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

In the Matter of: **DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (*Phonorecords IV*)**	**Docket No. 21-CRB-0001-PR (2023-2027)**

REPLY IN FURTHER SUPPORT OF THE SERVICES' EMERGENCY MOTION FOR LIMITED MODIFICATION TO *PHONORECORDS IV* PROTECTIVE ORDER
AND
OPPOSITION TO COPYRIGHT OWNERS' EMERGENCY CROSS-MOTION TO VACATE THE MAY 9 2022 INTERIM RELIEF AND STAY THE MAY 20, 2022 SUPPLEMENTAL SUBMISSION DEADLINE

Spotify USA Inc., Amazon.com Services LLC, and Pandora LLC (collectively the "Services") respectfully submit this reply in further support of their joint motion and in opposition to Copyright Owners' cross-motion in the above-referenced proceeding.

INTRODUCTION

The Services have consistently opposed several audit-like requests by the Copyright Owners seeking the production of certain highly sensitive, financial information throughout this proceeding. Copyright Owners concede as much. *See* CO's Opp. 10–12. Doing so places sensitive, audit-like materials into the hands of the very same attorneys who represent the Mechanical License Collective ("MLC") *outside* of those audit proceedings—information that is far more detailed and covers a broader date range than the MLC is entitled to request access to in an audit under the Music Modernization Act ("MMA"). This creates a serious risk of biasing those audit proceedings and undermining the protections provided under the MMA. And contrary to Copyright Owners' fictional tale of midnight surprise (CO's Cross-mot. and Opp'n at 3), the

Services' motion was filed at precisely the appropriate time: Shortly after the Services were ordered to produce highly sensitive financial information which—given that certain Copyright Owners' counsel are also lead counsel for the MLC—creates serious risks of prejudice to the Services in the audits the MLC intends to conduct in parallel to this proceeding.[1]

The Judges' order with respect to Broadcast Music, Inc.'s ("BMI") license agreements should make resolution of this motion straight-forward on the merits. *See Order Granting in Part Broadcast Music, Inc.'s Motion for a Limited Modification to the Protective Order*, Dkt. No. 21-CRB-0001-PR (2023-2027) (Mar. 23, 2022) [hereinafter BMI Order]. There, the Judges implemented screening procedures for the Services' lawyers that act in dual roles as counsel in this proceeding and as direct participants in certain private licensing negotiations with BMI. The Judges found "good cause" to modify the protective order because "knowledge of details within the BMI License Agreements by certain outside counsel" posed "an identifiable risk of prejudice to BMI." *Id.* at 3. Accordingly, the Services ask the Judges to order similar screening of dual-role counsel from a discrete subset of highly confidential financial and accounting documents that risk prejudicing the Services in imminent MLC audit proceedings, which the MLC may conduct pursuant to the MMA. What the Services are asking for is not remarkable, it is merely asking for the Judges to bar attorneys also representing the MLC from accessing certain business sensitive information. Those attorneys would not be barred from the data at issue if they recused themselves from ongoing and/or future MLC audits. This relief is crucial to protecting the integrity of the

[1] The Services do not oppose an extension of the May 20 supplemental submission deadline, which Copyright Owners' filing also seeks to stay. But Copyright Owners did not meet and confer with the Services on this point before filing their motion, so the Services have not had a chance to finalize their respective positions on the exact contours of any such potential extension. The Services will confer with Copyright Owners to develop a separate stipulation regarding a proposed extension for the Judges' consideration.

audit proceedings as contemplated by the MMA and to ensure consistency in the application of the Judges' discovery rulings.

I. THE BALANCE OF RISK WARRANTS GRANTING SERVICES' REQUESTED RELIEF

All parties appear to agree on the proper legal standard the Judges should employ consistent with the BMI Order: The Judges should balance the risk associated with disclosure of the restricted material with the risk that a party will be impaired in its ability to litigate its claims. Services Mot. at 5 (citing prior orders); CO's Cross-mot. and Opp'n at 7 (citing prior order). The balance here clearly favors granting Services' targeted request for relief.

A. Risk of Disclosure is Severe Given Mr. Semel's Dual Role As Representative for Both Copyright Owners and the MLC in Proceedings Adverse to the Services

Copyright Owners do not meaningfully rebut Services' key concern: The prejudice of giving the Services' highly sensitive, audit-like documents to Mr. Semel (and any others similarly situated) given his dual role as counsel to the MLC. Copyright Owners do not contest that the newly-produced documents include incredibly granular accounting and revenue data that has never been produced in these proceedings or similar rate-setting proceedings like this one. And to be clear, the MLC does not have the authority to access the information produced in this proceeding, or even the level of detail of the financial and accounting information the Services have been ordered to produce in this proceeding. Nor do Copyright Owners deny that dual-role advocates will likely "form opinions about which services to audit, for what periods, and with what focus," and would "shape and influence the forthcoming MLC audit" based on that data. Services Mot. at 5. Indeed, there is no question that whereas an independent auditor may conclude that a Service's accounting methods are independently reasonable under the applicable regulations, giving MLC counsel access to all Services' underlying granular financial materials invariably invites

comparisons among the Services that could guide MLC's independent auditors and allow them to form incorrect judgments based on an inappropriate use of this information. Finally, Copyright Owners do not contest that such an outcome is "expressly at odds with the MMA," which contemplates independent, third-party auditors to mitigate bias and preserve confidentiality in the audit process. Services Mot. at 6 (citing 17 U.S.C. § 115(d)(4)(D); 17 U.S.C. § 115(e)(25)).

Services' concerns are not farfetched or merely hypothetical. Copyright Owners do not dispute that the Services' concern that Mr. Semel and other counsel similarly situated might "abuse their direct access and representation of the MLC" has already come to bear—as illustrated by the fact that they have already accessed the Services' data and information as provided to the MLC without any notice to the Services. Services Mot. at 7 & n.10 (citing Services Motion For Protective Order To Prevent Circumvention of Discovery Rules With Respect to Data in Possession of the MLC (No. 25609), Dkt. No. 21-CRB-0001-PR (2023-2027)).

Copyright Owners' response to the risks of disclosure boils down to one equivocation and one red herring. First, Copyright Owners equivocate by suggesting the data the MLC will receive in its audit will be identical in substance and effect as giving dual-role counsel full access in these proceedings. *See* CO's Cross-mot. and Opp'n at 10 (claiming risk to the Services is "non-existent" because the MLC "has the right to obtain the same documents . . . through a statutory audit" (italics omitted)). The Services do not agree with this assertion and do not believe the substance of what should or should not be included in an MMA audit is a ripe issue for a decision in an adjacent proceeding by the Copyright Royalty Board. Additionally, this ignores distinctions in *substance* and *procedure* that the Services have already articulated. The Services have repeatedly objected to Copyright Owners' audit-*like* discovery requests—that's not the same thing as saying the MLC would request or be entitled to receive *exactly* the same thing in an actual audit. And even if some

of the types of data were identical in kind, REDACTED

REDACTED

and thus certainly includes information far beyond what the MLC is entitled to see or request in an MMA audit.

Copyright Owners simply ignore that the statutory provisions governing the MLC audit process are specifically structured to mitigate bias through the use of third-party, independent auditors. Nor do Copyright Owners acknowledge that the MLC audits will be the "first of their kind" and "will likely run parallel" to "Copyright Owners' review of the sensitive accounting and financial materials subject to the MTC Order." Services Mot. at 7. Thus, even if the information *were* the same in every way (which the Services do not concede in this motion), the process and sequence by which it is digested in an audit context is *different*. Without the Services' requested relief, the distinction between these rate-setting proceedings and the MMA's audit procedures will be effectively eviscerated, and dual-role counsel will be given carte blanche to circumvent the audit protections contemplated by the MMA.

Second, Copyright Owners puzzlingly point to the *absence* of a similar objection to the *other* "voluminous" financial documents that Services have produced and consider "responsive" to the relevant requests. CO's Cross-mot. and Opp'n at 13–14. That is an obvious red herring. The Services have *consistently* objected to a *narrow* subset of *audit-like* requests that require the production of highly sensitive, granular documents that are different in kind from those already produced.[2] As the Services have reiterated, these documents provide a level of detail not typically

[2] Copyright Owners' argument that Services agreed to the relevant protective order is beside the point for the same reason. Services agreed to the protective order in this proceeding *and* adamantly objected to producing accounting information that relate to *separate* proceedings under the MMA.

provided in rate-setting proceedings, contain information of profound commercial sensitivity, and are of a kind that one might see in an audit. That is why these particular documents were the object of motions practice, and that is why they must be protected to ensure that dual-representation attorneys do not taint the MLC audit process contemplated by the MMA. The fact that the Services did not similarly object to, and produced, other materials responsive to Copyright Owners' requests only undercuts Copyright Owners' claim of prejudice. *See* CO's Cross-mot. and Opp'n at 3 (conceding Services "made numerous productions in response to the very requests at issue").

B. The Narrowly Tailored Relief Sought Minimizes Any Purported Risk of Prejudice Claimed by Copyright Owners

The crux of Copyright Owners' opposition hinges on a single mischaracterization: That Services' motion and the Judges' interim relief "precludes Copyright Owners' chosen counsel from reviewing the core discovery related to the Services' rate proposal" such that it amounts to *disqualification* of such counsel. CO's Cross-mot. and Opp'n at 5. However, the Judges did not order anything of the sort when granting interim relief, nor did the Services request anything so draconian in the emergency motion. Both are narrowly focused on a limited screening requirement for a particularized subset of highly sensitive documents for a specific set of individuals. And all attorneys remain free to access the relevant materials by choosing not to advise the MLC on the audits that give rise to the need for the protective order.

The Judges' order granting interim relief (1) required *screening* that was limited only to specific outside counsel representing *both* Copyright Owners *and* the MLC in connection with audits, and (2) applied to the limited set of audit-like "confidential accounting and financial data" at issue "[i]n the Judges' April 26, 2022 Order on Copyright Owners' Motion to Compel Production of Documents and Information Concerning the Services' Rate Proposals." *Order Granting Services' Interim Relief Pending Resolution of Emergency Mot. For Limited*

Modification to Phonorecords IV Protective Order 1, Dkt. No. 21-CRB-0001-PR (2023-2027) (May 9, 2022). As Copyright Owners are well aware, the crux of the relevant discovery dispute has always been specific, highly-sensitive, audit-like accounting data—*not* the troves of documents otherwise produced in response to Copyright Owners' discovery requests. *See* CO's Cross-mot. and Opp'n at 13 (referencing Services' arguments emphasizing voluminous, relevant data already produced). In light of Copyright Owners' fundamental misunderstanding of the Services' request for emergency relief, and the Judges' interim relief, counsel for Spotify emailed Copyright Owners on May 13, 2022 drawing their attention to the language in Services' underlying motion focused on the disputed "confidential accounting material." Ex. A. For the avoidance of doubt, counsel for Spotify also specifically listed six detailed spreadsheets and two interrogatory responses from Spotify's production implicated by the Services' motion and the Judges' interim relief.

Copyright Owners' position that a *screening* requirement amounts to total disqualification of Pryor Cashman defies belief. *See* CO's Cross-mot. and Opp'n at 1–3 (claiming the Judges' interim relief means Copyright Owners did not "meaningfully" receive the Services' productions and contending the Services seek to "preclude the *only* law firm representing licensors" from information (emphasis in original)). As a threshold matter, Pryor Cashman is a large, sophisticated firm with a long history of work specializing in cases of this kind. In their words, they represent "virtually all of the major music publishers and recording companies," the "who's-who of chart-topping talent," and, of course, the "the largest trade association for the music publishing industry in the U.S." and "the world's largest nonprofit trade organization for songwriters."[3] The notion

[3] Pryor Cashman, *Music Litigation*, https://www.pryorcashman.com/music-litigation (last accessed May 15, 2022).

that Copyright Owners lack either the scale or sophistication to screen specific, dual-role attorneys from accessing a subset of materials while continuing to effectively litigate their case is implausible. (This is especially so given how commonplace conflicts screens are in legal practice.) And it is precisely what the Services were required by the Judges' ruling to do—and have been doing—with respect to the BMI agreements.

Further, Copyright Owners' efforts to distinguish the BMI Order from the Services' motion make little sense. They first make the dubious claim that the screening requirement was only appropriate for the BMI agreements—which are *benchmarks* that Copyright Owners *have already conceded are relevant*—because they are "far from central to this proceeding."[4] CO's Cross-mot. and Opp'n at 8. This notwithstanding the Judges' long standing recognition that a "thick market" of agreements (like the BMI agreements here) are important to these rate setting proceedings. *See Order Granting in Part Licensee Services' Mot. For Expedited Issuance of Subpoenas to Apple, Inc.* 5–6, Dkt No. 14-CRB-0001-WR (2016–2020) (Apr. 10, 2015) (*Web IV*); *Order Den., Without Prejudice, Mot. For Issuance of Subpoenas Filed by Pandora Media, Inc. and the Nat'l Ass'n of Broadcasters* 5, Dkt. No. 14-CRB-0001-WR (2016–2020) (Apr. 3, 2014) (*Web IV*). The audit-like accounting data at issue here simply cannot be considered *more* important than the relevant benchmarks subject to the Judges' BMI Order—especially given the Services have already produced "voluminous" financial data. In compelling production of these materials, the Judges merely found they were directly related in some way to the Services' written direct cases. As the Judges will see, Copyright Owners' hysterical assertions about the purported importance of this evidence are overstated.

[4] *See Recording of March 8 Status Conference* at 48:11, Dkt. No. 21-CRB-0001-PR (2023-2027) (Mar. 8, 2022) ("It's at least a comfort to know that nobody disagrees about the relevance [of the BMI agreements] . . . ." (Barnett, C.J.)).

Nor does Copyright Owners' "competitive decisionmaker" distinction persuade. CO's Cross-mot. and Opp'n at 8. The Judges' BMI Order did not rely on or even mention the "competitive decisionmaker" standard. The Judges should follow the BMI Order because it is analogous to the risk here: That the sharing of detailed accounting information between these proceedings and the MLC audit by means of dual-role attorneys like Mr. Semel will contaminate those proceedings and prejudice the audit in ways not contemplated by the MMA.

At bottom, the Services' emergency motion in fact asks the Judges to perform the role courts are *supposed* to perform in situations like this: To engage in an analysis that balances the risks of disclosure to the Services against the risk of prejudice to Copyright Owners. And that is exactly what the cases Copyright Owners' rely on say. *See U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984) (recognizing that "[m]eaningful increments of protection are achievable in the design of a protective order," that "particular circumstances may require specific provisions in such orders," and that such orders "would be developed in light of the particular counsel's relationship and activities"); *Sonix Technology Co. Ltd v. Yoshida*, No. 12cv380–CAB (DHB), 2014 WL 11878353, at *2 (S.D. Cal. Jun. 30, 2014) ("When weighing the risk of inadvertent disclosure, the Court must look at 'the factual circumstances surrounding each individual counsel's activities, association, and relationship with a party.'" (quoting *U.S. Steel*, 730 F.2d at 1468)).

The Services' requested relief does not effectively disqualify the Pryor Cashman team—or Mr. Semel individually—from representing Copyright Owners. Under the holding of the BMI Order, the inability of *certain* counsel on legal teams to review all documents clearly does not amount to disqualification of an entire firm.

II. SERVICES' REQUESTED RELIEF RESPECTS PRINCIPLES OF DUE PROCESS AND DOES NOT OTHERWISE CONFLICT WITH RELEVANT LAW

For all of the above reasons, the Judges should also reject Copyright Owners' efforts to constitutionalize their hyperbolic assertions of prejudice. As explained above, the same cases cited by Copyright Owners acknowledge that appropriate measures can and should be taken by courts to protect highly sensitive information. And while the Copyright Owners seem to fault the Services' reliance on the Judges' similar orders in this proceeding, CO's Cross-mot. and Opp'n at 4, they do not challenge the core holdings in those orders and, in fact, rely on the BMI Order when articulating the legal standard in their papers, CO's Cross-mot. and Opp'n at 7.

Copyright Owners are also wrong to suggest the Services' motion fails the relevant legal standard by not discussing the "competitive decisionmaker" standard. CO's Cross-mot. and Opp'n at 7. Services' motion is based on the Judges' BMI Order, which did not rely on the competitive decisionmaker standard.

For example, the *Sonix* case cited by Copyright Owners articulates the same principles invoked by the Judges in their earlier orders and described in the Services' motion: "To evaluate whether a protective order should deny counsel access to information, the Court must balance the risk of inadvertent disclosure against the potential that the protective order will impair the other party's ability to prosecute its claims." *Id.* To do that, the court must look to "the factual circumstances surrounding each individual counsel's activities, association, and relationship with a party." *Id.* (quoting *U.S. Steel*, 730 F.2d at 1468).

A close look at the factual circumstances here favors granting the requested relief. The risks of prejudicing the integrity of the MLC audit process are real—a fact Copyright Owners do little to rebut. And the modest screening measures requested for discrete dual-representation

attorneys mirror the Judges' approach in the BMI Order and will not prejudice Copyright Owners' ability to litigate their case.

III. CONCLUSION

For the foregoing reasons, the Judges should **GRANT** Services' Motion for Limited Modification to *Phonorecords IV* Protective Order, and **DENY** Copyright Owners' motion to vacate the Judges' interim relief. The Services will confer with Copyright Owners regarding a proposed stipulation to extend the supplemental rebuttal submission deadline.

Dated: May 16, 2022

Respectfully submitted,

/s/ Joseph R. Wetzel

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Dated: May 16, 2022

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Counsel for Pandora Media, LLC

EXHIBIT A

Snyder, Tim (DC)

From: Dukanovic, Ivana (Bay Area)
Sent: Saturday, May 14, 2022 10:33 PM
To: Snyder, Tim (DC)
Subject: FW: Phonorecords IV - Copyright Owners' Emergency Cross-Motion and Opposition to Services' Emergency Motion

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From: Dukanovic, Ivana (Bay Area)
Sent: Friday, May 13, 2022 9:38 AM
To: 'Garber, Kate E.' <KGarber@PRYORCASHMAN.com>; WEIL PHONO4 CIG <pandoraphonoIV@weil.com>; #C-M PHONORECORDS IV EXTERNAL - LW TEAM <C-MPHONORECORDSIVEXTERNAL-LWTEAM@lw.com>; KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>; #APL Phonorecords IV <APLPhonorecordsIV@kirkland.com>; WSGR - GooglePhonoIV <GooglePhonoIV@wsgr.com>
Cc: CRB Phonorecords Counsel <CRB_Phonorecords_Counsel@PRYORCASHMAN.com>
Subject: RE: Phonorecords IV - Copyright Owners' Emergency Cross-Motion and Opposition to Services' Emergency Motion

Counsel:

Upon review of the Copyright Owners' Cross-Motion it appears that Copyright Owners have misunderstood our designation of sensitive "accounting and financial materials" subject to the Emergency Motion for Limited Modification to the Protective Order ("Motion"). It was not Spotify's intention to designate its entire production subject to the Interim Relief Order. As the Motion makes clear the focus is on "confidential accounting material." Motion at 1-2 (providing examples of the type of produced documents at issue); *see also id.* at 9 (seeking relief related to "the Services' underlying accounting and financial documents and information").

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Based on that understanding, the following documents and information from Spotify's May 10, 2022 production should be considered subject to the Judges' Interim Relief Oder and the Services' underlying Motion:

- SPOT_P4_00009526
- SPOT_P4_00009527
- SPOT_P4_00009528
- SPOT_P4_00009529
- SPOT_P4_00009530
- SPOT_P4_00009531
- Spotify's Response to Interrogatory No. 5
- Spotify's Response to Interrogatory No. 6 (including references to data from SPOT_P4_00009526)

The remainder of Spotify's May 10, 2022 document production is subject to the existing protective order and RESTRICTED – OUTSIDE COUNSEL EYES ONLY designation.

Best,
Ivana

Ivana Dukanovic

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From: Garber, Kate E. <KGarber@PRYORCASHMAN.com>
Sent: Thursday, May 12, 2022 8:39 PM
To: WEIL PHONO4 CIG <pandoraphonoIV@weil.com>; #C-M PHONORECORDS IV EXTERNAL - LW TEAM <C-MPHONORECORDSIVEXTERNAL-LWTEAM@lw.com>; KELLOGG PHONO4CIG <KELLOGGPHONO4CIG@lists.kellogghansen.com>; #APL Phonorecords IV <APLPhonorecordsIV@kirkland.com>; WSGR - GooglePhonoIV <GooglePhonoIV@wsgr.com>
Cc: CRB Phonorecords Counsel <CRB_Phonorecords_Counsel@PRYORCASHMAN.com>
Subject: Phonorecords IV - Copyright Owners' Emergency Cross-Motion and Opposition to Services' Emergency Motion

Counsel:

Please find attached Copyright Owners' Emergency Cross-Motion to Vacate the May 9, 2022 Interim Relief and Stay the May 20, 2022 Supplemental Submission Deadline and Opposition to Services' Emergency Motion for Limited Modification to Phonorecords IV Protective Order, which was filed today via eCRB.

Best,

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Proof of Delivery

I hereby certify that on Tuesday, May 17, 2022, I provided a true and correct copy of the Reply in Further Support of the Services' Emergency Motion for Limited Modification to Phonorecords IV Protective Order and Opposition to Copyright Owners' Emergency Cross-Motion to Vacate the May 9, 2022 Interim Relief and Stay the May 20, 2022 Supplemental Submission Deadline [PUBLIC] to the following:

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

Apple Inc., represented by Mary C Mazzello, served via E-Service at mary.mazzello@kirkland.com

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

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

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

Google LLC, represented by Gary R Greenstein, served via E-Service at ggreenstein@wsgr.com

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

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

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

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

Signed: /s/ Joseph Wetzel