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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In re: **Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate those Performances (Web V)**	**Docket No. 19-CRB-0005-WR (2021-2025)**

SOUNDEXCHANGE'S CORRECTED REPLIES TO GOOGLE'S AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

November 10, 2020

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SoundExchange respectfully submits the following reply to Google's Proposed Findings of Fact and Conclusions of law.

I. INTRODUCTION

Response to ¶ 1. Despite Google's attempt to turn its Introduction into a series of evidentiary paragraphs, it still appears to violate the Judges' requirement that "participants shall file no . . . substantive introductions." *See* Sept. 23 Order Establishing Requirements for Post-Hearing Submissions at 2 ("Order"). Substantively, it misses the mark as well, for all of the reasons discussed in this reply.

Response to ¶¶ 2-9. SoundExchange incorporates its response to ¶ 1 *supra*.

II. GOOGLE HAS NOT SUPPORTED ITS PROPOSED RATES AND TERMS FOR COMMERCIAL, NONSUBSCRIPTION SERVICES

Response to ¶ 10. This proposed finding should be stricken for failure to cite to the hearing record or applicable law. *See Order* at 1-2; 37 C.F.R. § 351.14(c). In any event, SoundExchange's response to Google's proposed commercial rate and its supposed merits are discussed in the paragraphs below.

A. The Judges Have Employed Both Benchmarking and Modeling Approaches in the Past and Either May Be Used When Warranted by the Record.

Response to ¶ 11. This proposed finding of fact should be stricken, as it fails to cite to the hearing record. *See Order* at 1; 37 C.F.R. § 351.14(c). In addition, it is not correct to say the Judges have preferred benchmarking approaches over analytical approaches. *See infra* Resp. to ¶¶ 13-20.

Response to ¶ 12-13. No response.

Response to ¶ 14. The Judges have found benchmark-based approaches useful in the past. *See, e.g.*, *Web IV*, 81 Fed. Reg. at 26326. But SoundExchange does not understand the Judges to have expressed a preference of benchmarking over other approaches, such as modeling. Instead,

the Judges assess each type of analysis on its merits, as established by the record in each case. *See SDARS III*, 83 Fed. Reg. at 65231.

Response to ¶ 15. There is no hard-and-fast rule that the Judges will only look to modeling analysis if there is no sound benchmark available. Google cites to *Web IV* and *SDARS II* in support of its suggestion to the contrary. In *Web IV,* however, NAB's expert had proposed a zone of reasonableness, bounded only by "guide posts" that were "*not* market rates." *Web IV*, 81 Fed. Reg. at 26391. The NAB's "guideposts" certainly did not present the type of sophisticated modeling analysis offered by Professor Willig in this case. Nor does the Judges' decision in *SDARS II* establish such a rule—it simply noted that the Nash Framework, presented there "without real-world data," was not useful corroboration for Music Choice's proposed rates. *See SDARS II*, 78 Fed. Reg. at 23058.

Response to ¶ 16. *See supra* Resp. to ¶ 15.

Response to ¶ 17. Both benchmarking and modeling approaches can be useful and economically rational, as the Judges' use of both in the past recognizes. *See, e.g.*, *Web IV*, 81 Fed. Reg. at 26383-84 (employing benchmark analysis); *SDARS III*, 83 Fed. Reg. at 65231 (employing opportunity cost modeling analysis); *Phonorecords III*, 84 Fed. Reg. 1918, 1947 (Feb. 5, 2019), *affirmed in part and vacated in part*, *Copyright Royalty Bd. v. Nashville Songwriters Ass'n Int'l*, No. 19-1028 (Aug. 11, 2020) (employing Shapley Value modeling analysis).

Nor do the results of Professor Willig's modeling suggest otherwise. The fact that the royalty rates for [redacted] ad-supported service are lower than Professor's Willig's proposed statutory rates reflects the discount that [redacted] receives for its conversion record—it is perfectly rational that a record company would agree to a lower rate for a proven subscription funnel than for a statutory service. *See* Ex. 5603 ¶ 72 (Orszag WRT); SX PFFCL ¶¶ 178-88.

Response to ¶¶ 18-19. No response.

Response to ¶ 20. The Judges' past precedent does not dictate whether they should apply a benchmarking or modeling approach here. *See supra* Resp. to ¶ 15. Rather, the Judges should evaluate and apply each approach on its merits.

B. Dr. Peterson Improperly Used [ ] Ad-Supported Rates as a Benchmark.

Response to ¶ 21. No response.

Response to ¶ 22. The interactive market is a suitable starting place for a benchmarking analysis. *See Web IV*, 81 Fed. Reg. at 26353; SX PFFCL ¶ 87. But subscription interactive services are a better starting point than ad-supported interactive services, for the reasons discussed in the following responses and elsewhere. *See* Resp. to ¶¶ 23-25; SX Reply to JPFFCL ¶¶ 19-43.

Response to ¶ 23. Consumer willingness to pay can be expressed in different ways. Consumers that subscribe to a service pay for it out of pocket, whereas consumers of ad-supported services pay with their time spent listening to ads. *See* 8/12/20 Tr. 1548:18-22 (Orszag); *see also* SX PFFCL ¶ 159. Were it the case that ad-supported listeners had no willingness to pay, then ad-supported services would also have no willingness to pay—and that is clearly not the case. Ex. 5602 ¶ 90 (Orszag WDT). The fact that willingness to pay takes different forms is no barrier to using subscription interactive services as a benchmark. *See* SX PFFCL ¶ 160. The benchmark analysis in question must simply apply an interactivity adjustment calculated using the revenue of noninteractive ad-supported services—thus reflecting their particular willingness to pay. SX PFFCL ¶ 160; Ex. 5602 ¶ 91 (Orszag WDT). And that is what Mr. Orszag did. SX PFFCL ¶ 160; *see also, e.g.*, 8/11/20 Tr. 1241:23-1242:14 (Orszag).

Response to ¶ 24. Absent a proper adjustment, [ ] ad-supported service is a poor benchmark for statutory ad-supported services, because [

[redacted]—a fact that Dr. Peterson fails to take into account. SX PFFCL ¶ 177; *see also* SX PFFCL ¶¶ 178-88. [redacted] Ex. 5609 ¶ 23 (Harrison WDT); SX PFFCL ¶ 183. [redacted] without the proven track record of [redacted] successfully converting ad-supported users to the more valuable subscription tier. Ex. 5603 ¶ 72 (Orszag WRT); *see also* SX PFFCL ¶ 181.

The effective per-play rates calculated by Dr. Peterson and recited in this paragraph do not include his calculation of the per-play value for advertising credits of approximately [redacted] per play. Ex. 1103 ¶ 74 & Fig. 2 (Peterson AWDT).

Response to ¶ 25. Mr. Orszag's use of Spotify's subscription rates as a benchmark does not run counter to the Judges' decision in *Web IV*. *See* SX PFFCL ¶¶ 157-66. Unlike Professor Rubinfeld's analysis in *Web IV*, Mr. Orszag captured ad-supported listeners' non-zero willingness to pay by taking into account the revenue earned by ad-supported services in his interactivity adjustment, thus addressing one of the Judges' concerns in *Web IV*. SX PFFCL ¶¶ 158-61; *see supra* Resp. to ¶ 23; *accord* 8/11/20 Tr. 1248:19-1249:12 (Orszag). In addition, the record in this case reveals increasing substitution between subscription interactive services and ad-supported noninteractive services, affirming the use of subscription interactive services as a benchmark. SX PFFCL ¶¶ 162-63; *see, e.g.*, Ex. 5056 at 26; Ex. 5061 at 2; Ex. 5062 at 5; *see also* SX PFFCL ¶ 165 (discussing survey evidence from Sirius XM and SoundExchange consistent with this phenomenon). SoundExchange's further responses on this point—including its explanation of the appropriateness of Mr. Orszag's application of ration equivalency—are discussed in detail in its Reply to the Services' Joint PFFCL. *See* SX Reply to JPFFCL ¶¶ 19-56.

C. Dr. Peterson's Benchmark Adjustments Rest on Stale Evidence and Faulty Assumptions

Response to ¶ 26. The Judges have made adjustments to benchmarks in the past where necessary. *See Web IV*, 81 Fed. Reg. at 26404-05. But not every adjustment applied in *Web IV* is warranted here. In particular, based on substantial changes in the market for licensing recordings to interactive services since the time of *Web IV*, and the new evidentiary record presented in this proceeding, no competition adjustment is necessary. *See* SX PFFCL ¶¶ 73, 259-493. In addition, [ ] ad-supported service cannot be used as a benchmark without an upward adjustment to account for its proven ability to promote sales of subscriptions. *See Id.* at ¶¶ 177-88.

Response to ¶ 27. No response.

Response to ¶ 28. Google's proposed rates are not "reasonable," for all of the reasons described in this Reply. In addition, [ ]. *See id.* ¶¶ 206-08. [ ]. *Id.*; 8/11/20 Tr. 1408:25-1409:13 (Orszag); Ex. 5610 ¶ 14 (Harrison WRT). [ ]. SX PFFCL ¶ 207; Ex. 5610 ¶ 12 (Harrison WRT). [ ] are uninformative for the purpose of setting the statutory rate.

1. Dr. Peterson's Interactivity Adjustment Does Not Accurately Capture the Incremental Value Placed on Interactive Functionality and Is Improperly Influenced by the Statutory Rate

Response to ¶ 29. Google lacks support for its sweeping claims that interactive services "have a greater willingness to pay for sound recording licenses" and that "licensors expect higher rates from interactive licenses than non-interactive licenses." Those claims rest on: (1) a paragraph

from Dr. Peterson's written testimony, which itself contains no citations, Ex. 1103 ¶ 52 (Peterson AWDT); (2) a portion of Dr. Peterson's trial testimony in which he noted that [redacted]," 8/25/20 Tr. 3648:8-16 (Peterson); and (3) a statement from one label witness agreeing that [redacted], 9/3/20 Tr. 5691:9-16 (Harrison). Google takes these three pieces of evidence to "mean[] that negotiated rates in the interactive market are higher than those to which a willing buyer and seller would agree in the interactive market." Google PFFCL ¶ 29. This generalization sweeps too broadly, as discussed *infra* in SoundExchange's response to ¶ 30.

Response to ¶ 30. Google's assertion that "consumers place value on . . . increased functionality" is unsupported, backed up by a single paragraph from Dr. Peterson's written testimony, which largely describes the functionality of [redacted] mobile shuffle tier and says nothing about how consumers value that or other interactive functionality. *See* Ex. 1103 ¶ 45 (Peterson AWDT). Similarly, Google fails to provide evidentiary support for its argument that interactive streaming creates a risk of cannibalization, relying simply on Dr. Peterson's testimony that [redacted] 8/25/20 Tr. 3648:11-14 (Peterson).

In reality, both the value that consumers place on interactivity in the downstream market, and the opportunity cost to the sellers, are factual issues that must be determined for each service and cannot simply be assumed. As SoundExchange has demonstrated, [redacted], SX PFFCL ¶¶ 215-23, and [redacted] ability to upsell its ad-supported users makes it net promotional, *id.* ¶¶ 177-88. Dr. Peterson's failure to

consider these facts led him to calculate an interactivity adjustment that is divorced from marketplace reality. *See infra* Resp. to ¶¶ 33-34.

Response to ¶ 31. Dr. Peterson's interactivity adjustment may be less than the Judges' interactivity adjustment for subscription services in *Web IV,* but *Web IV* involved a different record and different benchmarks. *See* 81 Fed. Reg. at 26404. The adjustments there do not provide useful information about what adjustments are necessary if [redacted] ad-supported service is used as the benchmark.

Response to ¶ 32. No response.

Response to ¶ 33. Dr. Peterson's novel interactivity adjustment—which bears no resemblance to the approach accepted by the Judges in prior cases—is doubly flawed because it entirely fails to capture the value (or lack thereof) placed on the functionality by downstream consumers and is influenced by the statutory rate. SX PFFCL ¶¶ 227-39.

On the first point, the Judges have accepted in past cases that interactivity adjustments should be based on downstream market value evidenced by consumers' willingness to pay for the functionality. SX PFFCL ¶ 229 (citing *Web IV*, 81 Fed. Reg. at 26345, 26348; *Web II*, 72 Fed. Reg. at 24092). Here, there is no evidence that consumers value the additional functionality that Pandora obtained under its direct licenses—[redacted]. *Id.* ¶ 231. Specifically, Dr. Peterson cannot say whether this increased functionality generated more revenue per-play on the ad-supported tier, which is the relevant question. SX PFFCL ¶ 232; 8/11/20 Tr. 1401:1-4 (Orszag). Indeed, the record suggests the [redacted], rendering it inapposite for determining its value on a purely ad-supported service. SX PFFCL ¶¶ 235-36.

Google also claims that, because Dr. Peterson's interactivity adjustment supposedly represents what [redacted] paid for non-statutory functionality, "it is not meaningfully influenced by the statutory rate." That argument makes no sense. The adjustment turns on the statutory rate. Far from the "virtue" Dr. Peterson claimed it to be, 8/25/20 Tr. 3646:10-13 (Peterson), the Judges have explained that the hypothetical marketplace should be free of the influence of compulsory statutory licenses. *Web II*, 72 Fed. Reg. at 24087. Dr. Peterson's interactivity adjustment violates that principle.

Response to ¶ 34. Whether Peterson's interactivity adjustment is "conservative" or not turns not on Google's vague comparison of the functionality of [redacted] ad-supported service and Pandora's ad-supported service, but rather on data from the market about how consumers value the functionality—data that Dr. Peterson never considered. SX PFFCL ¶¶ 229-34. And SoundExchange has never suggested a "standalone" interactivity adjustment of any particular level. SoundExchange's experts have always based proposed interactivity adjustments on specific and detailed revenue and royalty data from the benchmark and target markets. *E.g., Web IV*, 81 Fed. Reg. 26337-39. Indeed, SoundExchange does not know what Google means by a "standalone" interactivity adjustment, because interactivity must always be evaluated based on the specific service and market in question.

2. Dr. Peterson's Competition Adjustment Is Unnecessary and Relies on Stale Evidence

Response to ¶ 35. Rates negotiated in a market with complementary oligopolists can reflect effective competition. *See* SX Reply to JPFFCL ¶¶ 12-14. From an economic perspective, and as the Judges have held, the key question is whether must-have suppliers and counterparties have roughly equal bargaining power. *Id.*; SX PFFCL ¶¶ 267-72.

Although Dr. Peterson offered some contrary and conclusory testimony, 8/25/20 Tr. 3652:21-3653:2 (Peterson), his analysis illustrates that it is necessary to examine both sides of a transaction when assessing whether the transaction reflects effective competition. *See* Ex. 1103 ¶¶ 34-35 (Peterson AWDT) (recognizing that effective competition can entail "*ability* of streaming services to, at least, reduce performances of recordings with high royalty rates and increase performances of recordings with lower rates." (emphasis added)); Ex. 1105 ¶ 66 (Peterson AWRT) (discussing effect of impasse on both sides of negotiation); *see also* Google PFFCL ¶ 39 (acknowledging that the ability to steer is a marker of effective competition).

Moreover, because Dr. Peterson [redacted] had roughly equal bargaining power to the [redacted] in negotiating the relevant agreements. For reasons laid out elsewhere, and at length, [redacted] and rates in the agreements reflect effective competition. *See, e.g.*, Ex. 5602 ¶ 113 (Orszag WDT); *see also* SX PFFCL ¶¶ 259-493; SX Reply to JPFFCL ¶¶ 7-18, 57-161.

Response to ¶ 36. The proposed finding is not informative. *First*, Google paints a misleading portrait of record company incentives and market outcomes by assuming away the existence of countervailing market power. *See* SX Reply to JPFFCL ¶¶ 12-13, 64. An appropriate conceptual model of the recorded music industry must reflect incentives created by the relative bargaining power that sellers bring to a negotiation, rather than focusing myopically on the fact that major record companies have complementary catalogues. *Second*, Google paints a misleading portrait of record company incentives and market outcomes by detaching its discussion from the record in this case, which illustrates that [redacted]

[redacted], SX PFFCL ¶¶ 297-456, and also illustrates that the Services' theory [redacted], SX Reply to JPFFCL ¶¶ 151-156.

Response to ¶ 37. Although SoundExchange agrees that the Majors are must-have for interactive services in the long-term, Dr. Peterson's analysis of consumer expectations is conclusory and also incorrect in two respects. First, the record suggests that consumer expectations may be driven by the availability of hits, [redacted]. *See id.* ¶ 16. Second, and relatedly, the expectation that any song can be played on demand may be sufficient to establish that the major labels are must have for a service, but is not necessary. That point is demonstrated by record evidence indicating that the Majors are also must haves for noninteractive services, where consumers expect to have access to the major labels' catalogs but not to be able to select songs on demand. *See* SX PFFCL ¶¶ 583-609.

Response to ¶ 38. Complementary oligopolists can compete for sales, for example through steering. SX Reply to JPFFCL ¶¶ 14-17. In this case, the record demonstrates that [redacted]. SX PFFCL ¶¶ 421, 423, 433, 442, 443; *accord* ¶¶ 398-404, 412-456. [redacted] relative bargaining power, establish that the agreements are consistent with effective competition. SX PFFCL ¶¶ 259-486.

Response to ¶ 39. According to Google, Dr. Peterson attempted to "replicate" the ability to steer with his competition adjustment. But there is no need to replicate this dynamic—it is already incorporated into the rates, because [redacted], *id.* ¶¶ 346-397; 8/19/20 Tr. 2868:20-25 (Shapiro), [redacted]. *See* SX Reply to JPFFCL ¶ 105; SX PFFCL ¶¶ 398-456; *see also*

infra Resp. to ¶¶ 47-49. Additionally, Google states that the ability to steer "means that licensors must compete to make sales, *at least* at the margin." Google PFFCL ¶ 39 (emphasis added). In this regard, Google acknowledges that the ability to steer can create broad steering-based price competition. And the record confirms that [[redacted]]. *See* SX Reply to JPFFCL ¶ 17.

Response to ¶ 40. Dr. Peterson's competition adjustment is "in line" with the steering adjustment adopted in *Web IV* for subscription services, in the sense that it relies on evidence from *Web IV*. *See* SX PFFCL ¶ 490. But Dr. Peterson failed to consider changes in the market since the time of *Web IV*, including the growing size and influence of interactive services, the growing ability of the services to influence market share, and the decline in royalty rates, all of which would dictate a far smaller competition adjustment assuming (against what SoundExchange believes to be the substantial weight of the evidence) that any adjustment was necessary. *See* SX PFFCL ¶¶ 491-93; *see infra* Resp. to ¶ 44.

Response to ¶ 41. Dr. Peterson's competition adjustment is based on evidence that cannot reasonably be called "market-based data." His lower bound is set by a 2014 agreement that has long since expired. *Cf.* Ex. 5083 at 1 ([[redacted]]). And his upper bound is set by a litigation experiment, also many years out of date. *See* Ex. 1103 ¶ 65 (Peterson AWDT). These data points are no longer relevant and do not reflect current market circumstances. SX PFFCL ¶ 491.

Response to ¶ 42. Google does not even attempt to argue that the agreements on which Dr. Peterson relies for his competition adjustment represent current market conditions. Google's attempt to explain away this deficiency in Dr. Peterson's analysis rests on speculation. *See* Ex. 1103 ¶ 37 (Peterson AWDT) (asserting, without citation, that the absence of "recent examples" of

steering provisions "is perhaps because" labels are now aware they could be used to lower rates, "which has created a chilling effect"); 8/25/20 Tr. 3670:3-3671:10 (Peterson) ([ ]).

Response to ¶ 43. Google tries to blame SoundExchange for the lack of more recent agreements by selectively quoting Exhibit 2113, in which SoundExchange acknowledged the fact that direct licenses might be used as evidence in the *SDARS III* rate-setting proceeding. In the next breath, however, SoundExchange also acknowledged that direct licenses "might be attractive to some labels." Ex. 2113 at 2. SoundExchange went on to say that SoundExchange "is not opposed to direct licenses" and "certainly won't treat anyone less favorably if they enter into such licenses," that "[w]hether to enter into a direct license with Sirius XM is entirely your decision," and that SoundExchange "does not advise record companies about what is best for their individual businesses." *Id.* The theme of the document was that "rights owners can and should strike whatever deals make sense for them" and "should be fully informed in their decision-making." *Id*. Indeed, SoundExchange offered to assist any label that entered into a direct license by administering the license for them, as long as the artists received their 50% share. *Id.*

Response to ¶ 44. Dr. Peterson's competition adjustment is not necessary and certainly not conservative. *First,* as a matter of economics, and as the Judges have previously held, a reasonable ability to steer can result in rates consistent with effective competition. *See* SX Reply to JPFFCL ¶¶ 12, 64; SX Reply to Sirius XM PFFCL ¶ 59. In this case, the record indicates that [ ] resulted in rates consistent with effective

competition.[1] *See* SX PFFCL ¶ 297-482; 8/11/20 Tr. 1211:23-1213:22, 1347:14-1348:4 (Orszag). *Second,* Dr. Peterson's "market data" remains stale and says nothing about prevailing market conditions. *See* SX PFFCL ¶ 491. *Finally*, [ ]. *See infra* Resp. to ¶ 76.

Again, Dr. Peterson's proposed competition adjustment fails to consider the changes in the market since *Web IV* and the different record in this case. For example, in *Web IV*, the interactive service benchmark analysis was based on the rates paid by a number of different services (rather than just one) and the 12% steering adjustment applied to all of them. SX PFFCL ¶ 492. Assuming for the sake of argument that an adjustment was deemed necessary, to apply Dr. Peterson's methodology [ ]. *Id.*; 8/11/20 Tr. 1190:1-8 (Orszag). To account for this, Mr. Orszag suggested [ ]. SX PFFCL ¶ 493; 8/25/20 Tr. 3837:10-24 (Orszag).

Response to ¶ 45. Mr. Orszag's opinion that the Benchmark Agreements were negotiated under conditions consistent with effective competition is supported by considerable evidence that was fortified at trial. SX PFFCL ¶¶ 297-486. As a result of its considerable countervailing bargaining power, [

[1] Dr. Peterson's passing reference to [ ] should be disregarded because he provides no record evidence to support his conjecture and elides the fact that [ ].

[redacted]]. *See id.* ¶¶ 398-404; 8/11/20 Tr. 1211:4-16 (Orszag).

Response to ¶ 46. Google's arguments are divorced from reality. Specifically, Google ignores the fact that [redacted]]. *See* 8/11/20 Tr. 1296:23-1297:21 (Orszag); 8/12/20 Tr. 1664:14-1665:7 (Orszag); SX PFFCL ¶¶ 302-04. [redacted]]. *Cf.* SX PFFCL ¶¶ 298-345; *cf.* 8/25/20 Tr. 3714:15-20 (Peterson) ([redacted]). The possibility that any record company would tolerate that outcome is a theoretical construct of the Services' economists, at odds with the views of the business people who actually negotiate agreements. SX Reply to JPFFCL ¶¶ 111-13. [redacted]]. Ex. 5609 ¶¶ 34-36 (Harrison WDT); Ex. 5611 ¶¶ 11-12 (Adadevoh WDT); Ex. 5613 ¶¶ 23-36 (Piibe WDT); *see also* SX Resp. to JPFFCL ¶¶ 109-129.

Response to ¶ 47. The only actual evidence that Google can muster on this point is [redacted]], SX PFFCL ¶¶ 388-391. Moreover, [redacted]]. *Id.* ¶¶ 392-395. [redacted]

[redacted]. SX PFFCL ¶¶ 386-87; SX Reply to JPFFCL ¶¶ 92-104.

Dr. Peterson's conceptual argument is also incorrect. In his written testimony, Dr. Peterson based his claim that must have record companies can neutralize steering on the fact that "parties to the negotiation recognize that the on-demand streaming services cannot survive long-term" without a license. However, that claim finds no support in law or economics. SX Reply to JPFFCL ¶¶ 12-14; 64. Moreover, the claim is flatly contradicted by evidence that the immediate consequences of a disruption in the relationship between Spotify or Apple Music and a record company would fall most heavily on the record company, [redacted].[2] SX PFFCL ¶¶ 298-345; *see also* SX Reply to JPFFCL ¶¶ 109-29.

Response to ¶ 48. *First,* [redacted] finds no support in law, economics, or the record. *See* SX Reply to JPFFCL ¶¶ 12, 68. Just the *threat* of steering—[redacted], *see, e.g.*, SX PFFCL ¶¶ 418-22, 435-36, 450-52—confers bargaining power and can drive rates consistent with an effectively competitive market. *See, e.g.*, *Web IV*, 81 Fed. Reg. at 26357 (quoting Professor Shapiro's written testimony); *see also* 8/11/20 Tr. 1211:23-1213:22, 1347:14-1348:4 (Orszag).

Second, evidence that [redacted]

[2] Recognizing that [redacted] presents a problem, Google grasps for another conceptual response. But its only support for [redacted] is Dr. Peterson's passing and conclusory reference at trial. Dr. Peterson did not ground that claim in any record evidence and overlooks a key point: That Services can use a credible steering to threat to [redacted]. 8/11/20 Tr. 1213:6-22 (Orszag).

[redacted]. *See* SX PFFCL ¶ 72. [redacted]. *See, e.g.*, *id.* ¶¶ 418-22, 435-36, 450-52.

Third, the [redacted]. *See* SX Reply to JPFFCL ¶ 68. [redacted]. *See* Ex. 4017 at 4; *accord* SX PFFCL ¶ 393 ([redacted]). In addition, [redacted]. *See* Ex. 5413 at 1; Ex. 5521 at 3; Ex. 5401 at 3.

[redacted]. *See* 9/3/20 Tr. 5564:7-13, 5565:9-15 (Adadevoh). [redacted]. *See* SX PFFCL ¶¶ 392-94; SX Reply to JPFFCL ¶¶ 70-71, 96-98 & n.20.

Response to ¶ 49. The fact that [redacted] strengthens the credibility of Mr. Orszag's opinion that Spotify has considerable ability to steer, for two reasons. *First*, the record reveals that [redacted]. *See* SX PFFCL ¶ 393. *Second*, the amount and nature of listening on playlists gives Spotify tremendous power to influence listening across

the platform, a point that Professor Waldfogel demonstrated empirically, *id.* ¶¶ 377-81, [ ], *id.* ¶¶ 363-369. In this regard, [ ].

Google's claim that [ ] is irrelevant. It is the ability to steer, and not actual steering, that dictates bargaining leverage. *Web IV*, 81 Fed. Reg. at 26356. In fact, the Judges have previously held that services can obtain the benefits of steering-based price competition without engaging in steering at all. *Id.* at 26367. And testifying economists, from both participant groups, have explained that the credible threat of steering (whether explicit or implicit) is sufficient to confer bargaining leverage. 8/11/20 Tr. 1211:23-1213:22, 1347:14-1348:4 (Orszag); *Web IV* 81 Fed. Reg. 26357 (quoting Shapiro WRT at 20). As a result, Google's point has no bearing on the critical question: [ ].[3] SX PFFCL ¶¶ 412-56.

Response to ¶ 50. Neither of Google's claims have merit. *First,* Google suggests the Judges disregard [ ]. This ignores the fact that [ ]

[3] Google's citations are also irrelevant, for reasons addressed elsewhere. *See* SX Reply to JPFFCL ¶ 69 (addressing Peterson testimony); ¶ 71 (addressing Adadevoh testimony); ¶ 71 (addressing Ex. 4014); ¶ 88 (addressing Harrison testimony); ¶ 91 (addressing Orszag testimony); SX PFFCL ¶ 394 n.16 (addressing Fowler testimony). Just by way of example, Dr. Peterson's suggestion that some record companies have not reported lowering royalties to undercut competition is irrelevant because price competition does not require one seller pricing below another. 8/12/20 Tr. 1737:9-16, 1738:12-23 (Orszag); 8/20/20 Tr. 3052:1-14 (Shapiro); *cf. Web IV*, 81 Fed. Reg. 26344.

[redacted]. SX PFFCL ¶¶ 306-482.

Second, Google suggests the Judges disregard [redacted]. Those [redacted] reflect the growing importance of all interactive services, but the more important point is that—as one might expect—the services that have [redacted] SX PFFCL ¶ 281.

Finally, Google mischaracterizes Professor Shapiro's testimony about [redacted]. Professor Shapiro testified that [redacted]. *See* 8/19/20 Tr. 2889:11-2890:5 (Shapiro) ([redacted]). [redacted] Mr. Orszag's Benchmark is based only on Spotify. SX PFFCL ¶ 287.

Response to ¶ 51. For reasons set forth in other proposed findings and responses, and at length, [redacted]. SoundExchange incorporates those proposed findings and responses here, SX PFFCL ¶¶ 470-82; SX Reply to JPFFCL ¶¶ 138-50, and notes that Google [redacted]

[redacted] in citing Exhibit 4026. *See* 9/2/20 Tr. 5265:5-11 (Piibe) ([redacted]); 9/2/20 Tr. 5323:14-5324:1 (Piibe) ([redacted]); *see also* SX Reply to JPFFCL ¶ 145 (noting that omitted portion of Exhibit 4026 illustrates [redacted]).

SoundExchange has also explained, in detail, why [redacted], SX PFFCL ¶¶ 478-82; SX Reply to JPFFCL ¶¶ 151-56, and reiterates that the [redacted]. SX PFFCL ¶¶ 416, 426-27, 431-32; *see also* 9/2/20 Tr. 5263:21-5265:17 (Piibe) (discussing Ex. 5469).

Response to ¶ 52. As SoundExchange explained elsewhere, Dr. Peterson's cursory Lerner analysis has no merit. SoundExchange incorporates that explanation by reference. *See* SX Reply to JPFFCL ¶ 157.

Response to ¶ 53. [redacted]. SX PFFCL ¶¶ 279-87. [redacted]

[redacted]

[redacted]]. *See* SX PFFCL ¶¶ 398-456; *accord supra* Resp. to ¶¶ 35-52.

3. Dr. Peterson's Proposed Skips Adjustments Are Overstated, Economically Unsound, and Unsupported by the Record

Response to ¶ 54. No response.

Response to ¶ 55. Both of Dr. Peterson's proposed skips adjustments are inappropriate for reasons discussed below. *See* Resp. to ¶¶ 56-57. Google does not explain its assertion that Dr. Peterson's skips adjustments are in line with the Judges' *Web IV* determination. The upper bound of Dr. Peterson's proposed adjustment is plainly not in-line with *Web IV* because it is [redacted] the *Web IV* adjustment and is based on a different methodology (Dr. Peterson uses skips data from the benchmark market instead of the target market). *See Web IV*, 81 Fed. Reg. at 26339.

Response to ¶ 56. Dr. Peterson's proposed [redacted] skips adjustment is not an upper bound—it is just wrong. SX PFFCL ¶¶ 246-47. [redacted]

[redacted]]. 8/25/20 Tr. 3774:19-23 (Peterson); SX PFFCL ¶ 246. Although Google claims that this upper bound calculation follows the "normal method," nothing supports that claim other than Dr. Peterson's *ipse dixit,* and it is contrary to the method adopted by the Judges in *Web IV*. *See Web IV*, 81 Fed. Reg. at 26339 & n.89.

In any event, a skips adjustment that only considers the benchmark market's skip rate—and not the target market's skip rate—is uninformative. If the target market's skip rate is lower than the benchmark market's skip rate, then a proposed skips adjustment based only on the benchmark market will be too large. SX PFFCL ¶ 247 (providing two hypotheticals to illuminate this point). There is no evidence to suggest that a statutory noninteractive ad-supported service

would have as large a skip rate as [ ] interactive ad-supported service. *See* SX PFFCL ¶ 247; Ex. 5603 ¶ 119 n.244 (Orszag WRT).

Response to ¶ 57. Even Dr. Peterson's "more conservative" [ ] skips adjustment is overstated. That adjustment—which Professor Shapiro proposes as well—is based on "radio" plays from all three tiers of Pandora's service. *See* 8/20/20 Tr. 3028:22-3029:2 (Shapiro); *see also* SX PFFCL ¶¶ 242-43. In other words, it also represents noninteractive plays on Pandora Plus and Pandora Premium. Ex. 5603 ¶ 120 (Orszag WRT); SX PFFCL ¶ 243. Because those tiers both have unlimited skips (making users of those services more likely to skip than ad-supported users), this skip rate is inflated. *See* SX PFFCL ¶ 243. Moreover, Dr. Peterson's failure to account for the fact that simulcast listeners cannot skip songs at all inflated his skip rate further. *Id.* ¶ 244.

D. Mr. Orszag Properly Highlighted, in Response to the Services' Testimony, Additional Potential Adjustments

Response to ¶ 58. Mr. Orszag's trial testimony relating to potential adjustments to Dr. Peterson's benchmark was proper. Indeed, Google's only objection to this testimony was overruled. *See* 8/25/20 Tr. 3810:12-17, 3815:11-21. The testimony was procedurally proper because it responded to rebuttal testimony by Professor Shapiro and the Judges' questions. It began with Mr. Orszag noting that Professor Shapiro's written rebuttal testimony had proposed a [ ] upward adjustment to the benchmark rates in the event that a promotion adjustment was deemed necessary. *See* Ex. 4107 at 42-43 (Shapiro WRT). In response to a question from Judge Strickler, [ ]. 8/11/20 Tr. 1381:20-1383:6 (Orszag). [ ]. 8/19/20 Tr. 2970:18-25 (Shapiro). In one of the later exchanges alleged by Google to be improper surrebuttal, Mr. Orszag noted that "[

[redacted]]" designed to adjust for the discounts given to [redacted] for its ad-supported service's success at conversion. 8/25/20 Tr. 3816:10-14 (Orszag). Mr. Orszag then went on to give his assessment of that proposed adjustment. 8/25/20 Tr. 3816:12-20 (Orszag). There is nothing improper here. And while Google suggests that Mr. Orszag's testimony on advertising benefits occurred during the economic rebuttal phase, the key part of it actually came during Mr. Orszag's direct examination. *See* 8/11/20 Tr. 1372:9-1373:5 (Orszag). Either way, it was well within the scope of Mr. Orszag's testimony—which is perhaps why Google did not object to it on either occasion. *See* 8/11/20 Tr. 1372:9-1373:5 (Orszag); 8/25/20 Tr. 3821:1-8 (Orszag).

SoundExchange responds to Google's substantive critiques of these potential adjustments in detail below. *See infra* Resp. to ¶¶ 60-69.

Response to ¶ 59. *See supra* Resp. to ¶ 58.

1. Dr. Peterson Failed to Adjust His Benchmark Rate to Account for [redacted] Conversion Record

Response to ¶ 60. Google again conveniently omits that the [redacted] adjustment to the ad-supported [redacted] rate originated in part from Professor Shapiro. *See* SX PFFCL ¶ 199. In his written testimony, Professor Shapiro suggested that, if the Judges concluded that an upward adjustment was necessary to account for conversion, [redacted]. Ex. 4107 at 42-43 (Shapiro WRT); SX PFFCL ¶ 200. At trial, he noted that [redacted], 8/19/20 Tr. 2970:18-25 (Shapiro); SX PFFCL ¶ 199, to account for the fact that [redacted] generally pays for its ad-supported service on a percentage-of-revenue, not per-play, basis, SX PFFCL ¶¶ 200-01. Google's criticisms of this adjustment are addressed below. *See infra* Resp. to ¶¶ 61-65.

Response to ¶ 61 (body). Google's critique that an adjustment must involve a comparative analysis of the conversion capabilities of [ ] versus statutory services is misplaced. [ ]. *See, e.g.*, SX PFFCL ¶¶ 183-88; Ex. 5609 ¶ 23 (Harrison WDT); Ex. 5611 ¶¶ 21-22 (Adadevoh WDT); *cf.* Ex. 1100 ¶ 30 (Fowler WDT).

The evidence that Google cites speaks to the intentions of other services, but not their results. While [ ] in converting users is undisputed, *supra* Resp. to ¶ 24; *see also* Ex. 5186, Pandora admits that "the conversion rate to one of our subscription products . . . is low." Ex. 4090 ¶ 28 (Phillips WDT). *See also* 8/6/20 Tr. 632:5-19 (Willig) (using Pandora public projections, [ ]. Simulcasters, of course, cannot convert at all. *See* Ex. 2160 ¶ 9 (Leonard CWRT).

Although Google cites to Professor Tucker's testimony, Professor Tucker was clear that free services tend to be substitutional because of the fact that "zero is a powerful anchor for consumers." Ex. 5604 ¶ 64 (Tucker WDT). Services must work hard to overcome this anchor, and it cannot be assumed that simply because a service offers an ad-supported tier, it has successfully implemented the incentives necessary to "nudge" users to become subscribers. 8/17/20 Tr. 2116:13-17 (Tucker). *See* SX Reply to Sirius XM PFFCL ¶ 248.

Response to ¶ 61 (footnote). To the extent Google is suggesting that, for some number of users, ad-supported [ ] substitutes for subscription [ ], that possibility is already baked into [ ] conversion rate. Nor does [ ]

[redacted]. *See* 9/2/20 Tr. 5188:20-5189:22 (Piibe).

Response to ¶ 62. Google's assertion that the "labels extract all value that they can [redacted]," and therefore did not give [redacted] a discount for conversion rests on speculation and is inconsistent with the record evidence cited above. Google's sole support for its claim are out-of-context quotes from two label witnesses (discussed below, *see infra* Resp. at ¶¶ 63-64) and Dr. Peterson's Lerner Equation analysis. According to Dr. Peterson, his Lerner Equation analysis showed that the labels are complementary oligopolists—and because they are complementary oligopolists, "they would be expected to extract as much as they can." *See* 8/26/20 Tr. 3948:5-17 (Peterson). This fails to connect what Dr. Peterson would expect with what actually happened. What actually happened, as Mr. Harrison testified, [redacted]. *See* SX PFFCL ¶ 416, 426.

Response to ¶ 63. Google misrepresents Ms. Adadevoh's testimony. [redacted] *See* Google PFFCL ¶ 63 (quoting Ex. 5611 ¶ 22 (Adadevoh WDT)). She said that, [redacted] Ex. 5611 ¶ 22 (Adadevoh WDT) (emphasis added). She went on to say that, [redacted] Ex. 5611 ¶ 22 (Adadevoh WDT). [redacted].

Response to ¶ 64. Google's representation of the facts is disingenuous. Google cites Mr. Harrison's trial testimony that [ ], 9/3/20 Tr. 5717:7-14 (Harrison), [ ]. *See* 9/3/20 Tr. 5748:4-9 (Harrison) [ ], 9/3/20 Tr. 5668:9-19 (Harrison), [ ] 9/3/20 Tr. 5710:11-19 (Harrison). [ ]. 8/25/20 Tr. 3845:11-16 (Orszag). Consequently, as Mr. Harrison explained, [ ] 9/3/20 Tr. 5710:11-19 (Harrison).

In any event, none of this relates to the question of whether [ ] The evidence is clear that it did. *See, e.g.,* Ex. 5609 ¶ 23 (Harrison WDT) [ ]

Response to ¶ 65. If anyone is internally inconsistent, it is Dr. Peterson. Dr. Peterson faults Mr. Orszag for using a ratio of headline per-play rates to adjust the effective per-play rates. But having just said that headline per-play rates are irrelevant because the percentage of revenue rates govern and underpin the effective rates, literally two minutes later Dr. Peterson turned around and himself suggested using the headline per-play rate [

[redacted] as the basis to account for [Spotify's] promotional value. 8/26/20 Tr. 3955:15-3956:6 (Peterson).

Mr. Orszag's use of the per-play rate ratio to adjust makes sense, because it offers a reasonable way to adjust the effective rates that [redacted] actually pays. Professor Shapiro agrees with Mr. Orszag. Professor Shapiro originally suggested just that, proposing to adjust effective rates using the ratio of the headline per-play rates of [redacted] Ex. 4107 at 42-43 (Shapiro WRT). Professor Shapiro later agreed that Mr. Orszag's modified implementation of that per-play ratio [redacted] was correct. 8/19/20 Tr. 2970:18-25 (Shapiro). Dr. Peterson's only proposed solution is to ignore the effective rates entirely, even though the foundation of his criticism of Mr. Orszag is that the effective rates are the rates actually being paid. 8/26/20 Tr. 3955:8-14 (Peterson).

Moreover, Dr. Peterson's proposed solution fails to take into account the fact that [redacted] is quite successful in converting consumers who have used the service for 24 months or more, *see* Ex. 5603 ¶ 75 (Orszag WRT) ([redacted]), and also fails to consider that some adjustment must be made for other conversion-related features of the [redacted] In his written testimony, Professor Shapiro offered that an adjustment "somewhat higher" than his original [redacted] Ex. 4107 at 42 (Shapiro WRT). He echoed this at trial. *See* 8/19/20 Tr. 2971:1-13 (Shapiro) ([redacted]). Dr. Peterson's suggestion that one might simply start with the [redacted] rate and look no further simply does not address [redacted] continued upselling after 24 months and [redacted]. In short, some percentage increase of the

effective rates is necessary if [redacted] ad-supported service is to be considered by the Judges as a benchmark, and using the ratio of per-play rates to do so is a proposal that makes sense in the opinions of both Professor Shapiro and Mr. Orszag.

2. Mr. Orszag's Benchmark Rate Should Be Adjusted to Account for Advertising and Marketing Benefits

Response to ¶ 66. Mr. Orszag observed in his written direct testimony that, "in theory, it would be appropriate to adjust [his] benchmark rates upward to account for the value of the non-rate compensation in the interactive market," including for advertising and marketing benefits. Ex. 5602 ¶¶ 171-72 (Orszag WDT); *see also* SX PFFCL ¶ 252. When Professor Shapiro and Dr. Peterson calculated the value of marketing and advertising benefits in their written direct testimony, Mr. Orszag accepted those calculations and noted that the result would be to raise his proposed per-play royalty rate by about $0.0001. *See* 8/11/20 Tr. 1372:9-1373:5 (Orszag); SX PFFCL ¶ 256.

Response to ¶ 67. *See infra* Resp. to ¶ 68.

Response to ¶ 68. The record companies derive significant value from [redacted]. *See* SX PFFCL ¶ 254. [redacted]. *Id.*; Ex. 5609 ¶ 71 (Harrison WDT). [redacted]—accordingly, UMG considers this to be additional monetary consideration not available under the statutory license. SX PFFCL ¶ 254; Ex. 5609 ¶ 71 (Harrison WDT).

Response to ¶ 69. Dr. Peterson and Professor Shapiro calculated and proposed adjustments based on advertising benefits. *See, e.g.*, Ex. 1103 ¶ 15(d) (Peterson AWDT); Ex. 4094, App. D

(Shapiro Second CWDT). Mr. Orszag merely accepted those calculations. It is odd, therefore, for Google to now blame SoundExchange for supposed difficulties in calculating such an adjustment. Quantifying the value of advertising benefits does require some judgment—but the Services' economists made those judgments and should not be able to walk away from them now that they have been accepted by Mr. Orszag.

E. The Judges Are Well Positioned to Resolve Disputed Issues in the Case

Response to ¶ 70. It is safe to say that after two rounds of written testimony, document and deposition testimony, and a lengthy trial including an opportunity for economic expert surrebuttal testimony, no one is hiding anything. Mr. Orszag and Professor Willig's analyses have been thoroughly explained in their written and oral testimony and do not require "leaps of faith." Dr. Peterson's benchmarking approach may avoid certain issues, but it raises others that Mr. Orszag avoids. For example, while Google claims that Dr. Peterson's benchmarking approach is "consistent with *Web IV*," that is not correct because Dr. Peterson eschews an interactivity adjustment based on the ratio equivalency concept adopted by the Judges in *Web IV*, in favor or an entirely new approach that ignores the value of interactivity in the downstream market. *See* SX PFFCL ¶¶ 227-239. Regardless, SoundExchange is confident the Judges can resolve any issues raised by the expert analysis in this case.

Response to ¶ 71. Google takes issue with Mr. Orszag's use of gross revenue and play data from [[redacted]]. This criticism is unfounded. Pandora accounts for over [[redacted]] of the total plays in the noninteractive market. SX PFFCL ¶ 650; Ex. 5600 ¶ 49 (Willig CWDT). [[redacted]]. *See* 8/25/20 Tr. 3643:4-15 (Phillips); Ex. 4090 ¶ 5 (Phillips WDT) (describing Pandora's ad-supported service as "fundamentally the same product it was at the time of the *Web*

IV proceeding"); *accord* Google PFFCL ¶ 33 (describing [ ] ad-supported service as "quite similar to a statutory service"). [ ]. SX PFFCL ¶ 651; *see, e.g.*, 8/5/20 Tr. 530:9-17 (Willig). [ ] 8/25/20 Tr. 3788:13-3789:4 (Peterson).

Assuming it is true that Pandora is better at monetizing its ad-supported service than other statutory services, that does not make it a poor proxy when setting a rate under a willing buyer/willing seller standard. As the Judges have said many times, a market rate will not necessarily be one that everyone can afford. *See, e.g., Web II*, 72 Fed. Reg. at 24088 n.8; *Web IV,* 81 Fed. Reg. at 26318, 26329.

Response to ¶ 72. Professor Willig's use of Pandora as a proxy is similarly reasonable. *See* SX PFFCL ¶¶ 650-56. Professor Shapiro did the same. 8/5/20 Tr. 530:12-17 (Willig). Given that his decision to use Pandora was based on its size in the industry and the availability of its data, he did not find it necessary to compare Pandora's financial performance to other noninteractive streaming services. *See* 8/10/20 Tr. 1101:24-1103:6 (Willig). Nor is it accurate to say that Professor Willig's analysis is sensitive to the level of service profits inputted in his model, provided profits per play are similar. *See, e.g.*, SX PFFCL ¶¶ 652-53; 8/10/20 Tr. 1137:18-23 (Willig). Google has no support for this claim, as it turns out. It first cites Dr. Peterson's testimony at trial that he didn't "have much to say" on Professor Willig's use of Pandora as a proxy and that he could just "refer back to [his] comments" from his "critique of Mr. Orszag's use of the Pandora

data." *See* Google PFFCL ¶ 72 (citing 8/25/20 Tr. 3736:5-11 (Peterson)). Google then cites eleven paragraphs from Dr. Peterson's written rebuttal testimony, ten of which are about the merger proxy issue, not the use of Pandora as a proxy. Ex. 1105 ¶¶ 122-31 (Peterson CWRT). The only paragraph Google cites that goes to the use of Pandora as a proxy says nothing about how sensitive Professor Willig's model might be to the use of other webcasters, Ex. 1105 ¶ 132 (Peterson CWRT). None of this establishes that Professor Willig erred in using Pandora as a proxy—or in using the merger proxy forecasts. *See* SX Reply to JPFFCL ¶¶ 283-86.

Response to ¶ 73. Mr. Orszag correctly applied the concept of ratio equivalency, for reasons discussed at considerable length elsewhere and incorporated here. *See* SX PFFCL ¶¶ 98-121; SX Reply to JPFFCL ¶¶ 19-56.

Response to ¶ 74. Professor Zauberman conducted a reliable survey, for reasons explained elsewhere in the participants' briefing and incorporated here. *See* SX PFFCL ¶¶ 712-30; SX Reply to JPFFCL ¶¶ 287-302. In any event, Professor Willig's model is robust to the results of Professor Hanssens' and Professor Simonson's survey as well. *See, e.g.*, SX PFFCL ¶¶ 710, 731. Professor Willig used Share of Ear data as corroboration in his written direct testimony. *See* SX PFFCL ¶ 622 (citing Ex. 5600 ¶¶ 56-57 (Willig CWDT)). Once the other surveys were available to provide that corroboration, however, it was no longer necessary. *See* 8/10/20 Tr. 1100:17-23 (Willig).

Response to ¶ 75. The testimony of the fact witnesses, and the documentary evidence that supports their testimony, is not genuinely contested. No fact witness for the Services took issue with the accounts by SoundExchange fact witnesses regarding negotiations with interactive services. Their testimony is "contested" only by the theories of the Services' economists who had no involvement in the events. Mr. Orszag's conclusion that a competition adjustment was unnecessary is reasonable and supported by the record evidence. That evidence is discussed at

length elsewhere. *See* SX PFFCL ¶¶ 259-493; SX Reply to JPFFCL ¶¶ 57-161; *see also* SX Reply to JPFFCL ¶¶ 19-179. Nor does Dr. Peterson's use of the Lerner Equation establish an absence of effective competition, as addressed elsewhere. *See* SX Reply to JPFFCL ¶ 157.

Response to ¶ 76. Professor Willig's must-have specification is reasonable. *See* SX PFFCL ¶¶ 583-609; SX Reply to JPFFCL ¶¶ 185-216. While it originated from the Judges' decision in *Web IV*, in which they noted that "[t]here appears to be a consensus that the repertoire of each of the three Majors is a 'must have' in order for a noninteractive service to be viable," Ex. 5600 ¶ 31 (Willig CWDT) (citing *Web IV*, 81 Fed. Reg. at 26373), it is borne out in the record as well. *See, e.g.*, SX PFFCL ¶¶ 588-606.

The Services' evidence to the contrary is flimsy. [ ]. *See* SX PFFCL ¶¶ 852-962. [ ]. *See, e.g.*, Ex. 1100 ¶ 17 (Fowler WDT); Ex. 1101 ¶ 20 (Diab WDT). [ ]. *See* Ex. 5609 ¶ 41 (Harrison WDT). [ ] Ex. 1100 ¶ 28 (Fowler WDT). [ ]

[redacted]. *See* 9/1/20 Tr. 4851:25-4852:5 (T. Fowler).

Google's baseless suggestion that the must-have specification is a "transparent effort" to reward labels for their market power ignores the fact that Professor Willig's model is not even sensitive to this specification. *See, e.g.*, SX PFFCL ¶¶ 699-709 (discussing Professor Willig's sensitivity scenarios, none of which apply his original must-have specification); *see also* Ex. 5601 ¶ 90, Fig. 16 (Willig WRT); *cf.* SX PFFCL ¶¶ 790-99 (explaining why the must-have specification does not require a competition adjustment).

Response to ¶ 77. Google's additional critiques of Professor Willig's model are equally unfounded. First, the Shapley Value model already takes steering into account, so there is no need for a separate steering input or adjustment. SX PFFCL ¶¶ 796-98; 8/10/20 Tr. 1079:5-17 (Willig). Because the Shapley Value model sets the characteristic function of each subset at its maximum, optimized value, it effectively takes the idea of a competitive determination of pricing to its end result. *See* SX PFFCL ¶¶ 796-97. That is apparent in its treatment of the "ultimate form of steering"—a record company blackout resulting in zero plays. *See* SX PFFCL¶ 798.

Second, the Shapley Value takes into account the fact that labels may lose plays when they remove their music from a noninteractive service. *See* SX PFFCL ¶¶ 833-40. Professor Willig recognized and incorporated the fact that about 50% of the Zauberman Survey respondents would "do something other than listen to music" if their noninteractive service became unavailable. *Id.* at ¶ 836. For respondents who selected only that option, he accorded them "zero opportunity cost" by treating them as if they had selected terrestrial radio (another non-royalty-bearing alternative). SX PFFCL ¶ 837; *see, e.g.*, 8/25/20 Tr. 3884:14-3886:3 (Willig). For respondents who said they would both "do something other than listen to music" and purchase CDs, vinyl, digital downloads,

or a new subscription, Professor Willig credited those purchases. SX PFFCL ¶ 838; *see also* SX PFFCL ¶ 638. And for respondents who said they would both "do something other than listen to music" and listen to services that generate royalties on a per-play basis, Professor Willig scaled those royalties using the Zauberman Survey's time allocation information. SX PFFCL ¶ 839. In other words, if a respondent indicated that she would spend 10% of her time on non-music options and 90% on per-play service, Professor Willig calculated royalties on the basis of the 90%, assigning the 10% no opportunity cost. SX PFFCL ¶ 839; *see also* Ex. 5600, App. E ¶ 16 (Willig CWDT); 8/25/20 Tr. 3885:21-3886:3 (Willig). Dr. Peterson acknowledged as much during the economic rebuttal phase, 8/26/20 Tr. 3969:1-9 (Peterson), directly contradicting his erroneous claim to the contrary during direct examination. 8/25/20 Tr. 3800:1-6 (Peterson); SX PFFCL ¶ 840.

Third, the Shapley Value model does not model "collusion," at least to the extent that that term has an anticompetitive meaning. SX PFFCL ¶¶ 800-18; *see, e.g.*, 8/5/20 Tr. 335:1-14 (Willig). As Dr. Peterson recognized, the Shapley Value model captures the fact that "parties can come together and form coalitions where they achieve together something that they cannot achieve on their own." 8/25/20 Tr. 3732:1-3 (Peterson). In Dr. Peterson's view, therefore, there is "this potential for collusion inside the Shapley Value model." 8/25/20 Tr. 3732:1-5 (Peterson). But the fact that parties can create additional value by working together does not mean that they are colluding. *See* SX PFFCL ¶ 802. As Professor Willig explained, the Shapley Value algebra does not represent record companies joining together to form, for example, a joint negotiating structure—rather, the modeled interactions are "individualistic among the labels themselves." 8/5/20 Tr. 337:5-11, 337:21-25 (Willig); SX PFFCL ¶ 805.

Response to ¶ 78. Google's sole support for its claim that the assumptions described above matter is that Professor Willig and Mr. Orszag's proposed rates are higher than unadjusted rates

for [redacted]. This outcome is not irrational or perverse. It follows naturally from the fact that [redacted] account for its unique ability to convert users to subscribers. *Supra* Resp. to ¶¶ 17, 24; Ex. 5603 ¶ 72 (Orszag WRT); SX PFFCL ¶¶ 178-88.

F. Google's Request that the Judges Protect Its Business Model Is Inappropriate

Response to ¶ 79 (body). This proposed finding should be stricken because it does not cite to the hearing record (with the exception of the footnote, discussed below). *See Order* at 1; 37 C.F.R. § 351.14(c). In any event, SoundExchange's rate proposal is dictated by evidence and expert analysis, and not a negotiating strategy.

Response to ¶ 79 (footnote). Google—apparently backing away from its request for a downward adjustment based on decreasing song length—suggests that its proposed rate reduction are "likely to be offset, at least partially, by an increase in the number of royalty-bearing plays." This conclusion is erroneous, for a number of reasons. Top playlists or stations often feature music from decades that predate the decline in song length observed by Dr. Peterson [redacted] and from different genres. *See* SX PFFCL ¶ 497; 8/11/20 Tr. 1463:23-1464:11 (Orszag); Ex. 5625 ¶ 34 n.21 (Ploeger WRT). In addition, services can modify the number of music minutes that they program—a service could use the time gained from decreasing song lengths to run longer ads or more ads, resulting in higher revenues and profits. SX PFFCL ¶ 496; Ex. 5603 ¶ 129 (Orszag WRT). In any event, [redacted]—it would be improper to view it as somehow compensating for a too-low rate. SX PFFCL ¶ 495; Ex. 5603 ¶ 128 (Orszag WRT); 8/11/20 Tr. 1463:13-17 (Orszag).

Response to ¶ 80. Google claims that "SoundExchange and its members have done extremely well financially" during the past five years. Although in recent years, the record labels

have been reversing the sharp revenue decrease associated with the drop off in physical sales and digital piracy, revenues have not returned to their historical highs. *See* Ex. 5604, App. 1 (Tucker WDT). And, of course, record labels are not the only recipients of statutory royalties—many artists depend on statutory royalties as an important part of their livelihood, and for the great majority of artists, there is no easy street. *See* SX PFFCL ¶¶ 1306-07; Ex. 5621 ¶¶ 11-14 (Hair WDT); Ex. 5623 ¶¶ 21-23 (Gauthier WDT).

Response to ¶ 81. [redacted]. (It makes no such claim about Google as a whole, of course.) Google suggests—[redacted]—that "[t]urning a profit on an advertising-based statutory streaming service is extremely difficult." Nevertheless, [redacted]. *See* SX PFFCL ¶¶ 1324-25 (citing *Phonorecords III*, 84 Fed. Reg. at 1921, 1927; Ex. 5604 ¶¶ 53, 79 (Tucker WDT)). Google, so vast that it is the subject of Congressional inquiry, has no need to be in the music business and would not be in the music business if it saw no benefit.

Response to ¶ 82. No response.

Response to ¶ 83. The fact that Pandora, iHeartMedia, and Google may consider using ad-supported services to funnel consumers in subscription services does not tell us anything about the scale or effectiveness of that funneling (also referred to as conversion). Indeed, we know that Pandora has limited success with funneling. *See* Ex. 4090 ¶ 28 (Phillips WDT) ("The conversion rate to one of our subscription products, however, is low."). There is no evidence, in other words, of the "importan[ce]" of statutory streaming services to the subscription funnel in general.

Critically, Professor Tucker explained that free services tend to be substitutional because of the fact that "zero is a powerful anchor for consumers." Ex. 5604 ¶ 64 (Tucker WDT). Services

must work hard to overcome this anchor, and it cannot be assumed that simply because a service offers an ad-supported tier, it has successfully implemented the incentives necessary to "nudge" users to become subscribers. 8/17/20 Tr. 2116:13-17 (Tucker). *See* SX Reply to Sirius XM PFFCL ¶ 248. Ad-supported services, therefore, are not necessarily "an important part of that funnel." They may, in fact, be more substitutional (because they are considered free by the users) than promotional (something the service will achieve only if it works hard to overcome the free anchor).

Response to ¶¶ 84-86. No response.

Response to ¶ 87. Google does not quantify what percentage of its subscribers were converted to its subscription services from its ad-supported services. *See* Ex. 1102 ¶ 16 (Agrawal WDT) (noting that subscriber growth was "due in part to the role played by the ad-supported services"). Indeed, it is unlikely that the Hardware Audio Tier played a major role in Google's subscriber growth, at least at the time of Mr. Fowler, Mr. Diab, and Mr. Agrawal's written testimony, as it had only launched five months before. *See* Ex. 1100 ¶ 19 (Fowler WDT).

Response to ¶ 88. Google has not established that [ ]. Mr. Diab testified [ ] Ex. 1101 ¶ 21 (Diab WDT). Nor does Mr. Diab's cited trial testimony establish this point, as he simply explained that [ ] 9/1/20 Tr. 4886:10-4887:4 (Diab).

Response to ¶ 89. In any event, [ ] is not relevant to the determination at hand, as this is not the type of economic circumstance that the Judges are charged with considering.

When setting a market rate based on the willing buyer/willing seller standard, the Judges need not guarantee that any particular webcaster will be profitable—or even will be able to continue operating. *See* SX PFFCL ¶ 58 (citing *Web IV*, 81 Fed. Reg. at 26318, 26329; *In re Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 79 Fed. Reg. 23102, 23119 (Apr. 25, 2014) (hereinafter "*Web III Remand*"); *In re Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24084, 24088 n.8 (May 1, 2007) (hereinafter "*Web II*")). Indeed, "the statute neither requires nor permits the Judges to protect any given business model proposed or adopted by a market participant." *Web IV*, 81 Fed. Reg. at 26318, 26329. Google misunderstands the Judges' statutory mandate to consider "the relative roles of the copyright owner and the transmitting entity" with respect to their contributions and risk. *See* 17 U.S.C. § 114(f)(1)(B)(i)(II). As the Judges' past determinations make clear, it is not the Judges' position to protect Google's business model—or even the current landscape of the streaming market. Rather it is to determine the "rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(1)(B).

Response to ¶ 90. Google's request that the Judges "recognize[]" its "substantial investments" in its statutory services and "be cautious not to quell such investments in the future" is strongly reminiscent of arguments made by Live365 in the *Web III* proceeding. There, Live365's argument that rates should be set to cover its investments, costs, and a profit margin were soundly rejected by the Judges as "mimic[ing] the methodology by which government agencies or commissions set rates for public utilities or other regulated natural monopolies. There is no basis in the Act or economic theory to support the use of this paradigm to establish royalty rates for the

licensing of sound recordings by noninteractive webcasters." *Web III Remand*, 79 Fed. Reg. at 23107. *See infra* Resp. to ¶ 89.

Even if it were appropriate to consider the investments Google has made into its statutory streaming services, that is still just one piece of the puzzle. Record companies, for example, make substantial investments—and take on risk—in creating, marketing, and distributing sound recordings. SX PFFCL ¶ 1308; *see, e.g.*, Ex. 5618 ¶¶ 18-45 (Gallien WDT). Statutory services directly benefit from those investments, because they can pick and choose from the most popular artists to build an audience for their services, but suffer no financial exposure if an artist's music is commercially unsuccessful. SX PFFCL ¶ 1309; Ex. 5618 ¶ 25 (Gallien WDT).

III. GOOGLE'S PROPOSAL FOR NONPORTABLE SERVICES

Response to ¶ 91. No response.

Response to ¶ 92. Google has not established that streaming services that are available only on voice-activated nonportable (or "smart speaker") devices are a "different type of service" warranting a different rate. Notably, Dr. Peterson did not address this question, stating only that "[ ] believes a separate rate for commercial nonportable non-subscription services is appropriate" and that he had "been asked to evaluate what the proper rate for such services should be if the Judges elect to create a separate rate for such services." Ex. 1103 ¶ 80 (Peterson AWDT). In fact, a separate rate is not warranted here, because there is no evidence that a willing buyer and willing seller would agree to lower rates for such a service. *See infra* Resp. to ¶¶ 95-100; *see also Web IV*, 81 Fed. Reg. at 26320.

Response to ¶ 93. This proposed conclusion of law should be stricken, because it does not cite applicable law. *See Order* at 1-2. In any event, the Judges have never before imposed a separate rate for nonportable devices under the Section 114 statutory license. *See* Ex. 1103 ¶ 80 (Peterson

AWDT). Dr. Peterson's purported benchmarks do not suggest that the Judges should do otherwise here. Ex. 5603 ¶ 139 (Orszag WRT); *see infra* Resp. to ¶¶ 101-06.

Response to ¶ 94. Google proposes that the royalty rates for services available only on nonportable devices be set at 50% of the general per-performance nonsubscription rate. Ex. 1103 ¶¶ 80, 86 (Peterson AWDT); *see also* Google Proposed Rates and Terms at 1 (filed Sept. 23, 2019); 8/25/20 Tr. 3775:6-8 (Peterson). None of Dr. Peterson's benchmarks, however, establish that such a discount is appropriate. *See* Ex. 5603 ¶¶ 139-44 (Orszag WRT).

A. Google Has Not Demonstrated that the Judges Should Set a Separate Rate for Voice-Activated Nonportable Streaming Services.

Response to ¶ 95. No response.

Response to ¶ 96. Google confuses nonportable *devices* with nonportable *services*. In purporting to highlight the differences between nonportable services and "portable services," it instead focuses on the features of the underlying smart speaker devices. Such devices must indeed be plugged into a wall, for example, making them unlikely to be used away from the home. That is a difference between smart speakers and, say, smart phones. But Google's attempted differentiation ignores the fact that users can listen to all kinds of streaming services on their smart speakers, not just ones that are only available on smart speakers. Google Home can play more than just the Hardware Audio Tier—users can also listen to their YouTube Music Premium subscription, for example, or their Spotify Premium subscription or to ad-supported Pandora. *See* Ex. 1100 ¶ 20 (Fowler WDT). In other words, so-called "portable services" can also be consumed on nonportable devices, undermining Google's proposed dichotomy.

The fact that smart speakers are voice controlled is also a softer distinction than Google suggests, as other devices allow for voice control as well, including smartphones and at least some in-car streaming services. *Cf.* Ex. 5604 ¶ 45 (Tucker WDT). Nor has Google made any showing

that the Hardware Audio Tier is particularly good at conversion or that any conversion that does occur is due to the fact that the service is voice controlled. 9/1/20 Tr. 4834:12-4835:1 (T. Fowler) (noting only that "conversational" nature of service "coupled with—with house ads that describe functionality . . . are fairly effective"). Its claim, therefore, that nonportable services "provide a unique opportunity for services to upsell users to subscription offerings" is vastly overblown.

Moreover, there is no evidence for the proposition that a service only available on a nonportable device is less likely to substitute for other forms of music consumption. While it is reasonable to assume that a user will not listen to her smart speaker in her car, she may well choose to listen to the Hardware Audio Tier instead of listening to ad-supported Pandora—or instead of upgrading to a streaming subscription. [ ]. *See* 8/25/20 Tr. 3682:13-21 (Peterson). And Dr. Peterson has not presented any analysis or any evidence in support of his conclusion.

Response to ¶ 97. Google suggestion that SoundExchange's witnesses agree that there is an emerging market for streaming services on smart speakers is misleading. While it is true that Professor Tucker testified that smart speakers themselves have grown in popularity, *see, e.g.*, Ex. 5604 ¶ 43 (Tucker WDT), she did not testify that streaming services that can only be operated on a smart speaker (like the Hardware Audio Tier) are growing in popularity. Indeed, Google has presented no evidence that that is the case.

Response to ¶ 98. This proposed finding of fact should be stricken, as it fails to cite to the hearing record. *See Order* at 1; 37 C.F.R. § 351.14(c). In any event, SoundExchange disagrees that the evidence justifies a separate rate for nonportable services, for the reasons discussed in its responses to ¶¶ 96-97 and ¶¶ 99-100.

Response to ¶ 99. The Judges have distinguished between portable and nonportable subscription services for the purpose of mechanical royalty floors. *See infra* Resp. to ¶¶ 105-06. And certain direct licenses have distinguished between subscription services limited to single nonportable devices from other subscription services. *See infra* Resp. to ¶¶ 101-03. But neither the Judges nor parties to any direct licenses have ever distinguished between portable and nonportable services—subscription or otherwise—in the context of Section 114 statutory royalties. Ex. 1103 ¶ 80 (Peterson AWDT).

Response to ¶ 100. As "the proponent of a rate structure that treats" a subgroup of streaming services as a separate class of webcasters, Google "bears the burden of demonstrating not only that" nonportable services "differ[] from other forms of commercial webcasting, but also that [they differ] in ways that would cause willing buyers and willing sellers to agree to a lower royalty rate in the hypothetical market." *See Web IV*, 81 Fed. Reg. at 26320 (applying that principle to simulcasters). It is Google's burden to show why there should be a separate service category—not SoundExchange's burden to show why there should not be. And Google has failed to make that showing, for the reasons described in the preceding responses.

B. Google Has Failed to Present Any Benchmarks that Support Its Proposed Nonportable Rate.

Response to ¶ 101. Dr. Peterson relies on three benchmark licenses in support of his proposal that the per-play rate for nonportable streaming services be set at 50% of the regular commercial rate. Ex. 1103 ¶¶ 82-84 (Peterson AWDT). But the discounts embodied in those contracts do not map on to Google's rate proposal. Specifically, [[redacted]]. *Id.*; Ex. 5603 ¶¶ 139, 141 (Orszag WRT); *see also* Ex. 1006 at 50 ([[redacted]]); Ex. 1010 at 65-67 ([[redacted]]); Ex. 5090 at 37-39

([ ]). These contracts do not provide useful information about the per-performance rate for a service tier accessible on multiple nonportable devices to which a willing buyer and a willing seller would agree, for reasons laid out in detail below.

Response to ¶ 102. [ ]. *See, e.g.*, Ex. 1101 ¶ 19 & n.12 (Diab WDT). The primary problem with using those rates as a benchmark is that they are per-subscriber rates, not per-performance rates, and therefore, without more, do not provide a sound basis to calculate a per-performance discount. Ex. 5603 ¶ 140 (Orszag WRT); Ex. 5610 ¶ 17 (Harrison WRT). The fact that one service pays a lower per-subscriber rate than another says nothing about the relative prices they pay on a per-performance basis. Ex. 5603 ¶ 140 (Orszag WRT); *see also* 8/25/20 Tr. 3776:23-3777:11 (Peterson) ([ ]). Just by way of example, a service with a per-subscriber rate of $1 and 10 listens a month will have a higher per-performance rate ($0.10) than a service with a per-subscriber rate of $2 and 100 listens a month ($0.02). Although the per-subscriber rate for the first service is 50% smaller than for the second, its per-performance rate is 500% larger. Indeed, one might expect that the average subscriber would make more use of a service available on any device anywhere than a service available only on one device in one location—and that such a difference would be reflected in the contractual rate structure. Ex. 5603 ¶ 140 (Orszag WRT).

[ ]." Ex. 5610 ¶ 17 (Harrison WRT); *see also* Ex. 5283 at 11; Ex. 5285 at 16.

[ ]. Ex. 5603 ¶ 141 (Orszag WRT); Ex. 5610 ¶ 16 (Harrison WRT). [ ] Ex. 5610 ¶ 16 (Harrison WRT). [ ]. Ex. 5603 ¶ 142 & n.282 (Orszag WRT); Ex. 5610 ¶ 16 (Harrison WRT). [ ]. Ex. 5610 ¶ 16 (Harrison WRT); Ex. 1006 at 50; Ex. 1010 at 65. Dr. Peterson acknowledged at trial that [ ]. 8/25/20 Tr. 3685:5-15 (Peterson).

Response to ¶ 103. All of the same problems described above apply to [ ] cited by Google as well. *See supra* Resp. to ¶ 102; Ex. 5090; *see also* Ex. 5100 ([ ]). [ ]. Ex. 5603 ¶ 140 & n.280 (Orszag WRT). And once again, [ ]. *See, e.g.*, Ex. 5281 at 2 ([ ]).

Response to ¶ 104. Google claims that these discounts "reflect an understanding that consumers are willing to pay an incremental amount for the ability to take music with them on phones and portable devices" and "are not willing to pay the same amount for" a streaming service limited to a nonportable device. But Google has provided no evidence whatsoever of downstream users' willingness to pay for nonportable streaming services. It cites only to Dr. Peterson's written and oral testimony, which also fails to provide support for the proposition that they have a lower willingness to pay. *See* Ex. 1103 ¶ 81 (Peterson AWDT); 8/25/20 Tr. 3681:21-3682:21 (Peterson).

Response to ¶ 105. In the context of Section 115 mechanical royalties, services and publishers settled on royalty floors for standalone nonportable subscription services that were 40-70% less than the floor for standalone portable subscription services. *Phonorecords II Settlement*, 78 Fed. Reg. 67938 (Nov. 13, 2013); see 37 C.F.R. § 385.13(a). And the Judges did re-adopt those royalty floors in *Phonorecords III*. *See* 84 Fed. Reg. at 1975. As Dr. Peterson has observed, those rates were "royalty floors included as part of a larger royalty structure (rather than stand-alone royalty rates)." Ex. 1103 ¶ 85 (Peterson AWDT). Nevertheless, he says, "they represent a value judgment concerning the proper minimum royalty value to be paid on a per-subscriber basis." *Id*.

Response to ¶ 106. Mechanical royalty rates are rates for the reproduction and distribution of musical works, not the performance and reproduction of sound recordings. Ex. 5603 ¶ 144 (Orszag WRT). Because mechanical licensing royalties involve different rights to different works with different sellers, it is well established that musical work royalties do not provide a reliable indicator of sound recording royalties. *Id.*; *see also SDARS II*, 78 Fed. Reg. at 23055, 23058; *Web II*, 72 Fed. Reg. at 24094-95; *Web I*, 67 Fed. Reg. at 45246-47, 45258-59. To be sure, Dr. Peterson proposes using musical work rates to determine a proportional discount, rather than an absolute

price. Ex. 5603 ¶ 144 (Orszag WRT). However, he provides no basis that discounting practices are similar in the two different markets. *Id*.

C. Mr. Orszag's Criticisms of the Proposed Nonportable Rate Retain Their Force.

Response to ¶ 107. This proposed finding should be stricken because it does not cite to the hearing record. *See Order* at 1; 37 C.F.R. § 351.14(c). In any event, Mr. Orszag's criticisms of the proposed nonportable rate are convincing, for the reasons described elsewhere. *See supra, e.g.*, Resp. to ¶¶ 101-06; *see infra* Resp. to ¶¶ 108-10.

Response to ¶ 98 /108. The mechanical royalty rates set in *Phonorecords II* were adopted as part of an industry-wide settlement—but that does not mean that they represent a market rate. The standard in effect in *Phonorecords II* and *Phonorecords III* was the standard formerly set forth in Section 801(b)(1) of the Copyright Act, which is a policy-based standard. Ex. 5603 ¶ 143 & n.283 (Orszag WRT) (citing *SDARS III*, 83 Fed. Reg. at 65214 (referring to "the section 801(b) policy factors")). Rates that arise out of settlements under such a regime "reflect (implicitly) the parties' predictions of how the Judges may apply [the Section 801(b)(1)] factors." *Phonorecords III*, 84 Fed. Reg. at 1933. If the Judges, who "have a duty to independently apply the statute," "find that the provisions arising from a settlement reflect the statutory principles set forth in section 801(b)(1), then the Judges may adopt the provisions of that settlement if it is superior to the evidence submitted in support of alternative rates and terms." *Phonorecords III*, 84 Fed. Reg. at 1933. The mechanical royalty floors—although negotiated by the interested parties—thus embody a set of policy factors and are not helpful in determining a market rate for sound recording royalties.

In addition, Google misstates the record when it suggests that Mr. Orszag was not aware of the *Phonorecords II* settlement when he criticized it for not being a market rate. Mr. Orszag simply did not recall, at the time of his oral testimony, whether or not the *Phonorecords*

proceedings involved settlements. *See* 8/12/20 Tr. 1579:13-15 (Orszag) ("[S]itting here today, I do not know."); 8/12/20 Tr. 1579:20 (Orszag) ("I, sitting here today, I don't recall."). His performance on this memory test, however, does not change the force of his original critique.

Response to ¶ 109. Mr. Orszag stated that, "as a purely theoretical matter, one might expect that the average subscriber would make more use of a service available on any device anywhere than a service available only on one device in one place, and that would be reflected in the contractual rate structure." Ex. 5603 ¶ 140 (Orszag WRT). Corroborating that point, he noted that, accounting for usage, [ ]. Ex. 5603 ¶ 140 (Orszag WRT). This is a far cry from what Google characterizes as "self-serving statements from a label witness that lower nonportable rates were offered based on an expectation of fewer plays."

Response to ¶ 110. [ ]. Ex. 5603 ¶ 141 (Orszag WRT). [ ]. *See* 8/25/20 Tr. 3685:5-15 (Peterson). [ ]. *See* Ex. 5610 ¶ 16 (Harrison WRT). As Mr. Harrison observed, [ ] Ex. 5610 ¶ 16 (Harrison WRT). Google has no evidence to the contrary.

Dated: November 10, 2020

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Wednesday, November 18, 2020, I provided a true and correct copy of the SoundExchange's Corrected Replies to Google's Amended Proposed Findings of Fact and Conclusions of Law to the following:

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Educational Media Foundation, represented by David Oxenford, served via ESERVICE at doxenford@wbklaw.com

National Religious Broadcasters Noncommercial Music License Committee, represented by Karyn K Ablin, served via ESERVICE at ablin@fhhlaw.com

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