complete  
10 answer? I don't want to say non-truthful, but a  
11 complete answer in the amended answer -- Interrogatory  
12 Answer Number 6.

13 A similar issue. Request for Admission  
14 Number 6:

15 "Admit that visitors have downloaded the  
16 standards from Public.Resource's website."

17 We got an answer that uses the term,  
18 "access." We asked an admission for "download," we get  
19 an answer that says "access."

20 We want an admission response to the question  
21 as put.

22 Admission Number 3:

23 "Admit that Public.Resource published our  
24 standards to their website."

25 Now, here is the one definition the parties

1 did not agree to, and to which we are not agreeing now,  
2 and we are not going to get an answer until the Court  
3 rules.

4 Now, before their answer they assert only  
5 general objections. So, if the Court rules that  
6 general objections are waived, there are no more  
7 procedural or substantive objections to this admission  
8 request.

9 Now, Admission Number 2, as we said in our  
10 opening papers, they admit that our standards were  
11 posted to Public.Resource's website. They will not  
12 admit that the standards were published there. Why?  
13 Because Mr. Bridges, Defendant's lead counsel, is  
14 nervous that "publish" is a defined term in the  
15 Copyright Act, and so when bantered back and --

16 THE COURT: Is that not the case?

17 MR. HUDIS: It is the case.

18 Now, it's our position that even if you use  
19 that definition, they should admit to publication.  
20 There's a number of reasons why, and it goes to the  
21 conversation that I and Mr. Becker had when we were  
22 here last.

23 So, Your Honor, from the Copyright Act,  
24 publish is -- "publication" is defined as, "The  
25 distribution of copies or photo records," and we're not



1 dealing with photo records here, so "copies of a work  
2 to the public, by sale or other transfer of ownership,  
3 or buying, rental, lease or lending, the offering to  
4 distribute copies to a group of persons for purposes of  
5 further distribution, public performance or public  
6 display constitutes publication."

7 So then we go to, "What is a copy?"

8 Under the Copyright Act, a -- excuse me, Your  
9 Honor, it's not "copy" it's "copies" used in the  
10 statute, --

11 THE COURT: Very well.

12 MR. HUDIS: -- "On material objects, other  
13 than photo records, in which a work is fixed by any  
14 method now known or later developed, and from which the  
15 work can be perceived, reproduced or otherwise  
16 communicated, either directly or with the aid of a  
17 machine or device. The term 'copies' includes the  
18 material object, other than the photo record in which  
19 the work his first fixed."

20 So what I just read to you, that is the  
21 extent to which that was briefed in Public.Resource's  
22 opposition papers.

23 When we had a conversation with Mr. Becker  
24 when we were here last week, we asked if there was a  
25 compromise. The answer was "No" because what Mr.

1 Malamud did was not a copy, because they're defining  
2 "material object" as a physical object, not a computer  
3 file.

4 So, in preparation for coming back here  
5 today, did little research. Roeslin v. The District of  
6 Columbia, 921 F.Supp 793:

7 "The placement of a copyrighted program into  
8 a computer, or the loading of a copyrighted  
9 program into a computer, which occurs every  
10 time an employee uses the program,  
11 constitutes copying the program for purposes  
12 of Copyright Act."

13 Now, that's a computer programmer.

14 THE COURT: Well, to what extent is that an  
15 issue regarding the merits of the case, rather than a  
16 matter that the Court can determine in resolving a  
17 discovery dispute?

18 MR. HUDIS: If they admit to publication,  
19 they're admitting to infringement. It's very simple.

20 Another case for Your Honor to consider,  
21 which is closely -- we know that you have a penchant  
22 for D.C. cases, that's why I mentioned the D.C. case  
23 first.

24 And, Your Honor, this case is from the  
25 District of Maryland, hopefully it's close enough,

1 geography, at least. The case is Lowry's, L-O-W-R-Y-  
2 'S, Reports v. Legg Mason, and the court case cite is  
3 271 F.Supp.2d 737, and that had to do with the  
4 unauthorized distribution of a financial newsletter,  
5 and the case says:

6 "Unauthorized electronic transmission of  
7 copyrighted text from the memory of one  
8 computer into the memory of another creates  
9 an infringing copy under the Copyright Act."

10 Last one on this point, Your Honor, which is  
11 cited, Louis Vuitton Malletier v. Akanoc, A-K-A-N-O-C.  
12 It's unpublished. 2010 U.S. District Lexis 85266 (N.D.  
13 Cal.), where Public.Resource is from:

14 "The Digital pictures stored on Defendant's  
15 servers fall squarely within the language  
16 'copies.' Defined otherwise would render the  
17 protection of a copyright meaningless by  
18 permitting, for example, unauthorized digital  
19 copies of a paper photograph to be non-  
20 infringing simply because the copy is  
21 embodied in a different medium than the  
22 original work."

23 That's exactly what we have here.

24 So, Your Honor, we need an answer to Admission  
25 Request Number 3 as put, and it's particularly

1 interesting that the cease and desist letter that AERA  
2 wrote to Mr. Malamud says, "Please stop posting the  
3 standards on your website," and the response gotten  
4 back, Exhibit BB to our reply papers is, "Yes, we're  
5 the ones who published the standards on-line."

6 So the parties clearly, as a non-legal matter,  
7 considered posting and publishing the (unintelligible).

8 I've gone through the legal reasons why even  
9 if you use Defendant's definition of "publish" under  
10 the Copyright Act, it is the publishing of a copy.

11 Your Honor, moving on.

12 Interrogatory Number 8 and Document Request  
13 Number 9. This asked for the basis of  
14 Public.Resource's defenses, and the documentation that  
15 supports those defenses. They utterly refuse, citing,  
16 it's a rather old case, Everett v. USAir, 165 F.R.D. 1  
17 (1995).

18 Now, this has to do what the Court in that  
19 case termed "contention interrogatories and document  
20 requests."

21 First of all, with regard to documents, even  
22 Everett says there's no merit to withholding those  
23 documents. That's not contention anything. That would  
24 be something that would be given as part of initial  
25 disclosures anyway, so there's -- even according to

1 Everett, they should've produced the documents on which  
2 their defenses are based.

3 Now, interrogatories, the Court does not put  
4 an absolute prohibition on them if they are contention  
5 in nature. What the Court says is that you have to  
6 give a good reason why you are asking for contention  
7 interrogatories at this time.

8 Your Honor, --

9 THE COURT: What is the -- Let me ask you to,  
10 for purposes of this record, --

11 MR. HUDIS: Uh-huh.

12 THE COURT: -- to read your Interrogatory  
13 Number 8.

14 MR. HUDIS: Sure. Your Honor, for the  
15 record:

16 "State the factual or legal basis of each  
17 affirmative and other defense to Plaintiffs'  
18 complaint, as asserted in Public.Resource's  
19 counterclaim and answer filed with the Court  
20 on July 14, 2014."

21 Two matters that occurs to us, Your Honor.  
22 At the time that those affirmative defenses were  
23 asserted, they had to have a Rule 11 basis for them.  
24 They should have been unable to, right out of the  
25 starting gate, give us answers.

1           Now, what is put forward in Defendant's  
2 opposition papers is discovery is ongoing. We haven't  
3 had a chance to take discovery.

4           Your Honor, I mentioned before, that  
5 discovery opened on November 25th. Do you know when we  
6 got our first set of discovery -- written discovery  
7 from Public.Resource? December 15th. Guess what,  
8 that's also the same day that we filed our amended  
9 motion to compel. We just gave them our answers. They  
10 have them. We're collecting documents to give to them,  
11 but it's very strange that they cannot -- they delayed  
12 almost three months in propounding written discovery,  
13 and then they say, "Oh well, we still have to take  
14 discovery so that we can give you a complete answer."

15           What's alarming me and our clients, Your  
16 Honor, is right now, according to Judge Cooper's  
17 scheduling order, discovery closes on March 16th. What  
18 are they waiting for? All right.

19           Your Honor, next is Document Requests Numbers  
20 4 and 5. This has to do with the materials regarding  
21 the digitization of our standards from paper to  
22 electronic format, and then the posting or publishing  
23 of them to Public.Resource's website.

24           Well, we got the document of the actual  
25 digital file that was uploaded to Public.Resource's

1 website. We didn't get anything else which was  
2 described in their answer to Interrogatory Number 3 as  
3 basically taking the binder off the book, slicing it  
4 up, scanning the pages, having them scanned for optical  
5 character recognition so that it could be searched,  
6 include metadata, and then they were uploaded.

7 Well, we got that kind of documentation from  
8 Internet Archive. We've got no such documentation from  
9 Public.Resource, and they're not willing to give it to  
10 us.

11 Finally, Public.Resource's initial disclosures  
12 --

13 THE COURT: Before you move on --

14 MR. HUDIS: Yes.

15 THE COURT: -- did you say, "Request for  
16 Production 4 and 5"?

17 MR. HUDIS: Yes. Yes.

18 THE COURT: Because in your reply, I'm  
19 looking at page 14, it references to Request 1 and 5.

20 MR. HUDIS: This is in the reply?

21 (Pause.)

22 MR. HUDIS: It would be covered the same way  
23 because Document Request Number 1 is:

24 "Everything you identified in your  
25 interrogatories."

1           So I'm going to get it either way.

2           Would you like me read those both into the  
3 record for you?

4           THE COURT: You should read -- For purposes  
5 of clarity, --

6           MR. HUDIS: Uh-huh.

7           THE COURT: -- is the request 1 and 5? I'm  
8 looking here at the further sentence:

9           "Plaintiffs withdraw their motion as to  
10 Production Request 3 and 4."

11          MR. HUDIS: Yes, Your Honor.

12          THE COURT: I thought I heard you say "4 and  
13 5."

14          MR. HUDIS: Uh-huh. Your Honor, all right,  
15 you are correct, you are correct, however, we still  
16 would need to get the documents that would be -- have  
17 been identified in Interrogatory Number 3, through  
18 Document Request Number 1, which is:

19          "All documents you identified in your  
20 Interrogatory answers."

21          So I'm still going to -- I'm going to get it  
22 either way.

23          THE COURT: Very well. I'll ask you to move  
24 on to the --

25          MR. HUDIS: Initial disclosures.



1 THE COURT: -- initial disclosures, yes.

2 MR. HUDIS: Your Honor, the only part we  
3 complain about is the identification of the documents  
4 that Public.Resource relies upon, under Federal Rules  
5 26(a)(1), (a)(2), and then according to our Document  
6 Request Number 2, produce them.

7 Your Honor, we set out in our motion papers,  
8 what the list of documents were. They are -- Some of  
9 the categories of documents don't even apply to this  
10 case. Other categories are so vague, we don't know  
11 what they're talking about.

12 We're entitled to know, under the case law we  
13 cited to you, what specific categories of documents  
14 they're relying on in their defense of this case, and  
15 Public.Resource utterly refuses.

16 Now, would you like me to read into the  
17 record, what their list of documents are?

18 THE COURT: Not at this time.

19 MR. HUDIS: All right.

20 But they either have no relation to the case,  
21 or they're so general and vague, we had no idea what  
22 they're talking about, and we suspect they were not  
23 produced, but I can't tell you.

24 THE COURT: Very well. What we will do is  
25 take a very brief recess. I will hear from

1 Public.Resource first, with respect to the opposition  
2 to the Plaintiffs' motion, and then any argument with  
3 respect to -- or perhaps I should say first, your  
4 discussion of the status, as Mr. Hudis did, and then  
5 your opposition to the motion.

6 Is that reasonable?

7 MR. BECKER: (Inaudible.)

8 THE COURT: Because you may be here at the  
9 podium for awhile, I think this is a good time to take  
10 just a five-minutes recess, or so.

11 MR. HUDIS: Gladly, Your Honor.

12 THE COURT: Very well. I thank you very  
13 much.

14 (Recess at 10:33 a.m., until 10:42 a.m.)

15 AFTER RECESS

16 THE CLERK: This honorable court is in  
17 session.

18 THE COURT: Now?

19 MR. BECKER: May I approach, Your Honor?

20 THE COURT: Yes. You are Mr.?

21 MR. BECKER: I'm Matthew --

22 THE COURT: Matthew Becker.

23 MR. BECKER: -- Becker for --

24 THE COURT: Very well.

25 MR. BECKER: -- the Defendant, Your Honor,

1 Public.Resource.Org.

2 THE COURT: Very well. Please, proceed.

3 MR. BECKER: So as an initial matter, Your  
4 Honor, we do believe that the cases should be  
5 consolidated for the purposes of discovery.

6 THE COURT: And let me ask you to please  
7 articulate the basis of that request.

8 MR. BECKER: Yes.

9 THE COURT: I've heard from counsel for  
10 Plaintiffs regarding, I think we can call it their  
11 strenuous objection to such process. We recognize that  
12 the state of the record is that the cases are assigned  
13 to the same District Judge as related cases; that is,  
14 the mere fact that the District Judge did not  
15 consolidate the cases does not mean that this Court  
16 could not consolidate for purposes of discovery, so  
17 that is what I'll ask you to address, with that  
18 background in mind.

19 MR. BECKER: Yes, Your Honor.

20 THE COURT: Now, please continue.

21 MR. BECKER: As you are aware, we have a  
22 parallel case going on, the ASTM case, and that case  
23 has produced -- has, in itself, been a great deal of  
24 work. We are actually about to approach Judge Chutkan  
25 about getting a discovery extension in that case, until

1 April 15th, and their -- we've encountered significant  
2 issues in that case which, as have been noted, have  
3 parallel legal issues to this one.

4 In that case we've discovered that where we  
5 thought that the case would be decided on just a narrow  
6 issue, we've instead found that there's significant  
7 reason to believe that the Plaintiffs do not actually  
8 own the copyright for the works that they claim and --  
9 but in doing so, this has been a very document-  
10 intensive process, and has required a great deal of  
11 effort on our part --

12 THE COURT: Just so the record is clear, the  
13 ownership issue applies to the -- or your argument  
14 regarding the ownership issue is with respect, not to  
15 this case, but the one we will call the "ASTM case,"  
16 and I apologize, I do not have immediate recall of the  
17 number, but we will call it the "ASTM case" as opposed  
18 to this one.

19 MR. BECKER: Correct, Your Honor.

20 THE COURT: Very well.

21 MR. BECKER: However, we believe that similar  
22 issues could be at play in this case, and we have not  
23 yet had the opportunity to delve into this. We had not  
24 yet received any documents, and we have only just  
25 received discovery responses in this case, this past

1 Tuesday.

2 THE COURT: All right. Let me interrupt you  
3 again.

4 What do you believe the Defendant would need  
5 to know by way of discovery or other procedures, in  
6 order to determine whether consolidation of the two  
7 cases, either for discovery or for some broader  
8 purpose, would be something that would be requested?

9 MR. BECKER: So, as an initial matter, Your  
10 Honor, we don't believe that we would need to know  
11 anything at this point, simply because of the -- the  
12 burdens of responding to and participating in the  
13 discovery process, for both the parallel case and this  
14 case, I believe, warrant that they should be treated in  
15 tandem and consolidated for discovery purposes, as  
16 there's a great deal of work being put on us, and we  
17 are being essentially pulled in opposite directions  
18 whereas if the cases were consolidated for discovery  
19 purposes, that would allow us to move forward in a more  
20 collected and efficient manner.

21 THE COURT: Is there authority -- Are you  
22 aware of authority at this time, which would -- which  
23 stands for the proposition that the burden of  
24 responding to competing or conflicting requests is a  
25 basis for consolidating cases for discovery?

1 MR. BECKER: Not at the moment, Your Honor,  
2 but I can look into that if that's something that you  
3 would request.

4 THE COURT: The Court's concern, of course,  
5 is that if there is a basis in support of your request,  
6 certainly the Court must consider it. At this time I  
7 have no basis to order such a consolidation because I  
8 haven't been presented with authority. My question was  
9 one that I posed to both sides, believing there might  
10 be some agreement that that would be appropriate. If  
11 there had been an agreement, perhaps we would not need  
12 further discussion, at least at the moment, regarding  
13 how to resolve this conflict, there would be an  
14 agreement, but there is no agreement. So it is  
15 imperative that the Court understand the full basis of  
16 the Defendant's request.

17 In other words, is it a request based solely  
18 on the logistical problems associated with responding  
19 to requests in two separate cases, or is there  
20 something else --

21 MR. BECKER: No, --

22 THE COURT: -- concerning an overlap of  
23 issues?

24 MR. BECKER: No, Your Honor. We believe  
25 there's also an overlap in terms of the issues from a

1 legal perspective, most immediately the issues that are  
2 being dealt with in both cases are similar, if not  
3 identical.

4 We disagree with the Plaintiffs'  
5 characterization that there's a difference between  
6 standards and codes, or that the standards and codes  
7 have been treated differently with regards to  
8 incorporation by reference into law for the ASTM case  
9 verses the present case, Your Honor.

10 THE COURT: How does that affect the issues  
11 with respect to the conduct of discovery?

12 MR. BECKER: Well, with regards to the  
13 conduct of discovery, Your Honor, we would -- this  
14 would influence the way in which we would go forward  
15 with depositions and other things, such as that -- like  
16 that, and will note that many of the same parties are  
17 being deposed in both cases, and this may also affect  
18 the particular requests for production of documents and  
19 the discovery that we proceed with in that matter.

20 THE COURT: Do you believe that the  
21 Defendant's request will be to consolidate both cases  
22 for all purposes, or only for the purpose of discovery?

23 MR. BECKER: Your Honor, we are only just  
24 contemplating that issue. It may be the case that we  
25 would ask for the cases to be consolidated for all

1 purposes, though I can't answer specifically on that  
2 point yet.

3 THE COURT: Very well.

4 I'll ask you to please continue with your  
5 discussion of the background.

6 MR. BECKER: Thank you, Your Honor.

7 THE COURT: If you are ready to address the  
8 merits of the -- or the substantive issues, the  
9 remaining issues that the Plaintiffs have identified,  
10 you may do that.

11 MR. BECKER: Your Honor, if I may first  
12 address the matter of the status of the litigation --

13 THE COURT: Of course.

14 MR. BECKER: -- and our efforts, in terms of  
15 meeting and conferring?

16 THE COURT: Yes.

17 MR. BECKER: As the Plaintiffs have noted, we  
18 have met and conferred many times over the past few  
19 months regarding this case, and specifically regarding  
20 these -- the points that are noted here.

21 In the process of that, we also -- there were  
22 ambiguities in the particular terms that Plaintiffs'  
23 had used in a discovery request, and we sought to  
24 clarify those ambiguities and set definitions. It was  
25 Public.Resource that put forward the definitions that



1 were decided on, and then that was just before the  
2 Thanksgiving holiday. Then two weeks after the  
3 Thanksgiving holiday, Public.Resource produced it's  
4 discovery responses that are based off of those  
5 particular definitions.

6 Now, with regards to the particular issues  
7 that still remain, Public.Resource has, of course,  
8 endeavored to try to meet and confer and to dispel with  
9 any remaining issues. There are some issues, but  
10 Public.Resource believes that it has tried, in good  
11 faith, to answer them, and that any remaining issues  
12 are ones that it either already has provided a proper  
13 answer for, or one that simply cannot be answered  
14 further. So --

15 THE COURT: May I ask whether the parties  
16 would benefit from an opportunity now, to attempt to  
17 reach a resolution --

18 MR. BECKER: Your Honor, I --

19 THE COURT: -- regarding any of the matters  
20 that remain, that we've addressed by review of the  
21 reply?

22 MR. BECKER: I would hope that that would be  
23 the case, but unfortunately, Your Honor, we discussed  
24 these issues just last week and the Plaintiff did not  
25 accept Public.Resource's position on this, and as I'll

1 explain, There are certain things that we simply cannot  
2 provide to Plaintiff, any greater than what has already  
3 been provided.

4 So, for instance, with regards to  
5 Interrogatory Number 5 and Request for Production  
6 Number 7, these are regarding the viewing and accessing  
7 of standards.

8 Now, Plaintiffs have called our amended answer  
9 "Techno-jargon," and they've said that they want an  
10 answer in plain English, but what they're asking for,  
11 as we have explained to Plaintiffs, it is something  
12 that simply cannot be produced. They say they want to  
13 know the number of viewers.

14 The issue is that Public.Resource, as any  
15 standard Internet website, cannot actually know the  
16 number of viewers who are looking at a web page.  
17 Public.Resource can know the number of hits,  
18 essentially, to the website, the number of calls that  
19 have been made to the server, but not all of those are  
20 from individuals. Sometimes they might be, say, from a  
21 web caller like Google or like the Internet Archive.  
22 They might be from other automated programs like that.  
23 They may also be from the same individual making  
24 multiple calls from different machines. And so, for  
25 that reason we -- Public.Resource cannot produce the

1 number of viewers.

2 A similar question was asked by the Plaintiffs  
3 in deposition of the representative of the Internet  
4 Archive, and that representative similarly noted that  
5 it's impossible for them to know the number of viewers.

6 Now, what we can produce and what we have  
7 produced is, in good faith we've attempted to provide  
8 the next best thing, which is that the only information  
9 we have, the actual information requests, the calls to  
10 the Public.Resource server, and so we've provided that  
11 in the detailed information that we thought would be  
12 helpful.

13 So, breaking that down for HTTP requests  
14 verses FTP requests versus rsync requests. So those  
15 are different ways of requesting that information, and  
16 then --

17 THE COURT: Well, what is your response to  
18 the Plaintiffs' contention that what was produced is  
19 "techno-jargon"?

20 MR. BECKER: No, we do not believe it's  
21 techno-jargon, Your Honor.

22 THE COURT: To what extent is it responsive  
23 to the request that the number -- that the answer be a  
24 number?

25 MR. BECKER: We believe it's fully

1 responsive. If you have an opportunity to look at our  
2 response, you'll see it is a listing of numbers. We  
3 break it down by each month so that it's easier for  
4 Plaintiffs to see how many of the particular requests  
5 have been made per month for -- going as far back as  
6 Public.Resource has that information.

7 Public.Resource doesn't have any information  
8 before the point in time in which those -- that  
9 information is provided, and so for that reason we  
10 simply -- Public.Resource is not capable of providing  
11 greater detail on that request.

12 We also believe that's fully intelligible.

13 THE COURT: Is there any -- Has there been  
14 any withholding of information --

15 MR. BECKER: No, Your Honor.

16 THE COURT: -- on any -- on the basis of any  
17 claim of privilege or any other objection?

18 MR. BECKER: We have fully responded to the  
19 interrogatory. We have not produced the server logs,  
20 and we do not believe that it would be proper to  
21 produce the server logs. The server logs themselves  
22 show the individual pings or requests to the server  
23 over the period of time in question. We believe that  
24 that would not provide any additional information to  
25 Plaintiffs that they don't already have, other than to

1 provide the IP addresses of those requests.

2 Our concern, Your Honor, is that --

3 THE COURT: Am I correct in my recollection  
4 that that information was not requested?

5 MR. BECKER: That information was not  
6 requested, Your Honor.

7 THE COURT: Very well.

8 MR. BECKER: And, in fact, that was not  
9 brought up in the initial motion, Your Honor. It was  
10 only -- The request for server logs was only mentioned  
11 in the reply brief, Your Honor, and so Public.Resource  
12 hasn't had an opportunity to fully respond to the -- to  
13 that request, but so far as that request has been made  
14 in the reply motion, we believe that there would be  
15 significant issues with regards to a chilling affect on  
16 those individuals who used Public.Resource.Org to get  
17 access to a law, and we have concerns that among this  
18 community of users, the knowledge that their personal  
19 information, and the fact of their accessing particular  
20 laws was being provided to a third party would thereby  
21 chill their participation in this important endeavor of  
22 providing access to the law.

23 THE COURT: Very well. You may continue.

24 MR. BECKER: So similarly, Your Honor, with  
25 regards to Interrogatory Number 6 and Request for

1 Production Number 1, this is concerning the downloads  
2 of standards.

3 As we've explained to Plaintiffs and as  
4 Plaintiffs have agreed, we had issues with the  
5 ambiguity of particular terms in their discovery  
6 requests. Plaintiffs had used the terms "accessed" and  
7 "viewed" and "download" as if they were  
8 interchangeable, but these terms all have actual  
9 technical meanings, and so in that respect we asked for  
10 a clarification and eventually came upon an agreement  
11 as to what these terms mean.

12 It's odd then, in that respect, that  
13 Plaintiffs are now seeming to push against the very  
14 definition that had already been agreed to on November  
15 25th in writing, and trying to cite other documents  
16 that they say shows a different understanding of the  
17 meaning of "download."

18 With regards to the document that they have  
19 provided, Your Honor, or rather, the two documents that  
20 they cite, Your Honor, I should note that although  
21 those documents have been produced by Public.Resource,  
22 those are not actually documents that were created by  
23 Public.Resource, and so the fact that they mention  
24 "download" does not mean that it's an actual statement  
25 from our client. They're simply responsive to the

1 production request.

2 And moreover, Your Honor, even if they had  
3 been created by our clients, documents -- statements by  
4 a layperson are not the same as a legally binding  
5 admission, and so a statement that's made outside of  
6 court shouldn't be used to hold our clients to a  
7 particular definition that would have repercussions if  
8 it was actually made to be an admission in court.

9 So, with regards to the actual term  
10 "downloading," as we've explained to Plaintiffs and as  
11 the definition has been agreed to by both parties, a  
12 "download" means that a third party is saving a  
13 document to their computer. Public.Resource cannot  
14 know whether a third party is saving a document to  
15 their computer. There's a difference between when  
16 someone accesses a document, makes an HTTP request to  
17 Public.Resource's servers. Public.Resource's servers  
18 then send them the information, but the information is  
19 stored only in temporary storage.

20 So if you think when you visit a web page,  
21 and then if you were to close your browser and then  
22 unplug your Internet and try to visit that web page  
23 again, you couldn't access it because the information  
24 hasn't actually been saved to your computer. The way  
25 you would be able to access it in that case, is if you

1 actually saved it onto your computer. And so that's  
2 the way that "download" has been defined.

3           Public.Resource has no way of knowing that  
4 something has been saved onto a third parties'  
5 computer, and this is also an issue that was explored,  
6 again, at the deposition of the Internet Archive  
7 representative, where that person also said that they  
8 have no way of knowing that -- similar information, and  
9 that the representative from the Internet Archive also  
10 said that "download" itself, is a term that could be  
11 defined in various ways by various parties, and was  
12 therefore an ambiguous term.

13           So as to the way that these things have been  
14 defined, as agreed to by the parties, we --  
15 Public.Resource believes that it's provided a full  
16 response. Nonetheless, I will note that this request  
17 is also -- it actually doesn't produce a tangential  
18 result, whether it's decided one way or the other,  
19 because Public.Resource has already provided, as  
20 mentioned just earlier, an accounting of the number of  
21 people who have accessed the -- these standards on the  
22 Public.Resource website, and so whether we call it  
23 "access" or whether we call it "download," it has no  
24 effect as to what has actually happened, it just means  
25 that Plaintiffs get to use a term that's somewhat



1 pejorative and is technically inaccurate in this case.

2 THE COURT: Very well. You may continue.

3 MR. BECKER: Your Honor, we believe that also  
4 addresses the matter with regards to Request for  
5 Admission Number 6. They asked for the number of  
6 downloads from the Public.Resource website. We don't  
7 have that information. In good faith, we provided them  
8 an answer as to access, so as I noted just a moment  
9 ago, it makes no difference, in terms of what has  
10 actually happened, whether it's referred to as  
11 "download" or whether it's referred to as "access,"  
12 except for the fact that "download" is an incorrect  
13 term. It's not the term that's been agreed to by the  
14 parties in writing on November 25th, and it is also, as  
15 I noted, a somewhat pejorative term as it's associated  
16 with peer to peer (phonetic) and downloaders, and so  
17 forth.

18 THE COURT: Very well. I believe the next  
19 issue concerns the contention interrogatory and the  
20 companion request for production of documents.

21 MR. BECKER: Yes, Your Honor.

22 So with regards to the contention  
23 interrogatories, we view Everett v. USAir differently,  
24 and we believe that that case firmly establishes that  
25 contention interrogatories do not need to be answered

1 until the end of discovery, unless the party who is  
2 requesting that they be answered has shown a firm basis  
3 for why that -- those particular requests need to be  
4 answered so that discovery can move forward.

5 At this point we are still in the process of  
6 discovery, as I noted. We have received -- We have not  
7 received documents from Plaintiffs. We have only just  
8 received their discovery responses, and there are a  
9 number of issues that need to be addressed with regards  
10 to those, and so our discovery process is still -- it's  
11 not nearly far enough along, such that we could respond  
12 to these particular contention interrogatories.

13 Now, we have --

14 THE COURT: Are you suggesting that the court  
15 in Everett held that in every instance contention  
16 interrogatories need not be answered until the close of  
17 discovery?

18 MR. BECKER: Well, we -- I am saying that  
19 unless that they're a party who is requesting those  
20 contention interrogatories firmly established a basis  
21 or a need for those particular documents earlier than  
22 that point.

23 THE COURT: Is that what Everett holds?

24 MR. BECKER: That is my reading of it, Your  
25 Honor.

1 THE COURT: Do you have your copy of --

2 MR. BECKER: Yes, I do, Your Honor.

3 THE COURT: -- Everett with you?

4 (Pause.)

5 THE COURT: I note that the opposition filed  
6 by the Defendant includes a citation to Everett, but  
7 the precise language on which the Defendant seemingly  
8 relies for the proposition that such interrogatories  
9 need not be answered until the close of discovery, is  
10 not --

11 MR. BECKER: Your Honor, --

12 THE COURT: -- cited anywhere in the  
13 opposition, unless I've overlooked it.

14 MR. BECKER: Your Honor, the opposition does  
15 cite Everett generally --

16 THE COURT: Yeah, I noted that. It cites  
17 Everett generally, but you have relied upon Everett for  
18 a more precise proposition, and that is that contention  
19 interrogatories need not be answered until the close of  
20 discovery.

21 MR. BECKER: If I may quote from Everett,  
22 Your Honor?

23 THE COURT: Yes.

24 MR. BECKER: So, within the first paragraph  
25 under Section (a), contention interrogatories, Everett

1 states:

2 "While such interrogatories are permitted,  
3 the obligation to respond to them is often  
4 postponed until near the end of the discovery  
5 period unless the proponent carries its  
6 burden of demonstrating why they are  
7 necessary earlier on."

8 And the case then goes on to address these  
9 contention interrogatories, then say:

10 "Insofar as these interrogatories call for  
11 Defendants to separately articulate the  
12 underlying facts upon which they base their  
13 defenses, however, they are contention  
14 interrogatories, and Defendants need not  
15 respond at this time."

16 THE COURT: To what extent have judges of  
17 this court addressed this question since the 1995  
18 opinion in Everett? Or put another way, is that --  
19 does that remain the applicable --

20 MR. BECKER: Your Honor, to my understanding  
21 this --

22 THE COURT: -- law?

23 MR. HUDIS: -- remains the applicable law.

24 THE COURT: Perhaps I should say the  
25 applicable articulation of the standard.

1 MR. BECKER: Yes, Your Honor. I have not  
2 seen any cases that say otherwise.

3 THE COURT: Very well. You may continue. I  
4 believe the next item -- final item concerns the  
5 sufficiency of Public.Resource's initial disclosures.

6 MR. BECKER: Your Honor, if I may also  
7 address the third Request for Admission regarding the  
8 term "publish"?

9 THE COURT: I apologize. You may.

10 MR. BECKER: So, with regards to "publish,"  
11 as Plaintiffs have noted, that is a definition that is  
12 listed in the Copyright Act itself. As this is a  
13 copyright case, we believe that we should be using the  
14 definitions where they are provided by the Copyright  
15 Act, and as Plaintiffs have noted, "publish" does refer  
16 to copies, and "copies" themselves are defined as  
17 material objects, in the Copyright Act.

18 While Plaintiffs say that if  
19 Public.Resource admits to publication, they're  
20 therefore admitting to infringement, that doesn't  
21 change the fact that what Public.Resource has done is  
22 not, in fact, publication.

23 There are -- As 17 U.S.C. 106 provides, there  
24 are numerous rights provided by the Copyright Act that  
25 come into effect in different circumstances with

1 regards to the form of the copyrighted work itself.  
2 Only some of those addressed copies, which are defined  
3 as material objects, while others do not address copies  
4 or material objects, and so for that reason we think  
5 that it's important for the proper application of the  
6 copyright law, that we use the actual definition of  
7 "publish."

8 I'll also note that Plaintiffs, in their  
9 reply, say that they don't believe that there should be  
10 any difference between "publish" and "post." They  
11 don't actually address the legal issues. They simply  
12 say that they want it to be defined in its colloquial  
13 sense, and that -- and then they provide a number of  
14 dictionary definitions for non-legal sources, and our  
15 point, Your Honor, is simply that those -- that while  
16 there may be a colloquial sense for the term "publish,"  
17 we don't think that it's appropriate to use a  
18 colloquial term for the -- as for the -- a copyright  
19 case. And so for that reason we believe that we should  
20 be defining "publish" according to the Copyright Act.

21 Now again, this is another issue where we  
22 don't think that it makes a difference with regards --  
23 a material difference with regards to whether we're  
24 saying that we post or publish, insofar as if they're  
25 saying that the Copyright Act definition should not

1 apply and it should be used in the colloquial sense.  
2 Well, they're trying to -- we have said that we posted  
3 the documents on-line. They're trying to argue in  
4 their reply, that post and publish are the same thing,  
5 in a colloquial sense, and therefore, after admitting  
6 to post it online, Public.Resource should also admit  
7 to publishing online.

8 We disagree with this stance. We think that  
9 it -- that there is a material difference, and  
10 therefore, we should be using "publish" as to its  
11 Copyright Act definition, and we had --  
12 Public.Resource has admitted to posting these  
13 materials on line, and so therefore Plaintiff has  
14 gotten a complete answer to their Request for  
15 Admission.

16 THE COURT: Very well. You may continue.

17 MR. BECKER: Moreover, Your Honor, although I  
18 -- because Plaintiffs did not address the underlying  
19 legal issue as to the term "publish," and its  
20 definition in the Copyright Act, in either their motion  
21 or in their reply, and only now at oral argument say  
22 that they think that there is a material difference  
23 between "post" and "publish," and actually address the  
24 meaning of "publish" under the Copyright Act, I don't  
25 have the cases at my disposal to address it, however, I

1 do want to take contention with the characterization of  
2 the -- of copies and material objects under the  
3 Copyright Act, Your Honor, and simply note that cases  
4 have found the difference between when something --  
5 when information is stored in temporary memory versus  
6 when it's fixed in memory, such as a hard drive, and  
7 that's the issue that we're dealing with in this case.

8 As I noted with regards to the term  
9 "download," there's a difference between when somebody  
10 simply accesses a web page and when they actually save  
11 that web page to their hard drive itself.

12 THE COURT: Very well.

13 You may move on to the question of the  
14 sufficiency of the initial disclosures.

15 MR. BECKER: Your Honor, with regards to the  
16 sufficiency of our initial disclosures, we don't  
17 believe that Plaintiffs have provided any case law to  
18 say that our initial disclosures are not sufficient.  
19 We have provided all the information that we had at the  
20 time of producing our initial disclosures, and  
21 discovery is ongoing. We believe that much of the  
22 information that we're going to find to further  
23 supplement those initial disclosures, which I should  
24 note, we do expect to eventually supplement as new  
25 information becomes available --



1 THE COURT: You may have anticipated the  
2 Court's question. You recognize, I assume, that there  
3 is an obligation under the rules, to supplement?

4 THE DEFENDANT: Yes, we do, Your Honor, and  
5 we do plan on supplementing as additional information  
6 becomes available, because many -- much of this case  
7 relies on people issues and information that we expect  
8 to get from Plaintiffs, and because the Plaintiffs have  
9 only just provided their discovery responses on  
10 Tuesday, and because document production is still  
11 outstanding, we are not in a position yet, to  
12 supplement our initial disclosures.

13 THE COURT: Very well. I have one final  
14 question before I hear any brief reply that the  
15 Plaintiffs wish to make.

16 When is it that you contemplate filing a  
17 motion to consolidate this case and the ASTM case for  
18 purposes of discovery?

19 MR. BECKER: Your Honor, although a  
20 determination on that point hasn't yet been made as it  
21 was brought up just this morning, I would imagine that  
22 we would file that shortly, most likely -- I'm sorry,  
23 Your Honor, are you asking for the purposes of  
24 discovery or for --

25 THE COURT: For the purposes of discovery.

1 MR. BECKER: Yes. Your Honor, we would  
2 anticipate filing that -- I think we can do so sometime  
3 next week, if that would be all right, Your Honor.

4 THE COURT: I assume you do not take the  
5 position that there is a reason to stay consideration  
6 of the pending motion? In other words, the Court can  
7 rule on the pending motion, which I will take under  
8 advisement, and your request for consolidation would be  
9 prospective.

10 MR. BECKER: You know, Your Honor, that does  
11 sound like a good idea. With your permission, Your  
12 Honor, we would like to seek that.

13 THE COURT: I believe we should set a  
14 deadline because the -- my recollection is that the  
15 parties in the ASTM case are scheduled to return to  
16 court on the -- on February 4th. Perhaps I will say  
17 sometime during the week of February 2nd. I believe it  
18 is the fourth.

19 MR. BECKER: I believe that's correct,  
20 Wednesday the 4th, if I'm not mistaken.

21 THE COURT: Yes.

22 Can you propose a date by which you would  
23 file a motion to consolidate the two cases, if at all?  
24 Please bear in mind I am not directing that you do so.  
25 In response to my question you have indicated that that

1 is something you consider.

2 Is one week from today a reasonable deadline?

3 MR. BECKER: Is this something that you would  
4 like to be able to address on February 4th, Your Honor?

5 THE COURT: It may be that the Court would  
6 have to move the February 4th hearing because the  
7 motion would not have been fully briefed at that time,  
8 bearing in mind that discovery deadlines are looming in  
9 both cases, and that the parties, as well as the Court,  
10 share an interest in ensuring that discovery is  
11 completed in an expeditious and orderly manner. If  
12 this request is going to be made, it should be made  
13 sooner so it can be fully briefed and decided.

14 MR. BECKER: Yes, Your Honor.

15 And would next week -- would by Friday of  
16 next week be appropriate for Your Honor, or do you  
17 require that earlier?

18 THE COURT: One week from today is January  
19 29th. So my -- The order I anticipate, is that if the  
20 motion is to be filed, it must be filed by no later  
21 than next week, because we recognize, all of us, that  
22 there are remaining issues concerning discovery in this  
23 case and the ASTM case, and we must have a mechanism in  
24 place for addressing them in an orderly fashion.

25 MR. BECKER: Yes, Your Honor.

1           In that case, would January 29th be  
2 appropriate or --

3           THE COURT: That would be the latest.

4           MR. BECKER: Okay. Thank you, Your Honor.

5           THE COURT: Very well.

6           (Pause.)

7           THE COURT: Now, is there anything further,  
8 Mr. Becker?

9           MR. BECKER: Your Honor, with regards to  
10 Plaintiffs' Request for Production Number, I believe  
11 it's 1 and 5, there's a question as to whether it was 4  
12 and 5 or 1 and 5, but 1 and 5 are those that are stated  
13 in the reply brief itself. These concerned production  
14 of documents regarding digitization of standards.

15           Your Honor, we have provided some documents  
16 that are responsive to that, and as our document  
17 production is ongoing, we do plan to continue to  
18 produce documents. If any additional documents that  
19 are responsive to that request, and not otherwise  
20 objected to on the grounds of privilege or some other  
21 reason exist, and I'll note at our -- when conferring  
22 last week, Public.Resource did say it would produce  
23 responsive documents to that request, and did not  
24 refuse to produce documents, as has been characterized,  
25 and the -- and with regards to our actual written

1 responses, there is also -- say that responsive -- that  
2 particular responsive documents will be produced.

3 THE COURT: So does that mean then, that with  
4 respect to Request for Production 1 and Request for  
5 Production 5, you have agreed to continue to produce  
6 documents?

7 MR. BECKER: With regards to the particular  
8 discovery Request Number 5 and Number 1, as it applies  
9 to the same content as Number 5, we have agreed to  
10 produce documents, and the particular statement that  
11 we've said is that Public.Resource will produce  
12 responsive, non-privileged documents that refer to  
13 Public.Resource posting or publishing the 1999  
14 standards to a Public.Resource website.

15 THE COURT: Is there an agreement regarding  
16 what will occur with respect to documents as to which  
17 there's a claim of privilege?

18 MR. BECKER: Public.Resource has refused to  
19 produce documents that -- for which there would be a  
20 claim of privilege, as is typical for any privilege.

21 THE COURT: Is there an agreement with  
22 respect to a privilege log?

23 MR. BECKER: Yes, Your Honor. A privileged  
24 log has already been provided in this case.

25 THE COURT: And will that log be supplemented

1 to the extent that additional documents are discovered  
2 but not produced on the basis of a claim of privilege?

3 MR. BECKER: Yes, Your Honor.

4 (Pause.)

5 THE COURT: Very well. Thank you --

6 MR. BECKER: Thank you very much.

7 THE COURT: -- very much. You may have a  
8 seat.

9 MR. BECKER: Your Honor, if I may address one  
10 more point?

11 THE COURT: Yes. I'm sorry.

12 MR. BECKER: It's the matter of the, excuse  
13 me, the matter of the general objections. I simply  
14 wanted to note that Public.Resource believes that the  
15 matter of whether the general objections should be  
16 discarded is unripe as Public.Resource has specifically  
17 pled objections that underlie all category of documents  
18 that are being addressed, and there's no particular  
19 categories that are being -- that are addressed in this  
20 motion that are withheld on that basis.

21 And I'll also note that Plaintiffs themselves  
22 produced general objections in their discovery  
23 responses to Public.Resource, and I will further note  
24 that all of the cases that are cited by Plaintiffs do  
25 not actually say that these general objections do not

1 actually state a basis for why these general objections  
2 themselves should be discarded. They state that the  
3 rules themselves, as to general objections, are vague  
4 and have not been well established by the Court.

5 THE COURT: Very well. Thank you very much,  
6 Mr. Becker.

7 MR. BECKER: Thank you, Your Honor.

8 THE COURT: Now, Mr. Hudis, I will permit you  
9 a brief reply.

10 MR. HUDIS: Thank you, Your Honor.

11 So in the matter of consolidation, Mr. Becker  
12 says that the case law does not provide any different  
13 consideration between standards and codes. That's  
14 incorrect, and it's -- The principal case on which  
15 Public.Resource relies, says exactly the opposite of  
16 what Mr. Becker has just told the Court. The case is  
17 Veeck, V-E-E-C-K, v. Southern Building Code, 293 F.3d  
18 791 (5th Cir. 2002) and makes a very distinct  
19 distinction between codes and standards vis-a-vis  
20 copyright protection.

21 As to the reasons for consolidation, the  
22 ownership issue that's involved in the ASTM case, at  
23 best, is speculative in our case. It's been raised as  
24 a defense. There's not going to be an issue about  
25 ownership.

1           As for consolidation for any purposes, when  
2 we were before a Judge Chutkan on the motion for  
3 striking jury demand, co-counsel, Nick Stoltz, said  
4 categorically that Public.Resource did not want  
5 consolidation so, that Mr. Becker is now advocating for  
6 consolidation, at least with respect to discovery, is  
7 news to us.

8           Regarding --

9           THE COURT: But no motion has been --

10          MR. HUDIS: Been filed.

11          THE COURT: -- filed yet. I asked the  
12 question for the reasons that I identified when I asked  
13 it; that is, to the extent that there are common  
14 issues, overlap of issues regarding efficiency or any  
15 other reason that suggests that the matter should be  
16 consolidated, I would like to know that.

17           I thought perhaps there would be an agreement  
18 that the matters -- the two cases should or should not  
19 be consolidated. There is no agreement, so I know of  
20 no other way to ensure that the matter is addressed  
21 other than to do what I did, and that is set a deadline  
22 for --

23          MR. HUDIS: For a motion.

24          THE COURT: -- for a motion to be filed.

25          MR. HUDIS: Your Honor, the matter that Mr.



1 Becker addressed on each of the specific discovery  
2 items, definitions of "view," "access" and "download,"  
3 which we agreed to and published, which, as you can see  
4 that Plaintiffs did not agree to, on information that  
5 there's no information on download, so Mr. Becker and  
6 counsel basically -- they're walking away from their  
7 own documents they produced to us, that give us the  
8 statistics on download.

9 So then on the techno-jargon, on HTTP and FTP  
10 and rsync, Mr. Becker calls these documentation of HIP  
11 server calls, and there could be a problem with  
12 automatic calls by a web -- well, let them say that,  
13 okay? If HTTP is the calling up of information so that  
14 somebody can view it, say that. If FTP file transfer  
15 protocol means it is something equivalent to a download  
16 or rsync, which is simultaneous download, then say  
17 that.

18 We want an answer that's in plain English  
19 that Judge Chutkan can understand, whether it's by way  
20 of summary judgment motion or by way of a bench trial.

21 Now, as to the chilling effect of giving us  
22 the server logs, a chilling effect on people who would  
23 access Public.Resource, there's a protective order in  
24 this case.

25 THE COURT: Am I correct that server -- or is

1 Mr. Becker correct that server logs were never  
2 requested?

3 MR. HUDIS: No. No. No. No. No.

4 THE COURT: In other words, there is no  
5 request for server logs?

6 MR. HUDIS: Identify --

7 "Produce the documents identified in your  
8 interrogatory answers."

9 That is Document Request Number 1. That  
10 clearly would -- They got this information about HTTP,  
11 FTP and rsync from their servers. That's where they  
12 got the information. Now they don't want us to have  
13 the documents to either dispute or prove up what  
14 they've given us in an interrogatory answer.

15 So basically, what Public.Resource is saying,  
16 "Trust us," all right? We have no basis to refute what  
17 they're saying.

18 We need to document for Judge Chutkan, the  
19 degree of our damage, as part of our motion for summary  
20 judgment that will request a final injunction.

21 THE COURT: Can you not do that with the  
22 information that has been provided?

23 MR. HUDIS: No.

24 THE COURT: Why is that?

25 MR. HUDIS: Because it's incomplete and Mr.

1 Becker, for the first time, says they're not even  
2 documents that Public.Resource can testify to because  
3 they're not their own documents.

4 They won't give us the very documents that we  
5 need to prove up or dispute what they said in  
6 interrogatory answers. This is basically a process of  
7 hide the ball. That's not the way discovery works.

8 THE COURT: Let me ask you, in the time  
9 remaining, --

10 MR. HUDIS: Yes.

11 THE COURT: -- to address the contention --  
12 to address Mr. Becker's argument regarding the  
13 contention interrogatory, --

14 MR. HUDIS: Sure, Your Honor.

15 THE COURT: -- Number 8, and the companion  
16 request.

17 MR. HUDIS: What --

18 THE COURT: -- and 9.

19 MR. HUDIS: -- Public.Resource is saying is  
20 that they don't get -- have enough information to give  
21 us a full answer. Well, guess what? That was their  
22 fault. They waited almost three months to serve their  
23 discovery.

24 Mr. Becker said, "Oh, we didn't get their  
25 answers until Tuesday." Because that's when they were

1 due. We didn't even ask for an extension. We gave  
2 them our answers the day they were due. We're  
3 collecting up the documents. It took Public.Resource  
4 three months, under the threat of a motion to compel,  
5 to give us their documents.

6 We're collecting up the documents. We've  
7 been collecting documents since the beginning of the  
8 case, plus additional documents we didn't anticipate  
9 they were going to ask for. So we're going full speed  
10 ahead.

11 What we are really suspicious about, Your  
12 Honor, is that this whole thing about delay and  
13 consolidation, this is all just to drag their feet, so  
14 we're going have to depose Mr. Malamud under the threat  
15 of a gun because we are up to the discovery deadline.  
16 We have been diligently requesting discovery all along,  
17 and all we've been getting is stall tactics.

18 Your Honor, if you were to rule that our  
19 interrogatory and document requests under contentions  
20 could not be answered at this time, after three and a  
21 half months of discovery and two months to go, you'd be  
22 rewarding Public.Resource for their delay.

23 Now, on this issue about published, and that  
24 it means "material objects," that's very nice. It was  
25 never briefed by Public.Resource in their opposing

1 papers. All they did was cite the statute, and then we  
2 heard from Mr. Becker for the first time last week in  
3 the anteroom, that "material object" meant a physical  
4 material object.

5 First of all, that's not what the statute  
6 says.

7 Second, we gave you cases that say it's the  
8 opposite of the position Public.Resource has taken.

9 Case law and disclosures, yes, we did give it  
10 to you, Your Honor, on pages 21 and 22 of our papers on  
11 the digitalization.

12 Mr. Becker says they'll provide us with the  
13 documents on digitization and uploading to  
14 Public.Resource's website. Where are they? Where are  
15 the documents? We've been asking for them now for  
16 three and a half months.

17 On general objections that -- being unripe,  
18 this is -- I cannot understand where that's coming  
19 from. We've had letter, after letter, after letter,  
20 and telephone calls about this very issue. That's all  
21 in our motion papers. We briefed the issue.

22 What Mr. Becker is trying to avoid is the  
23 fact that they never briefed it in their opposition  
24 papers. So don't decide it.

25 As for our general objections, it's one

1 paragraph. It says:

2 "We object to your interrogatories, document  
3 requests, admissions to the extent that they  
4 have definitions that would take obligations  
5 beyond the Federal Rules of Civil Procedure."

6 That's our general objections. That's it.

7 Their general objections go on for page,  
8 after page, after page. Your Honor, I've addressed  
9 them in my reply arguments.

10 Unless the Court has any further questions,  
11 I'll sit.

12 THE COURT: Thank you very much, Mr. Hudis.

13 The Court will take the pending motion under  
14 advisement. The entry with respect today's proceeding  
15 will, of course, indicate that we conducted a hearing  
16 on the motion; that is, Plaintiff's Amended Motion to  
17 Compel, the motion bearing Document Number 27.

18 The order that I enter at this time is that  
19 the Defendant shall file a motion to consolidate this  
20 case and the related case for discovery purposes, no  
21 later than one week from today.

22 I'm not directing that you file the motion.  
23 It may be that you will consider the authorities and  
24 determine there's no ground for it. The parties may  
25 ultimately meet and confer and reach some agreement

1 regarding consolidation or not, but if a motion is to  
2 be filed, it must be filed by January 29th.

3 Now, is there anything further with respect  
4 to this matter this morning? Anything further, Mr.  
5 Hudis or Ms. Cooney-Porter?

6 MR. HUDIS: My colleague, Ms. Cooney-Porter  
7 reminded me, you know, the problem I have, and I really  
8 do not want to upset Mr. Becker, is we have heard from  
9 ASTM's counsel, that they're having difficulty deposing  
10 Mr. Malamud. So that just raises concern about the  
11 progress of discovery, given what Your Honor said at  
12 the beginning of this hearing.

13 I just wanted to bring that to the Court's  
14 attention. It's a concern of ours if that, in fact, is  
15 true.

16 All I can say is that is a hearsay statement  
17 that was given to us by ASTM's counsel, and we know  
18 nothing further about it.

19 THE COURT: Very well. Thank you, Mr. Hudis.

20 Is that something you wish to address now,  
21 Mr. Becker?

22 MR. BECKER: Yes, Your Honor.

23 Your Honor, I'd simply like to say that we  
24 have provided multiple dates in the ASTM case, to  
25 Plaintiffs in that case, for the deposition of Mr.

1 Malamud. I'm not certain what Mr. Hudis is responding  
2 -- referring to with regards to that. It may be with  
3 regards to the Plaintiffs in that case refusing the  
4 dates that we had provided, trying to ask for dates on  
5 which the lead counsel in that case, for Mr. Malamud,  
6 will be at trial or preparing for trial in another  
7 case, and therefore not available.

8 THE COURT: Well, let me ask of all of you  
9 who are involved in, when I say "this case" I mean 14-  
10 857, to please concur in an effort to agree upon dates.

11 MR. BECKER: Yes, Your Honor.

12 THE COURT: Very well. Thank you very much.  
13 Anything further, Mr. Hudis or Ms. Cooney-  
14 Porter?

15 MR. HUDIS: No, Your Honor.

16 THE COURT: Mr. Becker, is there anything  
17 further on behalf of your client?

18 MR. BECKER: Nothing further.

19 THE COURT: Very well. I thank all of you  
20 very much. Thank you.

21 (Proceedings concluded at 11:38 a.m.)  
22  
23  
24  
25



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/ \_\_\_\_\_

February 7, 2015

STEPHEN C. BOWLES