

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

In the Matter of:

DETERMINATION OF RATES  
AND TERMS FOR MAKING AND  
DISTRIBUTING PHONORECORDS  
(PHONORECORDS III)

Docket No. 16-CRB-0003-PR (2018-2022)  
(Remand)

**COPYRIGHT OWNERS' MOTION TO STRIKE  
EXHIBITS ATTACHED TO SERVICES' JOINT REPLY BRIEF**

National Music Publishers' Association and Nashville Songwriters Association International (together, "Copyright Owners") respectfully request that the Copyright Royalty Judges (the "Judges") strike Exhibits A through D (the "Brief Exhibits") attached to the Services' Joint Reply Brief (the "Joint Reply Brief," eCRB No. 25426) and citations to the Exhibits in the Brief. The Exhibits are comprised of the deposition transcripts and corresponding errata sheets of the June 8, 2021 deposition of Michael L. Katz (Exhibits A–B), and the June 2, 2021 deposition of Leslie Marx (Exhibits C–D), respectively.

The Brief Exhibits were submitted in violation of the December 23, 2020 Order Adopting Schedule for Proceedings on Remand (eCRB No. 23413 at 2) (the "Scheduling Order") and amount to an unauthorized and improper submission of additional direct or sur-rebuttal opinion evidence.

It is important to note up front that there is nothing in the Brief Exhibits that in fact rebuts the voluminous evidence cited by Copyright Owners, or cures the Services' evidentiary failures. However, the submission is so procedurally improper, and would constitute such troubling precedent, that Copyright Owners are compelled to petition to have the Brief Exhibits struck.

**THE FILING OF THE BRIEF EXHIBITS WAS UNAUTHORIZED  
AND VIOLATES THE SCHEDULING ORDER**

The Scheduling Order provides for initial submissions, comprised of briefs not to exceed 100 pages, and the opportunity to file new evidence "supporting each participant's position on the rate structure issue." (Scheduling Order at 1.) The Scheduling Order further allows for reply submissions, comprised of briefing not to exceed 100 pages and "rebuttal evidence (which may include witnesses statements and accompanying exhibits)." (*Id.* at 1–2.)

The Services did not file any rebuttal witness statements by the July 2, 2021 deadline, and the Brief Exhibits are not rebuttal evidence of the Copyright Owners' initial submission. The Brief

Exhibits relate to the *Services*' initial submission. They are the full transcripts of depositions of the *Services*' experts, taken by Copyright Owners pursuant to the Scheduling Order, as discovery into the *Services*' initial submission, as part of Copyright Owners' preparation of their rebuttal case. Indeed, at the depositions, the *Services* made clear that the scope of the depositions was the *Services*' initial submission, objecting to questions that might go beyond the scope of the initial expert reports submitted by Drs. Marx and Katz. The improper attachment of these deposition transcripts to the Joint Reply Brief is simply an unauthorized attempt to submit additional direct evidence in violation of the Scheduling Order.

It is also plain from the Brief itself that the Brief Exhibits were inappropriately submitted to try to buttress the *Services*' initial submission. On page 37, the *Services* offer a "see also" citation to Dr. Marx's deposition transcript for a proposition that is explicitly described as something that was "as demonstrated in the *Services*' opening submission," and where the primary citation is the *Services*' own initial submission. (Joint Reply Brief at 37.) On pages 40 and 41, the *Services* also offer "see also" citations to the deposition transcripts of Drs. Marx and Katz for arguments from their own initial submission and where the primary citation is again their own initial submission. (*Id.* at 40-42.) This is not rebuttal evidence.

Moreover, even if the *Services* had legitimate rebuttal opinion evidence to submit, attaching to a legal brief full transcripts of their own witnesses' depositions by opposing counsel would not be an authorized submission. Drs. Katz and Marx are witnesses hired by the *Services*. If the *Services* have rebuttal opinion evidence to put in from them, they must do it through written expert witness statements, which include, *inter alia*, a statement of the opinions being offered, citations and exhibits and identification of materials relied upon, none of which is provided in deposition transcripts. The *Services* did not do this, and their attempt to end run the basic

requirements around the submission of their own expert opinion testimony should not be permitted.

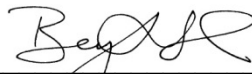
It is true that nothing in the Brief Exhibits in fact rebuts the evidence in the record cited in Copyright Owners' initial submission. However, the futility of the filing should not excuse its impropriety. The filing of the Brief Exhibits contravenes the Scheduling Order and is procedurally unauthorized, and should not be permitted.

### **CONCLUSION**

Based on the foregoing, Copyright Owners respectfully request that the Judges strike Exhibits A through D to the Services' Joint Reply Brief, and citations thereto in the Joint Reply Brief. A Proposed Order is attached.

Dated: July 20, 2021

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# Proof of Delivery

I hereby certify that on Tuesday, July 20, 2021, I provided a true and correct copy of the Copyright Owners' Motion to Strike Exhibits Attached to Services' Joint Reply Brief to the following:

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Signed: /s/ Benjamin K Semel