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

In re **DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords III)**	**Docket No. 16–CRB–0003–PR (2018–2022) (Remand)**

SERVICES' JOINT SUPPLEMENTAL BRIEF

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Pursuant to the Judges' Order Denying in Part and Granting in Part Services' Motion to Strike Copyright Owners' Expert Testimony and Granting Services' Request to File Supplemental Testimony and Briefing, eCRB Docket No. 25704 (Oct. 1, 2021) ("Order on Motion to Strike"), Amazon.com Services LLC, Google LLC, Pandora Media, LLC, and Spotify USA Inc. (collectively, the "Services") respectfully submit this joint supplemental reply brief to respond to those portions of the Copyright Owners' Reply Brief on Remand ("CO Reply Br."), the Remand Written Rebuttal Testimony of Richard Watt (PhD) ("Watt RWRT"), the Remand Written Rebuttal Testimony of Jeffrey A. Eisenach, Ph.D. ("Eisenach RWRT"), and the Remand Written Rebuttal Testimony of Daniel F. Spulber, Ph.D. ("Spulber RWRT") identified in the Order on Motion to Strike and in further support of their revised proposal for rates and terms for the 2018-2022 period (the "Services' Proposal").[1]

INTRODUCTION

The Services have shown that one of the many reasons that the Copyright Owners' proposal to reinstate the vacated *Phonorecords III* rates and terms must be rejected is because it is based on a premise that has failed the test of time. That premise, which undergirded the Majority's determination, was the "heroic assumption" that raising mechanical rates would have a "see-saw" effect whereby record labels would voluntarily reduce sound recording royalties in response to increasing mechanical royalties and "accept millions of dollars in lost revenue." *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phono III)*, Final Rule, 84 Fed. Reg. 1918, 1966 (Feb. 5, 2019) (Dissent) (cleaned up). The marketplace transactions that followed the Majority's Initial Determination have decisively disproven that

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[1] Specifically, the Services respond to the following portions of the Copyright Owners' reply submission: Eisenach RWRT ¶¶ 8-89 & Appx. C; Spulber RWRT ¶¶ 10-27; Watt RWRT ¶¶ 7-18, 42-46, & n.51; and CO Reply Br. at 40-41, 43-46, 55-58. Order on Motion to Strike n.10; Services' Motion to Strike Copyright Owners Expert Testimony at 18.

assumption. After the Majority increased mechanical royalty rate levels and uncapped the total content cost ("TCC") prong for all offerings, [redacted]

Having no meaningful response to this evidentiary showing, the Copyright Owners instead resort to misdirection through belated testimony from three economists. First, through Professors Watt and Spulber, the Copyright Owners attempt to recast the see-saw theory and the Majority's reliance on it, despite the fact that Professor Watt introduced the theory in the first place. In stark contrast to Professor Watt's trial testimony, the Copyright Owners now contend that the see-saw theory and the Majority's reliance on it was nothing more than a nod to certain "core principles" of bargaining theory. Not so. The see-saw theory that the Majority relied on, based solely Professor Watt's testimony, was a specific prediction that record labels would reduce their royalties to offset the "significantly hiked" *Phonorecords III* rates in response to that rate hike. *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363, 383 (D.C. Cir. 2020). And without this prediction, which has proven to be wrong, the "extreme change" made by the Majority to the rates and rate structure cannot satisfy the governing rate-setting standard. *Id*. at 382.

The Copyright Owners also offer, through Dr. Eisenach, a series of flawed and ultimately irrelevant empirical analyses in an effort to: (i) salvage the see-saw theory; (ii) support the (incorrect) notion that the Services "thrived" under the vacated *Phonorecords III* rates and terms; and (iii) demonstrate that the uncapped TCC prong served its "intended purpose." But these analyses are riddled with errors. Those that the Copyright Owners contend support the see-saw theory do nothing of the sort. They measure changes in rates over the wrong period of time and fail to show any causal connection between the increases in musical works rates and changes in

sound recording rates. The analyses that the Copyright Owners contend demonstrate that the Services "thrived" look at irrelevant and misleading metrics. When properly considered, these analyses show that it was the Copyright Owners, and not the Services, that thrived. And those analyses that the Copyright Owners contend support an uncapped TCC prong for subscription interactive services do nothing of the sort—they are completely uninformative to the question of whether the TCC prong for subscription interactive services should be capped or not.

In short, the Copyright Owners have again failed to provide any meaningful support for their proposal to reinstate the vacated *Phonorecords III* rates and terms. The Judges should reject the Copyright Owners' invitation to do so and instead adopt the Services' Proposal in its entirety.

ARGUMENT

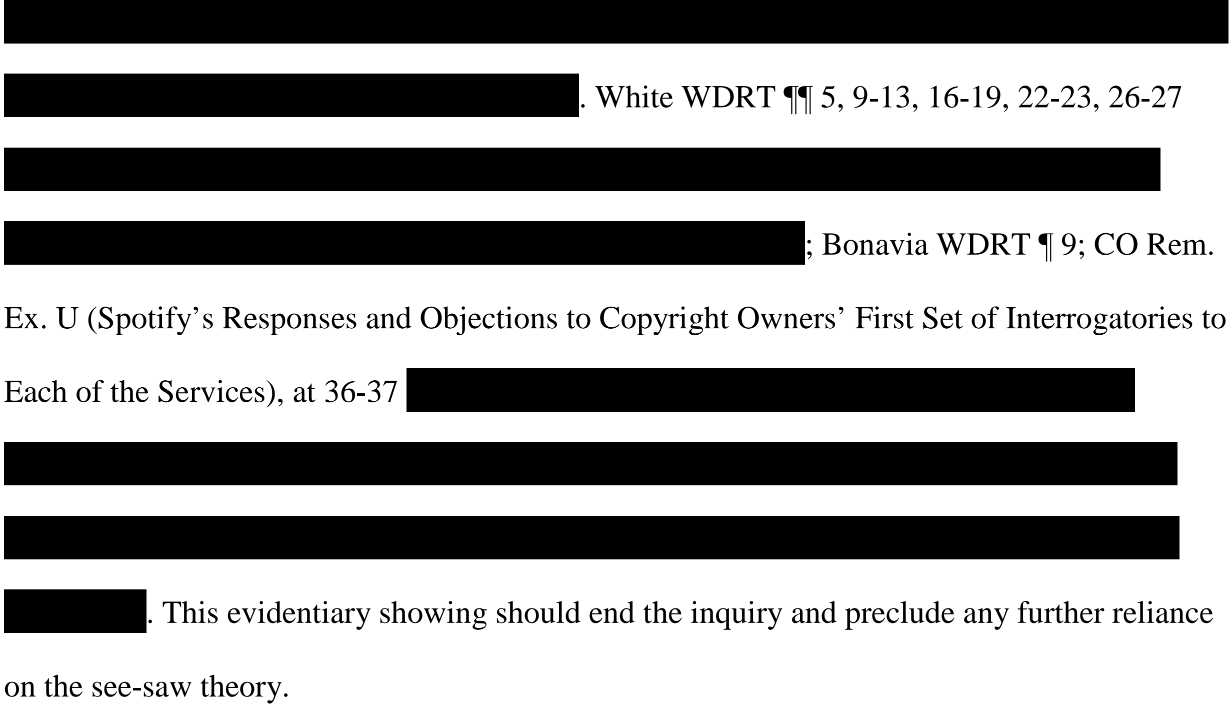
I. THE COPYRIGHT OWNERS' BELATED EFFORTS TO SUPPORT THE SEE-SAW THEORY FAIL

The Majority rested its Final Determination on the assumption that record labels would voluntarily "accept millions of dollars in lost revenue" by agreeing to "lower sound recording royalties" in response to increases in mechanical rates. *Phono III*, Final Rule, 84 Fed. Reg. 1918, 1966 (Feb. 5, 2019) (Dissent); *Phono III*, 84 Fed. Reg. at 1953 ("[T]he Judges rely on Professor Watt's insight (demonstrated by his bargaining model) that sound recording royalty rates in the unregulated market will decline in response to an increase in the compulsory license rate for musical works."); *see also* Order on Motion to Strike n. 12 ("The so-called 'see-saw' question relates to the issue of whether, as the majority predicted in *Phonorecords III*, 'the sound recording copyright owners' royalty rates would naturally decline in the course of their negotiations with interactive streaming services [in response to higher statutory mechanical rates] because the sound recording copyright owners would likely accept lower rates to ensure[] the continued survival and growth of the music streaming industry.'") (citing *Johnson v.*

Copyright Royalty Bd., 969 F.3d 363, 372 (D.C. Cir. 2020)). This assumption—what has come to be known as the "see-saw" theory—was central to the Majority's rationale for justifying the vacated rate levels and rate structure. *Phono III*, 84 Fed. Reg. at 1966 (Dissent); *Phono III*, 84 Fed. Reg. at 1953. As a result, the validity of that theory is of critical importance to this remand proceeding. Simply put, without adequate evidentiary support for the see-saw theory, the vacated rate levels and rate structure cannot be reinstated. Services' Opening Remand Brief at 44-50.

The Judges have provided a two-part framework for assessing the validity of the see-saw theory. Order on Motion to Strike at 11. "The first [] issue is whether the now-vacated mechanical rates and rate structure adopted by the Judges in *Phonorecords III* will cause sound recording rates to fall." *Id*. As the Judges noted, "this is a matter of prediction for the economic expert witnesses." *Id*. "The second overarching issue, unlike the first, is not a matter of economic prediction, but rather one of economic interpretation of actual events, *viz*., the movements, *vel non*, of mechanical rates, sound recording rates and the combination of the two, during the period from January 2018 through September 2020 when the *Phonorecords III* rates and rate structure were in effect. This is an empirical question." *Id*.

The Services addressed both of these questions in the opening remand submissions. There, the Services established, among other things, that: (i) Professor Watt's Nash bargaining model—the sole evidentiary support for the see-saw theory—cannot reliably predict how sound recording rates will change (if at all) in the real world in response to increasing musical works rates; and (ii) the actual rates negotiated between record labels and the Services after the Initial Determination issued in January 2018 [REDACTED] [REDACTED]. Services' Opening Remand Brief at 44-50 (collecting fact and expert witness testimony). On this second point, the Services also adduced evidence showing that [REDACTED]



. White WDRT ¶¶ 5, 9-13, 16-19, 22-23, 26-27 ; Bonavia WDRT ¶ 9; CO Rem. Ex. U (Spotify's Responses and Objections to Copyright Owners' First Set of Interrogatories to Each of the Services), at 36-37 . This evidentiary showing should end the inquiry and preclude any further reliance on the see-saw theory.

Lacking a meaningful response, the Copyright Owners attempt instead to muddy the waters. First, the Copyright Owners, relying on testimony from Professors Watt and Spulber, try to recast both the see-saw theory and the Majority's reliance on it. CO Reply Br. at 55-57. Second, the Copyright Owners, through Dr. Eisenach, provide a series of irrelevant and misleading empirical analyses. *Id*. at 57-58. Their efforts neither salvage the rates or rate structure previously determined in reliance on the see-saw theory, nor do they provide a basis for further consideration of that theory in setting rate levels and a rate structure on remand.

A. The Copyright Owners Mischaracterize Their Own See-Saw Theory

Remarkably, the Copyright Owners now claim that the see-saw theory was never meant as a prediction of what would actually happen in future negotiations between services and labels, and that Professor Watt's Nash bargaining model instead was only intended to educate the Judges as to certain "core principles" from bargaining theory. CO Reply Br. at 55-56; Watt RWRT ¶¶ 14-18; *see also* Copyright Owners' Motion to Compel at 8 ("Watt's report as a whole makes clear that his Nash bargaining analysis was never a guarantee of any particular

outcome."). According to the Copyright Owners, the Majority was only concerned with "forward-looking bargaining dynamics" and, as a result, "looked to bargaining theory for insights, and to Professor Watt's bargaining analysis." CO Reply Br. at 55. This blatantly mischaracterizes the testimony concerning the see-saw theory that they offered at trial and the Majority's reliance on it.

Contrary to the Copyright Owners' contention, the Majority did not look to vague generalizations about bargaining theory. Instead, as the Majority clearly stated, it relied on a very specific prediction, based solely on Professor Watt's testimony and his Nash bargaining model: "[T]hat sound recording royalty rates in the unregulated market will decline in response to an increase in the compulsory license rate for musical works" and, as a result of this responsive decline, "the total of musical works and sound recordings royalties [paid by the Services] would stay 'almost the same.'" *Phono III*, 84 Fed. Reg. at 1953; *see also* 3/27/17 Tr. 3091 (Watt) ("[REDACTED]") (emphasis added). It was this very specific prediction that served as the Majority's justification for dramatically increasing rates and making an unprecedented change to the rate structure. *Phono III*, 84 Fed. Reg. at 1953; *see also* Services' Opening Remand Brief at 44-50; Order on Motion to Strike n. 12.

Facing empirical evidence establishing the complete failure of the see-saw theory to predict actual market behavior, the Copyright Owners pivot to a far more generalized, nebulous discussion of "core principles" from bargaining theory. However, as Professor Marx explains in her Written Supplemental Remand Testimony ("Marx WSRT"), the untimely discussions from Professors Watt and Spulber regarding these "core principles" are not relevant to assessing the

see-saw theory that the Majority embraced. Marx WSRT ¶¶ 5-15.[2] These abstract theoretical concepts do not offer any real-world insight into the question of how record labels with complementary oligopoly power would actually respond to an increase in musical works rates when negotiating with a streaming service. *Id*. at ¶¶ 12, 15. At most, the "indeterminate" theory that Professors Watt and Spulber discuss suggests that there might be some change in sound recording rates to somewhat offset increases in musical rates under certain circumstances, but the newly submitted testimony does nothing to move the see-saw theory out of the realm of a "hypothetically plausible idea." *Phono III*, 84 Fed. Reg. at 2027-28 (Dissent). This belated testimony provides no reason to believe that: (i) this see-saw effect will actually occur in the real world under actual market conditions; or (ii) that a decline in sound recording rates (if any) would come anywhere close to fully offsetting the increase in musical works rates. Marx WSRT ¶¶ 12-15.

In short, in their remand testimony, Professors Watt and Spulber provide only theoretical discussion that does nothing to salvage the see-saw theory that formed the basis of the Majority's previous determination.

B. The Empirical Analyses Dr. Eisenach Offers Do Not Support the See-Saw Theory

While the Copyright Owners attempt to recast the see-saw theory as something other than what it is, they nevertheless attempt to support the actual theory empirically, claiming that "█ ██ ████████████████████" CO Reply Br. at 58; *see also* Watt RWRT ¶¶ 42-46. The Copyright Owners rely on a series of empirical analyses that Dr. Eisenach performed to

[2] Professor Marx also explains that these "core principles" are not as "core" as Professor Watt suggests. Marx WSRT ¶¶ 7-11.

support this conclusion. These analyses, however, are flawed and do not answer the relevant question.

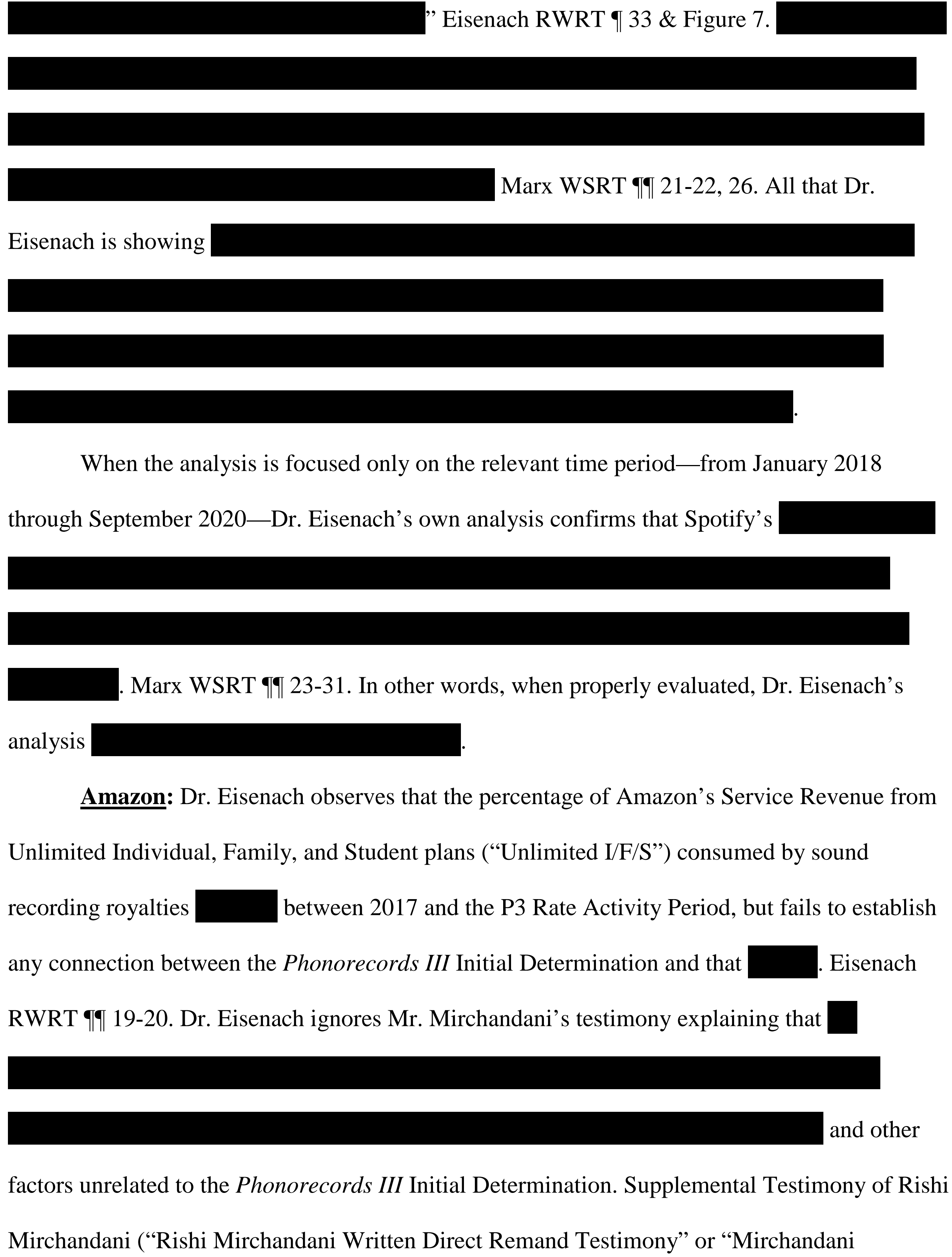
The relevant empirical question for assessing the validity of the see-saw theory is whether, "during the period from January 2018 through September 2020 when the *Phonorecords III* rates and rate structure were in effect" sound recording rates declined in response to the increase in mechanical rates. Order on Motion to Strike at 11. That is precisely the question that the Services answered: The Services established that the change in mechanical rates

. Services' Opening Remand Brief at 47-50.

In contrast, Dr. Eisenach's analysis on behalf of Copyright Owners does not address the question of whether the mechanical royalty rate increase adopted by the Majority caused any changes to sound recording royalty rates. CO Reply Br. at 57-58. Dr. Eisenach instead compares the effective royalty rates the Services paid during the last year *Phonorecords II* was in effect (2017) to the effective royalty rates they paid during the 33 months that the now-vacated *Phonorecords III* rates and terms were in effect (January 2018-September 2020 or the "P3 Rate Activity Period"). CO Reply Br. at 57-58; Eisenach RWRT § II(A). That crude comparison shows that certain effective rates changed over time, but Dr. Eisenach fails to isolate or identify the factors that drove those changes. In fact, Dr. Eisenach misunderstands and misrepresents the factors that determined the effective rates the Services paid during these time periods.

<u>Spotify</u>: Dr. Eisenach asserts that the Spotify data he reviewed

Eisenach RWRT ¶ 32. Specifically, Dr. Eisenach asserts that "



" Eisenach RWRT ¶ 33 & Figure 7.

Marx WSRT ¶¶ 21-22, 26. All that Dr. Eisenach is showing

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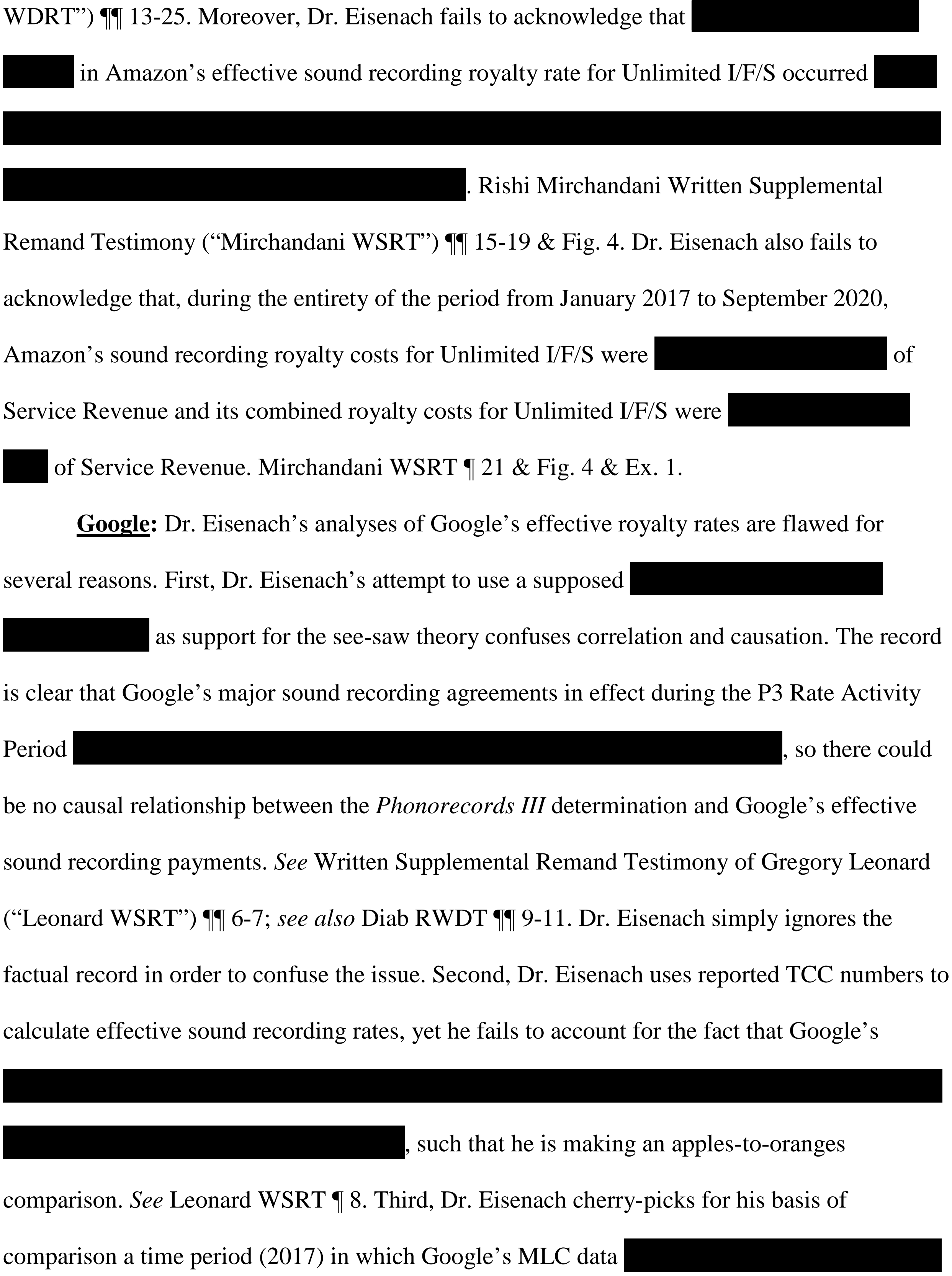
When the analysis is focused only on the relevant time period—from January 2018 through September 2020—Dr. Eisenach's own analysis confirms that Spotify's

. Marx WSRT ¶¶ 23-31. In other words, when properly evaluated, Dr. Eisenach's analysis .

<u>Amazon</u>: Dr. Eisenach observes that the percentage of Amazon's Service Revenue from Unlimited Individual, Family, and Student plans ("Unlimited I/F/S") consumed by sound recording royalties between 2017 and the P3 Rate Activity Period, but fails to establish any connection between the *Phonorecords III* Initial Determination and that . Eisenach RWRT ¶¶ 19-20. Dr. Eisenach ignores Mr. Mirchandani's testimony explaining that

and other factors unrelated to the *Phonorecords III* Initial Determination. Supplemental Testimony of Rishi Mirchandani ("Rishi Mirchandani Written Direct Remand Testimony" or "Mirchandani

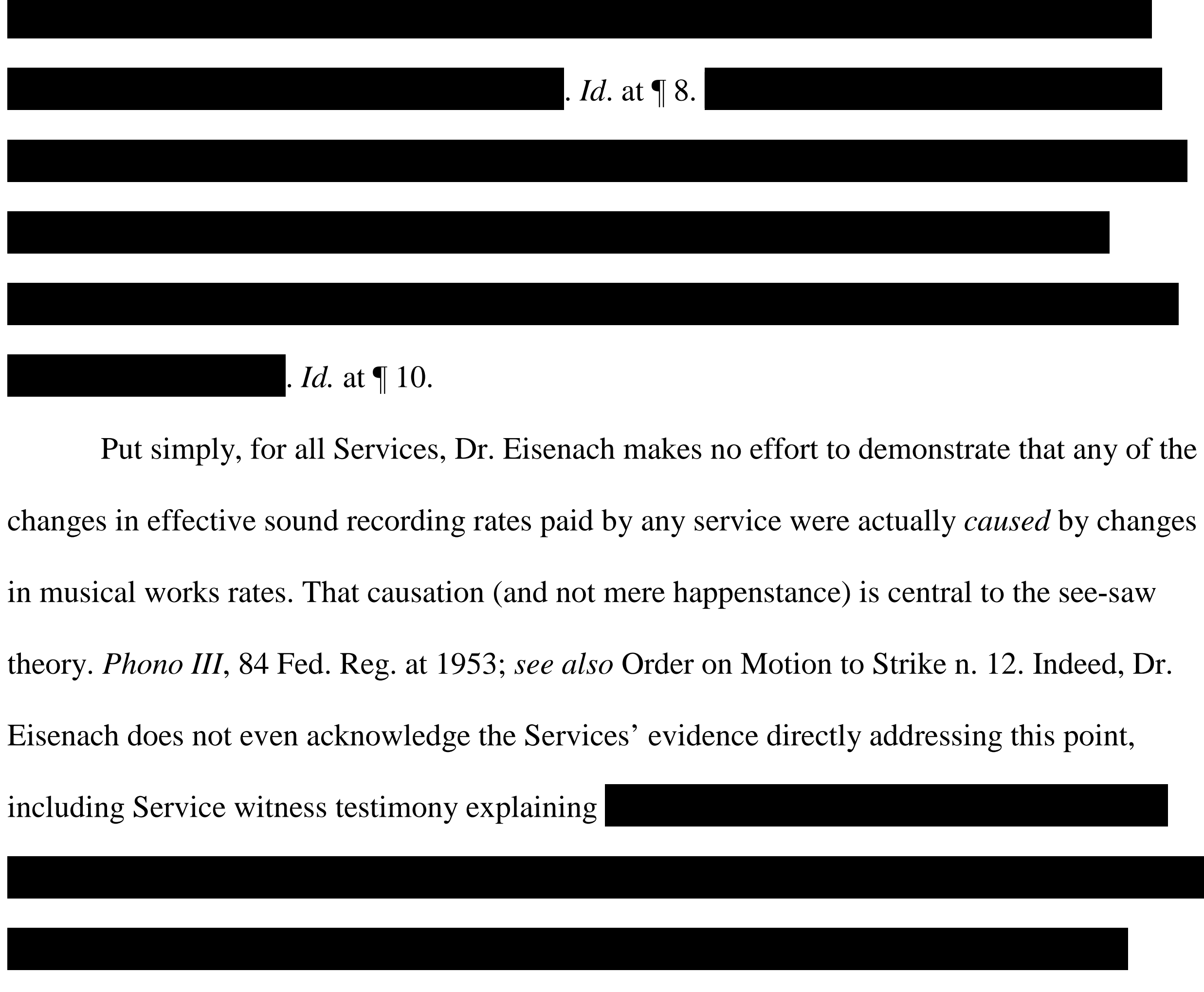


WDRT") ¶¶ 13-25. Moreover, Dr. Eisenach fails to acknowledge that [REDACTED] in Amazon's effective sound recording royalty rate for Unlimited I/F/S occurred [REDACTED]. Rishi Mirchandani Written Supplemental Remand Testimony ("Mirchandani WSRT") ¶¶ 15-19 & Fig. 4. Dr. Eisenach also fails to acknowledge that, during the entirety of the period from January 2017 to September 2020, Amazon's sound recording royalty costs for Unlimited I/F/S were [REDACTED] of Service Revenue and its combined royalty costs for Unlimited I/F/S were [REDACTED] of Service Revenue. Mirchandani WSRT ¶ 21 & Fig. 4 & Ex. 1.

<u>Google</u>: Dr. Eisenach's analyses of Google's effective royalty rates are flawed for several reasons. First, Dr. Eisenach's attempt to use a supposed [REDACTED] as support for the see-saw theory confuses correlation and causation. The record is clear that Google's major sound recording agreements in effect during the P3 Rate Activity Period [REDACTED], so there could be no causal relationship between the *Phonorecords III* determination and Google's effective sound recording payments. *See* Written Supplemental Remand Testimony of Gregory Leonard ("Leonard WSRT") ¶¶ 6-7; *see also* Diab RWDT ¶¶ 9-11. Dr. Eisenach simply ignores the factual record in order to confuse the issue. Second, Dr. Eisenach uses reported TCC numbers to calculate effective sound recording rates, yet he fails to account for the fact that Google's [REDACTED], such that he is making an apples-to-oranges comparison. *See* Leonard WSRT ¶ 8. Third, Dr. Eisenach cherry-picks for his basis of comparison a time period (2017) in which Google's MLC data [REDACTED]

. *Id*. at ¶¶ 14-15. As Dr. Leonard demonstrates, applying Dr. Eisenach's flawed methodology but simply choosing a different reporting period as the basis of comparison generates a starkly different result. *Id*. Finally, Dr. Eisenach conducts a blended analysis of Google Play Music and two different YouTube services in order to obscure the fact that, . *Id*. at ¶¶ 17-21. When all of these factors are considered, it is clear that Dr. Eisenach's analyses concerning Google are both irrelevant (because they do not consider the timing of Google's direct agreements) and unreliable.

Pandora: Dr. Eisenach does not contend that the royalty rates in Pandora's license agreements with record companies changed in response to the change in mechanical rates. Instead, he observes that . *See* Eisenach RWRT at ¶¶ 29-30; CO Reply Br. at 40-41 & n.31. But . As explained in the supplemental remand testimony of Jonathan Barnes ("Barnes WSRT"), Pandora



. *Id*. at ¶ 8.

. *Id.* at ¶ 10.

Put simply, for all Services, Dr. Eisenach makes no effort to demonstrate that any of the changes in effective sound recording rates paid by any service were actually *caused* by changes in musical works rates. That causation (and not mere happenstance) is central to the see-saw theory. *Phono III*, 84 Fed. Reg. at 1953; *see also* Order on Motion to Strike n. 12. Indeed, Dr. Eisenach does not even acknowledge the Services' evidence directly addressing this point, including Service witness testimony explaining

In addition to these problems with his empirical analyses, Dr. Eisenach commits at least two other critical errors in his examination of royalty rates over time. First, Dr. Eisenach looks at aggregate sound recording rates rather than at how rates negotiated by individual labels have changed in response to the *Phonorecords III* Initial Determination. Because sound recording rates are negotiated label by label, the changes of relevance are how each individual label has

responded to changes in musical works rates. By looking only at aggregate rates, Dr. Eisenach obscures what is actually going on. Marx WSRT ¶¶ 19, 29.

Second, Dr. Eisenach looks at Amazon's combined royalty costs as a percent of revenue across all services without adjusting for the change in how the regulations required Amazon to report Service Revenue. Eisenach RWRT Fig. 3. Whereas Amazon reported [REDACTED] for Prime under *Phonorecords II* in 2017, Amazon reported [REDACTED] for Prime during the P3 Rate Activity Period. As Dr. Eisenach admits, this difference distorts his results and creates [REDACTED] between 2017 and the P3 Rate Activity Period. *Id*. ¶ 22.

In short, Dr. Eisenach's analyses, like the discussions of bargaining theory put forward by Professors Watt and Spulber, do nothing to prop up the see-saw theory. Because the record established that the see-saw theory has no basis in reality, the vacated rate levels and rate structure that depend on it must be rejected.

II. THE SERVICES DID NOT "THRIVE" UNDER THE *PHONORECORDS III* RATES AND TERMS

The Copyright Owners rely on a series of flawed analyses performed by Dr. Eisenach to argue that the Services "thrived" and experienced unprecedented profit when the *Phonorecords III* rates and terms were in place. CO Reply Br. at 45. The Copyright Owners are wrong.

Dr. Eisenach begins his analysis by looking at Spotify global revenues, showing that they have increased over time as interactive streaming has become increasingly popular. While it is true that Spotify (and other Service) revenues have grown over time along with the increasing popularity of streaming, that says nothing about whether Spotify is "thriving" or "experiencing unprecedented [] profit." CO Reply Br. at 45. Revenues alone are the wrong metric to look to for evaluating Spotify's financial health. Marx WSRT ¶¶ 34-35. But, what these increases in

revenue do show is that the Copyright Owners are thriving, as their royalties can only go up as Service revenues increase. Moreover, Dr. Eisenach's own analyses show that the total royalties paid by the Services account for between [REDACTED] of these increasing revenues. *Id.* at ¶ 34. In short, the growing popularity of streaming has resulted in a financial windfall for the Copyright Owners.

Dr. Eisenach next purports to assess Spotify's profitability over time. Eisenach RWRT ¶ 47. Specifically, in his Figure 12, Dr. Eisenach reports that Spotify's global gross profit margins were higher during the period in which the *Phonorecords III* rates and terms were in effect than they were in 2016 and 2017. Again, this is the wrong metric. As Professor Marx explains, gross profit margins are not a reliable measure of profitability because they do not account for the costs of running a business. Marx WSRT ¶ 35. A more appropriate metric to consider (and one found in the same sources used by Dr. Eisenach that he chose not to report)—Spotify's operating margin—shows that [REDACTED]. Marx WSRT ¶ 35.

Dr. Eisenach's claims as to Pandora fare no better. His analysis focuses on Pandora's financial performance across all of its product lines, even though Pandora's interactive service offerings account for only a small fraction of its overall revenues. *Compare* Eisenach RWRT ¶¶ 52-54 & Figures 13, 14 *with* Barnes WSRT ¶ 22. And, even if Pandora's overall financial performance were probative, Dr. Eisenach has drawn the wrong conclusion. Pandora's adjusted EBITDA for the company overall [REDACTED] *Id.* at ¶ 23. To the limited extent Dr. Eisenach does address the financial performance of Pandora's interactive offerings, his analysis is nonetheless deeply flawed. He addresses only revenues attributable to those offerings while failing to account for costs, and he fails to acknowledge that almost all of the revenue growth he

identifies is simply a reflection that Pandora did not even start its rollout of Pandora Premium until part way through the year and he is comparing full-year results to partial-year results. *Id*.

Dr. Eisenach also attempts to characterize the financial success of the Section 115 services offered by Google and Amazon. Eisenach RWRT ¶ 55. But all Dr. Eisenach is able to muster is that "Amazon and Alphabet (Google's parent company) saw significant increases in market capitalization from January 2018 to October 2020." Eisenach RWRT ¶ 55. How these large, diversified parent companies fared overall says absolutely nothing about whether the Section 115 services offered by these entities were "thriving" or experiencing unprecedented profit.

III. THE COPYRIGHT OWNERS' BELATED ANALYSES DO NOT SUPPORT AN UNCAPPED TCC PRONG FOR SUBSCRIPTION INTERACTIVE SERVICES

Dr. Eisenach offers a series of analyses that he claims demonstrate that an uncapped TCC prong for subscription interactive services "has served its intended purpose by protecting Copyright Owners against the Services' revenue diminution strategies and as well as from apparently anomalous reporting practices." Eisenach RWRT ¶ 68. These analyses demonstrate nothing of the sort.

As an initial matter, a capped TCC prong provides the Copyright Owners with protection from these stated concerns. As Judge Strickler recognized, a multi-faceted rate structure with a capped TCC prong—like the Services' Proposal—addresses the potential for revenue displacement or deferment. *Phono III*, 84 Fed. Reg. at 1990 (Dissent) ("[A] way in which the input supplier can mitigate the effect of such revenue deferrals is to establish a pricing structure that provides alternate rate prongs and floors, below which the royalty revenue cannot fall. This is precisely the bargain struck between the Copyright Owners and the Services in 2008 and 2012,

and that has been ongoing through the present day."). Dr. Eisenach's analyses do not undermine Judge Strickler's reasoning in any way.[3]

More to the point, Dr. Eisenach's analyses do not speak to whether the TCC prong should be capped or not. For Spotify, Dr. Eisenach's analyses all boil down to one simple proposition—that there are differences in the *Phonorecords II* and *Phonorecords III* regulations that led Spotify to change certain of its reporting practices. First, Dr. Eisenach attempts to make much of the fact that [REDACTED]. Eisenach RWRT ¶ 82. But this only shows that [REDACTED][4] This analysis instead appears to be a veiled effort to challenge the treatment of mechanical floors for student and family plans under the *Phonorecords III* regulations. The D.C. Circuit already rejected the Copyright Owners' appeal of that issue and the treatment of student and family plans, consequently, is not an open issue for this remand proceeding. *See United States v. Kpodi*, 888 F.3d 486, 491 (D.C. Cir. 2018) ("law-of-the-case doctrine . . . prevents courts from reconsidering issues that have already been decided in the same case").

Moreover, as Professor Marx explains, [REDACTED]

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[3] The Copyright Owners' position is also directly at odds with the position they took during the original proceeding, where they argued that an uncapped TCC prong "does nothing to protect Copyright Owners from the Services' revenue displacement and deferment." Copyright Owners' Reply to Google PFF & COL at 2; *see also Phono III*, 84 Fed. Reg. at 1964-65 (Dissent). The Copyright Owners make no attempt to explain away this about-face.

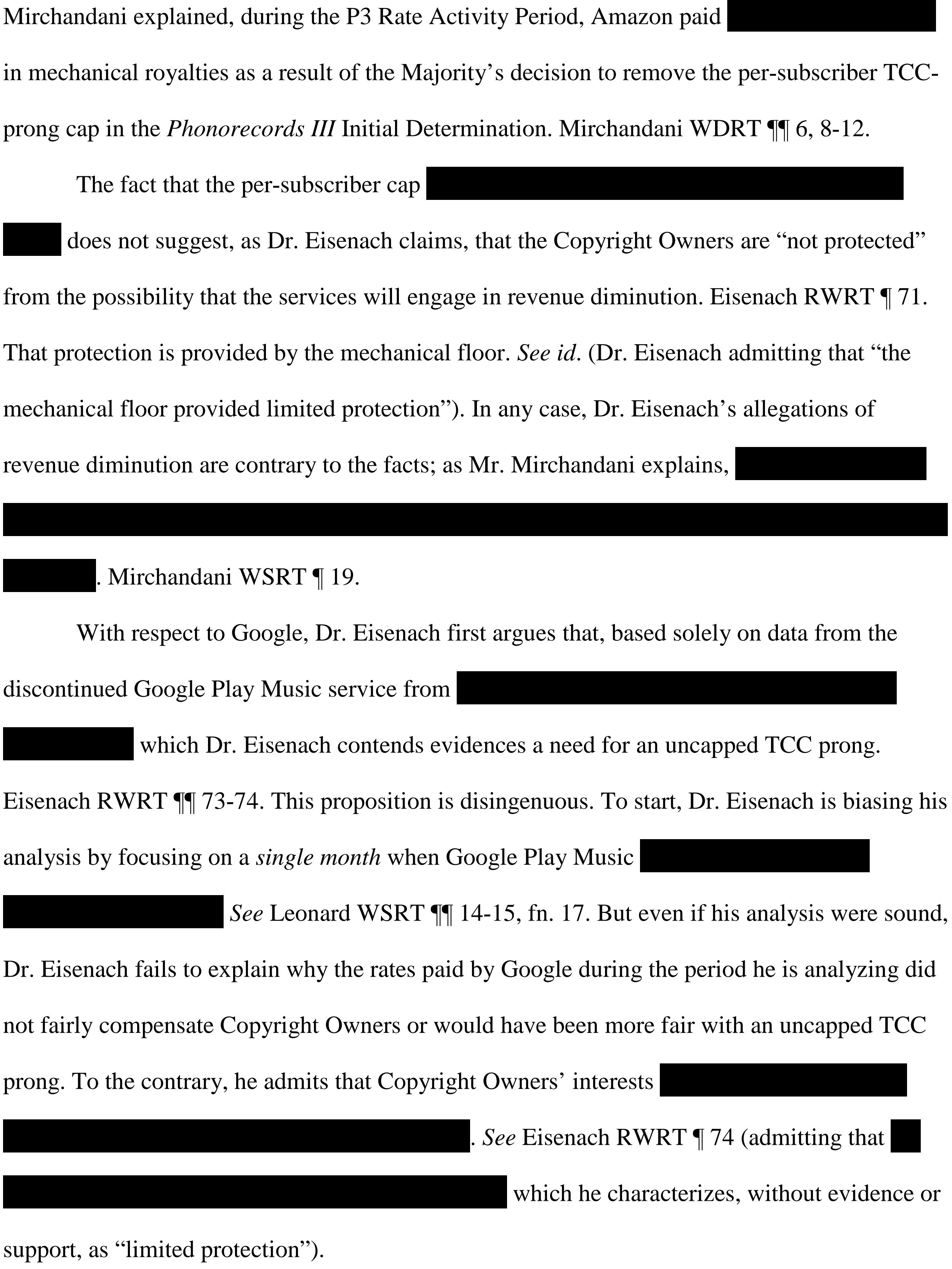
[4] Dr. Eisenach also claims that "Spotify has prioritized gaining market share and engages in substantial discounting, which leads to low revenues per subscriber." Eisenach RWRT ¶ 82. But the support he provides for this claim is about Spotify's desire to increase "the number of creators on [its] platform." *Id*. n. 101. The cited material says nothing about discounting or lowering revenues per subscriber.

Marx WSRT ¶¶ 37-39.

Id. at ¶ 38. This encouragement of beneficial price discrimination is precisely what the Judges sought to achieve through these modifications. *Phono III*, 84 Fed. Reg. at 1961-62; *Phono III*, 84 Fed. Reg. at 2018 (Dissent).

Dr. Eisenach next points out that, to comply with changes in the governing regulations, Eisenach RWRT ¶¶ 85-88. This too has nothing to do with "revenue diminution" or "anomalous reporting practices" and it in no way supports imposing an uncapped TCC prong for subscription interactive services. In fact, there is no dispute in this remand proceeding as to whether bundled offerings should have a capped or uncapped TCC prong—both the Services and the Copyright Owners have proposed leaving the TCC prong for bundled offerings uncapped. As with his analysis of student and family plans, Dr. Eisenach appears to be trying to introduce new evidence on issues for which the record remains closed—this time attempting to sneak in a new analysis that relates to the definition of revenue for bundled products, something that the Judges' remand scheduling order prohibits. Order Regarding Proceedings on Remand at 2, *Phono III*, No. 16-CRB-0003-PR (2018-2022), eCRB Doc. No. 23390 (Dec. 15, 2020).

With respect to Amazon, Dr. Eisenach observes that, during the last six months of 2017, when the *Phonorecords II* rates were in effect, the per-subscriber TCC-prong cap *See* Eisenach RWRT ¶¶ 71-72 & note 86. This simply confirms the practical importance of the per-subscriber cap for the Services. As Mr.



Mirchandani explained, during the P3 Rate Activity Period, Amazon paid in mechanical royalties as a result of the Majority's decision to remove the per-subscriber TCC-prong cap in the *Phonorecords III* Initial Determination. Mirchandani WDRT ¶¶ 6, 8-12.

The fact that the per-subscriber cap does not suggest, as Dr. Eisenach claims, that the Copyright Owners are "not protected" from the possibility that the services will engage in revenue diminution. Eisenach RWRT ¶ 71. That protection is provided by the mechanical floor. *See id.* (Dr. Eisenach admitting that "the mechanical floor provided limited protection"). In any case, Dr. Eisenach's allegations of revenue diminution are contrary to the facts; as Mr. Mirchandani explains, . Mirchandani WSRT ¶ 19.

With respect to Google, Dr. Eisenach first argues that, based solely on data from the discontinued Google Play Music service from which Dr. Eisenach contends evidences a need for an uncapped TCC prong. Eisenach RWRT ¶¶ 73-74. This proposition is disingenuous. To start, Dr. Eisenach is biasing his analysis by focusing on a *single month* when Google Play Music *See* Leonard WSRT ¶¶ 14-15, fn. 17. But even if his analysis were sound, Dr. Eisenach fails to explain why the rates paid by Google during the period he is analyzing did not fairly compensate Copyright Owners or would have been more fair with an uncapped TCC prong. To the contrary, he admits that Copyright Owners' interests . *See* Eisenach RWRT ¶ 74 (admitting that which he characterizes, without evidence or support, as "limited protection").

Dr. Eisenach also contends that a [redacted] evidences the need for an uncapped TCC prong because it impacted how much Google would pay [redacted]. Eisenach RWRT ¶¶ 75-76. As with his arguments concerning Spotify, Dr. Eisenach takes issue with Google [redacted]. Again, this has nothing to do with "revenue diminution" or whether the TCC prong for subscription interactive services should be capped or not. This is simply more untimely complaining about the treatment of family plans under the *Phonorecords III* regulations, which is not part of this remand proceeding.

CONCLUSION

For these reasons and those stated in the Services' Joint Opening Remand Brief and Joint Reply Remand Brief, the Judges should adopt the Services' Proposal in its entirety.

November 15, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all parties to this proceeding have consented to electronic service. I further certify that, on November 15, 2021, I caused a copy of the foregoing to be served via e-mail on all parties entitled to receive the materials under seal.

/s/ Richard M. Assmus
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Proof of Delivery

I hereby certify that on Monday, November 15, 2021, I provided a true and correct copy of the Services' Joint Supplemental Brief to the following:

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