

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,

Plaintiff,

Civil Action
No. 14-14176-ADB

v.

February 7, 2018
Pages 1 to 34

PRESIDENT AND FELLOWS OF HARVARD
COLLEGE (HARVARD CORPORATION),
et al.,

Defendants.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

JOAN M. DALY, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 5507
Boston, MA 02210
joanmdaly62@gmail.com

1 APPEARANCES:

2 FOR THE PLAINTIFF:

3 JOHN MICHAEL CONNOLLY
4 Consovoy McCarthy Park PLLC
5 3033 Wilson Boulevard, Suite 700
6 Arlington, Virginia 22201
7 703.243.9423
8 mike@consovoymccarthy.com

9 PATRICK STRAWBRIDGE
10 Consovoy McCarthy Park PLLC
11 8th Floor, South, PMB #706
12 Ten Post Office Square
13 Boston, Massachusetts 02109
14 617.227.0548
15 patrick@consovoymccarthy.com

16 BENJAMIN C. CALDWELL
17 Burns & Levinson LLP
18 One Citizens Plaza, Suite 1100
19 Providence, Rhode Island 02903
20 401.831.8330
21 bcaldwell@burnslev.com

22 FOR THE DEFENDANTS:

23 WILLIAM F. LEE
24 FELICIA H. ELLSWORTH
25 ANDREW S. DULBERG
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, Massachusetts 02109
617.526.6556
william.lee@wilmerhale.com
felicia.ellsworth@wilmerhale.com
andrew.dulberg@wilmerhale.com

SARA M. MADGE
Harvard University
Office of General Counsel
Smith Campus Center, Suite 980
Cambridge, Massachusetts 02138
617.495.1280
sara_madge@harvard.edu

P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Allison D. Burroughs, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on February 7, 2018.)

THE CLERK: All rise. Court is in session. Please be seated. This is civil action 14-14176, *Students for Fair Admissions versus Harvard College*. Will counsel identify yourselves for the record.

MR. CONNOLLY: Good afternoon, Your Honor. Benjamin Caldwell for the plaintiff, Students for Fair Admissions, Inc.

MR. STRAWBRIDGE: Patrick Strawbridge and Michael Connolly also for the plaintiff.

MR. LEE: Good afternoon, Your Honor. For Harvard College, Bill Lee, Felicia Ellsworth, Drew Dulberg and Greg Schmidt from Wilmer Hale. And from Harvard, Sara Madge at the table behind us.

THE COURT: I'm sorry. I have your first name, Sara. What is your last name?

MS. MADGE: Madge, M-A-D-G-E.

THE COURT: I have three at the first table. Who else is behind you there?

1 MR. SCHMIDT: Greg Schmidt, S-C-H-M-I-D-T.

2 THE COURT: All right. So I have all the paperwork
3 on the motion. And I have reviewed all the attachments and
4 the documents that were submitted by Harvard. And what I
5 would like to propose is that I and the court reporter and
6 Harvard go back to my little conference room and try and hash
7 some of this out. Acceptable?

8 MR. STRAWBRIDGE: Obviously we won't object if
9 that's what you'd like to do. When you come back there may
10 be need to put a ruling on the record or otherwise address
11 it.

12 THE COURT: That's all right. I'm going to do this
13 on the record back there, but I just have some questions
14 about some of the documents, and I wanted to talk to them
15 about that. I could do it cryptically here, but it seems it
16 would be more productive to do it back there.

17 MR. STRAWBRIDGE: That's fine.

18 [Hearing held in camera. In camera hearing
19 transcript will be sealed.]

20 THE COURT: We're back on the record. Thank you
21 for your patience. We went through these documents pretty
22 carefully. I'd gone through them pretty carefully before we
23 got there with them, but I wanted to do some follow up with
24 them. This is going to be a little awkward to do because I
25 was working out of the binders that they had provided of

1 their documents which those documents themselves aren't Bates
2 stamped.

3 So it's not like a -- I'm sure there's an easy way
4 to figure out what I was talking about in there, but I
5 haven't gotten it organized. I did borrow from them the
6 highlighted privilege log which you had provided which is the
7 one thing I hadn't brought out on the bench with me. I am
8 going to try and start with some of the easier ones of this
9 and then kind of back into the rest of it.

10 I'm not rejecting your motion in terms of
11 timeliness. I think given how far we are from summary
12 judgment, that it's not an untimely request. There are --
13 let's start with the Harvard Not Fair documents. My
14 understanding was that there were 10 of them to begin with.
15 They produced five more in light of your objections. You
16 identified five more which makes the balance of the ten.

17 I had trouble figuring out exactly which the five
18 were. So I think one of the five that you identified was
19 document 193, and I don't have that. They don't have that.
20 So I'm not sure where that reference comes from. So am I
21 right that one of the five is 193, or do you want to tell me
22 what the five are?

23 MS. ELLSWORTH: Your Honor, we figured it out. I
24 can explain it. It was mentioned in the brief, but it wasn't
25 highlighted on the privilege log. So when we did the

1 production of in camera review, it was not included because
2 we worked off of the highlighted log. So we can certainly
3 submit it after.

4 THE COURT: Are you pressing your objection on 193
5 once you figure out what it is?

6 MR. CONNOLLY: Yes. We remain to request that. I
7 apologize for not highlighting it.

8 THE COURT: It's fine. I just didn't have it. Do
9 these numbers correspond to the numbers on the privilege log?

10 MS. ELLSWORTH: They do, Your Honor.

11 THE COURT: I have split these into three binders
12 A, B, and C. C are the redactions; A is the privilege log;
13 and B is the supplemental privilege log. The next one that
14 you identified as having to do with Harvard Not Fair is 257,
15 and that document is going to remain privileged. It relates
16 to a contemplated lawsuit.

17 265 and 275 don't actually correspond to Harvard
18 Not Fair. 265 and 275 are documents that are part of the
19 university's response to the article at general counsel's
20 direction. So we were trying to figure out how you
21 identified those as Harvard Not Fair. It looks to be because
22 of the dates, but those are actually not Harvard Not Fair
23 documents.

24 MR. CONNOLLY: The way we meant to describe it is
25 essentially a time range following Harvard Not Fair. So we

1 weren't exactly sure whether each document related to Harvard
2 Not Fair, but that's how we were attempting to organize them
3 in categories for you.

4 THE COURT: Just so you know, those aren't Harvard
5 Not Fair documents. Those go to the university's response
6 basically to the article and the investigation that follows
7 from that.

8 And then 287 was the last one of the five, and that
9 is a statement on which they're running by general counsel.
10 It's clearly under the auspices of counsel. So those are the
11 Harvard Not Fair documents.

12 I'm trying to figure out how best to get into
13 these. Let me approach this a different way. There was an
14 investigation after the Unz article came out. The
15 investigation was done under the auspices of the general
16 counsel's office, and most of the documents that you refer to
17 in there are protected by the privilege under the auspices of
18 that investigation. They don't all involve, as you point
19 out, the general counsel. But to the extent this they don't,
20 the general counsel has sought information from people, and
21 those people have sought information from other people. And
22 in that rubric of the investigation are covered by the
23 privilege.

24 That being said, there are some documents that
25 they've withdrawn their objection to and other documents that

1 will be produced for various other reasons.

2 In these binders one of the things that's included,
3 they include not surprisingly a document and the attachments
4 to the document. I want to say in most instances there are
5 attachments that are not privileged that have already been
6 provided to you in other ways. For example, the -- the
7 mission of the committee, the composition of the committee.
8 So there are things in here that I'm not ordering produced
9 now that have already been produced to you.

10 In terms of what -- in terms of this committee,
11 their position is, and I think it's correct, is that to the
12 extent that Mr. Iuliano is not giving legal advice to the
13 committee, nor is the committee giving legal advice to him,
14 but as a prelude to the committee doing its business, there
15 are things that are privileged that concern advice that
16 Mr. Iuliano is giving the university about whether to have a
17 committee, the composition of the committee, etc. That stuff
18 will remain privileged.

19 They assure me, and it doesn't look like there's
20 anything here or much here that covers the committee
21 business. They tell me the committee business has been
22 turned over to you already. They're not trying to privilege
23 it. So what is going to be turned over to you now -- of
24 course I wrote it on the back of some piece of paper. Okay.

25 Let me start with binder C because that's the

1 easiest here. So C are the redactions. These are the
2 hardest ones to figure out how to reference for you. I guess
3 they are telling me these are Bates stamped back here. I'm
4 just going to read the last four digits. Okay?

5 5989 they're going to produce. 24156 they're going
6 to produce the second redaction. They're going to produce --
7 they withdrew their objection to 30556. And on the document
8 that begins with 74737, there's three redactions, basically
9 three redactions on that document. Let me just see what it
10 looks like on yours. It looks on yours like there's one
11 paragraph. There's actually three separate little
12 paragraphs.

13 They're going to produce the first sentence, the
14 third sentence. And on that second middle paragraph, they're
15 going to produce everything but the first sentence.

16 All right. Binder B, which is the supplemental
17 privilege. All right. So there were some attachments that
18 they're not sure that have been turned over, but they're
19 going to double check. And you will get all the attachments
20 that reflect pure data. There's some polls that look like
21 they're from the common application that are attachments.
22 They're going to turn those over. There are two of those.

23 There's like a survey that has some handwriting on
24 it. I have it at tab 88. They're going to redact the
25 handwriting but produce the rest of 88. They're going to

1 produce 101. They're going to produce 104 with one
2 redaction. And I think that covers it from binder B, right?
3 Eric, are you keeping track with me? Do I have that right?

4 MS. ELLSWORTH: I think so. We'll cross check our
5 notes.

6 THE COURT: I think that's right. Binder A. So,
7 for example, some of the statistical information, they're
8 going to give you all the purely statistical data. But I
9 know there's one at 34. They're going to produce 283 -- no.
10 I take that back. 283 they say they've already produced but
11 in redacted form, and the redaction is going to be allowed.

12 They're going to produce 275, and they're going to
13 produce 278 with one redaction. And again in this binder
14 there were things like the charge of the committee, the
15 invitation to join the committee, things like that that they
16 say have already been produced that are just attachments to
17 the documents you actually referenced. So those are my
18 rulings.

19 Again we will follow up with at least a short
20 written opinion on this. We've been through these super
21 carefully. I'm comfortable that what we have continued to
22 withhold is privileged.

23 Mr. Strawbridge, you look like you want to speak.

24 MR. STRAWBRIDGE: A couple of questions. I think
25 it would be useful for us to have some clarity as to which

1 things they are withdrawing objections on versus which things
2 are being ordered to be produced despite their continuing
3 objections.

4 THE COURT: I'm not sure I took notes like that.
5 Did you take notes like that? I know they withdrew on the
6 redaction at tab 10 in binder C which is -- of course tab 10
7 doesn't mean anything to you. I told you when I was going
8 through them that they've withdrawn on them. Did you all
9 keep notes on which you were withdrawing on? I just didn't
10 keep my notes like that.

11 MS. ELLSWORTH: I think we can provide some
12 information based on how these line up with the privilege log
13 and what was withdrawn versus what was ordered produced.

14 THE COURT: There were probably I want to say like
15 three or four things that were withdrawn. Some of them are
16 withdrawn on the legal basis that it's not worth fighting
17 about anymore. Okay?

18 MR. STRAWBRIDGE: We certainly could have had that
19 before today, but I understand. The second question, I
20 suppose, is with respect to material in which there was
21 assurances provided that we've already received the document.
22 It's unclear to me whether we actually received that document
23 as an attachment to that email or we received another copy of
24 it somewhere else. Sometimes as you know --

25 THE COURT: I understand the question. I will let

1 them supplement my response to that, but in most cases you
2 got it as an attachment to something else. Maybe in all
3 cases.

4 MR. STRAWBRIDGE: I would request that Harvard
5 actually produce it with whatever redacted version of the
6 cover email so we can actually see who got this information,
7 at what point in time because it may be important.

8 THE COURT: Well, in some cases, for example, I
9 want to be careful here. In some cases like the charge to
10 the committee which reflects -- the charge to the committee
11 went through several iterations and editing by the general
12 counsel's office, right, because it included their
13 reflections on what the law requires. So some of those as
14 they were in final form were still being circulated in the
15 general counsel's office.

16 Others of them, and I'm not sure, but others of
17 them may have been outside the general counsel's office. And
18 to the extent that there are those, you can turn over those
19 redacted emails if they're not under the rubric that we've
20 discussed.

21 MS. ELLSWORTH: Right. What we've produced would
22 be the final version, for in the example the charge to the
23 committee. I understand the argument being made. But the
24 point of the privilege log is first of all that information
25 is there, and we included the file name. So it's clear when

1 we're talking about, again to keep on the charge to committee
2 point, it's clear who that has gone to or not based on the
3 privilege log.

4 Second of all, sometimes that information itself is
5 privileged, who it's to, etc.

6 THE COURT: Right. I'm not sure there are any
7 documents. I'm looking through -- as I'm looking through
8 them, at the outset it's not entirely apparent what's an
9 attachment or what's not. This is just an example, something
10 like the charge to the committee and I say they are entitled
11 to that. And they're like, no, no, they've gotten that, but
12 it's an attachment to this prior email which is privileged.

13 MR. STRAWBRIDGE: I'm still of the view that they
14 should be required to produce anything even if it's duplicate
15 to something else in the production that is not itself
16 privileged.

17 THE COURT: In those cases you're not entitled to
18 who it went to.

19 MR. STRAWBRIDGE: To the extent it's already
20 produced in the log, I think that may not be right.

21 THE COURT: You're not entitled to the email that
22 transmits it I don't think. For example, if an email says
23 we're sending this to you for legal review before we finalize
24 it. Right?

25 MR. STRAWBRIDGE: Right. Just to clarify my

1 position, if the ruling is that some aspect of the
2 transmission email is privileged, that could be redacted. My
3 concern is it sometimes matters when these attachments went
4 out and who received them.

5 THE COURT: Don't you have that in the log?

6 MS. ELLSWORTH: All that information is on the log.
7 It's clear on the log what's an attachment as well by the way
8 it's laid out.

9 THE COURT: I wasn't actually working off the log.
10 I was working off the binders which is how that happens.

11 MR. STRAWBRIDGE: Right. I guess I'm looking at
12 the log -- you tell me where I'm supposed to look on the log.
13 I'm trying to figure out what Bates number is a duplicate of
14 this document that was sent on this date that was not
15 privileged.

16 THE COURT: No. She doesn't have to tell you which
17 document is a duplicate and which isn't. But to the extent
18 that there's an attachment that's not privileged, right, I
19 wanted to make sure that you've gotten the attachment.

20 MR. STRAWBRIDGE: Maybe I should just put this to
21 counsel.

22 THE COURT: That's fine.

23 MR. STRAWBRIDGE: There was discussion here. Are
24 you representing that you have produced the attachments to
25 the documents that are logged themselves to the extent

1 they're not privileged?

2 MS. ELLSWORTH: No. The duplicates of the
3 attachments have already been produced to the extent that the
4 attachment is a non privileged document.

5 MR. STRAWBRIDGE: So it's already been produced
6 perhaps because it was sent on another day to another person?

7 MS. ELLSWORTH: Yes. Or a non privileged context.

8 MR. STRAWBRIDGE: So my concern stands. I can't
9 tell who received which of these non privileged documents on
10 what date if they don't reproduce them.

11 THE COURT: So you're not always entitled if you've
12 got it, right?

13 MR. STRAWBRIDGE: If it's information that's on the
14 log I think we are.

15 THE COURT: I'm not sure what you're talking about.
16 If it's on the log, you have it. If it's not privileged,
17 you're not entitled to it. I'm not sure what else is left.

18 MR. STRAWBRIDGE: What I'm having a hard time
19 understanding is what's on the log that includes an
20 attachment which we have received in identical form at
21 another time. That's the piece I can't put together.

22 MS. ELLSWORTH: I think it's clear, Your Honor,
23 from the title of the document, the file names or the
24 subjects on the log what we're talking about here.

25 THE COURT: Hold on. I can give you an example.

1 So like what I'm looking at is on the supplemental privilege
2 log -- I don't know if I got this exactly right, but I think
3 that 258, 22, 51 and 53 is a document captioned Statement on
4 Asian American Admissions. They say that you have that. And
5 you can tell from the -- so you can see like document number
6 2 is an attachment to document number 1 to which you're not
7 entitled.

8 MR. STRAWBRIDGE: My understanding, and maybe I'm
9 wrong from Ms. Ellsworth, is that we do not actually have
10 document number 2. We have a different document that they
11 claim is identical in substance that was produced with
12 another email at another point in time.

13 THE COURT: Well, if you want her to produce 258,
14 22, 51 and 53 with those numbers on top, I'm sure she'll do
15 it.

16 MS. ELLSWORTH: It's identical to what we have. So
17 we can produce it with a completely redacted cover email.
18 I'm not sure what the point is.

19 MR. STRAWBRIDGE: With respect to the ones for
20 which we already have the cover emails, that's sufficient.
21 Understanding there are other documents which are attachments
22 and may have been circulated to people and the attachments
23 themselves which there's an assertion that we've received an
24 identical document. I don't know how to check that. I don't
25 know how to confirm that. I don't know how to understand

1 that.

2 MS. ELLSWORTH: I think, Your Honor, what we can
3 probably do is just provide the Bates numbers of what the
4 identical document is for this attachment and how many
5 different times it's been produced.

6 THE COURT: I think what he's saying is say you've
7 produced a statement on Asian American admissions, he's not
8 sure it's identical to -- he doesn't have any way to figure
9 out if it's identical to 258, 22, 51, and 53.

10 MS. ELLSWORTH: Right.

11 THE COURT: Why don't you just reproduce them and
12 write those numbers on the top?

13 MS. ELLSWORTH: Which numbers.

14 THE COURT: 258, 22, 51, and 53, the numbers that
15 correspond to the privilege log.

16 MS. ELLSWORTH: That's fine, Your Honor. We can do
17 that.

18 THE COURT: All right.

19 MR. STRAWBRIDGE: Okay. I guess my understanding
20 of the conference that was had before this is that it was on
21 the record.

22 THE COURT: Yes.

23 MR. STRAWBRIDGE: Is it possible to request a
24 transcript of that?

25 THE COURT: No.

1 MR. STRAWBRIDGE: I think I'd be doing my client a
2 disservice if I didn't put a provisional objection on the
3 record about our exclusion. We're concerned there may have
4 been factual information and/or contextual information that
5 goes to them meeting a burden on privilege that we may not
6 have had a chance to rebut. Without the transcript, I can't
7 figure that out.

8 THE COURT: My view of it is that normally these
9 decisions are just made on the paper here, and I had a bunch
10 of things I wanted to clarify with them. And rather than
11 just ruling and accepting the assertions of privilege, I've
12 delved deeper into it. So I think I have been more careful
13 than I would have been without that hearing, but you're
14 entitled to your objection.

15 I have made -- in my view I have been very careful
16 to make sure that the documents were, in fact, privileged.
17 And I was -- maybe next time I won't have a hearing if that's
18 going to be your position on it. The hearing resulted in the
19 production of more documents than you would have otherwise
20 gotten. Let me put it that way. Okay?

21 MR. STRAWBRIDGE: I'm not suggesting anything.
22 It's just for the record.

23 THE COURT: That's fine.

24 MR. STRAWBRIDGE: I guess I had a separate question
25 which may be set forth in the Court's rulings or could be

1 distilled. I just want to make sure I understand what the
2 Court's feeling on this. And that is, particularly with
3 respect to documents concerning the activities of any efforts
4 that Harvard intends to rely upon to satisfy its burden of
5 serious good faith consideration of race neutral
6 alternatives. We certainly contest the fact that we've
7 gotten adequate or complete answers to our questions.

8 THE COURT: Are you talking about the committee?

9 MR. STRAWBRIDGE: There was discussion about the
10 Ryan committee?

11 MS. ELLSWORTH: Yes.

12 THE COURT: There was in here a -- the documents
13 that go to the committee, that go to the activities of the --
14 there are no documents that go to the substance of the
15 activities of the committee. There's nothing in here in any
16 of these documents that takes place after the committee is
17 formed. The documents that have been withheld all go -- they
18 predate the formation of the committee. There is nothing --
19 the most recent, I think the most recent document that
20 pertains to the committee are the invitations.

21 MR. STRAWBRIDGE: Okay.

22 THE COURT: I don't know if they produced it or
23 not, but it's not in here.

24 MR. STRAWBRIDGE: Our concern, and maybe it's not
25 ripe now because I don't know what Harvard is ultimately

1 going to rely on as the case proceeds forward, but our
2 concern because it's an ongoing issue and there's a new
3 committee, and there's going to be a deposition at some point
4 in the next month or two about the activities of the
5 deposition, is that both in the depositions and the documents
6 that there's been a lack of transparency as to what the
7 committee is doing which presents a conundrum with respect to
8 how we are supposed to test the assertion that the
9 consideration of race neutral alternatives was, in fact,
10 done, serious and in good faith.

11 THE COURT: I understand why you want that. I may
12 even venture to say that you're likely entitled to it. It's
13 not in these documents. These documents predate the meeting
14 of the committee.

15 MR. STRAWBRIDGE: Okay.

16 THE COURT: They're not being withheld on privilege
17 at least the documents that you've identified to me.

18 MR. STRAWBRIDGE: The concern that we would have,
19 for example, and I don't know what's in the documents
20 obviously. I'm not trying to have an argument. I just want
21 to make sure who is selected for the committee and how
22 someone goes about being selected for the committee may, in
23 fact, reflect upon seriousness and good faith. That is why
24 posting committee documents may not be sufficient always.

25 MR. LEE: Just to clarify, Your Honor, he's now

1 talking about the Smith committee which was recently
2 constituted. They know that who the members are the Smith
3 committee are the dean of the faculty of arts and sciences,
4 the dean of admissions, and the dean of the college. All
5 three of them who I think by title are serious people. They
6 know who they are.

7 There's going to be a deposition of the chair of
8 the committee, as Mr. Strawbridge said, in a month or two.
9 If they have considerations at that time, that's the time to
10 raise them. They have non privileged material. They'll be
11 able to ask the committee about its activities. Like the
12 other committees, some of them are privileged, some of them
13 are not. But there will be plenty to ask them about when
14 they get to the deposition.

15 MR. STRAWBRIDGE: I was actually not actually
16 referring to the Smith committee. I'm talking about the Ryan
17 committee. If you guys have no intention to rely on anything
18 the Ryan committee did to --

19 THE COURT: I don't want to step on their claims or
20 privilege here. I will say this and I will not go any
21 further than this. There is no discussion in these documents
22 about how anybody is chosen for the committee with the
23 exception, I'm sure you know by now, that there was some
24 student representatives on the committee and there was some
25 discussion about who those students are going to be.

1 Other than that there is no conversation like that.
2 There were conversations largely about how the students --
3 who the students were is privileged. There's no conversation
4 beyond that on who's to be on the committee.

5 MR. STRAWBRIDGE: Just one second. I'm sorry.
6 That's all I have at this time.

7 THE COURT: We're not going to do a big long
8 opinion on this, but we'll do something sufficient to have
9 something on the record for you. All right?

10 MR. LEE: With Your Honor's indulgence, can I raise
11 one unrelated issue? I don't think it requires any action.
12 At some point in time, we raised with
13 Mr. Strawbridge the question of whether in a case that's
14 going to be tried to Your Honor without a jury and in a case
15 where only injunctive relief is requested, no damages,
16 whether it made sense to put Your Honor and your staff and
17 the parties through summary judgment briefing.

18 This is a case by the time we finish with rebuttal
19 reports there's going to be about a thousand pages of reports
20 from experts going in both ways. It seems to me that going
21 directly to the trial without lots of paper and lots of
22 motions made some sense. We raised this with
23 Mr. Strawbridge. I think he has a different view. And we
24 understand if he does and Your Honor's schedule has summary
25 judgment that that may be what it is.

1 I think we would just ask Your Honor to give some
2 consideration to at some point adding to the schedule a trial
3 date so that we have some sense of when it will be.

4 THE COURT: I have been sort of thinking about
5 summary judgment myself. I wasn't sure if the whole case
6 could be decided on summary judgment or this comes down to
7 experts needing to take the stand. What's your views on
8 that?

9 Is this going to be resolvable on summary judgment,
10 or -- the experts themselves, are those going to be factual
11 disputes that need to be --

12 MR. LEE: This is a place where we disagree. So
13 I'll give you our view, Your Honor. My view is that it's
14 inconceivable that the entire case could be resolved on
15 summary judgment. It's probably very unlikely that the vast
16 majority of it would be resolved on summary judgment. And
17 there will be -- there are conflicting experts who are taking
18 the same data and coming to different conclusions.

19 So the examination and cross examinations will be
20 important. There are factual witnesses who will describe
21 this process to you. You've gotten a window into some of it,
22 but you're going to see it in some significant detail.
23 There's going to be a whole host of factual herbs. I think
24 it's really the combination as we thought about it of it
25 being jury waived. Your Honor could be the decider both

1 legally and factually. But also because it's just an
2 injunctive relief case.

3 So getting the trial closer in time to the evidence
4 rather than having it be way out from the time the evidence
5 has been generated made some sense to us. But I think from
6 our perspective, I think I can say that I think it's
7 inconceivable that the whole case would be resolved and we
8 wouldn't have to have a trial on some issues. I think it's
9 probably very very unlikely that a substantial majority would
10 get resolved on summary judgment.

11 MR. STRAWBRIDGE: Well, obviously we have a
12 different point of view on that. We do think that --

13 THE COURT: I would hardly expect you to agree on
14 anything at this point.

15 MR. STRAWBRIDGE: That's not entirely true.

16 THE COURT: You have not yet. I don't know why
17 we'd begin today. Go ahead.

18 MR. STRAWBRIDGE: Let me indulge the Court and
19 start with something on which we agree, which is that it may
20 be useful at some point especially once we get through the
21 expert discovery phase to set a trial date at some point in
22 the future at least as a back up if there remains some issues
23 after summary judgment. But we do think that summary
24 judgment is going to be useful in this case to dispose of
25 some, if not all, of the claims. And we think that there's

1 support and we can make summary judgment arguments that would
2 potentially dispose of all of the claims.

3 I'll also just simply note that the parties have
4 built in dispositive motions into their motion practice which
5 did not stop my friends on the other side from filing their
6 dispositive motions a while ago. So I guess I'm less
7 surprised that they're now satisfied that there isn't a need
8 for further dispositive motions. But we think it will be
9 useful to the Court. We think it can narrow issues if not
10 completely resolve some of the claims if not all of the
11 claims. So we'd like to stick with the schedule as is.

12 THE COURT: Hold on. I'm trying to pull up a
13 scheduling order. My recollection is that summary judgment
14 motions are fully briefed at the end of this summer.

15 MS. ELLSWORTH: We have a copy.

16 MR. LEE: August 3, Your Honor.

17 THE COURT: Do you want to pass that up? My view
18 is it seems to me this is about all the experts at some
19 level, right?

20 MR. STRAWBRIDGE: Truly not for all of the claims
21 in our view.

22 THE COURT: How many claims are left?

23 MR. STRAWBRIDGE: Four, I believe.

24 THE COURT: I thought it was two. Is it four?

25 MR. STRAWBRIDGE: There were six claims originally.

1 THE COURT: There were six. And we knocked out
2 two.

3 MR. LEE: Four is correct.

4 THE COURT: So there's four left. And what are the
5 four?

6 MR. STRAWBRIDGE: So there's a claim of invidious
7 discrimination. There's a claim of failure to achieve race
8 neutral practice. There's a claim of too much emphasis on
9 race. And there's a claim of inconsistency with *Grutter*.
10 I'm doing this off the top of my head.

11 THE COURT: I know.

12 MR. LEE: Your Honor, may I offer a suggestion?

13 THE COURT: What of those do you think can be
14 resolved as purely a legal matter?

15 MR. STRAWBRIDGE: All of them.

16 THE COURT: I just don't see that.

17 MR. STRAWBRIDGE: We're prepared to present the
18 motions. If the Court needs to take them under advisement
19 and then proceed to fact finding, that's fine. I'm not going
20 to stand here and concede that we won't achieve summary
21 judgment on all those claims. Certainly some of them I think
22 you can easily understand. Experts don't disagree, for
23 example, that at some level weight has been given to race.
24 There's an argument to be had as to what whether that level
25 of weight is consistent with what has been proved by the

1 Supreme Court.

2 Whether or not Harvard has engaged in serious
3 considerations or race neutral alternatives in and of itself
4 may not be the subject of expert testimony or may not be the
5 subject of testimony that's --

6 THE COURT: Rather than going through the entire
7 summary judgment process, which is going to be expensive and
8 time consuming, why couldn't I just hear the evidence and
9 then rule on those issues as a matter of law?

10 MR. STRAWBRIDGE: We think we have a right to file
11 summary judgment and we would like to submit it. We're happy
12 to stick to the current schedule and the Court can do with
13 the motions what it wants. We think it's important to
14 present these issues, and we intend to do so.

15 MR. LEE: Your Honor, I don't think any party has
16 the right to the file summary judgment motions. That's
17 completely at your discretion. It's your docket. Let me say
18 this: Take Mr. Strawbridge as an example. I can't think of
19 a good case that involves -- I was going to suggest this,
20 Your Honor. Maybe the thing for us to do is to meet and
21 confer and talk about the issues that he thinks -- they think
22 can get resolved on summary judgment, and we can say why we
23 don't think they can.

24 And this is a procedure that some other courts have
25 followed, so this is just a suggestion. Maybe after we do

1 that, can we each submit a letter to you that's no more than
2 four pages that says what our position is on what can get
3 resolved on summary judgment and what can't? And then we can
4 come back and see Your Honor on the schedule if that makes
5 sense.

6 THE COURT: That's fine. I'm happy to have you do
7 that. In a case that's going to be tried to me, it seems
8 like I'm as well-positioned to make the summary judgment
9 ruling at the end of evidence as I am after the whole summary
10 judgment thing. The summary judgment motions, they're
11 expensive, they're time consuming.

12 In some ways I see it in this kind of case as
13 duplicative. It can be made as a matter of law. I'll make
14 it at the close of the presentation of the evidence. So I
15 feel like you're getting everything you would get out of a
16 summary judgment motion wrapped into a bench trial, and that
17 doing the summary judgment motions first is just expensive
18 and time consuming. But I'll hear you on it.

19 The schedule has expert discovery completed by
20 May 1 and dispositive motions by -- so really this could be
21 trial ready by May 1. I would love to try it next summer
22 because it's impossible to get a jury for a summer trial. So
23 I'd rather do a bench trial next summer.

24 MR. STRAWBRIDGE: I guess our view is this is the
25 schedule that the parties agreed to. I don't know that we'd

1 be ready to go as of May 1.

2 THE COURT: Without minimizing my own importance,
3 which I always hate to do, I don't understand why you don't
4 want to get this case by me and onto its next place. Right?
5 I don't understand why you want it to linger here.

6 MR. STRAWBRIDGE: We certainly don't want it to
7 linger here, but we think that -- one thing summary judgment
8 can do, as you know, there's motions for partial summary
9 judgment. It can narrow the issues. It can limit the need
10 for testimony. It can help work these things out. I
11 understand they don't agree.

12 The parties agreed to a dispositive motion briefing
13 schedule. We're prepared to stick to that schedule and keep
14 the case moving to the extent the Court doesn't think it can
15 dispose of some or all of the claims in summary judgment.
16 This is or our position.

17 THE COURT: I put summary judgment in the schedule
18 to have it in the schedule. It doesn't mean there's always
19 going to be summary judgment motions filed. It's a
20 placeholder. If it's apparent that it's not going to change
21 the complexion of the trial, I don't see that it's worth the
22 exercise of summary judgment motions.

23 If it can significantly change the complexion of
24 the trial and cut out days or weeks of testimony, then okay,
25 that's something different. But why don't you all meet and

1 confer on that and we'll see where we are. This case looks
2 like absent summary judgment motions it will be ready for
3 trial by May 1 and we can try it in the summer and then have
4 it be on its way. Have important issues resolved in a more
5 timely manner because there's -- almost certainly it's going
6 to be delayed if I have to do the summary judgment motion.
7 There's just no way around it.

8 And I have, just for your FYI, I have a 14-week
9 trial starting in January of '19. So you either get it tried
10 between now and basically January 1 of '19 or it's delayed
11 until, whatever, that spring. It seems like a long time when
12 this is a case that we know -- I will certainly share my
13 wisdom with you all. I just don't think it's going to be the
14 final say in this. So let's just get it going.

15 MR. STRAWBRIDGE: Again I think I set forth our
16 position. We're happy to meet and confer and we can submit
17 written submissions on this down the road.

18 THE COURT: That's fine. If you're thinking about
19 a trial date, that's my schedule. I would very much like to
20 try it next summer. I can go as far as up until January,
21 right?

22 MR. LEE: Summer would be terrific.

23 THE COURT: Summer would be terrific.

24 MR. LEE: Summer would be terrific for us.

25 THE COURT: People vacation here. They like it

1 here. It's hot in Texas.

2 MR. STRAWBRIDGE: Well, I live in Maine. I don't
3 vacation in Massachusetts in the summer. I understand the
4 Court's point. We'll come back to it. I do think that there
5 are issues that summary judgment is appropriate for. Why
6 don't we take it up with them and see if we can submit
7 something to the Court or not. We can circle back toward the
8 end of discovery.

9 THE COURT: Again I'm unencumbered by a lot of
10 that. It seems to me even if we can resolve a count or two,
11 it's not going to change the evidence. The evidence is going
12 to be what they did, right? The evidence of what they did
13 sort of goes to every count. Maybe your expert is going to
14 agree with their expert, but --

15 MR. STRAWBRIDGE: Or the other way around. Or
16 maybe where the dispute is is ultimately not legally
17 material. The reality is a lot of these cases in the past,
18 if not all of them, have been resolved on summary judgment.
19 I think it would be useful in this case. I'm happy to stick
20 to the schedule. I'm happy to have the Court take it under
21 advisement or use it to influence what evidence the Court
22 actually wants to hear from at trial.

23 THE COURT: I'd have to do a summary judgment-type
24 opinion after the trial on those issues that are purely legal
25 issues. It's not apparent to me what issues are going to be

1 purely legal at this point. So why don't you two confer.
2 We'll come back to it. If we're going to have a trial, I'd
3 love to do it next summer. I don't have any significant
4 trials scheduled over the summer because it's so hard to get
5 a jury.

6 MR. LEE: We'll meet and confer. Maybe by a week
7 from tomorrow, we can submit to Your Honor.

8 THE COURT: We're not in a big trial hurry on it.
9 If there was a trial as it stands right now, how long are you
10 all thinking it would be?

11 MR. LEE: Two to three weeks, I think, Your Honor.

12 MR. STRAWBRIDGE: Honestly I have not given it much
13 thought. I don't think it would be any shorter than that.

14 MR. LEE: Your Honor's trial days now are --

15 THE COURT: My preference is to try 10 to 4. I
16 will give you some say in that. I find that the 9:00 is
17 tough for the jurors to get in and park and everything else.
18 I tended to move it to 10. With just us, really whatever you
19 want. I do basically 10 to 4 and half day on Fridays.

20 MR. LEE: Two to three weeks could do it.

21 MR. STRAWBRIDGE: Maybe less if we narrow down some
22 of the issues. It's all premature at this point. Expert
23 reports are still not complete at this point.

24 MR. LEE: The plaintiff wanted to go slower than
25 the defendant.

1 THE COURT: I thought this trial would take longer
2 than two to three weeks to try. Even if we knock out a bunch
3 of the issues, it's going to take me longer to knock them out
4 than it's going to be to actually do the trial. I'm unlikely
5 to have a summary judgment opinion out two to three weeks
6 after you all file them. We may as well just try it.

7 MR. STRAWBRIDGE: Let's meet and confer and we'll
8 submit something.

9 MR. LEE: Thank you, Your Honor.

10 THE COURT: Everybody says they want trials. Trial
11 lawyers. Trials are fun and interesting. Summary judgments
12 are less fun and less interesting.

13 MR. STRAWBRIDGE: I think I've made our position
14 clear.

15 THE COURT: You have. So whenever you want to --
16 we don't have another status set, but if you all want to set
17 one after you get those submissions in -- I'm not going to
18 rush you. You're still in the middle of expert discovery, we
19 don't need to resolve this in the next week. If you want a
20 status on it or want to discuss that further.

21 MR. LEE: We'll work it out.

22 MR. STRAWBRIDGE: Okay.

23 MS. ELLSWORTH: Thank you, Your Honor.

24 THE CLERK: Court is adjourned.

25 (The Court adjourned at 4:33 p.m.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

- - - - -

CERTIFICATION

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/ Joan M. Daly

February 21, 2018

Joan M. Daly, RMR, CRR
Official Court Reporter

Date