

**PLAINTIFFS' SECOND SUPPLEMENTAL STATEMENT  
OF MATERIAL FACTS IN SUPPORT OF THEIR  
SECOND MOTION FOR SUMMARY JUDGMENT**

**REDACTED**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<p>AMERICAN SOCIETY FOR TESTING AND MATERIALS d/b/a ASTM INTERNATIONAL;</p> <p>NATIONAL FIRE PROTECTION ASSOCIATION, INC.; and</p> <p>AMERICAN SOCIETY OF HEATING, REFRIGERATING, AND AIR CONDITIONING ENGINEERS,</p> <p style="text-align:right">Plaintiffs/ Counter-Defendants,</p> <p>v.</p> <p>PUBLIC.RESOURCE.ORG, INC.,</p> <p style="text-align:right">Defendant/ Counter-Plaintiff.</p>	<p style="text-align:center">Case No. 1:13-cv-01215-TSC</p>
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**PLAINTIFFS’ SECOND SUPPLEMENTAL STATEMENT OF MATERIAL FACTS IN  
SUPPORT OF THEIR SECOND MOTION FOR SUMMARY JUDGMENT**

Pursuant to the Local Rule 7(h), Plaintiffs American Society for Testing and Materials (“ASTM”), National Fire Protection Association, Inc. (“NFPA”) and American Society of Heating, Refrigerating, and Air Conditioning Engineers (“ASHRAE”) (collectively, “Plaintiffs”) hereby submit, in support of their Second Motion for Summary Judgment, this Second Supplemental Statement of Material Facts<sup>1</sup> as to which there is no genuine issue to be tried.

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<sup>1</sup> Plaintiffs filed an original Statement of Material Facts (Dkt. 118-2) (“SMF”) and Supplemental Statement of Material Facts (155-1). The facts contained in this Second Supplemental Statement of Material Facts are additional to the already-developed record. Plaintiffs also have relied on and cited to their prior statements of material facts in support of the Second Motion for Summary Judgment.

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## **I. PLAINTIFFS OWN COPYRIGHTS IN THE 217 STANDARDS AT ISSUE IN THIS MOTION<sup>2</sup>**

### ASTM's Copyrighted Works

1. ASTM has obtained copyright registration certificates that cover its 191 standards at issue in this motion. Declaration of Jane W. Wise, filed concurrently herewith, (“Wise Decl.”) ¶¶ 2, 31-149, Exs. 30-148; Declaration of Thomas O’Brien, previously filed at Dkt. 118-7, (“O’Brien Decl.”) ¶¶ 5-12, Exs. 1-4.

2. Specifically, ASTM is the claimant for the works appearing in Annex A (collectively, the “ASTM Standards”). Wise Decl. ¶¶ 2, 31-150, Exs. 30-149; O’Brien Decl. ¶¶ 5-12, Exs. 1-4.

3. Each and every standard, edition, title, year of the Annual ASTM Book of Standards (“BOS”), and copyright registration number appearing in Annex A is true and correct as shown in the corresponding exhibits. Wise Decl. ¶¶ 2-150, Exs. 1-149; O’Brien Decl. ¶¶ 5-12, Exs. 1-4.

4. The specified edition of each ASTM Standard identified in Annex A was originally published in the BOS (identified by year) in the corresponding row of Annex A. Wise Decl. ¶¶ 2-33, 35-57, 59-137, 139-150, Exs. 1-32, 34-56, 58-136, 138-149; O’Brien Decl. ¶¶ 7-12, Exs. 3-4.

5. Each BOS identified in Annex A is the subject of the copyright registration identified in the corresponding row of Annex A. Wise Decl. ¶¶ 2-33, 35-57, 59-137, 139-150, Exs. 1-32, 34-56, 58-136, 138-149; O’Brien Decl. ¶¶ 7-12, Exs. 3-4.

6. For each ASTM Standard where no BOS is identified, the standard is the subject of the copyright registration identified in the corresponding row of Annex A. Wise Decl. ¶¶ 34, 58, 138, Exs. 33, 57, 137; O’Brien Decl. ¶¶ 5-6, Exs. 1-2.

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<sup>2</sup> The 217 standards at issue in Plaintiffs’ motion for summary judgment are collectively referred to herein as the “Works” or “Plaintiffs’ Works.”

7. The registrations whose numbers appear in bold Annex A were effective within 5 years of the date of first publication identified in the registration certificate. Wise Decl. ¶¶ 2-33, 35-57, 59-65, 67-149, Exs. 1-32, 34-56, 58-148; O’Brien ¶¶ 7-11, Exs. 3-4.

8. The published version of each ASTM Standard includes a copyright notice alerting the public to the fact that the copyright is owned by ASTM. O’Brien Decl. ¶ 11.

#### NFPA’s Copyrighted Works

9. NFPA has obtained copyright registration certificates for its 23 standards at issue in this motion, each within five years of publication. Declaration of Dennis J. Berry, previously filed at Dkt. 118-3, (“Berry Decl.”) ¶¶ 2-3, Exs. A-B; Supplemental Declaration of James Pauley Declaration, filed concurrently herewith, (“Supp. Pauley Decl.”) ¶¶ 6-24, Exs. W-OO (certificates of registration).

#### ASHRAE’s Copyrighted Works

10. ASHRAE has obtained copyright registration certificates for its 3 standards at issue in this motion, each within five years of publication. Declaration of Stephanie Reiniche, previously filed at Dkt. 118-10, (“Reiniche Decl.”) ¶ 15, Exs. 3-5.

## **II. PRO’S ONGOING INFRINGEMENT OF PLAINTIFFS’ WORKS**

### **A. PRO’s Postings To Internet Archive After Remand From The D.C. Circuit**

11. Following the D.C. Circuit remand in July 2018, Defendant Public.Resource.Org (“PRO”) “reposted the standards at issue . . . to the Internet Archive” website. Wise Decl. ¶ 165, Ex. 164 at Interrog. 22.

12. PRO had previously, at the Court’s suggestion (and prior to the injunction), removed Plaintiffs’ standards from its website and the Internet Archive website in November 2015. SMF ¶ 186.

**B. PRO Did Not Fix The Errors In Its Versions of Plaintiffs' Standards**

13. During his deposition, Mr. Malamud claimed that if he were notified of any mistakes, he would do a rigorous quality assurance check and correct any mistakes. SMF ¶ 217 (citing Declaration of Jordana Rubel, previously filed at Dkt. 118-12, ("Rubel Decl."). ¶ 6, Ex. 3 (C. Malamud Dep. at 140:19-25)).

14. Well over three years have passed since Plaintiffs notified Mr. Malamud of errors in his postings. Nonetheless, PRO never corrected most of these mistakes, instead reposting versions of standards which he previously admitted were not acceptable. SMF ¶ 216 (citing Rubel Decl. ¶ 6, Ex. 3 (C. Malamud Dep. at 140:19-141:6)).

15. For example, during Mr. Malamud's deposition, Plaintiffs notified him that the HTML version of ASTM D86-07 he had posted contained a number of errors, including text and numbers that differ from the information in the authentic versions of Plaintiffs' standards. SMF ¶ 215 (citing Rubel Decl. ¶ 6, Ex. 3 (C. Malamud Dep. at 127:4-139:8)).

16. PRO has not fixed those errors to its HTML version of ASTM D86-07. Wise Decl. ¶ 166, Ex. 165.

17. Plaintiffs also alerted PRO to a number of errors in the HTML posting of the 2011 edition of the National Electrical Code ("NEC") that distort the meaning of substantive provisions of the standard that were written to protect human safety and prevent property damage, including but not limited to erroneously using the letter "M" (an abbreviation for meters) rather than the letters "I" and "N" (an abbreviation for inches). SMF ¶ 219 (citing Declaration of James Pauley filed at Dkt. 118-8, ("Pauley Decl.") ¶ 54).

18. PRO has not reposted its version of the 2011 NEC in HTML form, but almost all of those precise errors remain in its Full Text posting of the 2011 NEC. Supp. Pauley Decl. ¶ 39; Wise Decl. ¶ 167, Ex. 166.

19. PRO has not made meaningful changes to the process it previously used to rekey text, convert graphics, reset mathematical formulas or otherwise make change its quality control measures. Wise Decl. ¶ 165, Ex. 164 at Interrog. 22.

20. PRO acknowledges that Plaintiffs (or governmental authorities), not PRO, are the definitive source for accurate copies of the Plaintiffs' standards by directing readers "to check with the standards organizations or governmental authorities for further information and access to definitive versions of these important laws." *See, e.g.*, Wise Decl. ¶ 168, Ex. 167.

**C. PRO Continues To Use Plaintiffs' Marks**

21. PRO stated that it removed all of Plaintiffs' logos from PRO's copies of Plaintiffs' Works. Wise Decl. ¶ 165, Ex. 164 at Interrog. 22.

22. As depicted below, PRO has in some instances "blacked out" Plaintiffs' logos, but has typed Plaintiffs' word marks, combined with the phrase "Logo Removed," over the redacted area.



Wise Decl. ¶ 153, Ex. 152 at 180.

23. However, Internet Archive postings show that not all of Plaintiffs' logos have been removed, and PRO has not removed Plaintiffs' word marks. For example, PRO has not removed the NEC logo for at least the 2011 and 2014 editions of the NEC or any of the word marks:



Wise Decl. ¶ 169, Ex. 168; Supp. Pauley Decl. ¶ 32.

24. Similarly, PRO's Internet Archive postings continue in some instances to display the ASTM Logo, as depicted below.



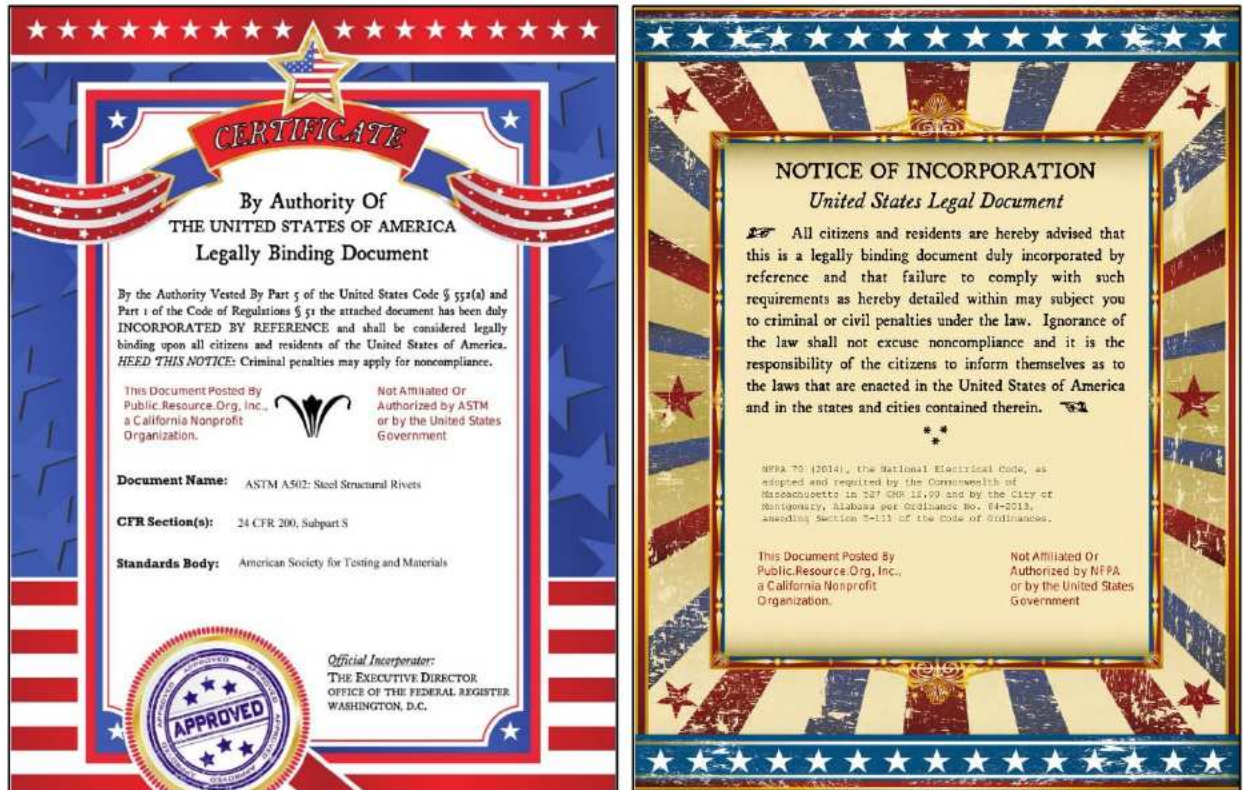
Wise Decl. ¶ 166, Ex. 165.

25. And even where PRO has redacted the ASTM logo, PRO has not in any instance redacted the ASTM word mark. Wise Decl. ¶ 153, Ex. 152.



**D. PRO's Changes To Its "Disclaimers" Are Insufficient**

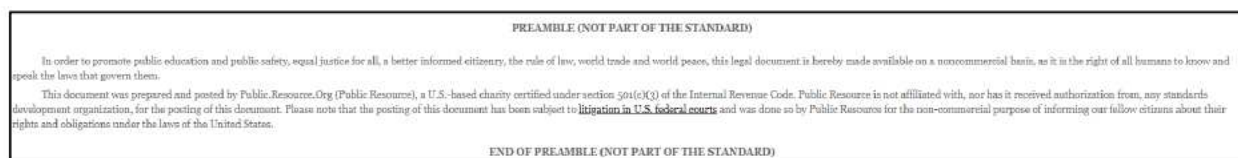
26. PRO's "disclaimers" take three forms. The first appears on the cover page of PDF copies of Plaintiffs' Works posted by PRO, as depicted below.



Wise Decl. Wise Decl. ¶ 153, Ex. 152 at 180; Wise Decl. ¶ 168, Ex. 167 at 6.

27. The second disclaimer appears "below the fold" of the Internet Archive webpage; a reader must scroll past the PDF copy of the standard to see the disclaimer at all. Wise Decl. ¶ 168, Ex. 167 at 6.

28. Finally, PRO's HTML-format copies of Plaintiffs' standards—which are available for download on the Internet Archive Website—contain the following "disclaimer," in the form of a "PREAMBLE (NOT PART OF THE STANDARD)":



Wise Decl. ¶ 166, Ex. 165.

29. This “disclaimer” appears in approximately the same typeface and size as the rest of the document. *Id.*

### **III. PRO’S FAILURE TO FOLLOW THE D.C. CIRCUIT’S DECISION**

#### **A. PRO Essentially Did Nothing In Response To The D.C. Circuit’s Decision**

30. Plaintiffs’ interrogatories asked PRO to identify the authority and portions of standards that it contended impose binding legal obligations; but PRO did not do any analysis to determine “with specificity each portion(s) of the Standard at Issue that PRO asserts imposes a legal obligation on an individual or entity.” *See generally* Wise Decl. ¶ 165, Ex. 164 at Interrogs. 17-21.

31. PRO disavowed any obligation to do any analysis of the standards to support its fair use defense: “The entirety of each standard listed [at issue in this litigation] is incorporated by reference into the law. Public Resource is not an attorney and does not provide legal advice, and cannot provide advice regarding what legal obligations an individual or entity may face as a result of hundreds of different federal, state, and local laws.” Wise Decl. ¶ 165, Ex. 164 at Interrog. 19.

32. In response to Plaintiffs’ interrogatories regarding PRO’s basis for copying and distributing every portion of Plaintiffs’ standards “verbatim,” PRO explained that “[t]he entirety of each standard [at issue in this litigation] is incorporated by reference into the law, and it is therefore necessary to reproduce the entire standard verbatim in order to accurately state what the law is.” Wise Decl. ¶ 165, Ex. 164 at Interrog. 21.<sup>3</sup>

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<sup>3</sup> Standards often incorporate other standards by reference. *See infra* ¶ 69. PRO’s answer does not explain how it would distinguish between standards that are incorporated by reference directly by a regulation and the numerous additional standards that are incorporated by reference within the standards of other related standards.

**B. PRO Has Failed To Identify Correct Citations That Incorporate The Works By Reference**

Incorrect Citations re: ASTM's Standards

33. ASTM standards are reviewed on a 5 year schedule. Declaration of James Thomas, previously filed at Dkt. 118-11, ("James Thomas Decl.") ¶ 33. ASTM publishes an Annual Book of ASTM Standards that is composed of a number of volumes and includes the then-current version of each of its standards. O'Brien Decl. ¶ 7.

34. Each ASTM standard has a unique designation comprised of a capital letter classification A-G which designates the general classification of the standard (*e.g.*, standards beginning with "A" address ferrous metals). O'Brien Decl. Ex. 3 at 1349.

35. In each serial designation, the number following the dash indicates the year of original adoption as a standard, or the year of the standard's last revision. *Id.* Standards that have been reapproved without change are indicated by the year of last reapproval in parentheses as part of the designation number (*e.g.*, C5-79 (1997) indicates that C5 was reapproved in 1997). *Id.* A letter following this number indicates more than one revision during that year (*e.g.*, A106-04b indicates the second revision in 2004 to A106). *Id.* A superscript epsilon indicates an editorial change since the last revision or reapproval (*e.g.*, A36-97a<sup>ε1</sup> indicates the first editorial revision of the 1997 version of A36). *Id.* If a standard is written in acceptable metric units, the metric version is indicated by the letter M (*e.g.*, A369M-92 indicates that this version of A389 contains metric units). *Id.* When ASTM publishes standards in metric and inch-pound units it identifies the standard with a dual designation (*e.g.*, ASTM A369/A369M-92 identifies a dual standard). *Id.* Regulations like the Code of Federal Regulations typically identify ASTM standards according to this specific designation number. For example, 40 C.F.R. § 114.600 specifies the edition of

the ASTM standards incorporated by reference in 46 C.F.R. § 119.440, including B122/B122M-95 and B96-93. *See* 40 C.F.R. § 114.600.

36. As discussed in detail below, PRO has reproduced and displayed at least 92 standards that have not been incorporated by the regulation(s) it identifies in its cover sheets:

- a. **ASTM A36 (1977a<sup>e</sup>):** PRO identifies 24 C.F.R. § 200 as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 1. However, 24 C.F.R. § 200 does not reference this standard.
- b. **ASTM A36/A36M (1997a<sup>e1</sup>):** PRO identifies 46 C.F.R. § 160.035-3(b)(2) as the incorporating by reference regulations. Wise Decl. ¶ 153, Ex. 152 at 7. However, 46 C.F.R. § 160.035 was removed and reserved. *See* 76 FR 62962, 62975, Oct. 11, 2011.
- c. **ASTM A82 (1979):** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00092094; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 12. However, 24 C.F.R. § 200, Subpart S does not reference this standard.
- d. **ASTM A106/A106 M (2004b):** PRO identifies 49 C.F.R. § 192.113 as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00079099; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19. However, 49 C.F.R. § 192.113 references ASTM A106, not ASTM A106/A106 M (2004b). And 49 C.F.R. § 192.7, which identifies standards incorporated by reference, references the 2010 version of ASTM A106/A106 M, not the 2004b version.
- e. **ASTM A184 (1979):** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. ¶ 153, Ex. 152 at 18. However, 24 C.F.R. § 200, Subpart S does not reference this standard.
- f. **ASTM A185 (1979):** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00080317; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 23. However, 24 C.F.R. § 200, Subpart S does not reference this standard.
- g. **ASTM A203/A203 M (1997):** PRO identifies 46 C.F.R. § 54.05-20(b) as the incorporating by reference regulation. ¶ 153, Ex. 152 at 31. However, 46 C.F.R. § 54.05-20(b) references ASTM A 203/A 203M-97 (Reapproved 2007)<sup>e1</sup>, not ASTM A203/A203 M (1997).

- h. **ASTM A242 (1979):** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00082342; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 36. However, 24 C.F.R. § 200, Subpart S does not reference this standard.
- i. **ASTM A285 (1978):** PRO identifies 10 C.F.R. § 440 Appendix A and 24 C.F.R. § 200 Appendix A as the incorporating by reference regulations. Wise Decl. ¶ 153, Ex. 152 at 40. However, 10 C.F.R. § 440 Appendix A and 24 C.F.R. 200 Appendix A do not reference this standard.
- j. **ASTM A307 (1978e):** PRO identifies 24 C.F.R. § 200, Subpart S and 46 C.F.R. 56.25-20(b) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00082371; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 45. However, 24 C.F.R. § 200, Subpart S does not reference this standard, and 46 C.F.R. § 56.25-20(b) references the 1997 version of ASTM A307, not the 1978<sup>e</sup> version.
- k. **ASTM A325 (1979):** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00082401; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 51. However, 24 C.F.R. § 200, Subpart S does not reference this standard.
- l. **ASTM A370-77<sup>e2</sup>:** PRO identifies 49 C.F.R. § 179.102-1(a)(1) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 62. However, 49 C.F.R. § 179.102-1(a)(1) incorporates ASTM A370-94 not ASTM A370-77<sup>e2</sup>. 49 C.F.R. § 179.102-1(a)(1).
- m. **ASTM A441-79:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 120. However, 24 C.F.R. § 200, Subpart S does not reference ASTM A441-79.
- n. **ASTM A449-78a:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 124. However, 24 C.F.R. § 200, Subpart S does not reference ASTM A449-78a.
- o. **ASTM A475-78(1984)<sup>e1</sup>:** PRO identifies 7 C.F.R. § 1755.370(b) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 131. However, 7 C.F.R. § 1755.370(b) incorporates ASTM A476-78, not ASTM A475-78(1984)<sup>e1</sup>.
- p. **ASTM A490-79:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00088099; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶

153, Ex. 152 at 138. However, 24 C.F.R. § 200, Subpart S does not reference ASTM A490-79.

- q. **ASTM A496-78:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 148. However, 24 C.F.R. § 200, Subpart S does not reference ASTM A496-78.
- r. **ASTM A497-79:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 155. However, 24 C.F.R. § 200, Subpart S does not reference ASTM A497-79.
- s. **ASTM A500-78:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 163. However, 24 C.F.R. § 200, Subpart S does not reference ASTM A500-78.
- t. **ASTM A501-76:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00089127; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 171. However, 24 C.F.R. § 200, Subpart S does not reference ASTM A501-76.
- u. **ASTM A502-76:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00090524; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 180. However, 24 C.F.R. § 200, Subpart S does not reference ASTM A502-76.
- v. **ASTM A514-77:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 186. However, 24 C.F.R. § 200, Subpart S does not reference ASTM A514-77.
- w. **ASTM A539-90a:** PRO identifies 24 C.F.R. § 3280.705(b)(4) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00091622; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19. However, 24 C.F.R. § 3280.705(b)(4) incorporates ASTM C539-99 not ASTM C539-90a. 24 C.F.R. § 3280.705(b)(4).
- x. **ASTM A570-79:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00091642; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 197. However, 24 C.F.R. § 200, Subpart S does not reference ASTM A570-79.

- y. **ASTM A572-79:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Decl. ¶ 153, Ex. 152 at 202. However, 24 C.F.R. § 200, Subpart S does not reference ASTM A572-79.
- z. **ASTM A588-79a:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 207. However, 24 C.F.R. § 200, Subpart S does not reference ASTM A588-79a.
- aa. **ASTM A611-72(1979):** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 211. However, 24 C.F.R. § 200, Subpart S does not reference ASTM A611-72(1979).
- bb. **ASTM A615-79:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00091848; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 216. However, 24 C.F.R. § 200, Subpart S does not reference ASTM A615-79.
- cc. **ASTM A616-79:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 224. However, 24 C.F.R. § 200, Subpart S does not reference ASTM A616-79.
- dd. **ASTM A617-79:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 232. However, 24 C.F.R. § 200, Subpart S does not reference ASTM A617-79.
- ee. **ASTM B21-83b:** PRO identifies 46 C.F.R. § 56.60-2 as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 246. However, 46 C.F.R. § 56.60-2 incorporates B21-96. Additionally, 46 C.F.R. § 56.60-2 only incorporates this standard with respect to certain copper alloys addressed in B21.
- ff. **ASTM B85-84:** PRO identifies 46 C.F.R. § 56.60-2 as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 252. However, 46 C.F.R. § 56.60-2 incorporates B85-96. 46 C.F.R. § 56.60-2. Additionally, 46 C.F.R. § 56.60-2 only incorporates one table within ASTM B85-96—table X-2—and states that “[t]ension tests shall be performed to determine tensile strength, yield strength, and elongation” in accordance with the minimum value in X-2. *Id.* The remainder of the standard is unnecessary to determine the minimum value in X-2. *Id.* Table X-2 also contains values for sheer strength and fatigue strength that are unnecessary to understand the minimum value for the required tension tests. *Id.*

- gg. **ASTM B580-79:** PRO identifies 49 C.F.R. § 171.7 as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00093063; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 318. However, 49 C.F.R. § 171.7 incorporates ASTM B580-79 reapproved in 2000, not ASTM B580-79. 49 C.F.R. § 171.7.
- hh. **ASTM C5-79(1997):** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00093990; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 330. However, 24 C.F.R. § 200, Subpart S does not reference ASTM C5-79.
- ii. **ASTM C150-99a:** PRO identifies 30 C.F.R. § 250.198 as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 334. However, 30 C.F.R. § 250.198 incorporates ASTM C150-07, not ASTM C150-99a. 30 C.F.R. § 250.198.
- jj. **ASTM C330-99:** PRO identifies 30 C.F.R. § 250.901(a)(18) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00093937; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 378. However, 30 C.F.R. § 250.901(a)(18) incorporates ASTM C330-05, not ASTM C330-99. 30 C.F.R. § 250.901(a)(18).
- kk. **ASTM C509-84:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 384. However, 24 C.F.R. § 200, Subpart S does not reference ASTM C509-84.
- ll. **ASTM C516-80(1996)<sup>e1</sup>:** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00094023; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 392. However, 24 C.F.R. § 200, Subpart S does not reference ASTM C516-80(1996)<sup>e1</sup>.
- mm. **ASTM C549-81(1995)<sup>e1</sup>:** PRO identifies 10 C.F.R. § 440, Appendix A as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00094157; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 411. However, 10 C.F.R. § 440, Appendix A incorporates ASTM C549-81 reapproved in 1986, not ASTM C549-81(1995)<sup>e1</sup>. 10 C.F.R. § 440, Appendix A.
- nn. **ASTM C564-70(1982):** PRO identifies 24 C.F.R. § 3280.611(d)(5)(iv) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 417. However, 24 C.F.R. § 3280.611(d)(5)(iv) incorporates ASTM C564-88 not ASTM C564-70(1982). 24 C.F.R. § 3280.611(d)(5)(iv).
- oo. **ASTM D86-07:** PRO identifies 40 C.F.R. § 1065.710 as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00106152; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 423.



However, 40 C.F.R. § 1065.710 incorporates ASTM D86-12, not ASTM D86-07. 40 C.F.R. § 1065.710.

- pp. **ASTM D512-89(1999):** PRO identifies 40 C.F.R. § 136.3(a) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00104757; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 466. However, 40 C.F.R. § 136.3(a) incorporates ASTM D512a-04, D512b-04, and D512c-04 not ASTM D512-89(1999). 40 C.F.R. § 136.3(a).
- qq. **ASTM D814-95:** PRO identifies 40 C.F.R. § 1051.245(e)(1) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00105881; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 493. However, 40 C.F.R. § 1051.245(e)(1) does not incorporate ASTM D814-95. 40 C.F.R. § 1051.245(e)(1).
- rr. **ASTM D975-07:** PRO identifies 40 C.F.R. § 1065.710 as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 517. However, 40 C.F.R. § 1065.710 incorporates ASTM D975-13a, not ASTM D975-07. 40 C.F.R. § 1065.710.
- ss. **ASTM D1246-95(1999):** PRO identifies 40 C.F.R. § 136.3(a), Table IB as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 546. However, 40 C.F.R. § 136.3(a), Table IB incorporates ASTM D1246-05, not ASTM D1246-95(1999). 40 C.F.R. § 136.3(a), Table IB.
- tt. **ASTM D1481-93(1997):** PRO identifies 40 C.F.R. § 136.3(a), Table IC as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 599. However, 40 C.F.R. § 136.3(a), Table IC does not incorporate ASTM D1481-93(1997). 40 C.F.R. § 136.3(a), Table IC.
- uu. **ASTM D1518-85 (1998)<sup>e1</sup>:** PRO identifies 46 C.F.R. § 160.174-17(f) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00095007; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 606. However, 46 C.F.R. § 160.174-17(f) incorporates ASTM D1518-85 reapproved in 1990, not ASTM D1518-85 (1998)<sup>e1</sup>. 46 C.F.R. § 160.174-17(f).
- vv. **ASTM D1785-86:** PRO identifies 46 C.F.R. § 56.01-2 as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 661. However, 46 C.F.R. § 56.01-2 does not reference ASTM D1785-86. 46 C.F.R. § 56.01-2.
- ww. **ASTM D1890-96:** PRO identifies 40 C.F.R. § 136.3(a) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 678. However, 40 C.F.R. § 136.3(a) does not reference ASTM D1890-96. 40 C.F.R. § 136.3(a).

- xx. **ASTM D2036-98:** PRO identifies 40 C.F.R. § 136.3(a), Table 1B as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 742. However, 40 C.F.R. § 136.3(a), Table 1B incorporates a different version of ASTM D2036. 40 C.F.R. § 136.3(a), Table 1B incorporates ASTM D2036-09(A) and (B), not ASTM D2036-98. 40 C.F.R. § 136.3(a), Table 1B.
- yy. **ASTM D2163-91 (1996):** PRO identifies 40 C.F.R. § 86.1313-94(f)(3) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 763. However, 40 C.F.R. § 86.1313-94 is reserved by 79 FR 23704 and does not reference ASTM D2163-91 (1996). 40 C.F.R. § 86.1313-94.
- zz. **ASTM D2986-95a (1999):** PRO identifies 40 C.F.R. § 86.1310-2007(b)(7)(i)(A) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 861. However, 40 C.F.R. § 86.1310-2007 is reserved by 79 FR 23704 and does not reference ASTM D2986-95a (1999). 40 C.F.R. § 86.1310-2007.
- aaa. **ASTM D3120-96:** PRO identifies 40 C.F.R. § 80.46(a)(3)(iii) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00103410; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 868. However, 40 C.F.R. § 80.46 incorporates a different version of ASTM D3120. 40 C.F.R. § 80.46 incorporates ASTM D3120-08, not ASTM D3120-96. 40 C.F.R. § 80.46.
- bbb. **ASTM D5257-97:** PRO identifies 40 C.F.R. § 136.3(a) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00104786; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1017. However, 40 C.F.R. § 136.3(a) incorporates ASTM D5257-11, not ASTM D5257-97. 40 C.F.R. § 136.3(a).
- ccc. **ASTM D5373-93 (1997):** PRO identifies 40 C.F.R. § 75, Appendix G as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00104803; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1025. However, 40 C.F.R. § 75, Appendix G incorporates a different version of ASTM D5373. 40 C.F.R. § 75, Appendix G incorporates ASTM D5373-02 (2007), not ASTM D5373-93 (1997). 40 C.F.R. § 75, Appendix G.
- ddd. **ASTM D5489-96a:** PRO identifies 16 C.F.R. § 423.8(g) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 1031. However, 16 C.F.R. § 423.8(g) incorporates ASTM D5489-96c, not ASTM D5489-96a. 16 C.F.R. § 423.8(g).
- eee. **ASTM E23-82:** PRO identifies 46 C.F.R. § 56.50-105(a)(1)(ii) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00106690; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶

153, Ex. 152 at 1122. However, 46 C.F.R. § 56.50-105(a)(1)(ii) incorporates a different version of ASTM E23. 46 C.F.R. § 56.50-105(a)(1)(ii) incorporates ASTM E23-96, not ASTM E23-82. 46 C.F.R. §§ 56.50-105(a)(1)(ii); 56.01-2(e)(68).

- fff. **ASTM E145-94<sup>e1</sup>**: PRO identifies 40 C.F.R. § 63.14 as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00106516; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1182. However, 40 C.F.R. § 63.14(h)(103) incorporates ASTM E145-94 (2001), not ASTM E145-94<sup>e1</sup>. 40 C.F.R. § 63.14(h)(103).
- ggg. **ASTM E283-91 (1999)**: PRO identifies 10 C.F.R. § 434.402.2 and 24 C.F.R. § 200, Appendix A as the incorporating by reference regulations. Wise Decl. ¶ 151, Ex. 150 at PRO\_00106751; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1223. However, 10 C.F.R. § 434.402.2 does not reference ASTM E 283, and 24 C.F.R. § 200, Appendix A incorporates ASTM E283-91, not ASTM E283-91 (1999).
- hhh. **ASTM E408-71**: PRO identifies 16 C.F.R. § 460.5(b) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00106805; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1230. However, 16 C.F.R. § 460.5(b) incorporates ASTM E408-71, reapproved in 2002, not ASTM E408-71. 16 C.F.R. § 460.5(b).
- iii. **ASTM E424-71**: PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00106810; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1235. However, 24 C.F.R. § 200, Subpart S does not reference ASTM E424-71. 24 C.F.R. § 200, Subpart S.
- jjj. **ASTM E606-80**: PRO identifies 24 C.F.R. § 200.946 as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00106820; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1244. However, 24 C.F.R. § 200.946 does not reference ASTM E606-80. 24 C.F.R. § 200.946.
- kkk. **ASTM E695-79 (1997)<sup>e1</sup>**: PRO identifies 24 C.F.R. § 200.946(a)(1)(viii) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00106851; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1273. However, 24 C.F.R. § 200.946(a)(1)(viii) incorporates ASTM E 695-79, reapproved in 1991, not ASTM E695-79 (1997)<sup>e1</sup>. 24 C.F.R. § 200.946(a)(1)(viii).
- lll. **ASTM E711-87 (1992)**: PRO identifies 40 C.F.R. § 63, Subpart DDDDD, Table 6 as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00106859; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1279. However, 40 C.F.R. § 63, Subpart DDDDD

cites ASTM E711-87, reapproved in 2004, not ASTM E711-87 (1992). 40 C.F.R. §§ 63, Subpart DDDDD; 63.14(h)(108).

- mmm. **ASTM E776-87 (1992):** PRO identifies 40 C.F.R. § 63, Subpart DDDDD, Table 6 as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00106908; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1300. However, 40 C.F.R. § 63, Subpart DDDDD, Table 6 incorporates ASTM E776-87, reapproved in 2009, not ASTM E776-87 (1992). 40 C.F.R. §§ 63, Subpart DDDDD; 63.14(h)(109).
- nnn. **ASTM E885-88:** PRO identifies 40 C.F.R. § 63, Subpart DDDDD, Table 6 as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 1308. However, 40 C.F.R. § 63, Subpart DDDDD, Table 6 does not reference ASTM E885-88. 40 C.F.R. § 63, Subpart DDDDD, Table 6.
- ooo. **ASTM E1337-90 (1996):** PRO identifies 49 C.F.R. §§ 571.105, S6.9.2(a) as the incorporating by reference regulations. Wise Decl. ¶ 153, Ex. 152 at 1336. However, 49 C.F.R. §§ 571.105 and 571.5 incorporate ASTM E1337-90, reapproved in 2008, not ASTM E1337-90 (1996). 49 C.F.R. §§ 571.105(a), (b); 571.5(d)(39).
- ppp. **ASTM F462-79 (1999):** PRO identifies 24 C.F.R. § 200, Subpart S as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00107383; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19. However, 24 C.F.R. § 200, Subpart S does not reference ASTM F462-79 (1999). 24 C.F.R. § 200, Subpart S.
- qqq. **ASTM F478-92 (1999):** PRO identifies 29 C.F.R. § 1910.137(b)(2)(ix) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00107415; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1343. However, 29 C.F.R. § 1910.137(b)(2)(ix) incorporates a different version of ASTM F478. 29 C.F.R. § 1910.137(b)(2)(ix) incorporates ASTM F478-09, not ASTM F478-92 (1999).
- rrr. **ASTM F631-80 (1985):** PRO identifies 33 C.F.R. § 156.40 as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 1349. However, 33 C.F.R. § 156.40 does not exist; 33 C.F.R. § 156.400 does not reference any ASTM standard, and 33 C.F.R. § 156.106(e)(1) incorporates a different version of ASTM F631. 33 C.F.R. § 156.106(e)(1) incorporates ASTM F631-93, not ASTM F631-80 (1985).
- sss. **ASTM F682-82a (1988):** PRO identifies 46 C.F.R. § 56.01-2 as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 1361. However, 46 C.F.R. § 56.01-2 incorporates ASTM F682-82a, reapproved in 2008, not ASTM F682-82a (1988). 46 C.F.R. § 56.01-2(e)(69).

- ttt. **ASTM F715-81 (1986):** PRO identifies 33 C.F.R. § 154.106 as the incorporating by reference regulations. Wise Decl. ¶ 153, Ex. 152 at 1368. However, both 33 C.F.R. §§ 155, Appendix B and 154.106 incorporate a different version of ASTM F715. 33 C.F.R. §§ 155, Appendix B and 154.106 incorporate ASTM F715-95, not ASTM F715-81 (1986). 33 C.F.R. §§ 155.140(c)(2); 155, Appendix B; 154.106(e)(2).
- uuu. **ASTM F722-82 (1988):** PRO identifies 33 C.F.R. §§ 155.140 as the incorporating by reference regulations. Wise Decl. ¶ 151, Ex. 150 at PRO\_00107471; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1377. However, 33 C.F.R. §§ 155.140 does not reference ASTM F722, and 33 C.F.R. § 154, Appendixes A and B incorporate ASTM F722-82, reapproved in 2008, not ASTM F722-82 (1988). 33 C.F.R. § 154, Appendix A, B; 154.106(e)(3).
- vvv. **ASTM F808-83 (1988)e1:** PRO identifies 33 C.F.R. § 154, Appendix C, 6.3.1 as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00107483; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1389. However, 33 C.F.R. § 154, Appendix C cites, but does not incorporate by reference, “Item 26 in ASTM F 808.” 33 C.F.R. § 154, Appendix C. ASTM F808-83 is also not included amongst the ASTM standards incorporated by reference in 33 C.F.R. § 154.106.
- www. **ASTM F1006-86 (1997):** PRO identifies 46 C.F.R. § 56.60-1(b) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00107009; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1403. However, 46 C.F.R. § 56.60-1(b) incorporates ASTM F1006-86, reapproved in 2008, not ASTM F1006-86 (1997). 46 C.F.R. §§ 56.60-1(b), 56.60-2(e)(70).
- xxx. **ASTM F1007-86 (1996)e1:** PRO identifies 46 C.F.R. § 56.60-1(b) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 1408. However, 46 C.F.R. § 56.60-1(b) incorporates ASTM F1007-86, reapproved in 2007, not ASTM F1007-86 (1996)e1. 46 C.F.R. §§ 56.60-1(b), 56.60-2(e)(70).
- yyy. **ASTM F1020-86 (1996)e1:** PRO identifies 46 C.F.R. § 56.60-1(b) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 1420. However, 46 C.F.R. § 56.60-1(b) incorporates ASTM F1020-86, reapproved in 2011, not ASTM F1020-86 (1996)e1. 46 C.F.R. §§ 56.60-1(b), 56.01-2(e)(72).
- zzz. **ASTM F1120-87 (1998):** PRO identifies 46 C.F.R. § 56.60-1(b) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 1424. However, 46 C.F.R. § 56.60-1(b) incorporates ASTM F1120-87, reapproved in 2010, not ASTM F1120-87 (1998). 46 C.F.R. §§ 56.60-1(b), 56.01-2(e)(73).

- aaaa. **ASTM F1121-87 (1998):** PRO identifies 33 C.F.R. § 126.15(a)(5) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00107047; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1433. However, 33 C.F.R. § 126.15(a)(5) incorporates ASTM F1121-87, reapproved in 2010, not ASTM F1121-87 (1998). 33 C.F.R. §§ 126.15(a)(5), 126.5(b).
- bbbb. **ASTM F1122-87 (1998):** PRO identifies 33 C.F.R. § 154.500(d)(3) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00107055; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1437. However, 33 C.F.R. § 154.500(d)(3) incorporates ASTM F1122-87, reapproved in 1992, not ASTM F1122-87 (1998). 33 C.F.R. §§ 154.500(d)(3), 154.106(e)(4).
- cccc. **ASTM F1123-87 (1998):** PRO identifies 46 C.F.R. § 56.60-1(b) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 1451. However, 46 C.F.R. § 56.60-1(b) incorporates ASTM F1123-87, reapproved in 2010, not ASTM F1123-87 (1998). 46 C.F.R. §§ 56.60-1(b), 56.01-2(e)(74).
- dddd. **ASTM F1139-88 (1998):** PRO identifies 46 C.F.R. § 56.60-1(b) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00107074; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19. However, 46 C.F.R. § 56.60-1(b) incorporates ASTM F1139-88, reapproved in 2010, not ASTM F1139-88 (1998). 46 C.F.R. §§ 56.60-1(b), 56.01-2(e)(75).
- eeee. **ASTM F1172-88 (1998):** PRO identifies 46 C.F.R. § 56.60-1(b) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 1481. However, 46 C.F.R. § 56.60-1(b) incorporates ASTM F1172-88, reapproved in 2010, not ASTM F1172-88 (1998). 46 C.F.R. §§ 56.60-1(b), 56.01-2(e)(76).
- ffff. **ASTM F1199-88 (1998):** PRO identifies 46 C.F.R. § 56.60-1(b) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 1523. However, 46 C.F.R. § 56.60-1(b) incorporates ASTM F1199-88, reapproved in 2010, not ASTM F1199-88 (1998). 46 C.F.R. §§ 56.60-1(b), 56.01-2(e)(78).
- gggg. **ASTM F1200-88 (1998):** PRO identifies 46 C.F.R. § 56.60-1(b) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00107162; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19. However, 46 C.F.R. § 56.60-1(b) incorporates ASTM F1200-88, reapproved in 2010, not ASTM F1200-88 (1998). 46 C.F.R. §§ 56.60-1(b), 56.01-2(e)(79).
- hhhh. **ASTM F1201-88 (1998):** PRO identifies 46 C.F.R. § 56.60-1(b) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 1528. However, 46 C.F.R. § 56.60-1(b) incorporates ASTM F1201-88,

reapproved in 2010, not ASTM F1201-88 (1998). 46 C.F.R. §§ 56.60-1(b), 56.01-2(e)(80).

- iiii. **ASTM F1271-90 (1995)<sup>e1</sup>:** PRO identifies 46 C.F.R. § 39.20-9(c)(1) as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00241177; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1534. However, 46 C.F.R. § 39.20-9(c)(1) does not exist, and 46 C.F.R. § 39.2009(a)(3) incorporates a different version of ASTM F1271. 46 C.F.R. § 39.2009(a)(3) incorporates a different version of ASTM F1271. 46 C.F.R. § 39.2009(a)(3) incorporates ASTM F1271-89, not ASTM F1271-90 (1995)<sup>e1</sup>. 46 C.F.R. §§ 39.2009(a)(3), 39.1005(d)(2).
- jjjj. **ASTM F1273-91 (1996)<sup>e1</sup>:** PRO identifies 46 C.F.R. § 32.20-10 as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00107183; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1540. However, 46 C.F.R. § 32.20-10 incorporates ASTM F1273-91, reapproved in 2007, not ASTM F1273-91 (1996)<sup>e1</sup>. 46 C.F.R. §§ 32.20-10, 32.01-1(c)(2).
- kkkk. **ASTM F1323-98:** PRO identifies 46 C.F.R. § 63.25-9 as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00107247; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1576. However, 46 C.F.R. § 63.25-9(a) incorporates a different version of ASTM F1323. 46 C.F.R. § 63.25-9(a) incorporates ASTM F1323-2001, not ASTM F1323-98. 46 C.F.R. §§ 63.25-9(a), 63.05-1(d)(1).
- llll. **ASTM F1471-93:** PRO identifies 40 C.F.R. § 86.1310-2007(b)(1)(iv)(B) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 1585. However, 40 C.F.R. § 86.1310-2007 is reserved by 79 FR 23704 and does not reference ASTM F1471. 40 C.F.R. § 86.1310-2007.
- mmmm. **ASTM F1546/F1546M-96:** PRO identifies 46 C.F.R. § 162.027-3(a) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 1599. However, 46 C.F.R. § 162.027-3(a) incorporates ASTM F1546/F1546 M-96, reapproved in 2012, not ASTM F1546/F1546M-96. 46 C.F.R. §§ 162.027-3(a); 162.027-2(b)(1).
- nnnn. **ASTM G154-00a:** PRO identifies 49 C.F.R. § 571.106, S12.7(b) as the incorporating by reference regulation. Wise Decl. ¶ 153, Ex. 152 at 1631. However, 49 C.F.R. § 571.106 incorporates ASTM G154-00, not ASTM G154-00a. 49 C.F.R. §§ 571.106, 571.5(d)(38).

Incorrect Citations re: NFPA's Standards

37. Additionally, PRO's posting of the 2000 edition of NFPA 101 states that it is posted "By Authority of the Code of Federal Regulations: 59 C.F.R. 130." Wise Decl. ¶ 168, Ex. 167 at

1. The Code of Federal Regulations, however, currently spans only Titles 1 to 50; there is no Title 59. See Code of Federal Regulations (Annual Edition), available at <https://www.govinfo.gov/app/collection/C.F.R.>

38. Similarly, PRO's postings on the Internet Archive often point to outdated regulations, with no information that the regulation has been superseded. For example, PRO's posting of the 2005 edition of NFPA 70 says it is posted "*By Authority of the Code of Federal Regulations: 49 C.F.R. 192.189(c).*" Wise Decl. ¶ 168, Ex. 167 at 2. That section provides that "[e]lectrical equipment in vaults must conform to the applicable requirements of Class 1, Group D, of the National Electrical Code, NFPA-70 (incorporated by reference, see § 192.7)." Section 192.7(h), however, incorporates the 2011, not the 2005, edition of NFPA 70. 49 C.F.R. § 192.7(h)(4).

39. Likewise, PRO's copy of the 2003 NFPA 30 states that it is posted "*By Authority of the Code of Federal Regulations: 49 C.F.R. 192.*" Wise Decl. ¶ 168, Ex. 167 at 3. Section 192.7 of Title 49 incorporates the 2012 edition of NFPA 30, but not the 2003 edition. 49 C.F.R. § 192.(h)(1).

40. PRO's posting of the 2005 NFPA 99 contains the same error, telling readers it is posted "*By Authority of the Code of Federal Regulations: 38 C.F.R. 51.200(b)(4),*" Wise Decl. ¶ 168, Ex. 167 at 4, even though that section references the 2012 edition of NFPA 99. 38 C.F.R. § 51.200(i)(2)(ii).

#### Incorrect Citations re: ASHRAE's Standards

41. In addition, PRO's posting of ASHRAE Standard 90.1-2004 on the Internet Archive states that it has been incorporated by reference in Minnesota, Maine and Nevada, Wise Decl. ¶ 170, Ex. 169 at 1, but those states' codes are actually based on a different standard, the



International Energy Conservation Code (“IECC”), for which compliance with ASHRAE 90.1 is just an alternative compliance option, Wise Decl. ¶ 171, Ex. 170.

42. The same is true with PRO’s posting of ASHRAE Standard 90.1-2007, which asserts that the standard has been incorporated in Illinois and California, ¶ 170, Ex. 169 at 2, which both have adopted the IECC rather than 90.1 or created their own codes that are more stringent than even later versions of 90.1 (that postdate what PRO has posted), Wise Decl. ¶ 171, Ex. 170.

43. PRO’s postings on Internet Archive also point to instances where the statute or regulation incorporating the standard triggers an obligation for a government actor but not for individuals. For instance, PRO’s postings of ASHRAE 90.1-2004 and ASHRAE 90.1-2007 both reference 10 C.F.R. § 433.4, which states “[a]ll Federal agencies shall design new Federal buildings” that meet the ASHRAE standards, but does not impose a similar requirement on private actors. *See* Wise Decl. ¶ 170, Ex. 169.

**C. PRO Copies And Distributes Plaintiffs’ Works, Regardless Of Whether They Are Essential To Comply With Any Legal Duty**

ASTM Standards (And Portions Thereof) That Do Not Impose Legal Duties

44. Apart from the instances where PRO has redacted the ASTM logo discussed above, PRO reproduced and displayed the full text of each of the ASTM Standards. Wise Decl. ¶¶ 151, 153, Exs. 150, 152; Rubel Decl. ¶ 5, Ex. 2 (Rule 30(b)(6) Dep. of Public Resource at 158:22-159:6).

45. PRO posted in their entirety numerous standards that are incorporated by regulations in such a manner as to be optional or references. For example, 40 C.F.R. § 86.113-04(a)(1) incorporates ASTM D86-07, the “Standard Test Method for Distillation of Petroleum Products and Liquid Fuels at Atmospheric Pressure.” But the regulation expressly provides that ASTM D86 is a mere “reference procedure,” and that a regulated entity can comply with the

codified requirements by meeting “substantially equivalent specifications approved by the EPA Administrator.” *See* 40 C.F.R. § 86.113-04(a)(1).

46. Similarly, PRO identifies 40 C.F.R. Appendix D to Part 75, the “Optional S02 Emmissional Data Protocol for Gas-Fired and Oil-Fired Units” as the regulation incorporating ASTM standard D1217-93, the “Standard Test Method for Density and Relative Density (Specific Gravity) of Liquids by Bingham Pycnometer.” This regulation incorporates the standard to be optional; Subsection 2.2.4.3(d) expressly provides an alternative procedure for sampling oil from shipment tanks or containers and testing samples for density, of which D1217-93 is just one. *See* 40 C.F.R. Appendix D to Part 75.

47. This is true for other ASTM Works as well. For instance:

- a. **ASTM F715-95:** PRO identifies 33 C.F.R. § 155, Appendix B, 2.4 as the regulation that incorporates ASTM F715-95, the “Standard Test Methods for Coated Fabrics Used for Oil Spill Control and Storage.” Wise Decl. ¶ 153, Ex. 152 at 1368. This regulation expressly states that testing must be in accordance with either ASTM F715 “or other tests approved by the Coast Guard.”
- b. **ASTM F1321-92:** PRO identifies 46 C.F.R. § 28.535(d) as the regulation that incorporates ASTM F1321, the “Standard Guide for Conducting a Stability Test (Lightweight Survey and Inclining Experiment) to Determine Light Ship Displacement and Centers of Gravity of a Vessel.” Wise Decl. ¶ 153, Ex. 152 at 1546. This regulation expressly states that ASTM F1321 “*may be used as guidance* for any inclining test or deadweight survey conducted under this section.”
- c. **ASTM A369-A369M-92, B42-96, B68-95, B75-97, B88-96, B111-95, B315-93, and F1006:** PRO identifies 46 C.F.R. § 56.60-1(b), as the incorporating by reference regulation. Wise Decl. ¶ 151, Ex. 150 at PRO\_00085147, PRO\_00092176, PRO\_00092980, PRO\_00093012, PRO\_00093103, PRO\_00093196, PRO\_00093301, and PRO\_00107009; Wise Decl. ¶ 165, Ex. 164 at Interrog. 19; Wise Decl. ¶ 153, Ex. 152 at 1403. The regulation contains a table of acceptable commercial standards from American National Standards Institute, ASTM, American Society for Mechanical Engineers, and several other SDOs that are each considered to comply with the regulation. 46 C.F.R. § 56.60-1(b). The regulation also contains a note indicating that: “The Coast Guard

will consider use of alternative pipes, tubing, and fittings when it receives certification of their mechanical properties.” 46 C.F.R. § 56.60-1(b).

48. On numerous occasions, PRO posted entire ASTM Standards, when only a portion of those standards is actually incorporated by reference into law. For instance:

- a. **ASTM B122/B122M:** PRO identifies 46 C.F.R. § 119.440 as the incorporating by reference regulation, Wise Decl. ¶ 151, Ex. 150 at PRO\_00092264, but that regulation only incorporates B122/B122M with respect to copper alloy C71500, one of eleven copper alloys addressed in the standard. 46 C.F.R. § 119.440. The portions of the standard related to the other ten copper alloys are unnecessary to understand the minimum thickness for copper alloy C71500. *See* Wise Decl. ¶ 151, Ex. 150 at PRO\_00092264.
- b. **ASTM B85-96:** PRO identifies 46 C.F.R. § 56.60-2 as the incorporating by reference regulation, Wise Decl. ¶ 153, Ex. 152 at 252, but that regulation only incorporates one table within ASTM B85-96—table X-2—and states that “[t]ension tests shall be performed to determine tensile strength, yield strength, and elongation” in accordance with the minimum value in X-2. 46 C.F.R. § 56.60-2. The remainder of the standard is unnecessary to determine the minimum value in X-2. *See* Wise Decl. ¶ 153, Ex. 152 at 252. Table X-2 also contains values for sheer strength and fatigue strength that are unnecessary to understand the minimum value for the required tension tests. *Id.*
- c. **ASTM B283-96:** PRO identifies 46 C.F.R. § 56.60-2 as the incorporating by reference regulation, Wise Decl. ¶ 151, Ex. 150 at PRO\_00092925, but that regulation only requires that tension tests shall be performed to determine tensile strength, yield strength, and elongation with the minimum values listed in Table 3 of ASTM B283-96. 46 C.F.R. § 56.60-2. All portions of the standard other than Table 3 are unnecessary to comply with the regulation. Additionally, Table 3 provides Rockwell hardness measurements, which are also unnecessary to understand the minimum value required for other three measurements. *See* Wise Decl. ¶ 151, Ex. 150 at PRO\_00092925.
- d. **ASTM E23:** PRO identifies 46 C.F.R. § 56.50-105(a)(1)(ii) as the incorporating by reference regulation, Wise Decl. ¶ 151, Ex. 150 at PRO\_00106690, but that regulation requires testing for low temperature toughness using the Charpy V-notch specimen as shown in ASTM E23, Figure 4. 46 C.F.R. 56.50-105(a)(1)(ii). Only Figure 4—no other part of the standard—is necessary to determine the low temperature toughness. *Id.*

- e. **ASTM E145-94 (2001):** PRO identifies 40 C.F.R. § 63.14 as the incorporating by reference regulation, Wise Decl. ¶ 151, Ex. 150 at PRO\_00106516, but Appendix A to Subpart PPPP of 40 C.F.R. § 63.14 references only forced draft oven types IIA or IIB. 40 C.F.R. § 63.14. The ASTM E145-94 (2001) standard addresses other types of forced draft ovens. *See* Wise Decl. ¶ 151, Ex. 150 at PRO\_001065.

49. In addition, PRO posts certain ASTM Standards in their entirety, despite the fact that the incorporation by reference has no direct legal effect on any private party's conduct. As just one example, ASTM A307 is incorporated by reference in 46 C.F.R. § 56.25-20(b), which governs the design, construction, and installation of piping systems in marine vessels. The regulation provides that, with respect to bolts used in ships' and barges' piping systems, "[w]hen class 250 cast iron flanges are used or when class 125 cast iron flanges are used with ring gaskets, the bolting material must be carbon steel conforming to ASTM A307 (incorporated by reference, see 46 C.F.R. § 56.01-2), Grade B." 46 C.F.R. § 56.25-20(b). The persons governed by the regulation at issue—those who design, construct and install piping systems in marine vessels—do not need access to ASTM A307 to comply with this regulation. They simply have to purchase bolts that are designated as A307, Grade B bolts; they do not need to know how to manufacture such bolts.

50. ASTM's standards also contain numerous non-mandatory portions that are aids or supplements to the standard. For example, ASTM's Manual of Style contains certain sections that must be included in each ASTM standard, such as the title of the standard. O'Brien Decl. Ex. 5 at A-2. Other sections, are only included when the subject matter is pertinent to the document. *Id.*

51. ASTM standards may include the following non-mandatory sections:

- a. **Appendixes:** "Additional information may be included in one or more annexes or appendixes . . . . There are times when it is desirable to include in a specification additional information for general use and guidance but which does not constitute a mandatory part of the [standard]. *Id.* at B-8.

- b. **Summary of Changes:** Identifies the “location of selected changes to [the] standard since the last issue. . .” *Id.* at C-3.
- c. **Summary of Test Method:** “[a] brief outline of the test method, describing in the passive voice its essential features without the details that are a necessary part of the complete statement of procedure.” *Id.* at A-5.
- d. **Significance and Use:** “[i]nclude in this section information that explains the relevance and meaning of the test. State the practical uses for the test and how it is typically employed.” *Id.*
- e. **Supplementary requirements:** “These should not include statements that would allow the lowering of minimum requirements of the standard . . . . Usually these only apply when specified by the purchaser in the purchase order or contract.” *Id.* at B-7.

52. There are 61 ASTM standards at issue in this motion that contain appendixes. Wise Decl. at ¶ 148, Ex. 149.

Standard	Edition	Pin Cite
A106/A106 M	1994	ASTM000200-01.
B21	1979a	ASTM000363.
B68	1996	ASTM000469.
B75	1997	ASTM000498-99.
B124	1984	ASTM000505-07.
B209	1995	ASTM000375.
B283	1995	ASTM000380-81.
D86	1996	ASTM000385.
D512	1980e 1	ASTM000436-39.
D975	1996	ASTM000452-54
D2216	1993	ASTM000463.
D4329	1979	ASTM001693.
D4986	1986	ASTM000491-92.
A106/A106 M	1979(1997)	ASTM000523.
B21	1989(1993) <sup>e1</sup>	ASTM000564.
B68	1984	ASTM000570-71.
B75	1970(1982)	ASTM000597.
B124	2007	ASTM001208-14.
B209	1998	ASTM000998-1000.
B283	1989(1999)	ASTM001095.
D86	2007	ASTM001220-34.
D512	1998b	ASTM001238-53.
D975	1990(1994) <sup>e1</sup>	ASTM001698.
D2216	1995(1999)	ASTM000608-609.
D4329	1986(1996)	ASTM000613.
D4986	1993(1997)	ASTM000641-42.
A106/A106 M	1995	ASTM000712.

Standard	Edition	Pin Cite
B21	1986	ASTM000722-25.
B68	1997	ASTM000727-29.
B75	1996	ASTM000752-56.
B124	1996	ASTM000781-82.
B209	1998	ASTM000796-800.
B283	1991(1996)	ASTM000806-807.
D86	1998	ASTM000896-901.
D512	1996	ASTM000918-19.
D975	1996	ASTM000956-57.
D2216	1996	ASTM000965-66.
D4329	1998	ASTM000984-86.
D4986	1995	ASTM001042-44.
A106/A106 M	1998	ASTM001088-89.
B21	1996	ASTM001113.
B68	1998a	ASTM001122-23.
B75	1998	ASTM001147-60.
B124	1982	ASTM001342-44.
B209	1980	ASTM001405-406.
B283	1995	ASTM001446-48.
D86	1971	ASTM001736-37.
D512	1980	ASTM001376-79.
D975	1985	ASTM001744.
D2216	1987(1992)	ASTM001388-90.
D4329	1997	ASTM001414.
D4986	1980(1985)	Page 829.
A106/A106 M	1993	ASTM001632.
B21	1982a(1988)	ASTM001636-37.
B75	1992	ASTM001561-74.
B124	1998	ASTM001580-81.
B209	1993	ASTM001588-93.
B283	1999	ASTM001609-11.
D86	1990	ASTM001681-82.
D512	1997	ASTM001668-69.
D975	2000a	ASTM001674-78.

53. There are 13 ASTM standards at issue in this motion that contain a summary of changes. Wise Decl. ¶ 148, Ex. 149.

Standard	Edition	Pin Cite
A106/A106 M	2004b	Page 8.
B21	1996	ASTM000434.
B68	1995	ASTM000485.
B75	1997	ASTM000499.
B124	1996	ASTM000385.
B209	1996	ASTM000424.

B283	1996	ASTM000454-55.
D86	2007	ASTM001215.
D512	1989(1999)	ASTM001096.
D975	2007	ASTM001235.
D2216	1998	ASTM000811-12.
D4329	1999	ASTM001069-70.
D4986	1998	ASTM001089.

54. There are 65 ASTM standards at issue in this motion that contain a summary of test method section. Wise Decl. ¶ 148, Ex. 149.

Standard	Edition	Pin Cite
C177	1997	ASTM000534-35.
C236	1989(1993) <sup>e1</sup>	ASTM000555.
C518	1991	ASTM000578.
D86	2007	ASTM001190.
D129	1995	ASTM000631.
D512	1989(1999)	ASTM001091-93.
D611	1982(1998)	ASTM001124.
D665	1998e 1	ASTM001181.
D1217	1993(1998)	ASTM000601.
D1246	1995(1999)	ASTM000606.
D1253	1986(1996)	ASTM000610.
D1266	1998	ASTM000614-15.
D1298	1999	ASTM000626.
D1335	1967(1972)	ASTM000636.
D1480	1993(1997)	ASTM000647.
D1481	1993(1997)	ASTM000653.
D1552	1995	ASTM000693.
D1688	1995	ASTM000707-08; ASTM000710.
D1890	1996	ASTM000731.
D1943	1996	ASTM000736.
D1945	1996	ASTM000741.
D2013	1986(1994)	ASTM000763.
D2015	1996	ASTM000774-75.
D2036	1998	ASTM000783-84.
D2163	1991(1996)	ASTM000802.
D2216	1998	ASTM000809.
D2460	1997	ASTM000830.
D2502	1992(1996)	ASTM000835.
D2503	1992(1997)	ASTM000839.
D2597	1994(1999)	ASTM000865-66.
D2622	1998	ASTM000875.
D2724	1987(1995)	Page 2.
D2879	1997	ASTM000903-04.

D3120	1996	ASTM000914.
D3173	1987(1996)	ASTM000920.
D3178	1989(1997)	ASTM000929.
D3236	1988(1999)	ASTM000943.
D3246	1996	ASTM000951.
D3286	1996	ASTM000958-59.
D3454	1997	ASTM000971.
D3697	1992(1996)	ASTM000987.
D4239	1997 <sup>e1</sup>	ASTM001045-46.
D4294	1998	ASTM001061.
D4809	1995	ASTM001072.
D4891	1989(1994) <sup>e1</sup>	ASTM001080.
D4986	1998	ASTM001084.
D5257	1997	ASTM001097-98.
D5373	1993(1997)	ASTM001103-04.
D5673	1996	ASTM001108.
D5865	1998a	ASTM001114-15.
D6228	1998	ASTM001161-62.
D6420	1999	ASTM001168.
D6503	1999	ASTM001174.
E23	1982	ASTM001321.
E96	1995	ASTM001441-42.
E283	1991(1999)	ASTM001258.
E408	1971	ASTM001730-31.
E424	1971	ASTM001733.
E681	1985	ASTM001738.
E695	1979(1997) <sup>e1</sup>	ASTM001380.
E711	1987(1992)	ASTM001384.
E776	1987(1992)	ASTM001749.
E885	1988	ASTM001416-17.
E1337	1990(1996)	ASTM001268.
F1471	1993	ASTM001582-83.

55. There are 95 ASTM standards at issue in this motion that contain a significance and use section. Wise Decl. at Ex ¶ 148, Ex. 149.

Standard	Edition	Pin Cite
B557	1984	ASTM000470.
C177	1997	ASTM000535-36.
C236	1989(1993) <sup>e1</sup>	ASTM000555-56.
C509	1984	ASTM000566-67.
C518	1991	ASTM000578-79.
D86	2007	ASTM001190.



Standard	Edition	Pin Cite
D512	1989(1999)	ASTM001090.
D611	1982(1998)	ASTM001124.
D665	1998 <sup>e1</sup>	ASTM001181-82.
D814	1995	ASTM001717.
D1217	1993(1998)	ASTM000601.
D1246	1995(1999)	ASTM000606.
D1253	1986(1996)	ASTM000610.
D1266	1998	ASTM000615.
D1298	1999	ASTM000626.
D1335	1967(1972)	ASTM000636.
D1412	1993(1997)	ASTM000639.
D1480	1993(1997)	ASTM000647.
D1481	1993(1997)	ASTM000653.
D1518	1985(1998) <sup>e1</sup>	ASTM000660.
D1552	1995	ASTM000693.
D1688	1995	ASTM000706.
D1835	1997	ASTM000728-29.
D1890	1996	ASTM000731.
D1943	1996	ASTM000736-37.
D1945	1996	ASTM000741.
D1946	1990(1994) <sup>e1</sup>	ASTM000757.
D2013	1986(1994)	ASTM000763.
D2015	1996	ASTM000775.
D2036	1998	ASTM000784.
D2163	1991(1996)	ASTM000802.
D2216	1998	ASTM000809.
D2234	1998	ASTM000814.
D2460	1997	ASTM000830.
D2502	1992(1996)	ASTM000835.
D2503	1992(1997)	ASTM000839.
D2597	1994(1999)	ASTM000866.
D2622	1998	ASTM000875-76.
D2724	1987(1995)	Page 2.
D2777	1998	ASTM000889.
D2879	1997	ASTM000904.
D3120	1996	ASTM000914.
D3173	1987(1996)	ASTM000920

Standard	Edition	Pin Cite
D3178	1989(1997)	ASTM000929.
D3236	1988(1999)	ASTM000943-44.
D3246	1996	ASTM000951.
D3286	1996	ASTM000959.
D3371	1995	ASTM000967.
D3454	1997	ASTM000971-72.
D3588	1998	ASTM000979-80.
D3697	1992(1996)	ASTM000987.
D4177	1995	ASTM001020.
D4239	1997 <sup>e1</sup>	ASTM001046.
D4268	1993	ASTM001055-59.
D4294	1998	ASTM001061.
D4329	1999	ASTM001066-67.
D4809	1995	ASTM001072.
D4891	1989(1994) <sup>e1</sup>	ASTM001080.
D4986	1998	ASTM001084-85.
D5257	1997	ASTM001098.
D5373	1993(1997)	ASTM001104.
D5489	1996a	Page 775.
D5673	1996	ASTM001108.
D5865	1998a	ASTM001115.
D6216	1998	ASTM001135-36.
D6228	1998	ASTM001162.
D6420	1999	ASTM001168.
D6503	1999	ASTM001174.
E23	1982	ASTM001321.
E72	1980	ASTM001393-400.
E96	1995	ASTM001442.
E169	1987	ASTM001297-98.
E185	1982	ASTM001312-13.
E260	1996	ASTM001346.
E283	1991(1999)	ASTM001258.
E424	1971	ASTM001733.
E606	1980	ASTM001367-68.
E681	1985	ASTM001738.
E695	1979(1997) <sup>e1</sup>	ASTM001380.

Standard	Edition	Pin Cite
E711	1987(1992)	ASTM001385.
E773	1997	ASTM001407.
E776	1987(1992)	Yes, ASTM001749.
E885	1988	ASTM001417.
E1337	1990(1996)	ASTM001268.
F478	1992(1999)	ASTM001620.
F631	1980(1985)	Page 826-27.
F631	1993	ASTM001629.
F715	1981(1986)	Page 803.
F715	1995	ASTM 1638.
F808	1983(1988) <sup>e1</sup>	ASTM001652 - 53.
F1321	1992	ASTM001548.
F1471	1993	ASTM001583.
G21	1990	ASTM001679
G151	1997	ASTM001661 - 62.
G154	2000a	ASTM001671

56. There are 23 ASTM standards at issue in this motion that contain a supplementary requirements section. Wise Decl. ¶ 148, Ex. 149.

Standard	Edition	Pin Cite
A36	1977a <sup>e</sup>	Pages (136-38).
A36/A36M	1997a <sup>e1</sup>	ASTM003436.
A106/A106 M	2004b	Pages 7-8.
A203/A203 M	1997	ASTM000171.
A242	1979	ASTM000182.
A285	1978	ASTM000184-85.
A333/A 333M	1994	ASTM000200.
A369/A 369M	1992	ASTM000205.
A441	1979	ASTM000262-63.
A514	1977	ASTM000309-11.
A522/A 522M	1995b	ASTM000321.
A572	1979	ASTM000330-31.
A588	1979a	ASTM000332-33.
A615	1979	ASTM000342.
A633	1979a	ASTM000361-62.
B16	1992	ASTM000392.
B42	1996	ASTM000468.

Standard	Edition	Pin Cite
B88	1996	ASTM000517.
B96	1993	ASTM000521.
B111	1995	ASTM000374-75.
B283	1996	ASTM000451.
E11	1995	ASTM001265.
F1120	1987(1998)	ASTM001466.

#### NFPA Standards (and Portions Thereof) That Do Not Impose Legal Duties

57. Each of NFPA’s 23 standards at issue in this case include sections that are optional, or permissive, designated by the language “shall be permitted” or “shall not be required.” As explained in the 2014 NEC: “Permissive rules of this Code are those that identify actions that are allowed but not required, are normally used to *describe options or alternative methods*, and are characterized by the use of the terms *shall be permitted* or *shall not be required*.” Supp. Pauley Decl. ¶ 27, Ex. P (NFPA 70, 2014 ed.) at art. 90.5(B) (NFPA-PR0098088) (emphasis added). An example of such an optional rule is article 324.56(A) of the 2014 NEC regarding FCC Systems Alterations, which states “Alterations to FCC systems shall be permitted.” *Id.* Ex. P at art. 324.56(A) (NFPA-PR0098260).

58. Similar optional provisions appear throughout the standards. *See* Supp. Pauley Decl. Ex. A (NFPA 1, 2003 ed.) at ch. 10.13.3.10 at 1-49 (NFPA-PR0013107); Ex. B (NFPA 1, 2006 ed.) at ch. 20.5.2.3.2 at 1-139 (NFPA-PR0013654); Ex. C (NFPA 10, 2002 ed.) at ch. 6.1.6 at 10-12 (NFPA-PR0014084); Ex. D (NFPA 11, 2005 ed.) at ch. 6.10.2.3 at 11-25 (NFPA-PR0014167); Ex. E (NFPA 12, 2005 ed.) at ch. 4.3.3.1.2 at 12-8 (NFPA-PR0014251); Ex. F (NFPA 13, 2002 ed.) at ch. 9.2.4.2 at 13-85 (NFPA-PR0014394); Ex. G (NFPA 25, 2002 ed.) at ch. 13.2.3.3 at 25-40 (NFPA-PR0020279); Ex. H (NFPA 30, 2003 ed.) at ch. 7.3.7.7 at 30-64 (NFPA-PR0014720); Ex. I (NFPA 54 (2006 ed.) at ch. 5.3.2.2 at 54-17 (NFPA-PR0014807); Ex. J (NFPA 58, 2001 ed.) at ch. 8.2.2.6 at 58-60 (NFPA-PR0015018); Ex. K (NFPA 58, 2004 ed.) at

ch. 5.7.1.4(C) at 58-15 (NFPA-PR0015096); Ex. L (NFPA 59, 2004 ed.) at ch. 5.5.2.6 at 59-13 (NFPA-PR0015228); Ex. M (NFPA 70, 1999 ed.) at ch. 240-23 at 70-76 (NFPA-PR0015342); Ex. N (NFPA 70, 2005 ed.) at ch. 504.70 at 70-369 (NFPA-PR0016284); Ex. O (NFPA 70, 2008 ed.) at ch. 517.77 at 70-441 (NFPA-PR0017137); Ex. P (NFPA 70, 2014 ed.) at ch. 324.56(A) at 70-197 (NFPA-PR0098260); Ex. Q (NFPA 72, 2002 ed.) at ch. 11.3.7 at 72-105 (NFPA-PR0018525); Ex. R (NFPA 99, 2005 ed.) at ch. 11.7.2.4 at 99-104 (NFPA-PR0018791); Ex. S (NFPA 101, 2000 ed.) at ch. 13.7.4.4.3 at 101-123 (NFPA-PR0019081); Ex. T (NFPA 101, 2003 ed.) at ch. 7.5.4.1.3 at 101-65 (NFPA-PR0019422); Ex. U (NFPA 101, 2006 ed.) at ch. 36.4.4.3.1 at 101-268 (NFPA-PR0020039); Ex. V (NFPA 704, 2007 ed.) at ch. 4.1.5 at 704-5 (NFPA-PR0020217); Dubai Decl. Ex. A (NFPA 70, 2011 ed.) at ch. 610.43(B) at 70-531 (NFPA-PR0018069).

59. Each of NFPA's 23 standards at issue, provide that the specific provisions of the NFPA standard are not the *only* way to comply with the law, using language that expressly allows for other materials and methods for compliance that would be acceptable to the authority having jurisdiction. *See, e.g.*, Supp. Pauley Decl. Ex. I (NFPA 54, 2006 ed.) at ch. 1.4 at 54-8 (NFPA-PR0014798) ("The provisions of this code are not intended to prevent the use of any material, method of construction, or installation procedure not specifically prescribed by this code, provided any such alternative is acceptable to the authority having jurisdiction.").

60. Similar optional provisions appear throughout the standards. *See* Supp. Pauley Decl. ¶ 26; Ex. A (NFPA 1, 2003 ed.) at ch. 1.4 (NFPA-PR0013044); Ex. B (NFPA 1, 2006 ed.) at ch. 1.4 (NFPA-PR0013527); Ex. C (NFPA 10, 2002 ed.) at ch. 1.2.1 (NFPA-PR0014076); Ex. D (NFPA 11, 2005 ed.) at ch. 1.5 (NFPA-PR0014147); Ex. E (NFPA 12, 2005 ed.) at ch. 1.2.2 (NFPA-PR0014247); Ex. F (NFPA 13, 2002 ed.) at ch. 1.5 (NFPA-PR0014320); Ex. G (NFPA 25, 2002 ed.) at ch. 1.3 (NFPA-PR0020244); Ex. H (NFPA 30, 2003 ed.) at ch. 1.5 (NFPA-

PR0014664); Ex. I (NFPA 54, 2006 ed.) at ch. 1.4 (NFPA-PR0014798); Ex. J (NFPA 58, 2001 ed.) at ch. 1.1.3 (NFPA-PR0014963); Ex. K (NFPA 58, 2004 ed.) at ch. 1.5 (NFPA-PR0015087); Ex. L (NFPA 59, 2004 ed.) at ch. 1.4 (NFPA-PR0015220); Ex. M (NFPA 70, 1999 ed.) at art. 90-4 (NFPA-PR0015285); Ex. N (NFPA 70, 2005 ed.) at art. 90-4 (NFPA-PR0015939); Ex. O (NFPA 70, 2008 ed.) at art. 90-4 (NFPA-PR0016718); Ex. P (NFPA 70, 2014 ed.) at art. 90-4 (NFPA-PR0098088); Ex. Q (NFPA 72, 2002 ed.) at ch. 1.5 (NFPA-PR0018433); Ex. R (NFPA 99, 2005 ed.) at ch. 1.4 (NFPA-PR0018700); Ex. S (NFPA 101, 2000 ed.) at § 1.5 (NFPA-PR0018981); Ex. T (NFPA 101, 2003 ed.) at ch. 1.4 (NFPA-PR0019378); Ex. U (NFPA 101, 2006 ed.) at ch. 1.4 (NFPA-PR0019793); Ex. V (NFPA 704, 2007 ed.) at ch. 1.5 (NFPA-PR0020216); Dubai Decl. Ex. A (NFPA 70, 2011 ed.) at art. 90.4 (NFPA-PR0017560).

61. All 23 of NFPA’s standards include specific portions of text that do not necessarily set forth any binding legal obligation. *See* Supp. Pauley Decl. ¶¶ 25-29. More specifically, these portions include the following:

62. **Prefatory Notices:** All 23 of the NFPA standards include prefatory notices, disclaimers and copyright information, such as a “Notice and Disclaimer of Liability Concerning the Use of NFPA Documents.” Supp. Pauley Decl. ¶ 28(a), Ex. A (NFPA 1, 2003 ed.) at NFPA-PR0013033-34; Ex. B (NFPA 1, 2006 ed.) at NFPA-PR0013514-15; Ex. C (NFPA 10, 2002 ed.) at NFPA-PR0014071-72; Ex. D (NFPA 11, 2005 ed.) at NFPA-PR0014141-42; Ex. E (NFPA 12, 2005 ed.) at NFPA-PR0014242-43; Ex. F (NFPA 13, 2002 ed.) at NFPA-PR0014308-09; Ex. G (NFPA 25, 2002 ed.) at NFPA-PR0020238-39; Ex. H (NFPA 30, 2003 ed.) at NFPA-PR0014655-56; Ex. I (NFPA 54, 2006 ed.) at NFPA-PR0014789-90; Ex. J (NFPA 58, 2001 ed.) at NFPA-PR0014957-58; Ex. K (NFPA 58, 2004 ed.) at NFPA-PR0015080-81; Ex. L (NFPA 59, 2004 ed.) at NFPA-PR0015214-15; Ex. M (NFPA 70, 1999 ed.) at NFPA-PR0015266-67; Ex. N (NFPA 70,

2005 ed.) at NFPA-PR0015914-15; Ex. O (NFPA 70, 2008 ed.) at NFPA-PR0016695-96; Ex. P (NFPA 70, 2014 ed.) at NFPA-PR0098062-63; Ex. Q (NFPA 72, 2002 ed.) at NFPA-PR0018419-20; Ex. R (NFPA 99, 2005 ed.) at NFPA-PR0018686-67; Ex. S (NFPA 101, 2000 ed.) at NFPA-PR0018957-58; Ex. T (NFPA 101, 2003 ed.) at NFPA-PR0019356-57; Ex. U (NFPA 101, 2006 ed.) at NFPA-PR0019770-71; Ex. V (NFPA 704, 2007 ed.) at NFPA-PR0020211-12; Dubai Decl. Ex. A (NFPA 70, 2011 ed.) at NFPA-PR0017536-37.

63. **History, Development, and Edition Information:** All 23 of the NFPA standards include a section describing the history and development of the standard. Supp. Pauley Decl. ¶ 28(b), Ex. A (NFPA 1, 2003 ed.) at 1-1 (NFPA-PR0013035); Ex. B (NFPA 1, 2006 ed.) at 1-1 (NFPA-PR0013516-17); Ex. C (NFPA 10, 2002 ed.) at 10-1 (NFPA-PR0014073); Ex. D (NFPA 11, 2005 ed.) at 11-1 (NFPA-PR0014143); Ex. E (NFPA 12, 2005 ed.) at 12-1 (NFPA-PR0014244); Ex. F (NFPA 13, 2002 ed.) at 13-1 to 13-2 (NFPA-PR0014310-11); Ex. G (NFPA 25, 2002 ed.) at 25-1 (NFPA-PR0020240); Ex. H (NFPA 30, 2003 ed.) at 30-1 to 30-2 (NFPA-PR0014657-58); Ex. I (NFPA 54, 2006 ed.) at 54-1 to 54-2 (NFPA-PR0014791-92); Ex. J (NFPA 58, 2001 ed.) at 58-1 (NFPA-PR0014959); Ex. K (NFPA 58, 2004 ed.) at 58-1 (NFPA-PR0015082); Ex. L (NFPA 59, 2004 ed.) at 59-1 (NFPA-PR0015216); Ex. M (NFPA 70, 1999 ed.) at 70-1 (NFPA-PR0015268); Ex. N (NFPA 70, 2005 ed.) at 70-1 (NFPA-PR0015916); Ex. O (NFPA 70, 2008 ed.) at 70-1 (NFPA-PR0016697); Ex. P (NFPA 70, 2014 ed.) at NFPA-PR0098064; Ex. Q (NFPA 72, 2002 ed.) at 72-1 (NFPA-PR0018421); Ex. R (NFPA 99, 2005 ed.) at 99-1 (NFPA-PR0018688); Ex. S (NFPA 101, 2000 ed.) at 101-1 (NFPA-PR0018959); Ex. T (NFPA 101, 2003 ed.) at 101-1 (NFPA-PR0019358); Ex. U (NFPA 101, 2006 ed.) at 101-1 (NFPA-PR0019772); Ex. V (NFPA 704, 2007 ed.) at 704-1 (NFPA-PR0020213); Dubai Decl. Ex. A (NFPA 70, 2011 ed.) at NFPA-PR0017538.

64. **Reference and Informational Notes:** Of the 23 NFPA standards, 19 also include informational notes throughout the text that provide context, background, cross-references, and other explanatory material, but they do not set forth any binding legal obligations. Many of these expressly state that the notes “are informational only and are not enforceable as requirements.” *E.g.*, Dubay Decl. Ex. A (NFPA 70, 2011 ed.) at art. 90.5(C) at 70-23 (NFPA-PR0017561). For example, NFPA 70 (2011 ed.) provides the following helpful information: “Some cleaning and lubricating compounds can cause severe deterioration of many plastic materials used for insulating and structural applications in equipment.” *Id.* at art. 110.11 (Note 2) at 70-35 (NFPA-PR0017572). Informational notes appear throughout the main text of the standards (*i.e.*, not including the annexes). *See, e.g.*, Supp. Pauley Decl. ¶ 28(c), Ex. A (NFPA 1, 2003 ed.) at Table 60.2.2.1.(b) (Note 1) at 1-203 (NFPA-PR0013237); Ex. B (NFPA 1, 2006 ed.) at Table 60.2.6.5 (Note 1) at 1-238 (NFPA-PR0013753); Ex. C (NFPA 10, 2002 ed.) at Table 5.3.1 (Notes 1-3) at 10-11 (NFPA-PR0014083); Ex. D (NFPA 11, 2005 ed.) at Table 5.2.5.3.4 (Note) at 11-14 (NFPA-PR0014156); Ex. E (NFPA 12, 2005 ed.) at Table 5.3.2.2 (Note) at 12-17 (NFPA-PR0014260); Ex. F (NFPA 13, 2002 ed.) at Table 10.8.3.1.2.2 (Note) at 13-95 (NFPA-PR0014404); Ex. G (NFPA 25, 2002 ed.) at Table 11.1 (Note) at 25-31 (NFPA-PR0020270); Ex. I (NFPA 54, 2006 ed.) at Table 6.2(f) (Note) at 54-28 (NFPA-PR0014818); Ex. J (NFPA 58, 2001 ed.) at Table 2.2.2.2 (Notes 1-3) at 58-10 (NFPA-PR0014968); Ex. K (NFPA 58, 2004 ed.) at Table 5.2.4.2 (Notes) at 58-13 (NFPA-PR0015094); Ex. M (NFPA 70, 1999 ed.) at art. 90-2(a)(1) at 70-17 (NFPA-PR0015284); Ex. N (NFPA 70, 2005 ed.) at art. 230.95(C) (FPN Nos. 1-4) at 70-80 (NFPA-PR0015995); Ex. O (NFPA 70, 2008 ed.) at art. 430.26 (FPN) at 70-306 (NFPA-PR0017002); Ex. P (NFPA 70, 2014 ed.) at art. 300.20(B) (Informational Note) at 70-151 (NFPA-PR0098214); Ex. Q (NFPA 72, 2002 ed.) at Table 10.4.2.2 (Note 3) at 72-97 (NFPA-PR0018517); Ex. T (NFPA 101, 2003 ed.) at Table 8.3.4.2



(footnote 2) at 101-72 (NFPA-PR0019429); Ex. U (NFPA 101, 2006 ed.) at Table 8.3.4.2 (footnote †) at 101-77 (NFPA-PR0019848); Ex. V (NFPA 704, 2007 ed.) at Table 5.2 (footnote \*) at 704-7 (NFPA-PR0020219); Dubai Decl. Ex. A (NFPA 70, 2011 ed.) at art. 505.8 (Informational Note) at 70-402 (NFPA-PR0017939).

65. **Diagrams, Figures, and Illustrations:** Of the 23 NFPA standards, 14 also include figures that illustrate concepts in the text, but that do not dictate any legal obligations. These include, for example, Figure 220.1 of the 2011 edition of NFPA 70, which provides a graphical overview of the organization of Article 220. *See* Dubai Decl. Ex. A (NFPA 70, 2011 ed.) at Figure 220.1 at 70-61 (NFPA-PR0017598). Similar figures and illustrations appear throughout the text. *See, e.g.,* Supp. Pauley Decl. ¶ 28(d), Ex. A (NFPA 1, 2003 ed.) at Figure 31.3.7.3.3(C) (NFPA-PR0013184); Ex. B (NFPA 1, 2006 ed.) at Figure 43.1.4.5.3 at 1-200 (NFPA-PR0013715); Ex. D (NFPA 11, 2005 ed.) at Figure 5.3.5.3.1 at 11-18 (NFPA-PR0014160); Ex. F (NFPA 13, 2002 ed.) at Figures 7.7.4.2.1(a), (b) at 13-36 (NFPA-PR0014345); Ex. I (NFPA 54, 2006 ed.) at Figure 12.6.2.1 at 54-85 (NFPA-PR0014875); Ex. J (NFPA 58, 2001 ed.) at Figure 8.2.10 at 58-63 (NFPA-PR0015021); Ex. M (NFPA 70, 1999 ed.) at Figure 250-2 at 70-81 (NFPA-PR0015347); Ex. N (NFPA 70, 2005 ed.) at Figure 250-126 at 70-113 (NFPA-PR0016028); Ex. O (NFPA 70, 2008 ed.) at FPN Figures 517.30 Nos. 1 & 2 at 70-431 (NFPA-PR0017127); Ex. P (NFPA 70, 2014 ed.) at Figure 516.4(C)(1) at 70-459 (NFPA-PR0098522); Ex. S (NFPA 101, 2000 ed.) at Figure 7.10.6.2 at 101-67 (NFPA-PR0019025); Ex. T (NFPA 101, 2003 ed.) at Figure 7.10.6.2.1 at 101-69 (NFPA-PR0019426); Ex. U (NFPA 101, 2006 ed.) at Figure 7.10.6.2.1 at 101-73 (NFPA-PR0019844); Dubai Decl. Ex. A (NFPA 70, 2011 ed.) at Informational Note Figure 505.9(C)(2) at 70-404 (NFPA-PR0017941).

66. **Examples:** Of the 23 NFPA standards, 18 include lists of examples or illustrative examples that do not dictate any legal obligations, *e.g.*, a list of examples of mobile homes not intended as a dwelling unit. *See* Dubai Decl. Ex. A (NFPA 70, 2011 ed.) at art. 550.4(A) at 70-482 (NFPA-PR0018019). These examples appear throughout the text. *See, e.g.*, Supp. Pauley Decl. ¶ 28(e), Ex. A (NFPA 1, 2003 ed.) at ch. 3.3.61.6 at 1-28 (NFPA-PR0013062); Ex. B (NFPA 1, 2006 ed.) at ch. 3.3.163 at 1-37 (NFPA-PR0013552); Ex. D (NFPA 11, 2005 ed.) at ch. 3.3.4 at 11-7 (NFPA-PR0014149); Ex. F (NFPA 13, 2002 ed.) at ch. 8.16.2.4.7.1 at 13-79 (NFPA-PR0014388); Ex. G (NFPA 25, 2002 ed.) at ch. 5.3.3.1 at 25-13 (NFPA-PR0020252); Ex. J (NFPA 58, 2001 ed.) at ch. 2.2.6.3(1) at 58-12 (NFPA-PR0014970); Ex. K (NFPA 58, 2004 ed.) at ch. 5.2.8.2(C)(1) at 58-15 (NFPA-PR0015096); Ex. M (NFPA 70, 1999 ed.) at art. 551-73(c) at 70-419 (NFPA-PR0015685); Ex. N (NFPA 70, 2005 ed.) at art. 352.26 at 70-191 (NFPA-PR0016106); Ex. O (NFPA 70, 2008 ed.) at art. 518.2(A) at 70-443 (NFPA-PR0017139); Ex. P (NFPA 70, 2014 ed.) at art. 551.73(C) at 70-525 (NFPA-PR0098588); Ex. Q (NFPA 72, 2002 ed.) at ch. 3.3.43.19 at 72-17 (NFPA-PR0018437); Ex. R (NFPA 99, 2005 ed.) at ch. 4.3.3.1.2 at 99-25 (NFPA-PR0018712); Ex. S (NFPA 101, 2000 ed.) at Table 22.3.8 (footnote ‡) at 101-183 (NFPA-PR0019141); Ex. T (NFPA 101, 2003 ed.) at Table 22.3.8 (footnote ‡) at 101-194 (NFPA-PR0019551); Ex. U (NFPA 101, 2006 ed.) at Table 22.4.4.11 (footnote †) at 101-207 (NFPA-PR0019978); Ex. V (NFPA 704, 2007 ed.) at Table 6.2 at 704-8 to 704-9 (NFPA-PR0020220-21); Dubai Decl. Ex. A (NFPA 70, 2011 ed.) at art. 552.47 at 70-508 (NFPA-PR0018045).

67. **Informational Annexes:** All 23 of the NFPA standards include informational annexes that come in a variety of forms. Many are purely explanatory, *e.g.*, Annex A “Explanatory Material,” which states “Annex A is not a part of the requirements of this NFPA document but is included for informational purposes only. This annex contains explanatory material numbered to

correspond with the applicable text paragraphs.” Supp. Pauley Decl. Ex. F at Annex A (NFPA 13 (2002 ed.)). Some of these are only binding if *specifically* incorporated by reference, *e.g.*, Annex H “Administration and Enforcement,” which states that it is “not a part of the requirements of this NFPA document and is included for informational purposes only . . . unless specifically adopted by the local jurisdiction adopting the National Electric Code®.” *Id.* Ex. P at Annex H (NFPA 70 (2014 ed.)). These examples are not unique, all of the standards include informational annexes. Supp. Pauley Decl. ¶ 28(f), Ex. A (NFPA 1, 2003 ed.) at Annexes A-K at 1-320 to 1-449 (NFPA-PR0013354-483); Ex. B (NFPA 1, 2006 ed.) at Annexes A-P at 1-357 to 1-523 (NFPA-PR0013872-4038); Ex. C (NFPA 10, 2002 ed.) at Annexes A-J at 10-17 to 10-53 (NFPA-PR0014089-125); Ex. D (NFPA 11, 2005 ed.) at Annexes A-I at 11-36 to 11-80 (NFPA-PR0014178-222); Ex. E (NFPA 12, 2005 ed.) at Annexes A-H at 12-25 to 12-52 (NFPA-PR0014268-95); Ex. F (NFPA 13, 2002 ed.) at Annexes A-E at 13-198 to 13-315 (NFPA-PR0014507-624); Ex. G (NFPA 25, 2002 ed.) at Annexes A-E at 25-41 to 25-109 (NFPA-PR0020280-348); Ex. H (NFPA 30, 2003 ed.) at Annexes A-H at 30-75 to 30-111 (NFPA-PR0014731-67); Ex. I (NFPA 54, 2006 ed.) at Annexes A-L at 54-111 to 54-151 (NFPA-PR0014901-41); Ex. J (NFPA 58, 2001 ed.) at Annexes A-J at 58-78 to 58-97 (NFPA-PR0015036-15055); Ex. K (NFPA 58, 2004 ed.) at Annexes A-K at 58-84 to 58-104 (NFPA-PR0015165-85); Ex. L (NFPA 59, 2004 ed.) at Annexes A-F at 59-31 to 59-40 (NFPA-PR0015246-55); Ex. M (NFPA 70, 1999 ed.) at Appendices A-E at 70-571 to 70-619 (NFPA-PR0015835-881); Ex. N (NFPA 70, 2005 ed.) at Annexes A-G at 70-640 to 70-737 (NFPA-PR0016555-652); Ex. O (NFPA 70, 2008 ed.) at Annexes A-H at 70-686 to 70-784 (NFPA-PR0017382-480); Ex. P (NFPA 70, 2014 ed.) at Annexes A-J at 70-772 to 70-867 (NFPA-PR0098835-930); Ex. Q (NFPA 72, 2002 ed.) at Annexes A-F at 72-111 to 72-227 (NFPA-PR0018531-647); Ex. R (NFPA 99, 2005 ed.) at

Annexes A-G at 99-124 to 99-238 (NFPA-PR0018811-925); Ex. S (NFPA 101, 2000 ed.) at Annexes A-B at 101-264 to 101-348 (NFPA-PR0019222-306); Ex. T (NFPA 101, 2003 ed.) at Annexes A-B at 101-276 to 101-359 (NFPA-PR0019633-716); Ex. U (NFPA 101, 2006 ed.) at Annexes A-B at 101-301 to 101-389 (NFPA-PR0020072-160); Ex. V (NFPA 704, 2007 ed.) at Annexes A-G at 704-12 to 704-20 (NFPA-PR0020224-32); Dubai Decl. Ex. A (NFPA 70, 2011 ed.) at Informational Annexes A-I at 70-727 to 70-829 (NFPA-PR0018264-366).

68. **Proposal Forms:** NFPA's standards also generally include information regarding the proposal and committee process for NFPA standards, as well as proposal forms so the reader can submit suggestions for future editions. This information and forms do not set forth any binding legal obligations. Supp. Pauley Decl. ¶ 28(g). *See, e.g., id.* Ex. A (NFPA 1, 2003 ed.) at NFPA-PR0013508-10; Ex. B (NFPA 1, 2006 ed.) at NFPA-PR0014067-69; Ex. D (NFPA 11, 2005 ed.) at NFPA-PR0014238-40; Ex. E (NFPA 12, 2005 ed.) at NFPA-PR0014304-06; Ex. H (NFPA 30, 2003 ed.) at NFPA-PR0014785-87; Ex. I (NFPA 54, 2006 ed.) at NFPA-PR0014953-55; Ex. K (NFPA 58, 2004 ed.) at NFPA-PR0015210-12; Ex. L (NFPA 59, 2004 ed.) at NFPA-PR0015262-64; Ex. N (NFPA 70, 2005 ed.) at NFPA-PR0016691-93; Ex. O (NFPA 70, 2008 ed.) at NFPA-PR0017523-34 (and membership information); Ex. P (NFPA 70, 2014 ed.) at NFPA-PR0098986-89; Ex. R (NFPA 99, 2005 ed.) at NFPA-PR0018953; Ex. T (NFPA 101, 2003 ed.) at NFPA-PR0019766-68; Ex. U (NFPA 101, 2006 ed.) at NFPA-PR0020207-09; Ex. V (NFPA 704, 2007 ed.) at NFPA-PR0020234-36; Dubai Decl. Ex. A (NFPA 70, 2011 ed.) at NFPA-PR0018414-17. PRO has posted these forms as well. *See* Wise Decl. ¶ 173, Ex. 172.

69. Many standards incorporate other standards by reference, which may in turn reference other standards. Supp. Pauley Decl. Ex. B (NFPA 1, 2006 ed.) at ch. 5.3.4 at 1-49 (NFPA-PR0013562) (providing that certain structures must comply with provisions in NFPA

101); Ex. U (NFPA 101, 2006 ed.) at ch. 9.1.2 at 101-84 (NFPA-PRO0019855) (dictating that “[e]lectrical wiring and equipment shall [generally] be in accordance with NFPA 70, *National Electrical Code*”).

ASHRAE Standards (and Portions Thereof) That Do Not Impose Legal Duties

70. All 3 of ASHRAE’s standards at issue, which are three different versions of ASHRAE Standard 90.1, include large portions of the text that are not necessary for compliance with the standard and therefore do not set forth any binding legal obligation in instances where the standard is incorporated by reference. These portions include the following:

71. **Foreword:** All 3 of the ASHRAE standards include a foreword, which does not set forth any binding legal obligations. In fact, the forewords open by stating “[t]his foreword is not part of this standard. It is merely informative and does not contain requirements necessary for conformance to the standard.” The forewords go on to provide, *inter alia*, historical information about the development of the Standard over time. Declaration of Steve Comstock, previously filed at Dkt. 155-5, (“Comstock Decl.”) ¶ 7, Ex. 1 (ASHRAE 90.1-2004) at 4; Supplemental Declaration of Stephanie Reiniche (“Supp. Reiniche Decl.”) ¶ 2, Ex. 1 (ASHRAE 90.1-2007) at 6, and Ex. 2 (ASHRAE 90.1-2010) at 6.

72. **“Informative Appendix E”:** All 3 of the ASHRAE standards include what the standards refer to as “Informative Appendix E.” The appendix opens with a disclaimer stating: “This appendix is not part of this standard. It is merely informative and does not contain requirements necessary for conformance to the standard.” The appendix contains a variety of general information, including contact information for certain trade associations that operate in industries related to the standard. Comstock Decl. ¶ 7, Ex. 1 (ASHRAE 90.1-2004 at 165-66);

Supp. Reiniche Decl. ¶ 2, Ex. 1 (ASHRAE 90.1-2007) at 170-71, and Ex. 2 (ASHRAE 90.1-2010) at 201-02.

73. **“Informative Appendix F”:** All 3 of the ASHRAE standards include what the standards refer to as “Informative Appendix F.” The appendix opens with a disclaimer stating: “This appendix is not part of this standard. It is merely informative and does not contain requirements necessary for conformance to the standard.” The appendix contains a log tracking changes to the standard over time. Comstock Decl. ¶ 7, Ex. 1 (ASHRAE 90.1-2004) at 167-69; Supp. Reiniche Decl. ¶ 2, Ex. 1 (ASHRAE 90.1-2007) at 172-75, and Ex. 2 (ASHRAE 90.1-2010) at 203-10.

74. **“Informative Appendix G”:** Two of the ASHRAE standards include what the standards refer to as “Informative Appendix G.” The appendix opens with a disclaimer stating: “This appendix is not part of this standard. It is merely informative and does not contain requirements necessary for conformance to the standard.” The appendix contains general information on multiple different ways to track energy efficiency with regard to different aspects of building construction. Comstock Decl. ¶ 7, Ex. 1 (ASHRAE 90.1-2004) at 168-80; Supp. Reiniche Decl. ¶ 2, Ex. 1 (ASHRAE 90.1-2007) at 175-185.

75. **Appendix B and D—Non-U.S. Data in Accompanying Tables:** All 3 of the ASHRAE standards include an Appendix B and an Appendix D. The appendices include tables on general climate data for the United States, Canada, and various foreign countries. Comstock Decl. ¶ 7, Ex. 1 (ASHRAE 90.1-2004) at 110-21, 131-64; Supp. Reiniche Decl. ¶ 2, Ex. 1 (ASHRAE 90.1-2007) at 114-16 and 148-69, and Ex. 2 (ASHRAE 90.1-2010) at 144-46 and 179-200. While data about the United States climate may be helpful to a reader for purposes of

understanding and applying the standards, the data on foreign climates would not be necessary for compliance with the standard within the United States.

76. **Informational Notes and Policy Statements:** All 3 ASHRAE standards also include informational notes that have nothing to do with requirements to comply with the standards. These include “Instructions For Submitting a Proposed Change to the Standard,” a form for submitting proposed changes, instructions for electronic submission of comments, a brief description of the ASHRAE organization, and a “Policy Statement” laying out ASHRAE’s general position and goals concerning the environmental impact of its activities. Comstock Decl. ¶ 7, Ex. 1 (ASHRAE 90.1-2004) at 181-89; Supp. Reiniche Decl. ¶ 2, Ex. 1 (ASHRAE 90.1-2007) at 189-92, and Ex. 2 (ASHRAE 90.1-2010) at 225-28.

#### **IV. PRO’S CONDUCT HARMS PLAINTIFFS’ ACTUAL AND POTENTIAL MARKETS; AND AN INJUNCTION IS NECESSARY**

##### **A. Plaintiffs Distribute Their Standards, Provide Free Read-Only Access, And Other Informational Resources**

###### Plaintiffs’ Sales, Licensing, and Derivative Works

77. Plaintiffs sell their standards, including the Works, in a variety of formats and for a reasonable cost to industry professionals and tradespeople (and the companies and organizations for which they work) who then use these standards in the course of their business. Supp. Pauley Decl. ¶¶ 34, 43; Reiniche Decl., ¶¶ 17-18; James Thomas Decl. ¶¶ 45-48; *see also* Pauley Decl. ¶ 13; Declaration of James Golinveaux, filed at Dkt. 118-5 (“Golinveaux Decl.”) ¶ 10.

78. Plaintiffs’ sell their standards individually for prices that range from \$25 to \$200, or as a part of a membership or subscription. Rubel Decl. ¶ 4, Ex. 1 (Jarosz Rep. ¶¶ 84 (ASTM), 92 (NFPA), 99 (ASHRAE)).

79. Plaintiffs depend on the sale of standards to fuel their overall mission-driving work. The vast majority of that revenue is from the sale of codes and standards, including those that have

been incorporated by reference and posted by PRO. Supp. Pauley Decl. ¶ 33; Supp. Reiniche Decl. ¶ 4; James Thomas Decl. ¶¶ 37-38; Rubel Decl. ¶ 4, Ex. 1 (Jarosz Rep. ¶¶ 107-08).

80. ASTM sells its standards in books and as individual standards. Wise Decl. ¶¶ 158-161, Exs. 157-160. ASTM derives revenue from not only the initial publication of a given standard but also from revised, reapproved, and reissued versions of standards. *Id.*

81. For example, B580 issued in 1979 has been reapproved and reissued in its original form every five years since 1979. Wise Decl. ¶ 160, Ex. 159. This standard originally appeared in ASTM's Annual Book of ASTM Standards in 1980. Wise Decl. ¶ 9, Ex. 8. The latest version of this standard still appears in ASTM's 2019 Annual Book of ASTM Standards. Wise Decl. ¶ 156, Ex. 155; Wise Decl. ¶ 161, Ex. 160, at ASTM103529, Section 02 Volume 05; Wise Decl. ¶ 159, Ex. 158 at ASTM103291, Section 02 Volume 05.

82. NFPA also earns significant revenue from licensing its standards to other companies and organizations to use in their products and services, for example, derivative works like checklists based on the standards. Supp. Pauley Decl. ¶ 36.

83. Plaintiffs' revenue from complementary and downstream products and services like e-learning and in person training courses and other derivative works is also dependent on their copyrights in their standards because they market these products as including copies of the published material. James S. Thomas Decl. ¶¶ 4, 5-9; Rubel Decl. ¶ 4, Ex. 1 (Jarosz Rep. ¶¶ 109-11, 145).

84. As the copyright owners, Plaintiffs' ability to include its standards as reference material for these training courses gives them a competitive advantage over competitors, such as third-party training programs. James S. Thomas Decl. ¶ 10. This advantage is "a significant



driver” of these sources of revenue “is the provision of the protected publications in, for example, trainings and seminars.” Rubel Decl. ¶ 4, Ex. 1 (Jarosz Rep. ¶ 146)).

Plaintiffs’ Read-Only Access (at No Cost to the Reader) and Other Information

85. Plaintiffs also provide read-only access to the Works—excluding certain of the Works that are simply not incorporated by reference as claimed by PRO—on their websites, and sometimes linked through other websites, such as local and state government websites. This is provided at no cost to the user. Supp. Pauley Decl. ¶¶ 40-41, 44; Reiniche Decl., ¶ 19; O’Brien Decl. ¶ 60; Wise Decl. ¶ 157, Ex. 156.

86. Plaintiffs’ provision of free read-only access to and other resources for researching their standards serves Plaintiffs’ overall missions by providing a resource for individuals to educate themselves as to the contents of standards, including standards that have been incorporated by reference. Supp. Pauley Decl. ¶ 43, 45; Supp. Reiniche Decl. ¶ 3; Declaration of James S. Thomas, dated October 4, 2019, filed concurrently herewith, (“James S. Thomas Decl.”) ¶ 12.

87. Plaintiffs’ provision of free read-only access and research tools also benefits the public, because they can be sure of the authenticity and accuracy of the copy of the standard they are reading. Supp. Reiniche Decl. ¶ 3; O’Brien Decl. ¶¶ 52-53; Supp. Pauley Decl. ¶ 39.

88. Although industry professionals and tradespeople who purchase Plaintiffs’ standards to use in the course of their work might reference Plaintiffs’ free access websites, the carefully controlled read-only environment do not provide a substitute for purchasing a copy of the Works. James S. Thomas Decl. ¶ 14; Supp. Pauley Decl. ¶ 45. Rather, Plaintiffs’ online copies serve those “parties that are interested in or affected by [Plaintiffs’ standards], but who do not necessarily need a digital or hardcopy of the standards.” Rubel Decl. ¶ 4, Ex. 1 (Jarosz Rep. ¶ 86).

89. Plaintiffs are not harmed by the provision of these free access websites because the users who visit them engage with their other products and services in furtherance of Plaintiffs' overall missions and because the read-only format prevents unauthorized distribution. Supp. Pauley Decl. ¶ 45; Supp. Reiniche Decl. ¶ 4; James S. Thomas Decl. ¶ 15.

90. NFPA has also developed additional resources for researching that consolidate information regarding the jurisdictions that have incorporated NFPA's standards by reference into local, state, or federal laws or regulations. These resources include the NEC Adoptions Map and CodeFinder™, which serves the "purpose of creating general public awareness of some of the jurisdictions where [AHJs] may require the use of NFPA codes and/or standards." Supp. Pauley Decl. ¶¶ 46-47.

**B. PRO's Posting Of Its Versions Of Plaintiffs' Works Online Is Substitutional And Harmful**

PRO's Conduct Threatens Plaintiffs' Actual and Derivative Markets

91. The expert report of John Jarosz concluded that PRO's activities would threaten the market both for Plaintiffs' standards and for derivative works, including future standards, trainings and seminars. Rubel Decl. ¶ 4, Ex. 1 (Jarosz Rep. ¶¶ 85, 92, 100, 130-49).

92. Anyone visiting PRO's postings of the Works on the Internet Archive website can download, copy, print, and redistribute the entirety of Plaintiffs' Works, which are available without restriction in multiple formats, such as Full Text and PDF. Declaration of Christopher Butler, of Internet Archive ("Butler Decl.") ¶ 9; Supp. Pauley Decl. ¶ 31; Wise Decl. ¶ 168, Ex. 167.

93. The individuals and entities who use PRO's unrestricted versions of the Plaintiffs' standards include the same sorts of industry professionals and tradespeople, such as engineers, as would otherwise typically obtain copies of Plaintiffs' standards directly from Plaintiffs. Wise

Decl. ¶ 174, Ex. 173 at PRO\_00267293 (engineer asking after remand from the D.C. Circuit, “Does Friday’s decision mean you can update the site?”), PRO\_00267241 (engineering firm saying it heard about PRO from a “colleague” and asking “How might we access the documents you offer?”); Wise Decl. ¶ 165, Ex. 164 at Interrog. 22.

94. PRO’s versions of Plaintiffs’ standards compete directly with Plaintiffs’ standards in the market because if the professionals and tradespeople are able to access and download nearly identical standards without cost through PRO’s postings to the Internet Archive, they will not buy Plaintiffs’ publications or use their free access websites. PRO’s postings to the Internet Archive therefore substitute for both sales of Plaintiffs’ Works and use of Plaintiffs’ free access websites. Supp. Pauley Decl. ¶ 35; Supp. Reiniche Decl. ¶ 5; James S. Thomas Decl. ¶ 16; Rubel Decl. ¶ 4, Ex. 1 (Jarosz Rep. ¶¶ 109-111, 149).

95. PRO’s provision of unrestricted, downloadable PDF and HTML copies of Plaintiffs’ works competes directly with not only sale of the Works but also ancillary products such as training courses that include copies of the Works. James S. Thomas Decl. ¶ 16; Rubel Decl. ¶ 4, Ex. 1 (Jarosz Rep. ¶¶ 131-41, 145-49).

96. The harm resulting from PRO’s posting and dissemination of unrestricted copies of ASTM’s standards for free extends beyond PRO’s impact on the sale of the same version of the ASTM work PRO copied. Prior versions of ASTM’s standards can serve as a substitute for new ones because significant portions—and in some instances the entire standard—may remain unchanged from edition to edition. As a result, for many users, prior versions of ASTM’s works may be a perfect or near perfect substitute that interferes with the market for the current version of ASTM’s standards. James S. Thomas Decl. ¶ 17.

97. A simple comparison between views of ASTM Standards in the ASTM reading room and data regarding downloads and access to the ASTM Standards on the PRO website and the Internet Archive website shows the damaging impact on the marketplace for ASTM's works.

[REDACTED]

[REDACTED] Wise Decl. ¶ 158, Ex. 157 at ASTM103291.

ASTM Reading Room Results						
	2013	2014	2015	2016	2017	2018
Standards Viewed:	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

98. PRO's reproduction and display of ASTM's Works dwarfs ASTM's Reading Room impressions. PRO's download data and access data was only available up to 2014. Wise Decl. ¶ 163, Ex. 162 at PRO\_00245530; Wise Decl. ¶ 164, Ex. 163 at PRO\_00232651; Wise Decl. ¶ 152, Ex. 151.

Standard	Edition	PRO Website Views	Downloads from PRO Website	Internet Archive Views	Impact
Total of Standards		48,985	15,451	108,992	173,428
A36	1977a <sup>e</sup>	334	187	1,304	1,825
A36/A36M	1997a <sup>e1</sup>	321	120	615	1,056
A82	1979	308	83	884	1,275
A106/A106 M	2004b	326	0	0	326
A184	1979	264	25	163	452
A185	1979	290	179	2,616	3,085
A203/A203 M	1997	253	40	149	442
A242	1979	293	65	367	725
A285	1978	295	47	175	517
A307	1978 <sup>e</sup>	349	87	417	853
A325	1979	333	97	479	909
A333/A 333M	1994	492	0	0	492
A369/A 369M	1992	245	0	0	245
A370	1977 <sup>e2</sup>	392	869	10,391	11,652
A441	1979	272	49	368	689
A449	1978a	290	50	257	597
A475	1978(1984) <sup>e1</sup>	279	91	508	878
A490	1979	290	87	357	734
A496	1978	285	49	390	724
A497	1979	284	130	973	1,387

Standard	Edition	PRO Website Views	Downloads from PRO Website	Internet Archive Views	Impact
A500	1978	293	82	325	700
A501	1976	267	64	295	626
A502	1976	281	133	781	1,195
A514	1977	272	62	315	649
A522/A 522M	1995b	277	0	0	277
A539	1990a	237	0	0	237
A570	1979	293	75	364	732
A572	1979	295	50	222	567
A588	1979a	292	36	202	530
A611	1972(1979)	266	84	638	988
A615	1979	369	102	497	968
A616	1979	243	32	288	563
A617	1979	246	51	293	590
A633	1979a	288	59	396	743
B16	1992	229	66	0	295
B21	1983b	248	71	460	779
B21	1996	259	0	0	259
B42	1996	277	0	0	277
B68	1995	288	0	0	288
B75	1997	311	0	0	311
B85	1984	299	120	1,164	1,583
B88	1996	270	0	0	270
B96	1993	238	0	0	238
B111	1995	281	0	0	281
B122/B 122M	1995	238	0	0	238
B124	1996	280	0	0	280
B209	1996	321	197	1,638	2,156
B224	1980 <sup>e1</sup>	259	57	274	590
B283	1996	254	0	0	254
B315	1993	209	0	0	209
B557	1984	343	85	961	1,389
B580	1979	257	138	1,131	1,526
B694	1986	219	54	247	520
C5	1979(1997)	231	45	237	513
C150	1999a	206	101	561	868
C177	1997	330	43	340	713
C236	1989(1993) <sup>e1</sup>	252	74	354	680
C330	1999	330	157	1,212	1,699
C509	1984	240	53	721	1,014
C518	1991	282	74	318	674
C516	1980(1996) <sup>e1</sup>	219	68	278	565
C549	1981(1995) <sup>e1</sup>	227	83	507	817
C564	1970(1982)	262	42	663	967
D86	2007	466	75	393	934
D129	1995	241	28	118	387
D396	1998	277	47	419	743
D512	1989(1999)	299	87	580	966

Standard	Edition	PRO Website Views	Downloads from PRO Website	Internet Archive Views	Impact
D611	1982(1998)	297	35	355	687
D665	1998 <sup>e1</sup>	253	76	359	688
D814	1995	211	41	147	399
D975	2007	426	159	861	1,446
D975	1998b	232	89	923	1,244
D1217	1993(1998)	245	31	252	528
D1246	1995(1999)	250	27	149	426
D1253	1986(1996)	258	64	396	718
D1266	1998	281	34	381	696
D1298	1999	347	168	786	1,301
D1335	1967(1972)	233	159	1,084	1,476
D1412	1993(1997)	253	83	495	831
D1480	1993(1997)	220	30	281	531
D1481	1993(1997)	252	35	286	573
D1518	1985(1998) <sup>e1</sup>	255	143	1,009	1,407
D1535	1989	218	100	454	772
D1552	1995	268	41	637	946
D1688	1995	233	41	299	573
D1785	1986	315	199	1,294	1,808
D1835	1997	295	74	814	1,183
D1890	1996	206	26	164	396
D1943	1996	213	17	184	414
D1945	1996	218	104	1,653	1,975
D1946	1990(1994) <sup>e1</sup>	261	34	786	1,081
D2013	1986(1994)	333	134	1,071	1,538
D2015	1996	351	131	2,409	2,891
D2036	1998	245	32	404	681
D2163	1991(1996)	313	58	841	1,212
D2216	1998	305	189	1,952	2,446
D2234	1998	253	63	835	1,151
D2460	1997	194	35	134	363
D2502	1992(1996)	227	24	350	601
D2503	1992(1997)	226	52	294	572
D2597	1994(1999)	232	36	160	428
D2622	1998	265	45	278	588
D2724	1987(1995)	256	155	1,183	1,594
D2777	1998	217	26	150	393
D2879	1997	243	31	391	665
D2986	1995a(1999)	230	43	399	672
D3120	1996	226	22	205	453
D3173	1987(1996)	285	79	924	1,288
D3178	1989(1997)	231	33	313	577
D3236	1988(1999)	259	101	729	1,089
D3246	1996	233	60	556	849
D3286	1996	227	138	582	947
D3371	1995	183	20	142	345
D3454	1997	198	45	147	390

Standard	Edition	PRO Website Views	Downloads from PRO Website	Internet Archive Views	Impact
D3588	1998	330	143	964	1,437
D3697	1992(1996)	230	32	138	400
D4177	1995	287	104	603	994
D4239	1997 <sup>e1</sup>	279	88	834	1,201
D4268	1993	256	96	572	924
D4294	1998	289	116	654	1,059
D4329	1999	280	0	0	280
D4809	1995	258	74	707	1,039
D4891	1989(1994) <sup>e1</sup>	326	19	102	447
D4986	1998	245	0	0	245
D5257	1997	214	28	228	470
D5373	1993(1997)	274	208	1,064	1,546
D5489	1996a	265	148	537	950
D5673	1996	253	25	153	431
D5865	1998a	290	303	2,161	2,754
D6216	1998	202	42	410	654
D6228	1998	261	56	560	877
D6420	1999	199	44	188	431
D6503	1999	222	61	428	711
E11	1995	268	82	273	623
E23	1982	237	411	3,059	3,707
E72	1980	195	141	1,111	1,447
E96	1995	239	168	1,225	1,632
E145	1994 <sup>e1</sup>	211	188	1,160	1,559
E169	1987	156	61	394	611
E185	1982	161	74	231	466
E260	1996	201	47	355	603
E283	1991(1999)	219	141	882	1,242
E408	1971	183	118	558	859
E424	1971	174	93	583	850
E606	1980	220	369	1,220	1,809
E681	1985	163	99	982	1,244
E695	1979(1997) <sup>e1</sup>	148	39	346	533
E711	1987(1992)	190	139	699	1,028
E773	1997	153	43	245	441
E774	1997	185	92	1,030	1,307
E776	1987(1992)	157	57	415	629
E885	1988	142	62	260	464
E1337	1990(1996)	155	60	582	797
F462	1979(1999)	200	0	0	200
F478	1992(1999)	148	53	275	476
F631	1980(1985)	135	36	214	385
F631	1993	126	60	218	404
F682	1982a(1988)	202	43	180	425
F715	1981(1986)	140	54	204	398
F715	1995	132	47	173	352
F722	1982(1988)	223	54	230	507

Standard	Edition	PRO Website Views	Downloads from PRO Website	Internet Archive Views	Impact
F808	1983(1988) <sup>e1</sup>	139	33	85	257
F1003	1986(1992)	154	36	139	329
F1006	1986(1997)	159	31	126	316
F1007	1986(1996) <sup>e1</sup>	179	41	153	373
F1014	1992	164	37	170	371
F1020	1986(1996) <sup>e1</sup>	160	40	159	359
F1120	1987(1998)	223	36	284	543
F1121	1987(1998)	231	43	325	599
F1122	1987(1998)	167	48	284	499
F1123	1987(1998)	213	78	268	559
F1139	1988(1998)	203	57	218	478
F1155	1998	215	225	702	1,142
F1172	1988(1998)	161	38	190	389
F1173	1995	204	56	235	495
F1199	1988(1998)	185	41	271	497
F1200	1988(1998)	187	49	0	236
F1201	1988(1998)	154	48	157	359
F1271	1990(1995) <sup>e1</sup>	145	52	137	334
F1273	1991(1996) <sup>e1</sup>	197	38	229	464
F1321	1992	233	73	642	948
F1323	1998	179	29	114	322
F1471	1993	158	40	323	521
F1546/F 1546M	1996	164	28	215	407
F1548	1994	173	45	165	383
F1951	1999	218	0	0	218
G21	1990	225	161	1,441	1,827
G151	1997	225	229	1,000	1,454
G154	2000a	234	583	3,065	3,882

99. The cumulative impact of PRO's reproduction and display of ASTM's standards on its own website and on Internet Archive represents ██████████ ASTM's total views across all six years combined. *Compare* Wise Decl. ¶ 158, Ex. 157 at ASTM103291, *with* Wise Decl. ¶ 163, Ex. 162 at PRO\_00245530 *and* Wise Decl. ¶ 164, Ex. 163 at PRO\_00232651.

100. With respect to NFPA, revenue is somewhat cyclical with publications, but in recent years, NFPA's revenue from the sale of standards has been declining. NFPA attributes this decline, at least in part, to PRO's making copies of NFPA's standards widely available, including



for use by those same industry professionals who would otherwise purchase copies or digital subscription access. Supp. Pauley Decl. ¶ 38.

101. NFPA's licenses likely would lose significant value if the licensees or their customers could obtain the same material from PRO in digital format, without cost, and without restrictions on further dissemination. Supp. Pauley Decl. ¶ 36.

102. A review of the Internet Archive websites to which PRO posted its versions of Plaintiffs' Works reveals that the 2011 National Electrical Code has been "View[ed]," which includes being accessed or downloaded, 40,151 times since originally uploaded. Supp. Pauley Decl. ¶ 31; Wise Decl. ¶ 168, Ex. 167 at 5. This is an increase of nearly 10,000 in the 13 months since PRO has reposted this standard. SMF ¶ 242 (NFPA's 2011 NEC was downloaded 30,350 times from the Internet Archive website) (citing Rubel Decl. ¶ 5, Ex. 2 (Rule 30(b)(6) Dep. of Public Resource at 254:14-256:16)); Rubel Decl. ¶ 43, Ex. 39 (Ex. 51 to Rule 30(b)(6) Dep. of Public Resource).

PRO's Conduct Threatens Further Harm from Widespread Anonymous Dissemination

103. The Internet Archive website is among the top 300 most-visited websites in the world by alexa.com rankings and millions of people visit the Internet Archive every day. See Butler Decl. ¶ 4.

104. Neither PRO nor the Internet Archive keeps information regarding the individuals and entities that download and use PRO's versions of Plaintiffs' Works or the reasons that they do so. PRO has "adopted a policy of not talking to its users and not answering any questions or asking questions" of those users regarding Plaintiffs' Works. Wise Decl. ¶ 165, Ex. 164 at Interrog. 23. Likewise, the Internet Archive does not keep records identifying information regarding the individuals who use or download PRO's versions of Plaintiffs' Standards. Butler Decl. ¶¶ 4, 9

(“as a general matter we avoid keeping the IP (Internet Protocol) addresses of our readers” and “[aside from counting the number of users] Internet Archive does not otherwise monitor how users view, access, download, or otherwise use the content posted on the websites”).

105. Accordingly, PRO’s download information is under-inclusive because it fails to account for versions of its standards re-posted by PRO’s users. For example, Scribd.com is a subscription service in which users must sign up for premium access to view beyond the PRO cover page. Wise Decl. ¶ 155, Ex. 154.



106. The open publishing forum at Scribd.com contains dozens of ASTM works bearing the PRO cover sheet. Wise Decl. ¶ 154, Ex. 153.

107. PRO’s postings threaten Plaintiffs’ ability to control the further dissemination and use of its standards. Because PRO offers unrestricted and anonymous access to standards in multiple formats, Plaintiffs cannot easily track down those individuals who use PRO’s versions of NFPA’s standards for their commercial businesses, or for sale to other individuals and entities. Supp. Pauley Decl. ¶ 37.

**C. PRO Does Not Make Use of Internet Archive’s Features That Would Protect Plaintiffs’ Standards**

108. Although Internet Archive has the functionality to provide access to books through “borrowing,” which allows registered users to “borrow books for two weeks, after which the loaned item expires and is removed from the user’s device,” PRO does not use this function. Butler Decl. ¶ 5.

109. Although Internet Archive has the functionality to offer access to the blind and print disabled in Digital Accessible Information System (DAISY) format protected by encryption and accessible through a key provided by the Library of Congress National Library Service to residents of the United States and American citizens abroad, PRO offers DAISY format *without* any encryption. Butler Decl. ¶ 6.

**D. Injunctive Relief Is Necessary**

110. PRO has and will continue to post versions of additional standards owned by Plaintiffs if not enjoined. For example, PRO posted the 2017 edition of the NEC in January 2019. Supp. Pauley Decl. ¶ 30; Wise Decl. ¶ 168, Ex. 167 at 6.

111. PRO has limited financial resources available to pay any damages award because it is dependent on fundraising for its activities. PRO Answer, Dkt. 21 at ¶¶ 46-47 (“[nearly] all of PRO’s funding comes from charitable donations”). PRO describes itself as a “charity.” Wise Decl. ¶ 165, Ex. 164 at Interrog. 22.

112. At the initial summary judgment hearing, when asked what would be an appropriate remedy, counsel for PRO responded “I am not able to say.” Transcript of Hearing on Motion for Summary Judgment, Dkt. 173 at 133:16 (Sept. 12, 2016).

Dated: October 7, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 7, 2019, the foregoing document was filed with the clerk of this Court via the CM/ECF system and served on counsel of record via email, including:

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