

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

AMERICAN EDUCATIONAL RESEARCH
ASSOCIATION, INC., AMERICAN PSYCHOLOGICAL
ASSOCIATION, INC., and NATIONAL COUNCIL ON
MEASUREMENT IN EDUCATION, INC.,

Case No. 1:14-cv-00857 (TSC)

Plaintiffs-Counterdefendants,

v.

PUBLIC.RESOURCE.ORG., INC.,

Defendant-Counterclaimant.

**DECLARATION OF MATTHEW BECKER IN OPPOSITION TO [134]
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND PERMANENT
INJUNCTION AND IN SUPPORT OF PUBLIC RESOURCE'S
SECOND MOTION FOR SUMMARY JUDGMENT**

I, Matthew Becker, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am an attorney admitted to practice in the District of Columbia and am an associate with the law firm of Fenwick & West LLP, counsel of record for Defendant-Counterclaimant Public.Resource.Org, Inc. ("Public Resource"). Except where otherwise indicated, I have personal knowledge of the facts herein and could and would testify competently hereto.

I. NEWLY DISCLOSED, UPDATED, AND SUPPLEMENTAL EVIDENCE

2. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 36** is a true and correct transcript of the deposition of Felice Levine as the Fed. R. Civ. P. 30(b)(6) corporate representative of Plaintiffs AERA, APA, and NCME, dated August 16, 2019.

3. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 37** is a true and correct copy of Plaintiffs' responses to Public Resource's second set of interrogatories,

submitted as Exhibit 1305 from the deposition of Felice Levine as the Fed. R. Civ. P. 30(b)(6) corporate representative of Plaintiffs AERA, APA, and NCME, dated August 16, 2019.

4. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 38** is a true and correct copy of the 1999 Standards' sales report bates stamped AERA_APA_NCME_RFP2_0000027, submitted as Exhibit 1306 from the deposition of Felice Levine as the Fed. R. Civ. P. 30(b)(6) corporate representative of Plaintiffs AERA, APA, and NCME, dated August 16, 2019. Because Plaintiffs have designated this document as "confidential," Public Resource is filing this document under seal in accordance with the protective order in this case.

5. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 39** is a true and correct copy of Plaintiffs' updates sales reports bates stamped AERA_APA_NCME_RFP2_0000001-26, submitted as Exhibit 1307 from the deposition of Felice Levine as the Fed. R. Civ. P. 30(b)(6) corporate representative of Plaintiffs AERA, APA, and NCME, dated August 16, 2019. Because Plaintiffs have designated this document as "confidential," Public Resource is filing this document under seal in accordance with the protective order in this case.

6. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 40** is a true and correct copy of a website printout for the 2014 Standards, submitted as Exhibit 1308 from the deposition of Felice Levine as the Fed. R. Civ. P. 30(b)(6) corporate representative of Plaintiffs AERA, APA, and NCME, dated August 16, 2019.

7. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 41** is a true and correct copy of a website printout for the 1999 Standards, submitted as Exhibit 1309 from

the deposition of Felice Levine as the Fed. R. Civ. P. 30(b)(6) corporate representative of Plaintiffs AERA, APA, and NCME, dated August 16, 2019.

8. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 42** is a true and correct copy of the mail order form necessary to purchase a copy of the 1999 Standards, submitted as Exhibit 1310 from the deposition of Felice Levine as the Fed. R. Civ. P. 30(b)(6) corporate representative of Plaintiffs AERA, APA, and NCME, dated August 16, 2019.

9. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 43** is a true and correct copy of the signed agreement between Plaintiffs and the New York State Education Department dated May 11, 2011, bates stamped AERA_APA_NCME_0032528-9, in which Plaintiffs assented to New York's incorporation by reference of the complete 1999 Standards document, as well as agreeing that New York's reproduction of the 1999 Standards at any person's request would be a fair use.

10. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 44** is a true and correct copy of Plaintiff APA's memorandum titled "Litigation Report," dated August 8, 2014, in which Plaintiff APA acknowledges that the complete 1999 Standards were incorporated by reference by the Department of Education into regulations under Title 34.

11. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 45** is a true and correct copy of the Office of the Federal Register's "IBR Handbook," dated July 2018, obtained by me on November 7, 2019 from the National Archives' website at <https://www.archives.gov/federal-register/write/handbook>.

12. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 46** is a true and correct copy of a report by the U.S. Government Accountability Office titled "Proprietary Schools: Stronger Department of Education Oversight Needed to Help Ensure Only Eligible

Students Receive Federal Student Aid,” dated August 2009, available at <http://www.gao.gov/new.items/d09600.pdf>.

13. Attached to Public Resource’s Consolidated Index of Exhibits as **Exhibit 47** is a true and correct copy of a Federal Bureau of Investigations Press release, “FastTrain Owner and Admissions Representative Convicted of Federal Student Aid Scheme,” dated Nov. 24, 2015, available at <https://www.fbi.gov/miami/press-releases/2015/fasttrain-owner-and-admissions-representative-convicted-of-federal-student-aid-scheme>.

14. Attached to Public Resource’s Consolidated Index of Exhibits as **Exhibit 48** is a true and correct copy of the complaint in the action *U.S. vs. FastTrain II Corp.*, Case No.: 1:12-cv-21431, Dkt. 54, filed Dec. 2, 2014, available at <http://www.justice.gov/sites/default/files/usao-sdfl/legacy/2014/12/03/141203-01.FasttrainIICorpCaseComplaint.pdf>.

II. UNABRIDGED DEPOSITION TRANSCRIPTS

15. Although the majority of the following deposition transcripts are already part of the district court record in this litigation, I attach here complete copies both for the convenience of having them collected in one place, and also in case unabridged copies might aid the Court in its analysis.

16. Attached to Public Resource’s Consolidated Index of Exhibits as **Exhibit 49** is a true and correct copy of the deposition of Diane L. Schneider, dated April 23, 2015. Because Plaintiffs have designated this transcript as “confidential,” Public Resource is filing this document under seal in accordance with the protective order in this case.

17. Attached to Public Resource’s Consolidated Index of Exhibits as **Exhibit 50** is a true and correct copy of the deposition of Marianne Ernesto, dated April 29, 2015. Because Plaintiffs have designated this transcript as “confidential,” Public Resource is filing this document under seal in accordance with the protective order in this case.

18. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 51** is a true and correct copy of the deposition of Wayne Camara, dated May 1, 2015. Because Plaintiffs have designated this transcript as "confidential," Public Resource is filing this document under seal in accordance with the protective order in this case.

19. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 52** is a true and correct copy of the deposition of Felice Levine, dated May 4, 2015. Because Plaintiffs have designated this transcript as "confidential," Public Resource is filing this document under seal in accordance with the protective order in this case.

20. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 53** is a true and correct copy of the deposition of Laress Wise, dated May 11, 2015. Because Plaintiffs have designated this transcript as "confidential," Public Resource is filing this document under seal in accordance with the protective order in this case.

21. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 54** is a true and correct copy of the deposition of Kurt F. Geisinger, dated September 10, 2015. Because Plaintiffs have designated this transcript as "confidential," Public Resource is filing this document under seal in accordance with the protective order in this case.

22. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 55** is a true and correct copy of the deposition of S.E. Phillips, dated September 22, 2015. Because Plaintiffs have designated this transcript as "confidential," Public Resource is filing this document under seal in accordance with the protective order in this case.

23. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 56** is a true and correct copy of the deposition of Carl Malamud, dated May 12, 2015.

24. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 57** is a true and correct copy of the deposition of Christopher Butler, dated December 2, 2014.

III. EARLIER-FILED DOCUMENTS ATTACHED FOR THE CONVENIENCE OF THE COURT

25. Although the below documents are already part of the district court record in this litigation, I attach them here in on place, for the convenience of the court.

26. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 58** is a true and correct copy of a document entitled "American Educational Research Association | Standards of Educational and Psychological Testing | Statement of Revenue and Expenses | (FY2000 – 12/31/2013)". This Exhibit was marked as Exhibit 1205 in the deposition of Felice Levine, produced by Plaintiffs bearing control number AERA_APA_NCME_0004818. Because Plaintiffs have designated this document as "confidential," Public Resource is filing this document under seal in accordance with the protective order in this case.

27. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 59** is a true and correct copy of a document entitled "American Educational Research Association | Standards of Educational and Psychological Testing | Statement of Revenue and Expenses | (FY2000 – 12/31/2014)". This exhibit was marked as Exhibit 1211 in the deposition of Felice Levine, produced by Plaintiffs bearing control number AERA_APA_NCME_0032527. Because Plaintiffs have designated this document as "confidential," Public Resource is filing this document under seal in accordance with the protective order in this case.

28. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 60** is a true and correct copy of a document entitled "Standards for Educational and Psychological Testing | Sales Report, 1999 Edition." This Exhibit was marked as Exhibit 1207 in the deposition of Felice Levine, produced by Plaintiffs bearing control number AERA_APA_NCME_0031848.

29. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 61** is a true and correct copy of a document entitled "Standards for Educational and Psychological Testing | Sales Report." This exhibit was marked as Exhibit 1208 in the deposition of Felice Levine, produced by Plaintiffs bearing control number AERA_APA_NCME_0005137.

30. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 62** is a true and correct copy of the Expert Report of James R. Fruchterman, dated June 13, 2015.

31. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 63** is a true and correct copy of a printout from the National Archives website, titled "Incorporation by Reference", available at <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

32. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 64** is a true and correct copy of the Declaration of Carl Malamud dated January 21, 2016, previously filed at Dkt. 69-5.

33. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 65** is a true and correct copy of the Declaration in Support of Probable Cause, *California v. Harris*, No. 17-CR-017349A (Cal. Super. Ct. June 5, 2017), available at <https://www.scribd.com/document/350446988/Ghost-Ship-fire-criminal-charges>.

34. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 66** is a true and correct copy of the Criminal Complaint, *California v. Harris*, No. 17-CR-017349A (Cal. Super. Ct. June 5, 2017), available at <https://web.archive.org/web/20170729051241/https://cbssanfran.files.wordpress.com/2017/06/almena-and-harris-complaint.pdf>).

35. Attached to Public Resource's Consolidated Index of Exhibits as **Exhibit 67** is a true and correct copy of the deposition of James R. Fruchterman, dated Sept. 8, 2015.

36. Attached to Public Resource’s Consolidated Index of Exhibits as **Exhibit 68** is a true and correct copy of Wayne Camara, “OCR Issues Draft Guide on Disparate Impact in Educational Testing,” Society for Industrial and Organizational Psychology, October 1999, archived at <https://web.archive.org/web/20100613083532/http://www.siop.org/tip/backissues/tipocto99/22Camara.aspx>.

37. Attached to Public Resource’s Consolidated Index of Exhibits as **Exhibit 69** is a true and correct copy of the APA memorandum produced by Plaintiffs bates labeled AERA_APA-NCME_0031518-20. Because Plaintiffs have designated this document as “confidential,” Public Resource is filing this document under seal in accordance with the protective order in this case.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 8th day of November, 2019 at San Francisco, California.

/s/ Matthew B. Becker

Matthew B. Becker