

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)**

**JOINT MOTION TO DISMISS DAVID POWELL AND BRIAN ZISK**

Amazon.com Services LLC, Apple Inc., Google LLC, Pandora Media, LLC, Spotify USA Inc., National Music Publishers' Association, Inc. and the Nashville Songwriters Association International (each, a "Participant" and collectively, the "Participants") jointly move the Copyright Royalty Judges (the "Judges") to dismiss David Powell and Brian Zisk from this proceeding. Mr. Powell and Mr. Zisk do not have the "significant interest" that the Copyright Act requires for a party to participate. 17 U.S.C. § 803(b)(2)(C); 37 C.F.R. § 351.1(c). Dismissing Mr. Powell and Mr. Zisk—neither of whom has complied with the regulatory requirement of filing written direct statements—will preserve resources and enhance the efficiency of the proceeding.

Mr. Powell's petition to participate does not state that he is *actively* involved with licensing of musical compositions. David Powell Petition to Participate ("Claimant David Powell owns offer and operates services that engaged in the making & distributing of phono records deliveries of musical works through interactive digital communication one or more covered activities.") (Feb. 4, 2021). Meanwhile, Mr. Zisk's petition to participate does not assert that he is actively involved in licensing or creating musical compositions. Zisk Petition to Participate

Joint Motion To Dismiss Brian Zisk and David Powell  
Docket No. 21-CRB-0001-PR (2023-2027)

(“As a United States citizen buyer of and listener to music, a supporter of musicians, a technologist, economist, entrepreneur and investor, I have significant personal interest in these proceedings and their outcomes.”) (Feb. 4, 2021). To date, neither Mr. Powell nor Mr. Zisk has attempted to show the kind of interest in the proceeding the Copyright Act requires. *See* 37 C.F.R. § 351.1 (stating that each petition to participate “must include . . . a description of the petitioner’s significant interest in the subject matter of the proceeding.”).

Neither has complied with section 351.4, which requires that all parties who have filed a petition to participate file a written direct statement that “shall include all testimony, including each witness’s background and qualifications, along with all exhibits.” 37 C.F.R. § 351.4(a) and (b). Pursuant to 37 C.F.R. 351.4(a), “[t]he deadline for the filing of the written direct statement will be specified by the Copyright Royalty Judges, not earlier than 4 months, nor later than 5 months, after the end of the voluntary negotiation period set forth in § 351.2.” The voluntary negotiation period in this proceeding ended on **May 13, 2021**, over a year ago. Notice of Participants, Commencement of Voluntary Negotiation Period, and Case Scheduling Order, Docket No. 21-CRB-0001-PR (2023-2027) ([eCRB No. 23746](#)), Exhibit A. Based on that deadline, the Judges ordered the submission of written direct statements for September 10, 2021, which was subsequently extended by agreement to **October 13, 2021**. Order Granting Join Motion to Modify the Case Scheduling Order, Docket No. 21-CRB-0001-PR (2023-2027) ([eCRB No. 25555](#)).

Mr. Powell and Mr. Zisk did not submit any written direct testimony on October 13, 2021 in support of any proposed rate in this proceeding or any written rebuttal testimony in the proceeding. In prior proceedings, the Judges have held that the failure to comply with section 351.4 is, itself, sufficient basis for dismissal. *See Order Dismissing David Powell and Circle God*

*Network Inc. From the Proceeding*, Docket No. 19-CRB-0005-WR (Web V), at 2; *see also Order Granting AARC Motion to Dismiss David Powell and Circle God Network*, Docket No. 2008-3 CRB DD (2007-2011 SRF), at 2-3; *Order*, Docket No. 2000-9 CARP DTRA 142, eCRB Docket No. 8037 (“As the Library has made abundantly clear, failure to file a written direct case in this proceeding is grounds for automatic dismissal.”); *Order*, Docket No. 2005-1 CRB DTRA, eCRB Docket No. 9263 (applying Librarian direction of automatic dismissal to failure to file written direct statements under 37 CFR 351.4).

Mr. Powell further has a history of filing petitions to participate in CRB proceedings and being subsequently dismissed for lack of interest. *See Order Dismissing David Powell and Circle God Network Inc. From the Proceeding*, Docket No. 19-CRB-0005-WR (Web V); *Order Granting SoundExchange’s Motion to Dismiss Music Reports, Inc. and David Powell* (June 24, 2016). When Mr. Powell has filed, his filings contain allegations of government conspiracies and attempts to call the Judges as witnesses. *See* <http://www.loc.gov/crb/distribution/statements/2014/David-Powell.pdf>; <http://www.loc.gov/crb/proceedings/2012-7/PTP/David-Powell.pdf>. His prior conduct strongly suggests that, if allowed to continue participating in this proceeding, he will not provide any information that will assist the Judges in reaching a determination. To the contrary, it is possible that Mr. Powell may distract from the important issues at stake in this proceeding, unnecessarily expending the Judges’ and the other participants’ time and resources. The Judges should accordingly dismiss Mr. Powell from this proceeding for the same reasons they dismissed him in *Webcasting V*.

According to the eCRB docket, Mr. Zisk has not filed petitions in prior CRB proceedings. Although Mr. Zisk has now attended two recent teleconferences with the Judges, he did not file

the required written direct statement last year and has not participated in any aspect of the proceeding other than those two teleconferences. The failure to timely file a Written Direct Statement alone is grounds for automatic dismissal. Mr. Zisk also has not fully participated in the proceeding nor has he provided evidence of a significant interest greater than that of any member of the general public. Notice of Participants, Commencement of Voluntary Negotiation Period, and Case Scheduling Order, Docket No. 21-CRB-0001-PR (2023-2027) ([eCRB No. 23746](#)), n. 1 (stating that “a putative participant must participate fully in proceeding, unless the participant withdraws its Petition, joins with other participants and shares joint representation, or is the subject of a dismissal order”).

### **Conclusion**

For the foregoing reasons, the Participants respectfully request that the Judges dismiss Mr. Powell and Mr. Zisk as participants from this proceeding.

DATED: September 1, 2022

Respectfully submitted,

By: /s/ Benjamin K. Semel

Donald S. Zakarin (N.Y. Bar No. 1545383)  
Frank P. Scibilia (N.Y. Bar No. 2762466)  
Benjamin K. Semel (N.Y. Bar No. 2963445)  
Joshua Weigensberg (N.Y. Bar No. 4894929)  
Lauren B. Cooperman (N.Y. Bar No.  
5252887)  
PRYOR CASHMAN LLP  
7 Times Square  
New York, New York 10036-6569  
Telephone: (212) 421-4100  
dzakarin@pryorcashman.com  
fscibilia@pryorcashman.com  
bsemel@pryorcashman.com  
jeigensberg@pryorcashman.com  
lcooperman@pryorcashman.com

*Counsel for the National Music Publishers’  
Association, Inc. and the Nashville  
Songwriters Association International*

By: /s/ Joseph R. Wetzel

Joseph R. Wetzel (Cal. Bar No. 238008)  
Andrew M. Gass (Cal. Bar No. 259694)  
LATHAM & WATKINS LLP  
505 Montgomery Street  
San Francisco, California 94111  
Tel.: (415) 391-0600  
joe.wetzel@lw.com  
andrew.gass@lw.com

- and-

Allison L. Stillman (N.Y. Bar No. 4451381)  
LATHAM & WATKINS LLP  
1271 Avenue of the Americas  
New York, NY 10020  
Tel.: (212) 906-1200  
alli.stillman@lw.com

– and –

Sarang (Sy) Damle (D.C. Bar No. 1619619)  
LATHAM & WATKINS LLP  
555 Eleventh Street, NW, Suite 1000  
Washington, DC 20004  
Tel.: (202) 637-2200  
sy.damle@lw.com

*Counsel for Spotify USA Inc.*

By: /s/ Joshua D. Branson  
Joshua D. Branson (D.C. Bar No. 981623)  
Scott H. Angstreich (D.C. Bar No. 471085)  
Aaron M. Panner (D.C. Bar No. 453608)  
Leslie V. Pope (D. C. Bar No. 1014920)  
KELLOGG, HANSEN, TODD, FIGEL, &  
FREDERICK, P.L.L.C.  
1615 M Street, N.W., Suite 400  
Washington, D.C. 20036  
Tel.: (202) 326-7900  
jbranson@kellogghansen.com  
sangstreich@kellogghansen.com  
apanner@kellogghansen.com  
lpope@kellogghansen.com

*Counsel for Amazon.com Services LLC*

By: /s/ Gary R. Greenstein  
Gary R. Greenstein (DC Bar No. 455549)  
WILSON SONSINI GOODRICH &  
ROSATI, P.C. 1700 K Street, N.W., 5th Floor  
Washington, DC 20006  
Tel. (202) 973-8849  
Fax: (202) 973-8899  
ggreenstein@wsgr.com

-and-

Ryan Benyamin (Cal. Bar No. 322594)  
Victor H. Jih (Cal. Bar No. 186515)  
Lisa D. Zang (Cal. Bar No. 294493)  
Rebecca E. Davis (Cal. Bar No. 322765)  
WILSON SONSINI GOODRICH &  
ROSATI, P.C.  
633 West Fifth Street, Suite 1550  
Los Angeles, CA 90071-2027  
Tel.: (323) 210-2900  
Fax: (866) 974-7329  
rbenyamin@wsgr.com  
vjih@wsgr.com  
lzang@wsgr.com  
becca.davis@wsgr.com

*Counsel for Google LLC*

By: /s/ Benjamin E. Marks  
Benjamin E. Marks (N.Y. Bar No. 2912921)  
Todd Larson (N.Y. Bar No. 4358438)  
WEIL, GOTSHAL & MANGES LLP  
767 Fifth Avenue  
New York, NY 10153  
Tel: (212) 310-8000  
benjamin.marks@weil.com

*Counsel for Pandora Media, LLC*

By: /s/ Mary C. Mazzello  
Mary C. Mazzello (N.Y. Bar No. 5022306)  
Dale M. Cendali (N.Y. Bar No. 1969070)  
Claudia Ray (N.Y. Bar No. 2576742)  
KIRKLAND & ELLIS LLP  
601 Lexington Avenue, 42nd Floor  
New York, NY 10022  
Tel. (212) 446-4800  
Fax: (212) 446-4900  
mary.mazzello@kirkland.com  
dale.cendali@kirkland.com  
claudia.ray@kirkland.com

*Counsel for Apple Inc.*

# Proof of Delivery

I hereby certify that on Thursday, September 01, 2022, I provided a true and correct copy of the Joint Motion to Dismiss David Powell and Brian Zisk to the following:

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

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

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

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

Joint Record Company Participants, 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

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

Amazon.com Services LLC, represented by Joshua D Branson, served via E-Service at jbranson@kellogghansen.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via E-Service at benjamin.marks@weil.com



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

Signed: /s/ Joseph Wetzel