

Before the  
UNITED STATES COPYRIGHT ROYALTY BOARD  
Washington, D.C.

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In the Matter of: )

DETERMINATION OF RATES )  
AND TERMS FOR MAKING AND )  
DISTRIBUTING PHONORECORDS )  
(*Phonorecords IV*) )

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Docket No. 21-CRB-0001-PR  
(2023-2027)

**SERVICES’ MOTION TO STRIKE, OR IN THE ALTERNATIVE TO SUBMIT  
SUPPLEMENTAL TESTIMONY CONCERNING, MR. BEBAWI’S IMPROPER  
REBUTTAL TESTIMONY AND ACCOMPANYING EXHIBITS**

The Judges should strike nearly all of the Written Rebuttal Testimony and exhibits of Antony Bebawi, President, Global Digital, of Sony Music Publishing (“Sony”).<sup>1</sup> Mr. Bebawi testifies at length about the “European digital music market” and the substance of Sony’s recent licenses for interactive streaming in Europe. *See* Written Rebuttal Testimony of Antony Bebawi (“Bebawi WRT”) ¶¶ 8-30. But no Service testified about its European licenses (or any non-U.S. licenses), so Mr. Bebawi’s testimony rebuts nothing. Instead, it is a belated attempt to introduce new licenses – into which Sony entered long before the Copyright Owners submitted their direct case – to bolster the Copyright Owners’ rate proposal, even though the Judges have repeatedly (and correctly) found that foreign licenses are poor benchmarks for setting U.S. rates.

This “rebuttal” testimony is improper. As the Judges have held, rebuttal testimony must “*rebut* the arguments and evidence proffered by the adverse parties.” *2000-03 CD Order*<sup>2</sup> at 3.

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<sup>1</sup> Specifically, the Judges should strike paragraphs 5, 6, and 8 through 30 of Mr. Bebawi’s Written Rebuttal Testimony, along with Exhibits COEX-12.1 through COEX-12.8.

<sup>2</sup> Order Denying Motion for Rehearing, *Distribution of 2000-2003 Cable Royalty Funds (2000-03 CD)*, No. 2008-2 CRB CD 2000-2003 (Phase II) (Aug. 7, 2013) (“*2000-03 CD Order*”).

To satisfy that standard, rebuttal testimony must have a sufficient “nexus” to an adversary’s direct case. *Web IV* Order<sup>3</sup> at 2. Mr. Bebawi’s testimony fails to meet that standard. No Service put its European licenses at issue, so Mr. Bebawi’s testimony about those licenses lacks a meaningful connection to the Services’ direct case. And that is why Mr. Bebawi does not – and cannot – cite any specific testimony that his discussion of Sony’s European licenses supposedly rebuts. Moreover, the Copyright Owners offer no evidence that the foreign markets Mr. Bebawi cites are comparable to the U.S. market, making his testimony irrelevant.

Because Mr. Bebawi’s testimony about Sony’s European licenses is “nothing more than an untimely” and irrelevant addition to the Copyright Owners’ Written Direct Statement, the Judges should strike it. *SDARS II* Order<sup>4</sup> at 2-3. If the Copyright Owners wanted to rely on their European licenses – despite the Judges’ repeated rejection of foreign benchmarks in the past – it was incumbent on them to do so in their direct case. They did not.

The only adequate remedy is to strike Mr. Bebawi’s improper testimony. Allowing the Services to submit sur-rebuttal testimony would not cure the prejudice caused by the Copyright Owners’ sandbagging. Requiring the Services to now build a factual record from scratch about European musical-works licenses would impose immense burdens on the Services and the Judges. It would require massive amounts of new discovery; likely precipitate additional motion practice; demand new testimony from new Service fact witnesses; and could even force the Services to amend their expert reports or serve new ones. It would also weigh down the

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<sup>3</sup> Order Granting In Part and Denying in Part Mot. by Pandora and NAB to Exclude Improper Written Rebuttal Testimony and Accompanying Exhibits, Dkt. No. 14-CRB-0001-WR (2016-20) (*Web IV*) (Apr. 22, 2015) (“*Web IV* Order”).

<sup>4</sup> Order Granting in Part and Denying in Part Music Choice’s Mot. To Strike, Dkt. No. 2011-1 CRB PSS/Satellite II (*SDARS II*) (Aug. 3, 2012) (“*SDARS II* Order”).

upcoming hearing with a distracting series of mini-trials about foreign copyright law and musical-works licensing, as the Judges would need to determine whether foreign licenses are meaningful benchmarks and, if so, which ones, and what adjustments would be necessary given the applicable rate-setting standard. None of these outcomes is desirable. Thus, although the Services seek leave to submit sur-rebuttal testimony in the alternative – it would be better than nothing – the Judges should strike Mr. Bebawi’s belated testimony.

### BACKGROUND

The Services proposed a number of benchmarks in their Written Direct Testimony, as did the Copyright Owners. *See, e.g.*, Amended Written Direct Testimony of Leslie Marx (“Marx AWDT”) ¶¶ 204-220; Written Direct Testimony of Jeffrey A. Eisenach (“Eisenach WDT”) ¶¶ 72-111. All of those benchmarks were U.S. agreements. None of the Services submitted testimony about any non-U.S. licenses. Nor did the Copyright Owners.

Despite this, the Copyright Owners’ Written Rebuttal Statement includes testimony from a new witness, Sony’s Antony Bebawi, about Sony’s European licenses. Bebawi WRT ¶ 1. The vast majority of Mr. Bebawi’s testimony concerns Sony’s licensing of musical works in the “European digital music market” and, in particular, “in the so-called ‘Tier 1’ countries”: the “United Kingdom, Germany, France, Sweden and the Netherlands.” *Id.* ¶ 8. Mr. Bebawi asserts that these “Tier 1” countries are “the most comparable market[s] to the U.S. digital music market.” *Id.* And he devotes several paragraphs to providing “background” on the European market, which he claims provides “context” for Sony’s negotiations abroad. *See id.* ¶¶ 8-13. Mr. Bebawi also testifies generally about Sony’s licensing objectives in Europe, as well as purported dynamics in that market that he believes inform Sony’s negotiations. *See id.* ¶¶ 14-23. None of this testimony is tied to any Service’s rate proposal or direct testimony.

Mr. Bebawi also discusses at length the terms of Sony’s “currently-operative pan-European agreements” with some of the Services. *See id.* ¶¶ 14, 24-30. He describes Sony’s licenses with [REDACTED]  
[REDACTED]  
[REDACTED]. *See id.* ¶ 25 n.8. Mr. Bebawi suggests that these licenses are relevant to rate proposals seeking “to eliminate one or more of the rate prongs that is intended to protect publishers and songwriters.” *Id.* ¶ 6. And he purports to rebut arguments that, “in the absence of the compulsory license in the US, [the Services] would be able to negotiate rates that are lower than the US statutory rate.” *Id.* ¶ 5. But Mr. Bebawi does not identify any particular rate proposal that he is actually rebutting or any particular witness testimony that his new assertions purport to disprove.

Instead, Mr. Bebawi uses the Services’ European licenses to argue generally that the [REDACTED]  
[REDACTED]  
[REDACTED]. *Id.* ¶ 28. He sets forth what he says are the “ [REDACTED] for their premium subscription services . . . [REDACTED]” in the UK, Germany, Netherlands, Sweden, and France, *id.* ¶ 29, and “the effective per-play amount received by [Sony] from those same services during that period,” *id.* ¶ 30.

Mr. Bebawi also attempts to translate [REDACTED]  
[REDACTED] – which differ between countries and between the Services – into a range of

U.S. dollar-equivalent amounts. *See id.* ¶ 25.<sup>5</sup> Again, he performs this exercise without identifying any specific testimony to which he is responding. Mr. Bebawi further describes

*Id.* ¶ 26. And he similarly offers a conversion of

*See id.*

## ARGUMENT

### I. MR. BEBAWI’S TESTIMONY ABOUT EUROPEAN LICENSES IS IMPROPER REBUTTAL TESTIMONY

#### A. Rebuttal Testimony Must Have A Sufficient “Nexus” to Issues Raised in Direct Testimony and Cannot Merely Bolster a Participant’s Direct Case

“As should be clear from their names, . . . the ‘written direct statement’ and the ‘written rebuttal statement’ serve different functions in the adjudication” of royalty rates and terms. *2000-03 CD Order* at 3. A Written Direct Statement is not merely a participant’s “opportunity to set forth the arguments and evidence it intends to rely upon in establishing” its own rate proposal. *Id.* Instead, the Judges’ rules require that a participant’s “written direct statement . . . include *all* testimony . . . along with *all* the exhibits” to support that proposal. 37 C.F.R. § 351.4(b)(1) (emphases added). As the Judges have explained, participants are “required to present the information necessary to establish their proposed” royalty rates and terms “(i.e., their direct case) in their written direct statement.” *2000-03 CD Order* at 3; *see also Settling Devotional Claimants v. Copyright Royalty Bd.*, 797 F.3d 1106, 1118 (D.C. Cir. 2015) (“It should be no surprise that a requirement that a party present in its initial direct statement ‘all

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<sup>5</sup> Mr. Bebawi testifies that it is “[REDACTED].” Bebawi WRT ¶ 27. But he does not cite any particular license to support this statement. Nor does his testimony say anything about the negotiation of these terms or any of the other terms in the Services’ European licenses.

testimony’ necessary to establish its claimed entitlement to royalties would obligate the party to include in that statement the testimony applying its proposed methodology to the case at hand.”).

A Written Rebuttal Statement, by contrast, is for “the counter-arguments and evidence [a participant] intends to offer to *rebut* the arguments and evidence proffered by the adverse parties in the proceeding.” *2000-03 CD* Order at 3 (emphasis added). Testimony that simply attempts to bolster a participant’s own direct submission or belatedly offers new evidence in support of a participant’s rate proposal is improper. That is why the Judges have struck rebuttal testimony that “was a required element of [a participant’s] direct case,” *id.* at 3-5, or that was “nothing more than an untimely addition to [witness’s] written direct testimony,” *SDARS II* Order at 2.

To be proper rebuttal testimony, “[t]here must be a sufficient ‘nexus’ between the purported rebuttal materials and the opposing direct testimony that those materials purport to rebut. If the proffered rebuttal materials ‘stray too far’ from the direct testimony they purport to rebut, the proffered rebuttal materials shall be barred.” *Web IV* Order at 2. In *SDARS II*, for example, the Judges struck portions of the rebuttal testimony of SoundExchange’s economic expert, George Ford, because “SoundExchange offer[ed] no direct testimony by Music Choice witnesses that Dr. Ford expressly responds to with his opinion that a greater-of-rate structure is desirable.” *SDARS II* Order at 3. Similarly, in *Web IV*, the Judges found that 711 agreements appended to the rebuttal testimony of five record company witnesses did “not constitute proper rebuttal.” *Web IV* Order at 2. Though the licenses were “documents underlying the benchmark [analysis] offered in the written direct testimony . . . of SoundExchange’s expert witness,” the Judges still found them improper rebuttal because “they [did] not address the argument made by the Licensee Services that *previous* benchmark analyses in prior proceedings were based on an inadequate sample of interactive agreements.” *Id.* at 1-2. The Judges also found that

SoundExchange had simply attached the licenses “to [its] rebuttal testimony, without any explanation of how these agreements [rebutted the other side’s case],” which was “insufficient to show a nexus between these materials” and the Licensee Services’ direct case. *Id.* at 2.

**B. Mr. Bebawi’s Testimony About European Licenses Has No Nexus to the Services’ Direct Case and Is Merely An Attempt to Bolster the Copyright Owners’ Own Written Direct Statement and Rate Proposal**

Mr. Bebawi discusses at length the “European digital music market,” Sony’s licensing objectives in that market, and the terms of the Services’ European licenses. *See* Bebawi WRT ¶¶ 5-6, 8-30. None of this is proper rebuttal testimony. The Judges have made clear that a rebuttal witness’s testimony must both “address issues raised in an adversary’s direct case,” *Web V* Order<sup>6</sup> at 5, and provide an “explanation of how” it is doing so, *Web IV* Order at 2; *see also SDARS II* Order at 3 (similar). Mr. Bebawi’s testimony does neither. None of the Services testified about the substance of their European licenses, so Mr. Bebawi’s testimony has no “nexus” to the Services’ direct case. And the absence of any such nexus explains why he does not cite a single paragraph in *any* witness’s written direct statement that he is rebutting.

The only part of Mr. Bebawi’s testimony that the Services do not move to strike provides a stark contrast. In paragraphs 31 and 32, Mr. Bebawi addresses specific conversations that he had with Amazon’s James Duffett-Smith, and which Mr. Duffett-Smith referenced in his Written Direct Testimony. *See* Bebawi WRT ¶¶ 31-32. That is clearly rebuttal testimony. In the remainder of Mr. Bebawi’s testimony, by contrast, the closest he comes to identifying a nexus with any Service’s Written Direct Statement is to assert that “one or more” Services (he does not say which ones) have sought to “eliminate one or more of the rate prongs” the Copyright Owners

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<sup>6</sup> Order Denying SoundExchange’s Mot. To Strike the Rebuttal Testimony of Pandora Witness Dr. David Reiley at 7, Dkt. No-19-CRB-0005-WR (*Web V*) (Apr. 9, 2020) (“*Web V* Order”).

have proposed here (by which he primarily means have not proposed “[REDACTED]”) and that “one or more” Services (again, he does not say which ones) have argued that, absent a compulsory license, Services could negotiate lower rates (none did). *Bebawi WRT ¶¶ 5-6*. If that were enough to constitute a “nexus” to the other side’s case, then anything supporting a participant’s affirmative rate proposal would become rebuttal. Indeed, at a high enough level of abstraction, *every* potential benchmark is in some sense a “rebuttal” of the other side’s benchmarks. There would be nothing to stop a participant from saving *all* its benchmarks for rebuttal and arguing that each one generally “rebutts” the other side’s rate proposal.

Federal courts – which the Judges have recognized provide instructive precedent<sup>7</sup> – reject such an expansive definition of “rebuttal” testimony. *See Bowman v. Int’l Bus. Mach. Corp.*, 2013 WL 1857192, at \*7 (S.D. Ind. May 2, 2013) (rejecting argument that “rebuttal reports merely have to rebut the same ‘subject matter’” as “far too broad” because “[t]he proper function of rebuttal evidence is to contradict, impeach or defuse the impact of the evidence offered by an adverse party”); *Century Indem. Co. v. Marine Grp., LLC*, 2015 WL 5521986, at \*4 (D. Or. Sept. 16, 2015) (expert’s report was improper rebuttal because the party had known from the beginning it would need to present the evidence affirmatively at trial). The Judges should as

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<sup>7</sup> The Judges have explained that they look to “[c]ourt rulings interpreting Federal Rules of Civil Procedure” where, as here, “the Judges’ procedural rules do not anticipate [a] circumstance.” *Discovery Order 15: Denying SoundExchange’s Mot. to Compel iHeartMedia at 3*, Dkt. No. 14-CRB-0001-WR (2016-20) (*Web IV*) (Jan. 15, 2015); *see also* *Order Denying Licensee Services’ Mot. to Strike SoundExchange’s “Corrected” Written Rebuttal Testimony of Daniel Rubinfeld at 6*, Dkt. No. 14-CRB-0001-WR (2016-20) (*Web IV*) (Apr. 2, 2015) (“*Rubinfeld Web IV Order*”) (“Neither the Act nor the Judges’ procedural regulations addresses the permissible scope of written rebuttal statements and testimony.”).



well. This sort of “‘gamesmanship’ [would] interfere[] with the Judges’ need for a comprehensive record.”<sup>8</sup>

The only real “nexus” between Mr. Bebawi’s testimony about the Services’ European licenses and a participant’s direct case is to the Copyright Owners’ direct testimony and rate proposal. The Copyright Owners’ direct testimony stressed the need for per-subscriber and per-play prongs, as Mr. Bebawi does in his rebuttal. *Compare, e.g.*, Eisenach WDT ¶ 76, Written Direct Testimony of Robin Flynn ¶ 47 *with* Bebawi WRT ¶¶ 14-23. The Copyright Owners also repeatedly suggested in their Written Direct Statement that the compulsory license depresses rates, as Mr. Bebawi likewise does in citing the Services’ European licenses. *Compare, e.g.*, Written Direct Testimony of David Kokakis ¶ 65, Written Direct Testimony of Thomas Kelly ¶ 18 *with* Bebawi WRT ¶¶ 24-30. All Mr. Bebawi is doing is proposing new benchmarks to support those same basic points the Copyright Owners have been making all along. Participants cannot save such affirmative benchmark evidence for rebuttal. *See 2000-03 CD Order at 3-5; see also Web IV Order at 2* (finding new benchmarks attached to five record company witnesses’ rebuttal testimony were not proper rebuttal material).

The Judges should reject the Copyright Owners’ sandbagging. If the Copyright Owners wanted to rely on a hand-picked selection of their European licenses with the Services to support their proposed rates and terms, they should have proposed these licenses as benchmarks in their direct case. They did not. And their belated submission of those licenses in an attempt to bolster their own rate proposal is “trial by ambush, in violation of the letter and spirit of the Judges’

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<sup>8</sup> *Rubinfeld Web IV Order at 11; see also Web V Order at 8* (“Although the Judges agree that a full record is important, that goal does not excuse any attempt by Pandora to assemble piecemeal its *direct case* in a manner that could compromise SoundExchange’s right to test the evidence and testimony.”).

procedural rules.”<sup>9</sup> *See also Oracle Am. Inc. v. Google Inc.*, 2011 WL 5572835, at \*3 (N.D. Cal. Nov. 15, 2011) (granting motion to strike and noting expert disclosure schedule “was designed to forestall ‘sandbagging’ by a party with the burden of proof who wishes to save its best points for reply, when it will have the last word”). As in *SDARS II*, Mr. Bebawi’s testimony “stray[s] so far from . . . the direct testimony it is offered to rebut as to be nothing more than an untimely addition to [the Copyright Owners’] written direct testimony.” *SDARS II* Order at 2.

## **II. THE JUDGES SHOULD STRIKE MR. BEBAWI’S IMPROPER REBUTTAL TESTIMONY BECAUSE AGREEMENTS CONCERNING NON-U.S. JURISDICTIONS ARE NOT RELEVANT**

No Service introduced evidence concerning its European or other non-U.S. licenses because such licenses are irrelevant and because the Judges have repeatedly rejected foreign benchmarks in setting rates for the U.S. market. Mr. Bebawi’s testimony not only “stray[s]” too far from the Services’ direct case, *id.*, it is also irrelevant to the Judge’s task. The Judges should strike Mr. Bebawi’s testimony for this reason as well.

The Copyright Owners offer no evidence that the foreign markets Mr. Bebawi cites are comparable to the U.S. market, other than his *ipse dixit* of which European markets are “in [his] view the most comparable” to the U.S. market. Bebawi WRT ¶ 8. And when participants proposing a foreign license fails to provide that evidence, the Judges have twice refused to consider those licenses in their benchmarking analysis. In *Phonorecords I*, for example, the Judges explained that “comparability is a much more complex undertaking in an international setting than in a domestic one. There are a myriad of potential structural and regulatory differences whose impact has to be addressed in order to produce a meaningful comparison.”

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<sup>9</sup> Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds, 78 Fed. Reg. 64,984, 65,004 (Oct. 30, 2013).

Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4,510, 4,522 (Jan. 26, 2009) (“*Phonorecords I* Final Rule”). Because “the full range of comparability issues has not been sufficiently analyzed and presented,” the Judges declined to rely on the foreign benchmarks. *Id.* Similarly, in *SDARS II*, the Judges rejected Music Choice’s evidence of foreign rates because Music Choice’s witnesses did not “attempt[s] an analysis or discussion of the intricacies of Canadian and U.K. markets for performance rights for musical works and sound recordings[.]” Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23,054, 23,083.

Here too, the Copyright Owners offer no evidence that any non-U.S. jurisdictions are similar to the United States. Instead, Mr. Bebawi asserts that “‘Tier-1’ countries are comparable to the United States” because Services “have been operating in these countries at least as long as in the US market” and the “economies of these countries are also developed.” Bebawi ¶ 9. That falls well-short of the detailed analysis of the “structural and regulatory differences” that “ha[ve] to be addressed in order to produce a meaningful comparison” between U.S. and foreign licenses. *Phonorecords I* Final Rule at 4522. Therefore, in addition to being improper rebuttal testimony, Mr. Bebawi’s testimony is irrelevant and should be struck for that reason as well.

### **III. SUR-REBUTTAL TESTIMONY WILL NOT CURE THE PREJUDICE THE COPYRIGHT OWNERS HAVE CAUSED**

Because Mr. Bebawi’s testimony concerning Sony’s European licenses is both not proper rebuttal and irrelevant, the Judges should strike it. That is the remedy the Judges ordered in *SDARS II*. And it is the appropriate remedy here.

*First*, allowing Mr. Bebawi’s testimony will require distracting mini-trials at the hearing about the copyright regimes and interactive streaming markets in multiple different countries.

“The benchmarking approach involves looking to actual market outcomes in *comparable markets* . . . to infer a reasonable rate in the target market.” Marx AWDT ¶ 196 (emphasis added). Determining whether the markets in various European countries are “comparable market[s]” as Mr. Bebawi posits would be a significant undertaking, particularly given the “myriad of potential structural and regulatory differences whose impact has to be addressed in order to produce a meaningful comparison.” *Phonorecords I* Final Rule at 4522.

To put the [REDACTED] Mr. Bebawi cites into context, the Judges would have to take testimony on differences between the markets in the United States and each of the countries Mr. Bebawi references. Issues the Judges would need to consider include, but are not limited to: (1) the existence of government-mandated PROs or CMOs in each foreign market; (2) whether publishers are able to fully withdraw their digital rights from PROs or CMOs in each market; (3) whether each foreign market has a “rate court”; (4) the number of licenses required for interactive streaming services in those foreign markets, and the different rates of those licenses; (5) whether publishers sit on the boards of foreign PROs/CMOs, and the impact of those relationships on license negotiations; and (6) whether, and to what extent, rates in foreign markets are influenced by the statutory rate in the U.S.<sup>10</sup>

*Second*, none of this evidence is currently part of any participant’s written direct statements. As the Judges have explained, in determining whether “license agreements may

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<sup>10</sup> For example, [REDACTED]

serve as appropriate benchmarks,” or whether they require “appropriate adjustments or outright rejection, the Judges rely upon an adversarial hearing predicated on full pre-hearing discovery.” *Web IV* Subpoena Order<sup>11</sup> at 6. And a full record is especially important for foreign licenses that are subject to foreign legal regimes and licensing practices. Requiring the Services to build a factual record from scratch about these markets would impose extraordinary burdens. Indeed, responding to Mr. Bebawi’s testimony will require the Services to present new fact and expert testimony about a topic none has addressed to date. Doing so would not only carry substantial costs, but also would distract the participants from building a complete record about their U.S. benchmarks, which are actually relevant.

The burden imposed on the Services is especially acute in light of the expedited timeline for rebuttal discovery. Allowing Mr. Bebawi’s testimony on Sony’s European licenses would significantly increase the amount of discovery that the Services must serve and review because they would now need to collect discovery related to five countries, rather than just one.<sup>12</sup> Had the Copyright Owners included Mr. Bebawi’s testimony with their Written Direct Statement (as they should have), the Services would have had an opportunity to take full discovery on these licenses over a period of six months and refute Mr. Bebawi’s statements with their own rebuttal testimony and supporting evidence. But by withholding testimony about the European licenses until rebuttal, the Copyright Owners have “avoided exposing [its] weaknesses,” *Century Indem. Co.*, 2015 WL 5521986, at \*6, and prejudiced the Services’ ability to respond, *id.* at \*6 (noting

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<sup>11</sup> Order Granting in Part Licensee Services’ Mot. for Expedited Issuance of Subpoenas to Apple, Inc., Dkt. No. 14-CRB-0001-WR (2016-20) (*Web IV*) (Apr. 10, 2015) (“*Web IV* Subpoena Order”).

<sup>12</sup> The Copyright Owners also appear to intend to use their inclusion of non-U.S. agreements in Mr. Bebawi’s improper rebuttal testimony to open the door to discovery into the Services’ non-U.S. licenses, as the Copyright Owners’ rebuttal discovery requests include requests for information concerning non-U.S. jurisdictions.

that the submission of improper rebuttal testimony “in such a complex case puts all complying parties at a significant disadvantage and disrupts the carefully designed structure and timing of pretrial filings and disclosures”).

For these reasons, striking Mr. Bebawi’s testimony is a superior remedy to granting the Services the opportunity to submit sur-rebuttal testimony. This situation is unlike the *Phonorecords III* remand proceeding, in which the Judges recently declined to strike nearly 300 pages of expert testimony in the Copyright Owners’ written rebuttal remand submission, all of which the Copyright Owners could have submitted in their direct remand statement. There, the Judges noted the “special importance” of the D.C. Circuit’s ruling, which they read to “allow[] each party to submit rebuttal testimonial and other evidence in response to any testimonial or other evidence that is *substantively* direct in nature, regardless of how the adverse party has been [sic] denominated its submission.”<sup>13</sup> No special circumstances justify allowing the Copyright Owners’ to belatedly expand their submission of affirmative evidence here.

Nonetheless, if the Judges do not strike Mr. Bebawi’s testimony regarding the European licenses, the Judges should allow the Services to submit sur-rebuttal testimony. Although that will not fully cure the prejudice the Copyright Owners have caused – and will divert the Services from hearing preparation, among other tasks – this opportunity is necessary to ensure that the Services are not again “procedurally blindsided.” *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363, 381 (D.C. Cir. 2020).

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<sup>13</sup> Order Denying in Part and Granting in Part Services’ Mot. to Strike Copyright Owners’ Expert Testimony and Granting Services’ Request to File Supplemental Testimony and Briefing at 2, Dkt. No. 16-CRB-0003-PR (2018–22) (*Phonorecords III Remand*) (Oct. 1, 2021).

## CONCLUSION

The Judges should grant the Motion.

Dated: May 13, 2022

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# Proof of Delivery

I hereby certify that on Friday, May 13, 2022, I provided a true and correct copy of the Services' Motion to Strike, Or in the Alternative to Submit Supplemental Testimony Concerning Mr. Bebawi's Improper Rebuttal Testimony (PUBLIC) to the following:

Powell, David, represented by David Powell, served via E-Service at davidpowell008@yahoo.com

Copyright Owners, represented by Benjamin K Semel, served via E-Service at Bsemel@pryorcashman.com

Zisk, Brian, represented by Brian Zisk, served via E-Service at brianzisk@gmail.com

UMG Recordings, Inc., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Sony Music Entertainment, represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Johnson, George, represented by George D Johnson, served via E-Service at george@georgejohnson.com

Joint Record Company Participants, represented by Susan Chertkof, served via E-Service at susan.chertkof@riaa.com

Warner Music Group Corp., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Signed: /s/ Joshua D Branson