PUBLIC

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

In the Matter of	
DETERMINATION OF ROYALTY RATES FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)	Docket No. 14-CRB-0001-WR (2016–2020)

IHEARTMEDIA, INC.'S BRIEF TO PERMIT PROF. FISCHEL TO RESPOND TO THE REBUTTAL TESTIMONY OF RON WILCOX

As the Judges have ruled, an expert can "answer questions regarding the rebuttal to their direct statements," so long as it does not involve a new study or analysis. Apr. 29 Hr'g Tr. at 883:20-22. The parties have followed this rule with their prior witnesses.[1]

In his written direct testimony, Professor Fischel provides his opinion, based on evidence regarding the expectations of the parties at the time of the agreement, that the price for the incremental performances negotiated by the parties was $0.0005 per performance. *See* Fischel & Lichtman WRT ¶¶ 39, 50 & Exhs. A & B.

In his written rebuttal testimony, Mr. Wilcox directly criticizes Professor Fischel – by name and over 12 pages – for allegedly misstating Warner's expectations. *See* Wilcox WRT ¶¶ 2, 15 (attached as Exhibit A). In support of his criticism, Mr. Wilcox attaches a document

[1] May 5 Hr'g Tr. at 1777:22-1778:8 (Pomerantz: "I believe the ground rules here – he did not address this particular competitive issue in his direct testimony, but I – as I understand the ground rules here, if one of their experts rebutted his testimony saying, for example, it wasn't effectively competitive, this is the time to respond, . . . we are entitled to respond to what their experts have said on rebuttal."). The Judges have applied this rule throughout the hearing – for example, in permitting SoundExchange's expert Dr. Blackburn to respond to Mr. Herring's and Mr. Peterson's criticisms of his direct testimony, May 4 Hr'g Tr. at 1581:3-18, 1600:11-25, and in permitting Professor Rubinfeld to respond to the criticisms of Professor Katz and others, May 5 Hr'g Tr. at 1924:5-14.

that, he says, more accurately reflects Warner's internal projections regarding the agreement. *Id.* ¶¶ 15, 23 & Exh. 4B (attached as Exhibit B).

Professor Fischel has responded to Mr. Wilcox's criticism by pointing out that the very document Mr. Wilcox attached to his testimony in fact *supports* Professor Fischel's prior expectations analysis and produces an expected incremental rate of $0.0008. SoundExchange questioned Professor Fischel extensively at his deposition about this response. *See, e.g.*, Fischel Dep. Tr. at 65:4-24, 73:12-75:7, 76:10-21, 89:13-95:10, 115:6-17, 145:1-23 (excerpts attached as Exhibit C). Professor Fischel explained that "using the document that Mr. Wilcox identified as the Warner projections [Exhibit B, attached hereto] produces an incremental rate of .0008." *Id.* at 115:9-15. The calculations supporting that $0.0008 rate were attached to iHeartMedia's opposition to SoundExchange's motion to strike Professsor Fischel's testimony (attached as Exhibit D), and are referenced in Professor Fischel's supplemental written rebuttal testimony. *See* Fischel & Lichtman SWRT ¶ 22.

SoundExchange mistakenly claims that Professor Fischel's written testimony contains improper rebuttal testimony and should be excluded. *See* May 15 Hr'g Tr. at 3979:11-3981:25.[2] Mr. Wilcox's rebuttal testimony was filed after Professor Fischel had the opportunity for a written response. But Professor Fischel is entitled to give his response during his testimony before the Judges, under the rules of this proceeding. There is certainly no basis whatsoever for preventing Professor Fischel from responding to Mr. Wilcox's criticism of his expectations analysis, made after Professor Fischel had an opportunity to respond in his written testimony.

[2] The Supplemental Written Response, by order of the Judges, was limited to the Apple and "III.E" agreements Professor Rubinfeld first addressed in his "Corrected Written Rebuttal Testimony." *See* Order Denying Licensee Services' Motion To Strike SoundExchange's "Corrected" Written Rebuttal Testimony of Daniel Rubinfeld and Section III.E of the Written Rebuttal Testimony of Daniel Rubinfeld and Granting Other Relief (Apr. 2, 2015). Professor Fischel briefly mentions the $0.0008 calculation in the course of criticizing Professor Rubinfeld's failure to identify and separate the shadow of the statutory rate from the Apple and III.E agreements. *See* Fischel & Lichtman SWRT ¶ 22.

It is important to note that Professor Fischel's response to Mr. Wilcox's criticism is *not* a new study or analysis. His response is a reaffirmation of his *existing* analysis. The spreadsheet cited by Mr. Wilcox is entirely consistent with that analysis, proves that Warner evaluated the deal just as iHeartMedia did, and produces a rate of $0.0008 for incremental spins. To prevent Professor Fischel from providing this appropriate response would be contrary to the rules of the proceeding and prejudicial to iHeartMedia.

Dated: May 20, 2015

Respectfully submitted,

iHEARTMEDIA, INC.

/s/ John Thorne

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CERTIFICATE OF SERVICE

I, John Thorne, hereby certify that a copy of the foregoing PUBLIC version of iHeartMedia's Brief to Permit Prof. Fischel to Respond to the Rebuttal Testimony of Ron Wilcox has been served on this 20th day of May 2015 on the following persons:

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EXHIBIT A

PUBLIC

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re	)	
DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)	)	**DOCKET NO. 14-CRB-0001-WR (2016-2020)**

WRITTEN REBUTTAL TESTIMONY OF

RON WILCOX

Executive Counsel, Business Affairs, Strategic and Digital Initiatives
Warner Music Group

PUBLIC VERSION

Witness for SoundExchange, Inc.

PUBLIC VERSION

TESTIMONY OF RON WILCOX

BACKGROUND

My name is Ron Wilcox. I am Executive Counsel, Business Affairs, Strategic and Digital Initiatives for Warner Music Group ("Warner"). In that position, I lead the business affairs efforts for Warner's major strategic and digital initiatives, and I work closely with Warner's digital legal affairs lawyers and Warner's Digital Strategy and Business Development department. Recently, I added oversight of Warner's digital legal affairs team to my responsibilities. I am one of the Warner attorneys primarily responsible for developing Warner's relationships and negotiating agreements with digital music services, including agreements that authorize the transmission of Warner's labels' repertoire through streaming services. I previously submitted written direct testimony in this proceeding. My background and qualifications are set forth in my written direct testimony.

I submit this rebuttal testimony to respond to the amended written direct testimony submitted by Profs. Fischel and Lichtman, filed January 13, 2015 (hereinafter, "Fischel-Lichtman"), which analyzes and derives a rate recommendation from Warner's agreement with iHeartMedia ("iHeart").[1] I also respond to the written direct testimony of Simon Fleming-Wood and Bob Pittman, both filed October 7, 2014 ("Fleming-Wood" and "Pittman," respectively) and to the redacted written direct testimony of Prof. Carl Shapiro and Prof. Michael Katz also filed on October 7, 2014 ("Shapiro" and "Katz," respectively).

[1] Fishel-Lichtman's analysis is based on the Warner-iHeart agreement entered into as of October 1, 2013. As I explained in my written direct testimony, Warner and iHeart entered into an amendment to that agreement as of March 31, 2014. Except where my rebuttal testimony specifically discusses this amendment, references to the agreement herein are to the original agreement.

DISCUSSION

I. The Fischel-Lichtman Analysis Concerning the Warner-iHeart Agreement is Wrong.

1. I have reviewed a specially redacted version of the Fischel-Lichtman analysis. Specifically, I have reviewed a version of the Fischel-Lichtman analysis that includes unredacted information concerning the Warner-iHeart agreement that iHeart filed with a "restricted" designation. (Fischel-Lichtman, at ¶¶ 32-56 and Exhibits A-B.) I have not seen and I have no information regarding the "restricted" portions of the Fischel-Lichtman analysis that concern confidential information of any entity other than Warner.

2. Fischel-Lichtman assert that the Warner-iHeart agreement is marketplace evidence that, absent the statutory license, a willing buyer and willing seller would agree to a rate of $0.0005 per performance for a non-simulcast radio service containing all of the functionality offered by iHeart's personalized or customized radio service. That assertion is absurd. Fischel-Lichtman's analysis is based on incorrect and misleading assumptions and conclusions regarding the Warner-iHeart agreement, the parties' negotiations, and Warner's modeling.

A. Fischel-Lichtman Misdescribe the Warner-iHeart Agreement and Their Analysis Has No Basis in the Actual Negotiations.

3. Fischel-Lichtman base their analysis on the notion that "the Warner agreement reflects a bundle of two distinct sets of rights": one "bundle" purportedly for iHeart to have the right "to play the same number of Warner performances as it would have played absent the agreement" on its non-simulcast radio service; and a second "bundle" purportedly for iHeart to have the right to perform Warner sound recordings on such service above and beyond the first "bundle." (Fischel-Lichtman, at ¶ 45.) Fischel-Lichtman contend that, absent the direct agreement, Warner's share of performances on iHeart's non-simulcast radio service would be equivalent to [redacted] ("Warner's Pre-Agreement

Share"), [ ][2] (*See id.*, at ¶¶ 19, 36.) The additional performances in Fischel-Lichtman's second "bundle" equal the difference between [ ].[4] Based on this "bundle of two distinct sets of rights" construct, Fischel-Lichtman assert that the Judges should simply disregard the amount of compensation iHeart agreed to pay for the first purported "bundle"—performances of Warner sound recordings up to Warner's Pre-Agreement Share. (*Id.*, at ¶ 46.) Fischel-Lichtman then opine that the true willing buyer/willing seller negotiation between iHeart and Warner was for the second purported "bundle"—performances in excess of Warner's Pre-Agreement Share. (*Id.*, at ¶ 49.) Relying on projections that [ ], Fischel-Lichtman assert that the value of this second "bundle" is $0.0005 per performance. (*Id.*, at ¶¶ 40, 51.)

4. Fischel-Lichtman have not accurately analyzed the agreement that Warner and iHeart executed or our negotiations with iHeart. Warner and iHeart never discussed a license

[2] During our negotiations, [ ]

[3] Under the agreement, [ ]

[4] Notably, under the agreement, and contrary to Fischel-Lichtman's allegations, [ ]

using the "bundles" construct used in the Fischel-Lichtman analysis; Warner did not model the agreement under that construct; and, most importantly, the agreement does not embody any such construct.

5. As I previously explained in my written direct testimony, [redacted] These are not, however, the bundles used in the Fischel-Lichtman analysis. The agreement describes [redacted] (attached as Exhibit 1 to my written direct testimony).

6. [redacted] is for iHeart's personalized or customized, non-simulcast radio service. In exchange for these rights, iHeart agreed to pay [redacted]

[5] [redacted] (*See* Fischel-Lichtman, at ¶ 38.)

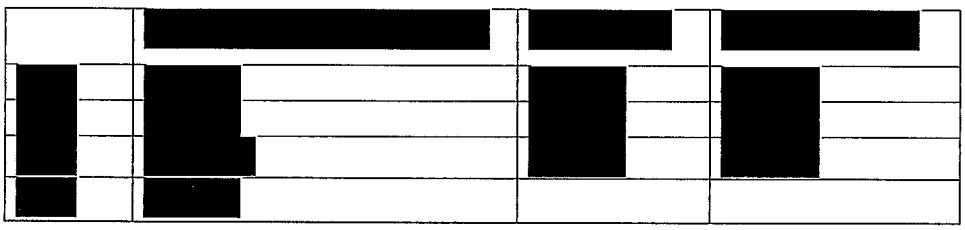
7. With respect to [redacted]

8. Prior to entering into the agreement, we modeled Warner's potential [redacted] An example of that modeling from around July 2013 is contained in Exhibit 3. We believed that it was likely that Warner's [redacted]

9. Based on [redacted] that iHeart has provided to us, Warner's [redacted]

10. Warner negotiated [redacted]

[redacted]



[redacted]

11. By way of example, assume that iHeart's non-simulcast radio service streamed five billion total performances in a particular month in the first full calendar year of the agreement (2014), and that Warner sound recordings accounted for 20% of those royalty-bearing

performances (one billion). [redacted]

[redacted] Sticking with the same assumptions, iHeart could reduce the total effective per-performance rate paid to Warner below the NAB rate of $0.0023, but only by performing Warner sound recordings [redacted]

12. The actual economics of the Warner-iHeart agreement thus completely debunk the Fischel-Lichtman analysis. As demonstrated, [redacted] That is completely contrary to Fischel-Lichtman's theory that their first purported "bundle" [redacted]

[6] [redacted]

[redacted] may be disregarded because the parties would never agree to value performances within that "bundle" at any rate other than the statutory rate. (Fischel-Lichtman, at ¶¶ 46-47.)

13. Likewise, Fischel-Lichtman's theory that Warner and iHeart valued the performances in their second purported "bundle" [redacted] at $0.0005 is demonstrably false. *In all cases,* [redacted]

14. At no time during our negotiations did iHeart ever claim, or provide to Warner, any modeling, that showed iHeart valuing the agreement as in the Fischel-Lichtman analysis.

15. At no time did Warner model the potential agreement with iHeart as in the Fischel-Lichtman analysis. Attached as Exhibit 4 are several of our models of the potential agreement. To provide context [redacted]

[redacted]

16. None of the Warner models utilize the Fischel-Lichtman two "bundle" construct. The Warner models instead [redacted]

B. Fischel-Lichtman Pick and Choose Assumptions.

17. Fischel-Lichtman also make key errors in their analysis and omit inconvenient particulars that impact the result, even if their model were to have some basis in fact.

18. ***First***, as I have noted, Fischel-Lichtman base their analysis on the assumption that, absent the direct agreement, iHeart would have performed Warner's sound recordings at Warner's Pre-Agreement Share [redacted][7] (*See* Fischel-Lichtman, at ¶ 19.) Fischel-Lichtman assert that iHeart "would have continued to play [Warner's] music at this baseline level and would have paid for those performances at the statutory rate." (*Id.*) Fischel-Lichtman's assumption [redacted]e

[7] As noted, [redacted]

[redacted]

19. For the Fischel-Lichtman analysis to have any basis in fact, it must account for [redacted] Again, the Fischel-Lichtman "bundles" are specious. But Fischel-Lichtman's analysis fails even on its own terms, not only for all of the reasons described above and below, but also because it does not account for [redacted]

20. ***Second***, Fischel-Lichtman's assumption of [redacted]

[redacted]

21. *Third*, Fischel-Lichtman model Warner's [redacted]

[redacted]

C. Fischel-Lichtman's Analysis Fails to Value Multiple Protections that Warner Received under the Agreement.

22. Fischel-Lichtman disregard that the agreement [redacted] (Fischel-Lichtman, at ¶ 34.) Regardless [redacted] I have discussed this and other important [redacted] in my written direct testimony.

23. Fischel-Lichtman make no attempt to determine the value of these protections. They instead either do not discuss these numerous protections or surmise that their value could

"overstate" or "understate" the $0.0005 Fischel-Lichtman rate. As already demonstrated, the $0.0005 rate that Fischel-Lichtman put forth is simply wrong: [redacted]

For example:

- [redacted]
- [redacted]

[8] [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

24. Finally, I understand that Fischel-Lichtman contend that [redacted]

[redacted]

[redacted]

9 [redacted]

[redacted]

II. Response to Fleming-Wood's and Pittman's Assertion that Webcasters Do Not Compete with Interactive Services.

25. I understand that the Services participating in this proceeding contend that "non-interactive" services are fundamentally different from interactive services. Mr. Fleming-Wood and Mr. Pittman claim that non-interactive services compete primarily with terrestrial radio and do not compete in the market with "interactive" services, such as Spotify. (Fleming-Wood, at 6-8; Pittman, at 6.) I do not agree with these witnesses' view that non-interactive and interactive services compete in different markets. As explained in my written direct testimony, *all* digital streaming services have fundamentally changed how the recorded music industry distributes music. Non-interactive services include functionality that customizes and personalizes the user experience, so as to approach the experience of interactive. Interactive services, on the other hand, have increased their editorial, curation and playlist functionality to provide listeners with more of the "lean back" experience historically associated with non-interactive services. In short, the line between the two types of services is more blurry than bright, and it is not accurate to say they operate in different markets.

26. Mr. Pittman's views, in particular, are inconsistent [redacted] As noted in my written direct testimony, [redacted]

[redacted]

27. The fact that iHeart requested [redacted] (Exhibit 7.) [redacted]

III. Response to Shapiro's and Katz's Claims that Warner Exerts Monopolistic Power.

28. I understand that Prof. Shapiro and Prof. Katz argue that the market for licenses between major recorded music companies and interactive streaming services is not sufficiently competitive because, as they characterize it, the major record labels hold all of the bargaining power. For Warner, this is far from true. Our negotiations with interactive streaming services with respect to economic terms and functionality are hard fought and take place over many months and sometimes more than a year. This back-and-forth is not a superfluous exercise in which Warner ultimately dictates the price. Rather, as evident from our actual negotiations, it involves give-and-take on both sides. Services, of course, range in their negotiating power from

large multifaceted companies that can both make offers and extert pressures beyond the bounds of the particular agreement being negotiated (for example, AT&T, Apple, Google) to smaller startups or companies with a niche product. Regardless, the negotiations are meaningful and our agreements always reflect that give-and-take.

29. For example, in our negotiation with [redacted] I have attached as Exhibit 8 an early term sheet [redacted] The agreements show, however, [redacted]

30. Another example of an interactive service that has exerted considerable leverage because [redacted] (Exhibits 9-10.) [redacted] (Exhibit 11, at 3.)

31. While not an interactive streaming service example, when Google Play first launched, Google offered a download store. To make Warner sound recordings available in the download store, Google needed rights from Warner. Initially, we could not reach an agreement for those rights. Despite not having Warner sound recordings available in its download store, Google Play launched in 2011. We eventually reached an agreement in 2012 to make Warner

sound recordings available in Google's download store in conjunction with the launch of the Google Play streaming service.

32. Finally, I have attached as Exhibit 12 a CD containing copies of numerous relevant Warner agreements with interactive services. I understand that the Judges are interested in seeing a substantial number of agreements, representing a "thick market" of evidence. These agreements make it clear that Warner negotiates for a range of rates and terms across the interactive services. Warner is not a price-maker, and it does not exert monopoly-like power.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: February 22, 2015

Ron Wilcox

EXHIBIT B

PUBLIC

SX EX. 023 -RR

RESTRICTED — Subject to Protective Order in Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)

EXHIBIT C

PUBLIC

Redacted in its Entirety

EXHIBIT D

PUBLIC

Redacted in its Entirety

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

In the Matter of	)	
DETERMINATION OF ROYALTY RATES FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)	)	**Docket No. 14-CRB-0001-WR (2016-2020)**

DECLARATION AND CERTIFICATION OF JOHN THORNE ON BEHALF OF iHEARTMEDIA, INC.

1. I am one of the counsel for iHeartMedia, Inc. ("iHeartMedia") in this proceeding, and I submit this Declaration in support of iHeartMedia's Brief to Permit Prof. Fischel to Respond to the Rebuttal Testimony of Ron Wilcox.

2. On October 10, 2014, the CRB adopted a Protective Order that limits the disclosure of materials and information marked "RESTRICTED" to outside counsel of record in this proceeding and certain other parties described in subsection IV.B of the Protective Order. *See* Protective Order (Oct. 10, 2014). The Protective Order defines "confidential" information that may be labeled as "RESTRICTED" as "information that is commercial or financial information that the Producing Party has reasonably determined in good faith would, if disclosed, either competitively disadvantage the Producing Party, provide a competitive advantage to another party or entity, or interfere with the ability of the Producing Party to obtain like information in the future." *Id.* The Protective Order further requires that any party producing such confidential information must "deliver with all Restricted materials an affidavit or declaration . . . listing a description of all materials marked with the 'Restricted' stamp and the basis for the designation." *Id.*

3. I submit this declaration describing the materials iHeartMedia has designated "RESTRICTED" and the basis for those designations, in compliance with Sections IV.A of the Protective Order. I have determined to the best of my knowledge, information and belief that the materials described below, which are being produced to outside counsel of record in this proceeding, contain confidential information.

4. The confidential information comprises or relates to (1) contracts, contractual terms, and contract strategy that are proprietary, not available to the public, competitively sensitive, and often subject to express confidentiality provisions with third parties; (2) financial projections, financial data, and business strategy that are proprietary, not available to the public, and commercially sensitive; and (3) material subject to third-party licenses or other limitations that restrict public disclosure.

5. If the confidential information were to become public, it would place iHeartMedia at a commercial and competitive disadvantage; unfairly advantage other parties to the detriment of iHeartMedia; and jeopardize iHeartMedia's business interests. Information related to iHeartMedia's confidential contracts or iHeartMedia's relationships with content providers could be used by iHeartMedia's competitors, or by other content providers, to formulate rival bids, bid up iHeartMedia payments, or otherwise unfairly jeopardize iHeartMedia's commercial and competitive interests.

6. With respect to the financial information, I understand that iHeartMedia has not disclosed to the public or the investment community the financial information that it seeks to restrict here, including its internal financial projections and specific royalty payment information. Consequently, neither iHeartMedia's competitors nor the investing public has been privy to that information, which iHeartMedia has treated as highly confidential and sensitive, and

has guarded closely. In addition, when iHeartMedia does disclose information about its finances to the market as required by law, iHeartMedia provides accompanying analysis and commentary that contextualizes disclosures by its officers. The information that iHeartMedia seeks to restrict by designating it confidential is not intended for public release or prepared with that audience in mind, and therefore was not accompanied by the type of detailed explanation and context that usually accompanies such disclosures by a company officer. Moreover, the materials include information that has not been approved by iHeartMedia's Board of Directors, as such sensitive disclosures usually are, and is not accompanied by the disclaimers that usually accompany such disclosures. iHeartMedia could experience negative market repercussions and competitive disadvantage were this confidential financial information released publicly without proper context or explanation.

7. The contractual, commercial and financial information described above must be treated as restricted confidential information in order to prevent business and competitive harm that would result from the disclosure of such information.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that the foregoing is true and correct.

May 20, 2015

Respectfully submitted,

/s/ John Thorne

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DETERMINATION OF ROYALTY RATES FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)	)	**Docket No. 14-CRB-0001-WR (2016-2020)**

REDACTION LOG FOR iHEARTMEDIA'S BRIEF TO PERMIT PROF. FISCHEL TO RESPOND TO THE REBUTTAL TESTIMONY OF RON WILCOX

iHeartMedia hereby submits the following list of redactions from the restricted version of iHeartMedia's Brief to Permit Prof. Fischel to Respond to the Rebuttal Testimony of Ron Wilcox filed May 20, 2015 ("the Brief"), and the undersigned certifies, in compliance with 37 C.F.R. § 350.4(e)(1), and based on the Declaration of John Thorne submitted herewith, that the listed redacted materials are properly designated confidential and "RESTRICTED."

Document	Page/Paragraph/ Line	General Description
Exhibit A to the Brief.	¶ 3 (four redactions) ¶ 5 (two redactions) ¶ 6 (two redactions) ¶ 7 ¶ 8 (two redactions) ¶ 9 (two redactions) ¶ 10 (two redactions) ¶ 11 (two redactions) ¶ 12 (two redactions) ¶ 13 (two redactions) ¶ 15 ¶ 16 ¶ 18 (second redaction) ¶ 19 (two redactions) ¶ 20 ¶ 21 ¶ 22 (three redactions)	Contains information designated as restricted by other participants.

Document	Page/Paragraph/ Line	General Description
	¶ 23 (seven redactions) ¶ 24 ¶ 26 (two redactions) ¶ 27 (two redactions) ¶ 29 (three redactions) ¶ 30 (two redactions) Footnote 2 Footnote 3 Footnote 4 Footnote 5. Footnote 6 Footnote 7 Footnote 8 Footnote 9	
Exhibit B to the Brief.	Entire document.	Contains information designated as restricted by other participants.
Exhibit C to the Brief.	Entire document.	Contains proprietary business information that is competitively sensitive.
Exhibit D to the Brief.	Entire document.	Contains information designated as restricted by other participants.

/s/ John Thorne

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