

Judge Buchanan Justification - Extract

“First of all, I readily acknowledge that this order came out much later than it should have been. I don’t deny that; I own that – that is certainly true. And the parties are justifiably upset with me that it took so long. I understand everybody’s feeling about that.

“But I would like to have an opportunity to push back, at least partially, on what appears to be the developing narrative in the Defendants’ pleadings with respect to that. And I would ask that you take a couple of things into consideration. This case really is extraordinary in a lot of ways. The main one, in my judgment, being how long it has gone on. Mr. Pozner referred to asymmetric discovery. And, to a certain extent, that is certainly true, but the bottom line is this case started in 2012. By the time it went to its first contested evidentiary hearing in the form of a preliminary injunction, it was already three, three and a half years old. All of that happened before I arrived in Courtroom 275.

“By the time this case went to trial, it was five years old – in terms of the lawyers being involved, and the evidence, and so forth. It had only been filed three years previously, but in terms of how long the litigation has been going on, it was on the order of five. And I’ve reflected on that a number of times in this case, and I think that it had the following effect: every lawyer that has tried the same case more than once will tell you they did a better job the second time than they did the first time. And the third time may even be a charm. And I think what happened in this case was this case became extraordinarily refined and extraordinarily precise, and extraordinarily well-tuned by the time it was tried to me.

“And there are a couple of different aspect of that – the parties were shown all evidence by electronic... in electronic form. Images of documents – you know, obviously manuals, pictures, charts, everything else were cast on a wall, and I will tell you that I have over 600 pages of notes and there will be a notation that it’s exhibit, and I’ll list it, and I’ll say page whatever. And what I’m being asked to look at is a single paragraph on page 53 of a 250-page document, and it’s being suggested to me that this is really important. And then on cross examination, I’m redirected to page 76, then page 12, and so forth, and getting through the evidence in writing this order was an extraordinary challenge – much greater by order of magnitude than any challenge I’ve ever had as a judge before.

“And there was another aspect of this, which the trial lawyers may remember, which was that I asked them to give me hard copies of the exhibits because I’m kind of a hard copy guy to begin with, but more importantly I wanted to see them as the evidence developed; I wanted to see notebooks of their exhibits. And so they did that, and what happened was that I would get... I would give the Plaintiff’s exhibits for week one of the trial, and the Defendants’ exhibits; and then Plaintiff’s exhibits for the first three days of the second week, and vice versa, and I went back and forth. Which, at the time, seemed like a good

idea, but in writing the order I realized it was an absolute disaster because what you had to remember or figure out was which day the evidence came in order to go to the right notebook, and I spent an awful lot of time just pawing through and being very frustrated by the organization of the exhibits, which again, I had invited, I don't blame anyone for that. The saving grace is that there was in fact a transcript, and I could go back and get my bearings with the transcript. Those are all things that normally my handwritten notes are adequate to do, but that was a particular challenge.

“The other thing I would mention is that I'm sure you're familiar with the limited resources of a trial judge in Colorado. In civil court, I have a single administrative person, a CJA, and a single law clerk. My law clerks have always been frantic because they have so many different things that they have to keep up in the air. And attempting to do an order of this magnitude is an extraordinary challenge.

“And I started off trying to take the people, or the parties' submissions, proposed findings of fact, conclusions of law, of which, according to my calculations, there are a total of 412 pages of. And I started trying to meld them in some way; to piece together the parts that I liked from each one. And I realized probably too late in the process that was a fool's errand, as I just wasn't getting it put together.

“And actually fairly late in the case, I decided that I would use the State's Proposed Findings of Fact, Conclusions of Law as a starting point. And I address this because there is a portion of the Defendants' submissions in these motions that suggest that I simply bought them wholesale. And I want to assure the parties that I simply did not. I checked every paragraph; I checked every citation; I wanted to make sure that I was comfortable with it, and I was very careful about that – probably too careful, because it's incredibly time consuming.

“In terms of the actual time spent on this order, it was many hundreds of hours. I took a previously... again, initially, I tried to do this an hour here, an hour there, a Saturday afternoon, and that sort of thing, and that's... after a time, it became very clear that was not going to get the job done. And so, I eventually took large blocks of time; I took a... what I characterized as a staycation back in October of 2019, I believe it is, and I've taken three since – three one-week staycations to work on this order.

“The last one being in the first or second week of August of this year. And I will tell you the reason that I chose the State's Proposed Findings of Fact, Conclusions of Law is this: It was simply more granular, it was simply more focused, and it was organized in a way that made sense to me ultimately. By which I mean a given paragraph tended to focus on one issue and one issue alone, and allowed me to review the evidence from that standpoint and conclude whether I wanted that paragraph in, out, edited, however. The Defendants' Findings of Fact, Conclusions of Law I found much more... I'm going to characterize it as adversarial, in the sense that it's an extraordinarily well-drafted

document, as all of the documents have been in this case, but it is much more of a piece of advocacy than the State's Proposed Findings of Fact, Conclusions of Law. In other words, the... and the organization was different; it was difficult for me to follow, and again, this business... the reason I mentioned the five years in the making is that you could write a document like that and it's extremely... it may actually be extremely, completely accurate, but it loses nuance, it loses detail, it loses some of the issues that you see if you watch them come in piece by piece and brick by brick.

"And it took me a long, long time to get through those Findings of Fact, Conclusions of Law and feel like I had done them justice to have looked at everything. And ultimately what I did was I used the State's Findings of Fact, Conclusions of Law as the starting place, but I tried to use the Defendants' as a checklist of the things that I needed to be sure to look at, and think about, and so forth.

"Now, I know that explanation is probably not very satisfying to anyone, and frankly I feel like I'm whining.

"Mr. Pozner referred to the saying: 'Oy'. I feel like I'm whining, and I don't mean to. But I think at this distance, and at this... the tremendous amount of time and effort that's been put in on this case on all sides, and obviously the parties worrying about it. I think you're entitled to know everything that I've said; that I just wanted you to understand where it came from, and why it took the time that it did.

"If I had it to do over, believe me, I would do things a lot differently. And I would get going on things a lot earlier, and spend a lot more... a bigger block of time earlier and try to get the thing done earlier. I'm not asking anybody to react to that in any way. If you want to say something on the record you're certainly entitled to, but I want to... I did want to take an opportunity to explain that."