Before the
COPYRIGHT ROYALTY JUDGES
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Washington, D.C.

In the Matter of **DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)**	**Docket No. 14-CRB-0001-WR**

SIRIUS XM RADIO INC.'S PROPOSED CONCLUSIONS OF LAW

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I. COPYRIGHT LAW PRINCIPLES APPLICABLE TO THIS PROCEEDING

1. The Constitution mandates that the primary purpose of copyright law is "not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'" *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349 (1991) (quoting U.S. Const. art. I, § 8, cl. 8); *see also* H.R. Rep. No. 100-887(I), at 10 (1988) (noting that copyright law exists "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public").

2. Thus, to the extent that copyright law provides intellectual property rights to authors and their assigns, such rights are merely a means, not an end: as the Copyright Clause clearly dictates, the Constitution's ultimate goal is to promote the public availability of music, literature, and other artistic works—by providing copyright holders with a limited scope of rights in their works. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The limited scope of the copyright holder's statutory monopoly… reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, *but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts*.") (emphasis added).

3. This careful balance of competing claims upon the public interest is reflected throughout the Copyright Act. The Act does not end with Section 106 (the exclusive rights), but rather continues through many additional sections, containing various exclusions, limitations, and privileges for the benefit of copyright users and, by extension, the public. *See, e.g.,* 17 U.S.C. §§ 107-122. Among these limitations on copyright owners' exclusive rights is the Section 114 license at issue in this proceeding.

II. LEGAL HISTORY OF THE SOUND RECORDING PERFORMANCE RIGHT

A. For Almost the Entire First Century of the Recording Industry's Existence, Sound Recordings Were Excluded From the Copyright Act

4. The sound recording industry can trace its roots back at least to the invention of the phonograph in 1877 and the founding of the first record company, Columbia, in 1888. Although the recording industry, beginning as early as 1906, repeatedly lobbied Congress to extend copyright protection to sound recordings, Congress consistently resisted these entreaties. As a consequence, the musical compositions (the melodies and lyrics comprising the songs) embodied in sound recordings were protected by the Copyright Act from unlicensed copying and performance, but the sound recordings themselves were not. *See Report of Register of Copyrights, Federal Protection for Pre-1972 Sound Recordings*, December 2011, at 7-10. It was during this long historical period and in this legal landscape that both the recording and radio industries developed and thrived.

B. Congress's First Grant of a Limited, Prospective Copyright for Sound Recordings in 1971 for the Purpose of Preventing Piracy

5. It was not until November 15, 1971, almost one hundred years after the invention of the phonograph, that Congress for the first time extended federal copyright protection to sound recordings, with the passage of the Sound Recording Amendment. Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971) (granting copyright protection to sound recordings created on or after February 15, 1972). Even then, however, sound recordings were granted only a limited copyright, comprising the exclusive rights of duplication and public distribution, but no right to exclude public performance. The passage of the Sound Recording Amendment was driven entirely by concerns about record piracy, which by 1971 had reached a volume in excess of $100 million. H.R. Rep. No. 92-487, 92nd Cong., at 2 (1971). At the same time, the patchwork of

state laws used by record companies to combat this piracy in the absence of federal copyright protection was deemed inadequate to the task. *Id.*

6. Congress declined to provide a public performance right for sound recordings in part because its focus was on combating piracy, but also because of concerns about the disruption of the radio broadcasting industry that would be caused by requiring broadcasters to pay sound recording license fees. Barbara A. Ringer, *Copyright Law Revision, Study No. 26: The Unauthorized Duplication of Sound Recordings*, at 37 (Feb. 1957); "*Performance Rights in Sound Recordings*," Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Comm. on the Judiciary, 95th cong., 2d Sess., at 54-55 (1978) (Comm. Print No. 15) ("1978 Performance Rights Report"). Thus, even after the creation of a limited federal copyright for sound recordings, both the recording and radio industries continued to develop and thrive without radio broadcasters paying any royalties to sound recording copyright owners.

C. Congress's Creation of a Limited, Digital Performance Right in 1995 for the Purpose of Preventing Piracy and Other Displacement of Record Sales

7. Responding again, in 1995, to record industry concerns regarding the potential displacement of record sales, Congress passed the *Digital Performance Rights in Sound Recordings Act of 1995*, Pub. L. No. 104-39, 109 Stat. 336 (1995) ("DPRSRA"). Addressing the concern over then-nascent technology enabling interactive, or on-demand, digital performances of sound recordings, which could substitute for the purchase of physical records, Congress granted a limited public performance right for a limited category of digital audio transmissions.

8. In so doing, Congress rejected the recording industry's attempt to secure a more expansive right. *See* S. Rep. No. 104-128, at 13 (1995) ("DPRSRA Senate Report") ("[T]he Committee has sought to address the concerns of record producers and performers regarding the effects that new digital technology and distribution systems might have on their core business

without upsetting the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries for decades. Accordingly, the Committee has chosen to create a *carefully crafted and narrow performance right*, applicable only to certain digital transmissions of sound recordings.") (emphasis added).

9. Congress further reiterated that, because "the sale of many sound recordings and the careers of many performers have benefitted considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting," the DPRSRA was not meant to "change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries." DPRSRA Senate Report at 14-15. Therefore, Congress further limited the new digital performance right for sound recordings by making that right subject to a compulsory license for those digital music services unlikely to pose any harm to record sales. *See* DPRSRA Senate Report at 15.

III. LEGAL HISTORY OF THE SECTION 114 LICENSE

A. Congress's Creation of a Compulsory License for Noninteractive Subscription Services as a Limitation on the New Performance Right

10. In enacting the DPRSRA, Congress agreed with the record industry's claim that interactive, on-demand music services were likely to be highly substitutional for the sale of legitimate copies of sound recordings, whereas non-interactive services would not. H.R. Rep. No. 104-274, at 14 (1995) ("DPRSRA House Report"); DPRSRA Senate Report at 16. For this reason, the digital performance right with respect to such interactive services was made absolutely exclusive, meaning that interactive services would have to obtain direct licenses from each copyright owner and that copyright owners could refuse entirely to license such services.

11. The DPRSRA was meant to balance the protection of the recording industry's core business of the distribution and sale of recordings with the public's interest in fostering new technologies for the enjoyment of music. DPRSRA Senate Report at 15; DPRSRA House Report at 14.

12. Thus, Congress limited the exclusive digital performance right by creating a compulsory license in Section 114 of the Copyright Act for non-interactive subscription music services so that copyright owners could not refuse to license these non-interactive services. DPRSRA, § 3, 109 Stat. 336, 338, 340-42 (1995). The overarching purpose of the compulsory license is to balance the legitimate concerns of record companies regarding potential displacement of revenues from their core business with the encouragement of new technologies and markets for sound recording performances:

> It is the intent of this legislation to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.
>
> In deciding to grant a new exclusive right to perform copyrighted sound recordings publicly by means of digital audio transmission, it is important to strike a balance among all of the interests affected thereby. That balance is reflected in various limitations on the new performance rights that are set forth in the bill's amendments to section 114 of title 17 and described in detail later in this report.

DPRSRA House Report at 14.

13. In addition to its exclusion of interactive services, the Section 114 license contains various other conditions designed to minimize any risk that the licensed services would displace record sales. DPRSRA House Report at 20-21; DPRSRA Senate Report at 24-25. Those requirements include compliance with the "sound recording performance complement," a

set of programming restrictions limiting the frequency with which songs by the same artist or from the same album or compilation may be transmitted. DPRSRA House Report at 26-27; DPRSRA Senate Report at 34-36. Other requirements include the transmission of song and artist identification if encoded by the copyright owner and a prohibition on "pre-announcing" songs about to be played so that home recording is not facilitated. DPRSRA House Report at 20-21; DPRSRA Senate Report at 24-25.

B. Congress's Revision of Section 114 With the DMCA to Expressly Include Non-Subscription Webcasters and Its Adoption of the Fair Market "Willing Buyer – Willing Seller" Rate Standard

14. In 1998, Congress again modified the legal landscape in which digital music services operate, in response to the record industry's concerns that certain non-subscription digital music services, *i.e.*, non-subscription webcasters, had not been expressly addressed in the DPRSRA or the Section 114 license. *Digital Millennium Copyright Act*, Pub. L. No. 105-304, § 405(a), 112 Stat. 2860, 2890 (1998) ("DMCA"); H.R. Rep. No. 105-796, at 80 (1998) ("DMCA Conference Report").

15. With the passage of the DMCA, Congress also changed the Section 114 rate-setting standard for future subscription and non-subscription services otherwise eligible for the Section 114 license to a fair market, willing buyer – willing seller standard. DMCA, § 405(a), 112 Stat. at 2896. *See also Memorandum Opinion of the Register of Copyrights*, Docket Nos. RF 2006-2 and RF 2006-3 (Oct. 20, 2006), at 3 ("*Register's PSS Opinion*").

16. The overarching purpose of the entire DMCA was to "promot[e] the continued growth and development of electronic commerce" while also "protecting intellectual property rights." H.R. Rep. No. 105-551(II) ("DMCA House Report"), at 23 (1998). Congress explicitly noted that the "fundamental goal" of Article 1, Section 8, Clause 8 of the Constitution is to

"promote the Progress of Science and useful Arts" by maintaining a *balance* between creators and "the industries that use such works." *Id.* at 24. Specifically with respect to the provisions of the DMCA modifying the Section 114 license, Congress noted its intent to continue the balance struck in the DPRSRA, including "to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and users as a result of the rapid growth of digital audio services." H.R. Rep. No. 105-796 ("DMCA Committee Report"), at 79-80 (1998).

17. In adopting the "willing buyer – willing seller" rate standard, Congress did not intend to create an unusual or innovative new valuation concept. To the contrary, it merely continued the existing requirement from the DPRSRA that rates should be reasonable, and used common shorthand for the frequently employed fair market value formula:

> Consistent with existing law, a copyright arbitration proceeding should be empaneled to determine reasonable rates and terms. The test applicable to establishing rates and terms is what a willing buyer and willing seller would have arrived at in marketplace negotiations. In making that determination, the copyright arbitration royalty panel shall consider economic, competitive and programming information presented by the parties including, but not limited to, the factors set forth in clauses (i) and (ii).

Id. at 86.

IV. LEGAL STANDARDS AND PRECEDENTS APPLICABLE TO THIS RATE-SETTING PROCEEDING

A. General Rules Applicable to the Determination of Webcasting Rates and Terms

18. Section 114 of the Copyright Act provides that the Copyright Royalty Judges "shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(2)(B).

19. In determining rates under this willing buyer-willing seller standard, the Copyright Royalty Judges "shall base their decision on economic, competitive and programming information presented by the parties, including—

(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk."

17 U.S.C. § 114(f)(2)(B).

20. The statute further provides that the Copyright Royalty Judges "may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A)." *Id.*

B. The "Willing Buyer – Willing Seller" Standard is a Reasonable Fair Market Value Standard, Which Considers a Hypothetical, Competitive Market For Blanket Licenses of Performance Rights

21. As noted above, Congress did not with the DMCA intend to create a new standard that would lead to the imposition of webcasting rates higher than fair market value. To the contrary, the willing buyer-willing seller standard was meant to determine reasonable rates and is essentially the same as the "fair market value" standard, which is widely employed in various valuation exercises, including rate-setting proceedings for analogous blanket musical composition performance licenses. *See* ¶ 17, *supra* (citing DMCA Committee Report at 86).

22. Indeed, there is a substantial body of instructive precedent from those ASCAP and BMI rate courts dealing with determination of a "reasonable" blanket license fee in a

regulated market, wherein the licensor has aggregated rights to a sufficient number of songs to engender market power (both ASCAP and BMI have considerably less market share than the 100 percent represented in the statutory license, but similar market share to that of a major record company) based upon a hypothetical arms-length transaction between a willing buyer and a willing seller. A recent decision summarizes years of precedent from such rate proceedings, which precedent is highly applicable to the valuation problem in this proceeding:

> Section IX of AFJ2 [the relevant antitrust consent decree] requires the rate court to set a "reasonable" fee for a requested license, but that term is not defined in AFJ2. Governing precedent dictates, however, that in determining the reasonableness of a licensing fee, a court "must attempt to approximate the 'fair market value' of a license – what a license applicant would pay in an arm's length transaction." *MobiTV, Inc.*, 681 F.3d at 82. "In so doing, the rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music." *Id.* The Second Circuit has recognized that, because music performance rights are largely aggregated in the PROs which operate under consent decrees, "there is no competitive market in music rights." *ASCAP v. Showtime/The Movie Channel*, 912 F.2d 563, 577 (2d Cir. 1990). Consequently, fair market value is a "hypothetical" matter. *Id.* at 569. In such circumstances, "the appropriate analysis ordinarily seeks to define a rate or range of rates that approximates the rates that would be set in a competitive market." *Id.* at 576.

In re Pandora Media, Inc., 6 F.Supp.3d 317, 353-54 (S.D.N.Y. 2014).

23. In that same decision, the court quoted a definition of fair market value, upon which both ASCAP and Pandora agreed:

> A widely used description of fair market value is the cash equivalent value at which a willing and unrelated buyer would agree to buy and a willing and unrelated seller would agree to sell . . . when neither party is compelled to act, and when both parties have reasonable knowledge of the relevant available information. . . . Neither party being compelled to act suggests a time-frame context – that is, the time frame for the parties to identify and negotiate with each other is such that, whatever it happens to be, it does not affect the price at which a transaction would take place. .

> . . The definition also indicates the importance of the availability of information – that is, the value is based on an information set that is assumed to contain all relevant and available information. Robert W. Holthausen & Mark E. Zmijewski, *Corporation Valuation* 4-5 (2014).

In re Pandora Media, Inc., 6 F.Supp.3d at 354.

24. Other ASCAP rate-setting decisions have noted that when setting a reasonable royalty rate for a blanket musical works performance license, the court must take particular care to keep in mind that the actual licensing market is very different from the hypothetical, competitive market considered to determine fair market value. One key difference is that by the very nature of blanket licenses, which aggregate millions of copyrights into one single license for which there are no substitutes in the actual marketplace, that marketplace is characterized by extreme market power on the side of licensors. As explained by the Second Circuit, a court should "take[] into account the fact that ASCAP, as a monopolist, 'exercises disproportionate power over the market for music rights.'" *United States v. ASCAP (In re RealNetworks, Inc. and Yahoo!)*, 627 F.3d 64, 76 (2d Cir. 2010) (quoting *United States v. Broad. Music, Inc (In re Music Choice)*, 426 F.3d 91, 96 (2d Cir. 2005).

25. "The opportunity to users of music rights to resort to the rate court whenever they apprehend that ASCAP's market power may subject them to unreasonably high fees would have little meaning if that court were obliged to set a 'reasonable' fee solely or even primarily on the basis of the fees ASCAP had successfully obtained from other users." *ASCAP v. Showtime/The Movie Channel*, 912 F.2d 563, 570 (2d Cir. 1990). Thus, the Judges in this proceeding should not focus myopically on market evidence of particular "willing buyers" and "willing sellers" comprising license agreements extracted by major record companies with "must have" catalogs, but must also determine whether any such proposed benchmarks satisfy all of the elements of

fair market value, including whether the agreed rates and terms are consistent with the target hypothetically competitive market.

26. In prior proceedings, the Copyright Royalty Judges have similarly recognized that the willing buyer – willing seller standard requires rates intended "to replicate those that would have been negotiated in a *hypothetical* marketplace." *Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final rule and order*, 79 Fed. Reg. 23102, 23110 (Apr. 25, 2014) (*Webcasting III*) (emphasis added). "The hypothetical marketplace is one in which no statutory license exists." *Id.*

27. The Copyright Royalty Judges have also noted that "the hypothetical sellers are the several record companies rather than a single monopolist." *Webcasting III* at 23113. The Copyright Royalty Judges accepted one expert's conclusion that the major record companies own approximately 85% of the supply (the sound recordings), "and therefore comprise an oligopoly . . . . Each record company has a unique catalog of sound recordings that are highly valued (or even necessary inputs) to any webcasting service. The individual record companies, as a consequence, have a degree of market power." *Id.* In these circumstances, "oligopoly pricing behavior can mimic monopoly pricing decisions." *Id.*

28. The Judges have also previously acknowledged that rates set under the willing buyer – willing seller standard must reflect a hypothetically competitive market and not be unduly influenced by sellers' or buyers' power in that market. *Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final rule and order*, 72 Fed. Reg. 24084, 24091 (May 1, 2007), *aff'd in relevant part sub nom., Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F.3d 748 (D.C. Cir. 2009) (*Webcasting II*). "An effectively competitive market is one in which super-competitive prices or below-market prices cannot be extracted by sellers or

buyers, because both bring comparable resources, sophistication and market power to the negotiating table." *Id.* Thus, "neither sellers nor buyers can be said to be 'willing' partners to an agreement if they are coerced to agree to a price through the exercise of overwhelming market power." *Id.*

V. BENCHMARK ANALYSIS

A. SoundExchange's Interactive Services Benchmark

29. Given the limited nature of Sirius XM's participation in this proceeding, it did not submit a rebuttal case and instead relies on the other participating licensees' specific refutations of SoundExchange's proposed benchmarks and proposals for rates and terms. Sirius XM will not submit extensive, duplicative briefing based upon the testimony submitted by the other licensees, but notes that it agrees with those refutations and further agrees that the various problems identified by the other licensees, *inter alia*, render SoundExchange's proposed benchmarks unreliable and unusable. Nonetheless, a few general points related to SoundExchange's primary benchmark, the interactive services benchmark, warrant a brief discussion.

30. The *sin qua non* of benchmarking is comparability. It is well established in prior determinations of the Copyright Royalty Judges that rates for digital music services can only be used as benchmarks if the benchmark music service is sufficiently comparable to the target music service. *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 78 Fed. Reg. 23054, 23058 (Apr. 17, 2013) ("*SDARS II*") (finding that the various benchmark agreements submitted by SoundExchange for the Pre-existing Subscription Services rate reflected "the licensing of products and rights separate and apart from the right to publicly perform sound recordings in the context of this proceeding. The

buyers are different from the target PSS market; thus, the key characteristic of a good benchmark—comparability—is not present"); *Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding (Final Determination of Rates and Terms)*, 74 Fed. Reg. 4510, 4519 (Jan. 26, 2009) ("*2009 Mechanical and DPD Determination*") ("Potential benchmarks are confined to a zone of reasonableness that excludes clearly noncomparable marketplace situations."). *See also Webcasting III* at 23104 ("Except as directed by the WSAs, the Judges may consider rates and terms negotiated in voluntary licensing agreements for *comparable* transmission services.") (emphasis added).

31. Other courts in similar blanket music licensing rate proceedings have similarly recognized the fundamental requirement that reliable benchmarks be comparable to the hypothetical competitive market:

> In choosing a benchmark and determining how it should be adjusted, a rate court must determine "the degree of comparability of the negotiating parties to the parties contending in the rate proceeding, the comparability of the rights in question, and the similarity of the economic circumstances affecting the earlier negotiators and the current litigants", as well as the "degree to which the assertedly analogous market under examination reflects an adequate degree of competition to justify reliance on agreements that it has spawned."

United States v. Broad. Music, Inc. (In re Music Choice), 426 F.3d 91, 95 (2d Cir. 2005), *internal citations omitted.*

32. The Judges first used the interactive services benchmark in *Webcasting II*—to disastrous results. The resulting rates, derived from this inappropriate benchmark, lead Congress to enact legislation—the Webcaster Settlement Acts of 2008 and 2009—specifically to allow the affected parties to override *Webcasting II*'s market-distorting rates by engaging in private negotiations for lower rates. *See Webcasting III* at 23102 n.4.

33. Since *Webcasting II*, the interactive services benchmark has grown increasingly disfavored, including in the *SDARS II* proceeding and *Webcasting III remand. See Webcasting III* at 23115 (using the interactive benchmark proposed by SoundExchange's expert "only after making certain significant adjustments to that proposed benchmark"); *id.* at 23118 (noting that SoundExchange's expert's "interactive benchmark analysis is of some, albeit limited, assistance in determining the royalty rate in the noninteractive market"); *SDARS II* at 23065 ("[T]he Judges do not find that the market for interactive subscription streaming services as characterized by Dr. Ordover in this proceeding offers a foundation to support a comparable benchmark from which to begin an analysis of reasonable rates for SDARS for the upcoming license period. For example, the rights licensed by interactive subscription services are not the same as those by non-interactive services such as the SDARS, and the Judges did not find Dr. Ordover's efforts to adjust for the differences to be helpful.").

34. Moreover, in *Webcasting III*, the Judges noted one "major difference between" interactive and noninteractive services: which is "the ultimate consumer in selecting the sound recordings for listening. In the interactive market…the ultimate consumer essentially decides which sound recordings he or she will receive. By contrast, in the noninteractive market…the consumer plays a more passive role, and the webcaster offers the consumer music that the webcaster anticipates the listener might enjoy (much like radio)." *Webcasting III* at 23115.

35. SoundExchange's use of the flawed interactive services benchmark, without even attempting to cure the infirmities previously identified by the Judges, is based upon its claim that interactive and noninteractive services are "converging" in the minds of consumers, changing the two types of services from non-comparable to comparable. This claim finds no support in—and is actually, contradicted by—the evidence in this proceeding. Indeed, record company market

research, commissioned not for this proceeding but for internal business planning, clearly indicates [redacted]. *See* PFF ¶¶ 62-65; Ex. PAN at 5046 at 8 & PAN at 5048 at ¶ 44. This market research demonstrates that [redacted].

B. The Webcaster Settlement Act ("WSA") Settlement Agreements

36. In *Webcasting III*, the Judges used the WSA settlement agreements entered into between SoundExchange and Sirius XM and the National Association of Broadcasters ("NAB"), respectively, as benchmarks for a number of reasons, including, *inter alia*, that the rights sold in those agreements were the same as the ones at issue, that the sellers are the same copyright owners whose copyrights were at issue in that proceeding (albeit jointly represented by SoundExchange), and that the agreements were for licenses to be used for statutory webcasting services. *Webcasting III* at 23111.

37. However, at the time Sirius XM and NAB entered into their WSA agreements with SoundExchange, a number of external factors, unrelated to the fair market value of the statutory license and unique to Sirius XM's and broadcasters' business circumstances during the negotiations, left both Sirius XM and NAB with no rational choice other than to accept the rates and terms dictated by SoundExchange and reflected in the WSA agreements. In *Webcasting III*, the Judges did not have the benefit of any evidence from Sirius XM or NAB concerning these external factors, or any other facts surrounding the negotiation or valuation of the WSA. *See id.*

1. A Number of External Factors Affected Sirius XM at the Time of the WSA Negotiations, Which Left Sirius XM With No Rational Option Other Than to Accept the Above-Market Rates Offered by SoundExchange

38. During the period immediately leading up to, and during, its WSA negotiation with SoundExchange, Sirius XM was experiencing a perfect storm of circumstances, wholly unrelated to the fair market value of the Section 114 license, which influenced the WSA settlement rates. The extremely low usage of and revenue from Sirius XM's Internet radio service, the low relative importance of that service to Sirius XM's overall business, the disastrous existing *Webcasting II* rates (which would continue to apply in the absence of a settlement), Sirius XM's severe financial distress (including a brush with bankruptcy and a plummeting stock price), and the looming enormous litigation costs if Sirius XM were to seek lower rates in the *Webcasting* III proceeding, all left Sirius XM with no rational option but to agree to the WSA rates dictated by SoundExchange. PFF at ¶ 39-53. Under the totality of these circumstances, any rate reduction offered by SoundExchange, no matter how small, was preferable to no rate reduction at all or, even worse, no immediate rate reduction coupled with the cost of another rate proceeding. PFF at ¶ 39-53.

39. For all of these reasons, the rates and terms embodied in the Sirius XM WSA settlement agreement do not reflect any industry-wide fair market value for the license. Instead, the rates are a product of (1) the *Webcasting II* rates, which Congress found to be so wildly supracompetitive as to warrant congressional intervention and which would continue to apply in the absence of a settlement; (2) SoundExchange's monopoly power as the only entity that could provide any effective relief from those rates; and (3) the exacerbation of that imbalance in bargaining power caused by various unrelated circumstances affecting Sirius XM at the time of the negotiations. Notably, all of those factors increased SoundExchange's ability to extract rates

above fair market value; neither SoundExchange nor its major record company overlords had similar countervailing pressures that could have mitigated this extreme imbalance. PFF at ¶ 53.

2. Contrary to SoundExchange's Argument, Sirius XM Did Not Have a Viable Option to Reject the WSA Settlement Offer

40. In his rebuttal testimony, Mr. Huppe, President of SoundExchange, suggests that Sirius XM had viable options other than settling with SoundExchange: that Sirius XM could obtain direct licenses with individual copyright owners, that it could choose to litigate the rate in *Webcasting III*, or that it could simply refuse SoundExchange's settlement offer and allow others to litigate in *Webcasting III* instead. Written Rebuttal Testimony of Michael Huppe ("Huppe WRT"), Ex. SX 0026, at ¶ 24-27. But as the testimony of Mr. Frear demonstrates, these "options" were illusory.

41. First, direct licensing was not a viable option. The statutory license covers all sound recordings protected by federal copyright. SoundExchange represents 20,000 distinct copyright owners. 4/29/15 Tr. 680:11-19 (Huppe). In order to replicate the rights at issue in the WSA negotiations, Sirius XM would have had to negotiate and close direct licenses with at least each of those 20,000 copyright owners (there may be other copyright owners that are not members of SoundExchange), all within the short time period allowed for negotiations under the WSA. From a logistical perspective, alone, such a task would have been impossible. PFF at ¶ 55; 5/22/15 Tr. 5440:25-5441:7 (Frear). Negotiating a direct license with even one, much less all, of the major record companies could not have been concluded in that time. And even if it could have negotiated direct licenses with the major record companies, such licenses would have only accounted for approximately half to two third of the music played by Sirius XM. *Id.* at 5442:16-19.

42. Setting aside the logistical impossibility, Sirius XM's attempts to obtain direct licenses for its service, which have been ongoing for several years, including meetings with the major record companies as early as 2008 or 2009, have not resulted in a single direct license with a major record company. 5/22/15 Tr. 5441:15-5443:3 (Frear). In fact, SoundExchange, and Mr. Huppe personally, have actively undermined Sirius XM's attempts to obtain direct licenses from record companies by urging record companies to refuse such direct license requests from Sirius XM in favor of staying within the statutory license. *Id.* at 5439:25-5440:3. Thus, SoundExchange's suggestion that a direct licensing initiative for Sirius XM's Internet radio was a viable alternative is both disingenuous and absurd.

43. Second, SoundExchange argues that Sirius XM could have chosen to litigate the *Webcasting III* proceeding instead of agreeing to the WSA settlement, noting that Sirius XM spent approximately $150 million on merger expenses in the period leading up to the WSA negotiations. Huppe WRT, Ex. SX 0026, at ¶ 24. This argument is meritless. The merger was essential to the survival of the entire business of Sirius and XM. In contrast, because of the ancillary and relatively small size of the Internet radio business, it would have made little business sense for Sirius XM to engage in a proceeding that would have cost far more in legal fees than it could possibly save in royalties. 5/22/15 Tr. 5434:17-22 (Frear).

44. Finally, SoundExchange argues that Sirius XM could have refused the WSA settlement offer and still not participated in the *Webcasting III* proceeding, a choice that SoundExchange characterizes as a "costless short-term option." Huppe WRT, Ex. SX 0026, at ¶ 26. This argument is nonsensical. Even without the litigation costs of *Webcasting III*, if Sirius XM refused SoundExchange's WSA settlement offer, it would have had to continue paying under the higher *Webcasting II* rates. This obviously would have resulted in higher net costs

than if Sirius XM accepted the settlement offer. 5/22/15 Tr. 5431:18-20 (Frear). In fact, *accepting* the SoundExchange settlement offer was the *only* cost-free (and actually cost-saving) option open to Sirius XM.

3. The NAB WSA Settlement Similarly Was Affected By External Factors Not Present in a Hypothetical Competitive Marketplace Negotiation

45. Adding to the extreme imbalance in bargaining power at the time of Sirius XM's WSA negotiations was the fact that SoundExchange had already reached an agreement with the NAB, and thus had no incentive to lower rates for Sirius XM. *See* 5/22/15 Tr. 5435:18-24 (Frear). But the NAB agreement, far from being the result of a competitive marketplace negotiation, was similarly affected by external factors unrelated to the true marketplace value of the license.

46. As the NAB's witness Steve W. Newberry, who negotiated the WSA agreement for the NAB, testified, at the time of the WSA negotiations SoundExchange already had the *Webcasting II* rates on its side, and therefore had little incentive to negotiate a rate dramatically lower than those. *See* 5/20/15 Tr. 5081:15-20 (Newberry).

47. Moreover, at that time, the entire broadcasting industry was coming out of a terrible recession and was unable to spend a large amount of money litigating in *Webcasting III*—fearing, at any rate, that if they chose not to settle and chose rather to litigate, SoundExchange would advocate for a much higher rate before the Copyright Royalty Board. 5/20/15 Tr. 5081:23-5082:15 (Newberry). *See also* Written Direct Testimony of Steven W. Newberry ("Newberry WDT"), Ex. NAB 4001, at ¶¶ 20-23.

48. The NAB was also able to obtain various non-monetary concessions in its WSA settlement, including waivers of various programming restrictions in the statutory license, which

were crucial to broadcasters but would not have been available in the absence of a settlement. PFF at ¶ 62.

49. In any event, because streaming has not been profitable for the broadcasters, they, like Sirius XM, viewed webcasting as wholly ancillary to their larger, broadcasting business, providing little business incentive to litigate for lower rates in lieu of settlement. *See, e.g.*, Written Direct Testimony of Julie Koehn ("Koehn WDT"), Ex. NAB 4006, at ¶¶ 21-22; Written Direct Testimony of Ben Downs ("Downs WDT"), Ex. NAB 4005, at ¶¶ 24-26; Written Direct Testimony of John Dimick ("Dimick WDT"), Ex. NAB 4002, at ¶¶ 23-29.

4. In the Absence of Any Reliable Benchmark, the First Year Rate in the Sirius XM WSA Agreement Should Be Used to Set the Upper Bound of a Range of Reasonable Rates in the Current Proceeding

50. Despite the numerous reasons noted above as to why the Sirius XM WSA agreement does not reflect rates that would have been negotiated between a willing buyer and a willing seller, the Judges have in the past used imperfect marketplace agreements to help establish a "zone of reasonableness," but "only after making certain significant adjustments to that proposed benchmark." *See Webcasting III* at 23115.

51. In the absence of any reliable benchmark, Sirius XM proposes that the Sirius XM WSA settlement agreement should be used as such a marketplace referent. As noted above, the various external factors distorting the outcome of the WSA negotiations all operated to drive the rates higher rather than lower. Consequently, only the lowest rate contained in the agreement should be considered, and then only to set the upper bound of a range of reasonable rates. This approach would use $0.0016 per performance, the rate from the first year of the WSA settlement agreement, to set the upper bound of reasonable rates for the period at issue in this proceeding. Sirius XM proposes that the rate be set at the highest rate in that range: $0.0016.

C. Marketplace Evidence Submitted By Other Participants Corroborates the Reasonableness of Sirius XM's Proposed Rate

52. In the absence of directly comparable benchmarks, it is appropriate for the Judges to use a "guidepost" approach similar to the approach approved by the D.C. Circuit in *Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1009 (D.C. Cir. 2014). The effective per-performance rates from the agreements offered by various parties in this proceeding demonstrate that [redacted]. They create a range from [redacted] using the best analysis from various expert economists of the effective per-performance rate of the various agreements. Specifically, the Apple Agreements range from [redacted], the Pandora-Merlin agreement has a blended, effective per-performance rate of [redacted], the iHeart-Indie agreements have a per-performance effective rate of [redacted], and the iHeart-Warner agreement has an effective per-performance rate of [redacted].

53. For the Apple agreements, the best analysis of the effective per-performance rate comes from Professor Shapiro. Professor Shapiro made a number of appropriate adjustments to derive an adjusted effective per-play rate as expected by the major labels and Apple for their respective agreements. Supplemental Written Rebuttal Testimony of Carl Shapiro ("Shapiro Supp. WRT") Ex. PAN 5365, Table 1 at p.16. Including the [redacted], he calculated for Year One of the Apple-Sony deal an effective rate of [redacted] for the Apple-Universal deal. *Id.* He calculated a Year One effective rate of [redacted] for the Apple-Warner agreement. *Id.*

54. For the iHeart-Warner agreement, the best effective per-performance rate comes from Professor Fischel who calculated an effective per-performance rate of [redacted]. Ex. IHM 3048; Ex. IHM 3034 at p. 172. For the iHeart-Indie agreements (agreements between iHeart and

twenty-seven independent record companies), Professor Fischel calculates an average royalty rate of [redacted]. Ex. IHM 3050; Ex. IHM 3034 p. 176, Exhibit D. For the Pandora-Merlin agreement, Prof. Shapiro calculates a blended rate of [redacted] Written Direct Testimony of Carl Shapiro ("Shapiro WDT") Ex. PAN 5022 at p. 31 .

55. These guideposts create a range of bargains in the marketplace of [redacted], using the term "bargain" in its economic sense. In economics, marketplace outcomes between willing buyers and sellers are typically described by the intersection of a downward-sloping marginal revenue (or demand) curve and an upward-sloping marginal cost (or supply) curve. This framework works well when markets are perfectly competitive or when there is some market power on only one side of a market. In an idealized, perfectly competitive market, prices would fall all the way to marginal cost. Written Direct Testimony of Michael L Katz ("Katz WDT") Ex. NAB 4000 ¶ 5 at p. 5. In markets where there are small numbers of both buyers and sellers and each has some degree of market power, however, this kind of "marginal analysis" proves less useful. Economists have found that modeling marketplace outcomes with bilateral market power as *bargains* is more realistic. Alvin E. Roth, *Bargaining (Economic theories of bargaining)*, Social Science Encyclopedia (London: Routledge, 1996) at 46–7.

56. The hypothetical market for sound recording performance rights fits this description well (though the actual market does not). In the hypothetical target market, there would be no posted prices because record companies could not likely dictate to services what they would be willing to accept for a sound recording performance right nor could services dictate to labels what they would be willing to pay. The parties would surely bargain over the appropriate rate instead. Shapiro WDT, Ex. PAN 5022 at p. 7.

57. Determining the result of bargains that would occur in the hypothetical market from evidence of bargains made in the actual market is analytically very difficult because of the differences between the hypothetical market and the actual market. Shapiro WDT, Ex. PAN 5022 at p. 18. One way, however, to approach this problem is to analyze the directional difference that would be caused by differences between the hypothetical and actual markets and use those directional indications to determine where in the range of guidepost rates the statutory rate should be set.

58. For example, the hypothetical market would be "workably competitive" whereas the actual market is not because it consists of sellers (record companies) whose catalogs are "must haves" for the webcasting services. Shapiro WDT Ex. PAN 5022 at pp. 12 – 15; Written Rubuttal Testimony of Carl Shapiro ("Shapiro WRT") Ex. PAN 5023 at p. 14. This creates a situation described as "Cournot complements" where a buyer must, in essence, negotiate with several entities with market power to assemble the inputs necessary to conduct its webcasting service. Katz WDT, Ex. NAB 4000 ¶¶ 41 – 43. This is considered even more difficult than negotiating with a single monopolist. Shapiro WRT, Ex. PAN 5023 at p. 18. This market structure fits no one's definition of workably competitive; therefore, the hypothetical market's structure would necessarily have more labels with less market power. Shapiro WDT at p. 11 (Ex. PAN 5022). This difference would tend to push rates down because the buyers (webcasters) would have more bargaining power to play one seller (an individual record company) against another. Katz WDT, Ex. NAB 4000 at ¶ 5, p. 60.

59. Another difference is that the hypothetical market would not have a compulsory license with a statutory rate; nor would it have a regulatory body to set such a rate. Corrected Written Direct Testimony of Daniel L. Rubinfeld ("Rubinfeld WDT"), Ex. SX 0017 ¶ 81. This

difference supports an inference that the current statutory rate is above the hypothetical market rate because there would not be any direct licensing agreements if the reverse were true. Shapiro WRT Ex. PAN 5023 at p. 34, 38, Figure 8. The webcaster buyer would simply opt for the statutory rate instead of paying more than the statutory rate, in other words, the statutory rate provides a ceiling on what a webcaster would pay. Shapiro WDT Ex. PAN 5022 at p. 36.

60. Another way to examine the directional impact of the differences between the hypothetical market and the actual market is to examine the threat points of the bargaining parties in the hypothetical market and the actual market. The most important implication of a bargaining framework relative to a conventional demand-and-supply framework is the role of threat points, also known as disagreement points. Written Rebuttal Testimony of Michael L. Katz ("Katz WRT"), Ex. NAB 4015 ¶ 177. A party's threat point in a negotiation is the profit it would achieve in the absence of an agreement. Katz WDT, Ex. NAB 4000 ¶ 39 n.38. So in a negotiation between a record company and webcaster, the label's threat point would be its profit in the absence of an agreement with the webcaster, whereas the webcaster's threat point would be its profit in the absence of an agreement with the label.

61. The nature of substitutability or complementarity in record companies' catalogs can impact webcasters' threat points, and therefore also impact the royalty negotiated in the hypothetical market. For example, if record companies' catalogs are substitutable in the hypothetical market because the market is workably competitive, then a non-interactive webcaster's threat point would be relatively strong (i.e., it would be able to earn a significant amount of profit even in the absence of an agreement with a single record company). The higher substitutability of the record companies' catalogs in the hypothetical market would mean that a webcaster would not have to pay as high a license fee as compared to the case where its threat

point was weaker because of a lack of substitutability. Directionally, therefore, rates in the hypothetical market would be lower than the actual market based on the higher threat point enjoyed by webcasters in the hypothetical market as compared to the actual market.

62. Looking at the other side of the equation, the nature of substitutability or complementarity of a webcasting service for other record company revenue streams would impact the record companies' threat points. Amended Written Rebuttal Testimony of Daniel R. Fischel and Douglas G. Lichtman ("Fischel/Lichtman WRT") Ex. IHM 3034 ¶ 27. For example, if a subscription to a non-interactive webcaster promotes other record company revenue streams (e.g., the sale of CDs or digital downloads), then this lowers record companies' threat points, reducing the royalty predicted in the hypothetical market. However, the record companies' threat points would appear to be equal in the hypothetical market and the actual market because the promotional effect of a particular internet radio service would not be affected by increased competition between record companies in the hypothetical market.

63. The directional impact, therefore, of the difference in threat points between the hypothetical market and the actual market would point towards lower rates. The webcasters would have higher threat points meaning they could earn more profits in the absence of a deal then they could currently in the actual market. On the other hand, the directional impact of the record company threat points is neutral because the promotional effect on other revenue streams of the label would be the same in both markets.

64. In sum, evidence from the non-interactive webcasting direct licensing market provides a range of guideposts from [redacted], with directional indications that bargains between a willing buyer and willing seller in the hypothetical market would be lower than those in the actual market. Sirius XM's rate proposal of $0.0016 is therefore appropriate

and well within (indeed, at the high end of) a range of reasonableness for determining what a willing buyer and willing seller would pay for a license in a workably competitive market.

VI. THERE SHOULD NOT BE ESCALATING RATES DURING THIS RATE PERIOD

65. SoundExchange's proposed annual rate increases are arbitrary and incompatible with the willing buyer-willing seller standard. As SoundExchange's expert, Daniel L. Rubinfeld, testified, its proposed escalating rates [redacted]. 5/6/15 Tr. 2226:10-21.

66. In fact, of all of SoundExchange's benchmarks, [redacted]. *Id.* at 2227:11 – 2228:20. As for [redacted], Professor Rubinfeld himself criticized its use as an appropriate benchmark in the current proceeding. *Id.* at 2229:7-12.

67. There is no basis to assume, without supporting evidence, that fair market rates would necessarily increase during the next Rate Period. Indeed, the record evidence indicates [redacted]. Rubinfeld WDT, Ex. SX 0017, ¶ 140; 5/8/15 Tr. 2736:18-2737:7 (Shapiro); 5/15/15 Tr. 4142:7-12 (Lichtman); 5/19/15 Tr. 4611:1-4 (Shapiro). There is simply nothing in the record that would support annual increases in the webcasting rate during the upcoming rate period.

68. If anything, the record supports a decrease in webcasting rates during the upcoming rate period. Professor Rubinfeld admitted that [redacted] 5/6/15 Tr. 2231:7-12 (Rubinfeld). Even

if the Judges were to accept as true (which they should not) the assumption underlying Professor Rubinfeld's proposal—that interactive and noninteractive services are converging (*id.* at 2225:22-2226:4)—this certainly does not support the conclusion that the Judges should impose on non-interactive webcasters what Professor Rubinfeld himself characterized as a [redacted] during the rate period. *Id.* at 2223:20-21. SoundExchange's proposal that rates escalate by over 3 percent per year is completely unsupported by record evidence and contradicted by its own expert's testimony. The Judges should accordingly reject any such rate escalation proposal.

VII. A PERCENTAGE OF REVENUE BASED RATE FORMULA WOULD BE UNFAIR AND UNWORKABLE

69. In all three prior webcasting proceedings the Copyright Royalty Board and its predecessor, the Copyright Arbitration Royalty Panel ("CARP"), have repeatedly rejected requests to implement percentage of revenue rate formulas, in favor of a per-performance rate. The CARP summarized the multiple problems inherent in a percentage-of-revenue formula as, *inter alia*: (1) revenue merely serves as a proxy for what is truly being licensed, whereas a per-performance metric is directly tied to the nature and value of the right being licensed; and (2) percentage-of-revenue models are difficult to utilize because identifying relevant webcasting revenues are very complex, especially where a webcaster offers, as Sirius XM does, features and content unrelated to music. *Report of the Copyright Arbitration Royalty Panel, Docket Nos. 2002-1 CARP DTRA3 & 2001-2 CARP DTNSRA*, at 36 (Feb. 20, 2002).

70. Likewise, in *Webcasting II*, the Judges gave the following reasons for rejecting a percentage-of-revenue approach: (1) that "percentage of revenue metrics ultimately demand a clear definition of revenue so as to properly relate the fee to the value of the rights being provided," which SoundExchange has not done, as webcasters presented evidence that "on-air

talent, programming director contributions and marketing skills impact the revenues of simulcasting webcasters" (Sirius XM has also presented such evidence here); (2) "the use of a revenue-based metric gives rise to difficult questions for purposes of auditing and enforcement related to payment for the use of the license"; and (3) that a revenue-based metric eschews the basic notion that "payments should increase in direct proportion to usage," resulting in a situation where webcasters "would be forced to share revenues that are not attributable to music use, but rather to other creative or managerial inputs," or, conversely, in situations where a webcaster is generating little income, copyright owners may "receive little compensation for the extensive use of their property." *Webcasting II* at 24089-24090. The Judges' rejection of the percentage of revenue rate structure was upheld on appeal by the D.C. Circuit. *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 760-61 (D.C. Cir. 2009).

71. The Copyright Royalty Judges' considered preference for per-performance rate structures, where possible, has not been limited to webcasting. The Judges similarly rejected requests for a percentage of revenue rate structure in connection with the Section 115 mechanical license. *2009 Mechanical and DPD Rate Determination Proceeding*, 74 Fed. Reg. 4510, 4515-17. Similar to *Webcasting II*, the Judges' rejection of the percentage of revenue rate structure was again upheld by the D.C. Circuit on appeal. *RIAA v. Librarian of Congress*, 608 F.3d 861, 869-70 (D.C. Cir. 2010).

72. There is no evidence in the record of this proceeding that would justify departure from the Judges' (and their predecessors') consistent reasoning and precedent. To the contrary, the record evidence demonstrates that the application of a percentage of revenue rate across the many different types of commercial webcasters, and particularly to Sirius XM's Internet radio service, would be unworkable and unfair. Both the importance of non-music content to Sirius

XM's Internet radio service, and the fact that the non-music content is bundled together with the music content for one, undifferentiated license fee, renders a percentage-of-revenue rate inappropriate. *See* Corrected Written Direct Testimony of David J. Frear ("Frear WDT"), Ex. SXM 6000, at ¶ 54.

73. Any attempt to adjust for this fact by calculating the amount of time a subscriber spends listening to music versus non-music programming could be riddled with imprecision and error: relative time spent listening to music vs. non-music content does not necessarily correspond to the relative contribution of music to consumers' willingness to pay Sirius XM's subscription fees. *Id.* at ¶ 57; 5/22/15 Tr. 5449:11-25.

74. Indeed, the Judges' concern in *Webcasting II* that webcasters would be forced to share revenue that is not attributable to music, but to "other creative or managerial inputs," *Webcasting II* at 24090, is directly applicable here: Sirius XM has invested heavily in on-air personalities and hosts, as well as a broad array of exclusive non-music content—all of which distinguish Sirius XM from its competitors. *See* Frear WDT, Ex. SXM 6000, at ¶ 12-18. This also sets Sirius XM apart from the interactive services that SoundExchange relies upon for its benchmark agreements—those services are pure music delivery services, in which almost all of the revenue is related to the performance of sound recordings.

75. Even if the relative value of Sirius XM's music to non-music content could be accurately determined, that ratio of value would certainly not apply to every other (or perhaps any other) statutory webcaster. Consequently, the difficulty in devising a fair and workable definition of revenue for the royalty calculation, a key problem repeatedly cited by the Copyright Royalty Judges and the D.C. Circuit, as noted above, is present and insurmountable in this proceeding. No participant has even proposed such a definition that deals with these problems.

There simply is no one-size-fits-all percentage of revenue formula that fairly takes into account the variety of programming philosophies and business models found throughout the statutory webcasting market.

76. These fundamental problems would not be alleviated if the Judges were to devise some form of arbitration process by which future conflicts concerning the manner of allocating or computing revenue subject to the rate calculation, as described in questioning by Judge Strickler at the hearing. 5/14/2014 Tr. 3955:14-3960:10. Such an approach merely delays resolution of the inevitable disputes, it does not prevent them. It would only increase uncertainties and lead to a potentially endless series of costly future arbitrations. Moreover, the problem is with the percentage of revenue formula itself, and the inability to craft a formula that would fairly apply to all licensees. Merely providing a dispute resolution mechanism does not at all address the underlying problem leading to the dispute. A licensee such as Sirius XM needs to be able to order its business, and its accounting systems, in reliance on an understandable rate formula. The suggested approach would undermine any ability for licensees to do so.

77. In contrast, the per-performance rate structure, which has always been used for webcasters, suffers from none of these problems. It is simple to compute and administer and may be fairly applied across many different types of webcasters because it is directly tied to the usage of the licensed rights. Most importantly, SoundExchange has not introduced a shred of record evidence that the longtime exclusive use of a per-performance rate structure, in itself, has had any adverse impact on copyright owners or artists. SoundExchange's request for a percentage of revenue based royalty rate is a solution in search of a problem.

VIII. CONCLUSION

78. For the reasons set forth herein, and in Sirius XM's Proposed Findings of Fact, the Copyright Royalty Judges should adopt Sirius XM's rate proposal and set the rate for commercial webcasters at $0.0016 per-performance for the upcoming rate period.

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Before the
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In the Matter of	)	
DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)	)	**Docket No. 14-CRB-0001-WR**

SIRIUS XM RADIO INC.'S PROPOSED FINDINGS OF FACT

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I. RATE PROPOSALS

A. Sirius XM Proposal

1. Sirius XM Radio Inc. ("Sirius XM" or "the Company") proposes that the Section 114 digital sound recording public performance license applicable to commercial webcasters for the 2016 – 2020 rate period (the "Rate Period") be $0.0016 per performance.

2. Sirius XM maintains that the Section 112 ephemeral license has no value independent of the Section 114 performance license, and consequently proposed that the royalty for the Section 112 license be deemed included within the Section 114 royalty payment. Sirius XM takes no position at this time as to what, if any, percentage of the Section 114 royalty should be deemed attributed to the Section 112 ephemeral license.

B. SoundExchange Proposal

3. SoundExchange, Inc. ("SoundExchange") proposes that the royalty rate applicable to commercial webcasters for the Rate Period be the greater of the following percentage of revenue and per-performance rates:

Year	Percentage of Revenue	Per-Performance Rate
2016	55%	$0.0025
2017	55%	$0.0026
2018	55%	$0.0027
2019	55%	$0.0028
2020	55%	$0.0029

II. HISTORY OF SIRIUS XM

A. Sirius XM's Business

4. Sirius XM built from scratch a unique audio entertainment service, including not only a wide variety of music, talk, news, weather, and sports programming, but also the hardware

(i.e., receivers) necessary to access that service and the proprietary satellite network that enables the service to be seamlessly delivered. Corrected Written Direct Testimony of David J. Frear ("Frear WDT"), Ex. SXM 6000, at ¶ 5.

5. The Company has invested billions of dollars to date in creating and supporting this service. *Id.* at ¶ 6.

6. Today, Sirius XM is the world's largest radio broadcaster measured by revenue, and currently has over 26 million subscribers. *Id.* at ¶ 7. Its primary source of revenue is subscription fees, with the Company offering discounts for longer-term prepaid subscription plans as well as discounts for multiple subscriptions. *Id.* at ¶ 8. Sirius XM also obtains revenue from account activation and other fees, the sale of advertising on select non-music channels, the sale of satellite radios and accessories, and other ancillary services, such as weather, traffic, data, and Backseat TV services. *Id.*

7. Sirius XM originally aimed at becoming the world's best pure music service; the initial business plan was to have a "jukebox in the sky," transmitting automated playlists of only music, with no disc jockeys and no commercials or any other interruptions. *Id.* at ¶ 9; 5/22/15 Tr. 5407:20-24 (Frear). Those plans were soon abandoned as it became clear that the ubiquity of music—especially for free on terrestrial radio and the Internet—required a new business strategy. The Company realized that to persuade consumers to pay for radio, it needed more than an outstanding music product, but also compelling non-music programming that, in many cases, consumers could not get anywhere else. Frear WDT, Ex. SXM 6000, at ¶ 9; 5/22/15 Tr. 5407:24-5408:6 (Frear). Given the increasingly competitive market in which Sirius XM operates, this need remains even more compelling today. Frear WDT, Ex. SXM 6000, at ¶ 9.

8. To the extent music programming contributes to subscribers' willingness to pay

for Sirius XM's service, the Company must differentiate its music channels from the ubiquitous and free competition. It does so by investing heavily in both on-air talent, disc jockeys and other personalities who engage listeners with their original banter and announcements, as well as expert music programmers who use their expertise to curate each music channel by selecting a tiny fraction of the available music and deciding the order in which to play those songs so that the resulting playlists are better than anything Sirius XM subscribers could hear on terrestrial or Internet radio. *Id.* at ¶ 10; 5/22/15 Tr. 5409:23-5412:1(Frear).

9. The Company regularly sees evidence of a direct correlation between the performances of an artist's music on its services and a spike in that artist's record sales—a phenomenon that has been explicitly recognized by recording artists and their representatives. Frear WDT, Ex. SXM 6000, at ¶ 10.

10. Although Sirius XM has invested heavily in unique music programming by hiring quality on-air talent and expert music programmers, its non-music content is truly what distinguishes the service from its competitors. Frear WDT, Ex. SXM 6000, at ¶ 12. Sirius XM's expansive array of exclusive content includes talent and brands such as Howard Stern, Oprah Winfrey, Joel Osteen, Dr. Laura, Jamie Foxx, John Madden, Chris "Mad Dog" Russo, Comedy Central, Entertainment Weekly, the TODAY Show Radio, and many others. *Id.* Sirius XM also broadcasts the audio feed from several television channels such as Fox, CNN, and CNBC. *Id.*

11. Sirius XM also currently broadcasts over 30 sports channels, offering listeners sports talk (including fantasy sports) and live play-by-play broadcasts from the NFL, Major League Baseball, NASCAR, NBA, NHL, PGA TOUR, FORMULA 1, and more. These channels are critical to subscriber acquisition and retention because they are not available elsewhere. *Id.* at ¶ 13; 5/22/15 Tr. 5408:25-5409:14 (Frear). Sirius XM also has over 80 other

non-music channels, offering a variety of third-party and original content in news, talk, entertainment, comedy, family, health, religion, and more. Frear WDT, Ex. SXM 6000, at ¶ 13.

12. The variety and exclusivity of Sirius XM's non-music programming are critically important to the Company's subscribers, helping Sirius XM retain those subscribers and attract new subscribers. *Id.* at ¶ 14. Whereas music is ubiquitous and often available to consumers for free, because consumers can only obtain, for example, the Howard Stern show, from Sirius XM, then they are more likely to pay to receive that programming. *Id.* Moreover, advertisers are likely to pay more to advertise on that platform in connection with that programming. *Id.*

13. The fact that non-music content drives subscriptions and prevents consumer defection can be illustrated by one example: Sirius XM has approximately 22 million subscribers, most of whom pay over $100 a year for the Company's programming in connection with 65 million satellite-enabled vehicles. *Id.* at ¶ 18. Pandora, the largest non-interactive webcaster in the market, has only approximately 3 million paying subscribers on the approximately 150 million smartphones in the United States. *Id.* Pandora, which webcasts only music, charges either $4 or $5 per month for a commercial-free subscription. *Id.*

14. To this day, Sirius XM's primary competition is still AM and FM radio, though it does compete to a lesser extent with Pandora and other webcasters, all of which are available for free to consumers. 5/22/15 Tr. 5412:4-10 (Frear). Sirius XM's service does not directly compete with interactive, on-demand music services, which provide a fundamentally different user experience. On-demand music streaming services do not provide the value-added curation or on-air talent components provided by Sirius XM. Instead, interactive streaming is more properly seen as a new format in the evolution of music ownership, in which consumers lease particular recordings rather than buy them via CD or download. *Id.* at 5412:13-5413:2.

15. Because of these fundamental differences, Sirius XM's service is complementary to on-demand services, not substitutional, and the two types of services only compete in the very broadest sense: competition for consumers' time in the same way that Sirius XM competes for time with CD and download listening, videogame playing, television and movie viewing, book reading, gardening, and quiet reflection. *Id.* at 5413:2-13. Although they do not compete directly with Sirius XM, on-demand services like Spotify are part of the broader audio entertainment market. Because of this, and also to better understand its customers, Sirius XM does track those services and sometimes does market research on those services, as any responsible business would do. *Id.* at 5413:14-24.

B. Sirius XM's Internet Radio Business

16. While Sirius XM's primary business is broadcasting on a subscription fee basis over its two proprietary satellite systems, it also provides a simulcast of its satellite broadcast over the Internet. Frear WDT, Ex. SXM 6000, at ¶ 20. The Company's Internet radio service is not a stand-alone business, but rather is an ancillary extension of its core satellite service. 5/22/15 Tr. 5422:22-5423:14 (Frear).

17. Sirius XM's Internet radio strategy has developed and changed over time. *Id.* From its inception until 2006, neither Sirius nor XM charged a separate subscription fee or otherwise attempted to monetize its Internet radio offering: the companies offered free streaming of a subset of its satellite radio channels as part of its subscriptions. *Id.* at ¶ 21. The Internet radio service was launched primarily as a promotional and retention tool and to reach potential subscribers who did not yet have a satellite radio. *Id.* at ¶ 32; 5/22/15 Tr. 5427:7-22 (Frear).

18. Beginning in September 2006, Sirius began charging those customers who were already paying for a satellite radio subscription $2.99 per month to add a higher-bandwidth (and therefore higher sound quality) version of Internet radio, but continued to provide free low-

bandwidth Internet radio for its satellite subscribers. *Id.* at ¶ 22. Sirius also charged "standalone" Internet radio subscribers (those without a satellite subscription) the (then) full satellite radio subscription fee of $12.95 per month. *Id.*

19. In March 2009, Sirius's free Internet radio service was eliminated (due to the high rates set in the *Webcasting II* proceeding, as discussed in more detail below), excepting certain legacy subscribers, and the subscription charges for the offering were standardized across the Sirius and XM platforms. *Id.* at ¶ 23; 5/22/15 Tr. 5416:3-16 (Frear). Currently, a standalone subscription to Sirius XM Internet radio is priced at $14.99 a month, or $4.00 a month when purchased as a complement to a Sirius XM satellite radio subscription, or included in the All Access subscription package for $18.99 a month. Frear WDT, Ex. SXM 6000, at ¶ 24.

20. Compared to Sirius XM's over 26 million satellite subscribers, the number of subscribers with access to the Company's Internet radio service is extremely low, coming in at only 2.25 million as of March 2014. *Id.* at ¶ 25.

21. Sirius XM does not sell separate advertising for its Internet radio service, nor is the Sirius XM Internet radio service revenue model primarily advertising based. *Id.* at ¶ 26. Rather, advertising covers both the satellite and Internet radio services, and is sold predominantly to reach the much larger satellite radio audience. *Id.*

22. As noted above, the Internet service is primarily a simulcast of Sirius XM's satellite service. *Id.* at ¶ 27. However, a small number of additional channels not broadcast over satellite are available, such as a collection of dedicated Spanish language channels. *Id.* Sirius XM also uses these additional channels as a kind of laboratory to test potential new channel formats for the satellite service. 5/22/3015 Tr. 5419:4-11 (Frear). Usage of these channels is very low. Frear WDT, Ex. SXM 6000, at ¶ 27.

23. The Sirius XM Internet radio service also includes Sirius XM On Demand and My Sirius XM, both offered at no extra charge to Internet radio subscribers. *Id.* at ¶ 28. Sirius XM On Demand allows subscribers to choose favorite episodes from a catalog of thousands of hours of Sirius XM shows, specials, series, live events, and more—and are predominantly of non-music content. *Id.* Through this part of the service, subscribers may listen to replays of archived segments of popular Sirius XM shows, such as the Howard Stern show or the Dr. Radio show. 5/22/15 Tr. 5420:7-12 (Frear). The On Demand service also provides access to replays of five-hour blocks of certain music shows, but subscribers are unable to select any particular songs from those blocks. *Id.* at 5420:13-21.

24. My Sirius XM allows subscribers to slightly personalize a select group of music and comedy channels from the satellite service, to adjust for characteristics like library depth, familiarity, and music style. Frear WDT, Ex. SXM 6000, at ¶ 28. Although introduced as a response to truly customized Internet radio like Pandora, My Sirius XM does not provide nearly the same amount of customization because such algorithm-generated playlists are inconsistent with Sirius XM's high-value, human-curated programming philosophy. Rather than allow extensive input from users to generate a custom playlist from a massive catalog of songs, like Pandora, My Sirius XM begins from the same playlist created by human curators for a satellite radio channel, and narrows that playlist slightly by manipulating a few sliders, which emphasize or deemphasize broad characteristics common to the relevant genre. 5/22/15 Tr. 5419:12-5420:6, 5421:1-10 (Frear). For example, listening to the '60s channel through My Sirius XM might allow the subscriber to emphasize more late '60s music, more early '60s music, more electric music, or more acoustic music. *Id.* at 5419:19-25. Notably, it allows users to shrink the playlist by adjusting for these characteristics—but does not permit users to expand the playlist

from that of the satellite radio channel. *Id.* at 5419:12-5420:6, 5421:7-10.

25. Usage of these two products has been extremely low in comparison to the Internet radio simulcast channels, with Sirius XM On Demand and My Sirius XM together comprising only [redacted] of the total Internet radio listening hours. Frear WDT, Ex. SXM 6000, at ¶ 28. The percentage of music listening for these two services is even lower, with only 15 percent of On Demand listening comprising music. 5/22/15 Tr. 5421:19-22 (Frear). Nor does Sirius XM receive any revenue specifically attributable to either of these services. *Id.* at 5421:25-5422: 3.

26. Usage of the overall Internet radio service in comparison to the satellite radio service is not any more significant. The Sirius XM Internet radio service is a minor part of Sirius XM's overall business, with self-pay subscription revenue (*i.e.*, excluding trial subscriptions) accounting for only [redacted] of Sirius XM's total revenue. Frear WDT, Ex. SXM 6000, at ¶ 29. Of Sirius XM's 26.3 million subscriber base at the end of the first quarter of 2014, only approximately [redacted] had standalone Internet radio subscriptions. *Id.* at ¶ 30. An additional [redacted] had add-on subscriptions linked to their satellite radio service, with an additional [redacted] million self-pay subscribers who had access to the service by virtue of their All Access subscription. *Id.* Despite such bundling, demand for the All Access subscription is driven by non-music content such as Howard Stern, Oprah Radio, and the NFL. *Id.* Of all these self-pay Internet radio service subscribers, only [redacted] log onto the Internet radio service in a given month. *Id.*

27. The mix of usage for Internet radio subscribers as of December 31, 2013, based upon listening time, was 55.8% music and 44.2% non-music (talk)—however, this does not necessarily reflect the relative value of Sirius XM's non-music programming. *Id.* at ¶ 31. As noted above, music programming is widely available for free. Once a consumer makes the

decision to subscribe, the relative time spent listening to music does not in itself indicate the relative contribution of music to that consumer's willingness to pay. Nor does it indicate, even with respect to the music listening, the relative contribution of the underlying music versus Sirius XM's unique contributions of curation and on-air talent to the consumer's willingness to pay. Consumer studies consistently show that one of the top reasons Sirius XM subscribers pay for the Internet radio service is the exclusive content. *Id.*

III. BENCHMARK ANALYSIS

A. Interactive Services Are Not Comparable to Sirius XM's Non-Interactive Service, Nor Is There Convergence Between the Two

28. The Judges first used the interactive services benchmark in Webcasting II (see *Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final rule and order*, 72 Fed. Reg. 24084, 24092 (May 1, 2007), aff'd in relevant part sub nom., *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F.3d 748 (D.C. Cir. 2009))—to disastrous results.

29. As a result of the *Webcasting II* rates, Sirius XM made the decision to drop all free streaming on both the Sirius and XM platforms, a decision that resulted in a [redacted] drop in the Internet radio service's reported listening hours and a resulting decrease in royalty payments to SoundExchange. Frear WDT, Ex. SXM 6000, at ¶ 35.

30. The excessive rates derived from the interactive webcasting benchmark in *Webcasting II* affected not only Sirius XM, but the entire industry, causing several existing webcasters to exit the market. This widespread disruption to the webcasting industry led Congress to enact legislation—the Webcaster Settlement Acts of 2008 and 2009—that essentially allowed parties to override *Webcasting II*'s market-distorting rates by engaging in private negotiations. 5/22/15 Tr. 5425:25-5426:24 (Frear). *See also Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final rule*

and order, 79 Fed. Reg. 23102, 23102 n.4 (Apr. 25, 2014) (*Webcasting III*).

31. Since Webcasting II, the interactive services benchmark has grown increasingly disfavored, including in the *SDARS II* (*Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 78 Fed. Reg. 23054, 23058 (April 17, 2013)) proceeding and Webcasting III remand. See *Webcasting III* at 23115 (using the interactive benchmark proposed by SoundExchange's expert "only after making certain significant adjustments to that proposed benchmark"); *id.* at 23118 (noting that SoundExchange's expert's "interactive benchmark analysis is of some, albeit limited, assistance in determining the royalty rate in the noninteractive market"); *SDARS II* at 23065 ("[T]he Judges do not find that the market for interactive subscription streaming services as characterized by Dr. Ordover in this proceeding offers a foundation to support a comparable benchmark from which to begin an analysis of reasonable rates for SDARS for the upcoming license period. For example, the rights licensed by interactive subscription services are not the same as those by non-interactive services such as those by non-interactive services such as the SDARS, and the Judges did not find Dr. Ordover's efforts to adjust for the differences to be helpful.").

32. Moreover, in *Webcasting III*, the Judges noted one "major difference between" interactive and noninteractive services: which is "the ultimate consumer in selecting the sound recordings for listening. In the interactive market…the ultimate consumer essentially decides which sound recordings he or she will receive. By contrast, in the noninteractive market…the consumer plays a more passive role, and the webcaster offers the consumer music that the webcaster anticipates the listener might enjoy (much like radio)." *Webcasting III* at 23115.

33. SoundExchange's attempt to use the flawed interactive services benchmark, without even attempting to cure the infirmities previously identified by the Judges, is based upon

its claim that interactive and noninteractive services are "converging" in the minds of consumers, changing the two types of services from non-comparable to comparable. This claim finds no support in—and is indeed, contradicted by—the evidence in this proceeding.

34. For example, in studies [redacted] (Ex. PAN 5046 & Ex. PAN 5048)—studies conducted not for purposes of this proceeding but for internal business planning—[redacted] Ex. PAN 5046 at 8; *see* 4/30/15 Tr. 1121:9-13 (Harrison). [redacted] *Id.* at 1121:20-22. [redacted] Ex. PAN 5046 at 8; *see* 4/30/15 Tr. 1122:24-1123:3 (Harrison).

35. In contrast [redacted] Ex. PAN 5046 at 8 (emphasis added); *see* 4/30/15 Tr. 1123:7-13 (Harrison). SoundExchange's witness, Aaron Harrison, [redacted]. *Id.* at 1123:19-20. [redacted]. *Id.* at 1123:25-1124:7.

36. [redacted]. Ex. PAN 5048 at 44; *see* 4/30/15 Tr. 1125:20 – 1126:7 (Harrison).

37. As noted above, Sirius XM does not compete with, and is not a substitute for, the

on-demand, ownership experience provided by interactive services. Instead, the two types of services are complementary. *Supra* ¶¶ 14-15.

B. The Webcaster Settlement Act ("WSA") Settlement Agreements

38. At the time Sirius XM and NAB entered into their respective WSA settlement agreements with SoundExchange, a number of external factors, unrelated to the fair market value of the statutory license to unique to Sirius XM's and broadcasters' business circumstances during the negotiations, left both Sirius XM and NAB with no rational choice other than to accept the rates and terms dictated by SoundExchange, and as reflected in the WSA agreements.

1. A Number of External Factors Affected Sirius XM at the Time of the WSA Negotiations, Which Left Sirius XM With No Rational Option Other Than to Accept the Above-Market Rates Offered by SoundExchange

39. During the period immediately leading up to (and during) its WSA negotiations with SoundExchange, Sirius XM was experiencing a perfect storm of circumstances, wholly unrelated to the fair market value of the Section 114 license, which influenced the WSA settlement rates. The extremely low usage of and revenue from Sirius XM's Internet radio service, the low relative importance of that service to Sirius XM's overall business, the disastrous existing *Webcasting II* rates (which would continue to apply in the absence of a settlement), Sirius XM's severe financial distress (including a brush with bankruptcy and a plummeting stock price), and the massive litigation costs if Sirius XM were to seek lower rates in the *Webcasting III* proceeding, all left Sirius XM with no rational option but to agree to the WSA rates dictated by SoundExchange. Frear WDT, Ex. SXM 6000, at ¶ 37. Under the totality of these circumstances, any rate reduction offered by SoundExchange, no matter how small, was preferable to no rate reduction at all or, even worse, no immediate rate reduction coupled with the cost of another rate proceeding.

40. When Sirius and XM first launched their respective Internet radio services, those

services were simulcasts of the companies' respective satellite radio channels, and were provided mainly as a promotional vehicle, allowing consumers without the necessary satellite radio hardware to sample the service before obtaining the necessary hardware and subscriptions. *Id.* at ¶ 32; 5/22/15 Tr. 5427:7-22 (Frear). For those who wanted an extension of the satellite service beyond the automobile, the Internet radio service also reached locations where satellite radio reception was difficult. Frear WDT, Ex. SXM 6000, at ¶ 32.

41. In 2007, *Webcasting II* was decided, resulting in a dramatic increase in the already high rates applicable to Sirius XM's webcasting activities. Those rates increased from .07 cents per performance for the entire prior rate period to .08 cents for the first year of the *Webcasting II* rate period, with further increases each year of that period escalating to .19 cents in 2010. *Id.* at ¶ 34; 5/22/15 Tr. 5425:25 – 5426:3 (Frear). Because of the disastrous results of *Webcasting II*, Congress passed the WSA, allowing webcasters and SoundExchange to negotiate lower rates in lieu of the *Webcasting II* rates, while at the same time settling rates for the period that would be covered by *Webcasting III*. *Id.* at ¶ 36; 5/22/15 Tr. 5426:4-7 (Frear).

42. As a result of the *Webcasting II* rates, Sirius XM made the decision to drop all free streaming on both the Sirius and XM platforms, a decision that resulted in a 60-65% drop in the Internet radio service's reported listening hours and a resulting decrease in royalty payments to SoundExchange. *Id.* at ¶ 35; 5/22/15 Tr. 5416:24-5417:17 (Frear). At the same time usage dropped overall, once subscribers had to pay for Internet radio access, listening to non-music content increased dramatically, from approximately 40% of overall listening to 60%. *Id.* at 5417:18-24.

43. Prior to the merger of Sirius and XM, both companies had endured years of sustained losses due to the companies' investment of billions of dollars to create the technology

and infrastructure necessary to invent and grow the satellite radio business. Frear WDT, Ex. SXM 6000, at ¶ 39. In 2007, in order to save both companies, they announced their intent to merge. *Id.* But that merger took longer and cost far more than anyone anticipated. By the time the merger was consummated, in 2008, the companies had spent over $150 million just on the merger costs. *Id.* at ¶ 46. At the same time, both companies were spending millions of dollars participating in the *SDARS I* rate proceeding. By the time of the WSA negotiations, the *SDARS I* decision remained on appeal and the *SDARS II* proceeding was less than a year and a half away. *Id.*

44. Unfortunately, consummation of the merger did not immediately relieve the Company's financial stress. By late 2008, Sirius XM had insufficient cash to repay hundreds of millions of dollars of debt scheduled to come due in February 2009, and was unable to access the capital markets to refinance this, and other, debt. *Id.* at ¶ 40. In an effort to avoid bankruptcy, the Company sought out investors to raise capital to refinance the notes that were coming due. *Id.* Twenty-one prospective investors were solicited, but none was willing to provide the necessary financing to the Company. *Id.* The reasons given by these investors included: (1) Sirius XM and its predecessors had experienced nearly twenty years of losses and still did not have positive EBITDA margins; (2) its business was subject to significant risk; (3) it faced competition from new technologies; (4) its business was dependent on the automotive industry and General Motors and Chrysler were on the verge of bankruptcy; and (5) institutional investors were facing outflows of investment funds. *Id.* at ¶ 41. The Company's ability to obtain the needed financing was further hampered by the widespread credit crisis affecting the country in the wake of the Lehman Brothers bankruptcy. 5/22/15 Tr. 5429:17-5430:9 (Frear).

45. Failing to receive any viable offers, Sirius XM instructed its consultants to start

preparing to file a Chapter 11 bankruptcy on the date the Notes were scheduled to come due. Frear WDT, Ex. SXM 6000, at ¶ 42. Sirius XM narrowly avoided filing for bankruptcy protection only when, after brief but intense negotiations, Liberty Media Corporation, a potential lender to which Sirius XM had only recently been introduced, agreed to provide a $380 million loan (in two phases) in a series of transactions that narrowly enabled Sirius XM to avert a default on its debt and bankruptcy. *Id.*; 5/22/15 Tr. 5430:17-24 (Frear).

46. It was at this time that Sirius XM was simultaneously negotiating the WSA Agreement. Frear WDT, Ex. SXM 6000, at ¶ 44. The Sirius XM stock price reflected its difficulties at this time, falling from over $4.00 per share in January 2007 to a low of $0.05 per share on February 11, 2009. *Id.* at ¶ 45. On September 15, 2009, Sirius XM received a delisting notice from NASDAQ because its common stock had closed below $1.00 per share for 30 consecutive days and was therefore not in compliance with the NASDAQ Marketplace Rules. *Id.* SoundExchange was certainly aware of Sirius XM's financial difficulties, as they were widely reported in the press. 5/22/15 Tr. 5430:25-5431:5 (Frear). SoundExchange was also aware that Sirius XM had fallen behind on its royalty payments due to its financial difficulties. *Id.* at 5435:19-23.

47. Given Sirius XM's extremely precarious financial situation, and litigation and regulatory fatigue, Sirius XM was not prepared to spend further funds litigating *Webcasting III.* Frear WDT, Ex. SXM 6000, at ¶ 46; 5/22/15 Tr. 5431:10-17, 5432:14-18 (Frear).

48. Moreover, the WSA did not require SoundExchange to enter into a settlement agreement with Sirius XM. Frear WDT, Ex. SXM 6000, at ¶ 50. If no agreement was reached, Sirius XM would be stuck with the rates set in *Webcasting II. Id.* This fact greatly minimized SoundExchange's incentive to agree to substantially lower rates. *Id.*

49. Further adding to the less-than-competitive circumstances existing at the time of Sirius XM's WSA negotiations was the fact that SoundExchange had already reached an agreement with NAB, and thus had no incentive to lower rates for Sirius XM. *See* 5/22/15 Tr. 5435:18-24 (Frear).

50. In the context of the severe financial stress affecting Sirius XM's entire business, and the Internet radio services' extremely low usage and importance to its core business, Sirius XM had no sensible option other than to take the deal offered by SoundExchange. If it did not take the deal, Sirius XM would be stuck continuing to pay the higher *Webcasting II* rates. At the same time, NAB simulcasters with which Sirius XM's Internet radio service competes would be paying the lower WSA rates, and the single largest webcaster, Pandora, would be paying a small fraction of the *Webcasting II* rates, putting Sirius XM at a significant competitive disadvantage. Although refusing the deal would then allow Sirius XM to seek a rate reduction in the upcoming *Webcasting III* proceeding, due to the low usage of the Internet radio service the cost of that proceeding would far exceed any possible future savings in royalty payments, even if the rate were reduced to zero. Although Sirius XM attempted repeatedly to negotiate a more significant reduction, SoundExchange consistently refused to materially move off of its opening offer of matching the NAB rates. *Id.* at 5435:15-5436:2. Left with no other option that would have a less costly net result, Sirius XM made the only rational choice available: it took the deal. *Id.* at 5434:17-5435:14.

51. Then, two days before the deadline on which Sirius XM and SoundExchange were required to close negotiations—and after the parties had already agreed on the rate schedule and finalized their deal—Michael Huppe (the party negotiating on behalf of SoundExchange) added an extra term into the Agreement, requiring that it be precedential under the WSA. 6/3/15

Tr. 7627:11-7629:6 (Huppe); 5/22/15 Tr. 5443:4-5444:21 (Frear). Having already negotiated the rest of the agreement with no success moving the needle with respect to royalty rates, Sirius XM said yes to bring an end to the negotiations within the statutory deadline. *Id.* at 5444:20-21 (Frear).

52. For all of these reasons, the rates and terms embodied in the Sirius XM WSA settlement agreement do not reflect any industry-wide fair market value for the license. Instead, the rates are a product of (1) the *Webcasting II* rates, which Congress found to be so wildly supracompetitive as to warrant congressional intervention and which would continue to apply in the absence of a settlement; (2) SoundExchange's monopoly power as the only entity that could provide any effective relief from those rates; and (3) the exacerbation of that imbalance in bargaining power caused by various unrelated circumstances affecting Sirius XM at the time of the negotiations.

53. Notably, while all of those factors increased SoundExchange's ability to extract rates above fair market value; neither SoundExchange nor its major record company overlords had similar countervailing pressures that could have mitigated this extreme imbalance. *See* Frear WDT, SXM 6000, at ¶ 47. Further, SoundExchange funds rate litigation expenses out of the royalty payments it collects, so the costs of litigation are spread widely among thousands and thousands of members. *Id.* Finally, SoundExchange would have to litigate the *Webcasting III* proceeding irrespective of whether it reached an agreement with Sirius XM, so any savings in litigation costs from such an agreement would be minimal. *Id.*

2. Contrary to SoundExchange's Argument, Sirius XM Did Not Have a Viable Option to Reject the WSA Settlement Offer

54. In his rebuttal testimony, Mr. Huppe, President of SoundExchange, suggests that Sirius XM had viable options other than settling with SoundExchange: that Sirius XM could

obtain direct licenses with individual copyright owners, that it could choose to litigate the rate in *Webcasting III*, or that it could simply refuse SoundExchange's settlement offer and allow others to litigate in *Webcasting III* instead. Written Rebuttal Testimony of Michael Huppe ("Huppe WRT"), Ex. SX 0026, at ¶¶ 24-27. But as the testimony of Mr. Frear demonstrates, these "options" were illusory.

55. First, direct licensing was not a viable option. The statutory license covers all sound recordings protected by federal copyright. SoundExchange represents 20,000 distinct copyright owners. 4/29/15 Tr. 680:11-19 (Huppe). In order to replicate the rights at issue in the WSA negotiations, Sirius XM would have had to negotiate and close direct licenses with at least each of those 20,000 copyright owners (there may be other copyright owners that are not members of SoundExchange), all within the short time period allowed for negotiations under the WSA. From a logistical perspective, alone, such a task would have been impossible. 5/22/15 Tr. 5440:25-5441:7 (Frear). Negotiating a direct license with even one, much less all, of the major record companies could not have been concluded in that time. And even if it could have negotiated direct licenses with the major record companies, such licenses would have only accounted for approximately half to two third of the music played by Sirius XM. *Id.* at 5442:16-19. As Mr. Frear testified, to cover *all* the music Sirius XM plays, they would have had to obtain direct licenses from thousands of record companies. *Id.* at 5440:25-5441:4. Even Mr. Huppe had to admit that direct licensing could therefore not have provided a substitute for the statutory license at issue in the WSA negotiations. 6/3/15 Tr. 7633:5-13, 7634:18-24 (Huppe).

56. Setting aside the logistical impossibility, Sirius XM's attempts to obtain direct licenses for its service, which have been ongoing for several years, including meetings with the major record companies as early as 2008 or 2009, have not resulted in a single direct license with

a major record company. 5/22/15 Tr. 5441:15-5443:3 (Frear). In fact, SoundExchange, and Mr. Huppe personally, have actively undermined Sirius XM's attempts to obtain direct licenses from record companies by urging record companies to refuse such direct license requests from Sirius XM in favor of staying within the statutory license. *Id.* at 5439:25-5440:3. Thus, SoundExchange's suggestion that a direct licensing initiative for Sirius XM's Internet radio was a viable alternative is both disingenuous and absurd.

57. Second, SoundExchange argues that Sirius XM could have chosen to litigate the *Webcasting III* proceeding instead of agreeing to the WSA settlement, noting that Sirius XM spent approximately $150 million on merger expenses in the period leading up to the WSA negotiations. Huppe WRT, Ex. SX 0026, at ¶ 24. This argument is meritless. The merger was essential to the survival of the entire business of Sirius and XM. In contrast, because of the ancillary and relatively small size of the Internet radio business, it would have made little business sense for Sirius XM to engage in a proceeding that would have cost far more in legal fees than it could possibly save in royalties. 5/22/15 Tr. 5434:17-22 (Frear).

58. In July 2009, Sirius XM had only [redacted] self-pay Internet radio subscribers. Frear WDT, Ex. SXM 6000, at ¶ 49. Under the *Webcasting II* rate of $0.0018, Sirius XM's royalty cost would have been only $[redacted] for July 2009. *Id.* At that level of subscribers and royalty payments, even a significant decrease in the per-performance fee from the *Webcasting II* rates would not have saved enough in royalty fees to cover the litigation costs and the risk inherent in litigation. *Id.*

59. Finally, SoundExchange argues that Sirius XM could have refused the WSA settlement offer and still not participated in the *Webcasting III* proceeding, a choice that SoundExchange characterizes as a "costless short-term option." Huppe WRT, Ex. SX 0026, at ¶

26. This argument is nonsensical. Even without the litigation costs of *Webcasting III*, if Sirius XM refused SoundExchange's WSA settlement offer, it would have had to continue paying under the higher *Webcasting II* rates. This obviously would have resulted in higher net costs than if Sirius XM accepted the settlement offer. 5/22/15 Tr. 5431:18-20 (Frear). In fact, *accepting* the SoundExchange settlement offer was the *only* cost-free (and actually cost-saving) option open to Sirius XM.

3. The NAB WSA Settlement Similarly Was Affected By External Factors Not Present in a Hypothetical Competitive Marketplace

60. Adding to the extreme imbalance in bargaining power at the time of Sirius XM's WSA negotiations was the fact that SoundExchange had already reached an agreement with NAB, and thus had no incentive to lower rates for Sirius XM. *See* 5/22/15 Tr. 5435:18-24 (Frear). But the NAB agreement, far from being the result of a competitive marketplace negotiation, was similarly affected by external factors unrelated to the true marketplace value of the license.

61. As NAB's witness Steve W. Newberry, who negotiated the WSA agreement for NAB, testified, at the time of the WSA negotiations SoundExchange already had the *Webcasting II* rates on its side, and therefore had little incentive to negotiate a rate dramatically lower than those. *See* 5/20/15 Tr. 5081:15-20 (Newberry). Moreover, at that time, the entire broadcasting industry was coming out of a terrible recession and was unable to spend a large amount of money litigating in *Webcasting III*—fearing, at any rate, that if they chose not to settle SoundExchange would advocate for a much higher rate before the Copyright Royalty Board. 5/20/15 Tr. 5081:23-5082:15 (Newberry). *See also* Written Direct Testimony Steven W. Newberry ("Newberry WDT"), Ex. NAB 4001, at ¶¶ 20-23.

62. Moreover, much of the value of the NAB WSA Agreement rested not in the

actual rates but in a number of exemptions NAB was able to negotiate, including an exemption from SoundExchange for the reporting requirements for very small broadcasters, and a series of waivers of certain statutory license restrictions, such as the prohibition on pre-announcing songs, with the American Association of Independent Music and with the major record companies. Without those waivers, which would not have been available in the absence of a settlement with SoundExchange, simulcasters would not have been able to comply with the requirements of the statutory license and would have had to cease all simulcasting activities. *Id.* at ¶¶ 26-28. Finally, NAB was able to negotiate with SoundExchange the ability for broadcasters to pay SoundExchange for music used based on Aggregate Tuning Hours, rather than actual number of performances. *Id.* at ¶ 29. These non-rate-based components of the agreement was of much value to broadcasters, and provided incentive for NAB to enter into the agreement, despite the fact that the actual rate-per-play enumerated in the agreement was unreasonable. *See id.* at ¶ 6.

63. In any event, because streaming has not been profitable for broadcasters, they, like Sirius XM, viewed webcasting as wholly ancillary to their larger, broadcasting business, providing little incentive to litigate for lower rates in lieu of settlement. *See, e.g.*, Written Direct Testimony of Julie Koehn ("Koehn WDT"), Ex. NAB 4006, at ¶¶ 21-22 ("I am not aware of any small broadcasters who are streaming their broadcast programming and making a profit from it."); Written Direct Testimony of Ben Downs ("Downs WDT"), Ex. NAB 4005, at ¶¶ 24-26 ("We have found, after more than a decade of streaming experience, that streaming contributes very little, if anything, to our success."); Written Direct Testimony of John Dimick ("Dimick WDT"), Ex. NAB 4002, at ¶¶ 23-29 (noting that streaming of over-the-air Lincoln Financial Media Company broadcasts is done at a loss).

33. Also similar to its tactics in the Sirius XM negotiation, SoundExchange made a

last-minute demand that the NAB WSA settlement agreement be precedential. Newberry WDT, Ex. NAB 4001, at ¶ 30; 5/20/15 Tr. 5094:11-5096:14 (Newberry).

4. In the Absence of Any Reliable Benchmark, the First Year Rate in the Sirius XM WSA Agreement Should Be Used to Set the Upper Bound of a Range of Reasonable Rates in the Current Proceeding

64. In the absence of any reliable benchmark, Sirius XM proposes that the Sirius XM WSA settlement agreement should be used as a marketplace referent to mark the outer boundary of a range of reasonable rates. As noted above, the various external factors distorting the outcome of the WSA negotiations all operated to drive the rates higher rather than lower. Consequently, only the lowest rate contained the agreement should be considered, and then only to set the upper bound of a range of reasonable rates. This approach would use $0.0016 per performance, the rate from the first year of the WSA settlement agreement, to set the upper bound of reasonable rates for the period at issue in this proceeding. Sirius XM proposes that the rate be set at the highest rate in that range: $0.0016.

C. Marketplace Evidence Submitted By Other Participants Corroborates the Reasonableness of Sirius XM's Proposed Rate

65. The effective per-performance rates from the agreements offered by various parties in this proceeding demonstrate that these guideposts cluster around the $0.0016 rate proposal proffered by Sirius XM. They create a range from [redacted] using the best analysis from various expert economists of the effective per-performance rate of the various agreements. Specifically, the Apple Agreements range from [redacted], the Pandora-Merlin agreement has a blended, effective per-performance rate of [redacted], the iHeart-Indie agreements have a per-performance effective rate of [redacted], and the iHeart-Warner agreement has an effective per-performance rate of [redacted]

66. For the Apple agreements, the best analysis of the effective per-performance rate

comes from Professor Shapiro. Professor Shapiro made a number of appropriate adjustments to derive an adjusted effective per-play rate as expected by the major labels and Apple for their respective agreements. Supplemental Written Rebuttal Testimony of Carl Shapiro ("Shapiro Supp. WRT") Ex. PAN 5365, Table 1 at p.16. Including the [redacted], he calculated for Year One of the Apple-Sony deal an effective rate of [redacted] for the Apple-Universal deal. *Id.* He calculated a Year One effective rate of [redacted] for the Apple-Warner agreement. *Id.*

67. For the iHeart-Warner agreement, the best effective per-performance rate comes from Professor Fischel who calculated an effective per-performance rate of [redacted]. Ex. IHM 3048; Ex. IHM 3034 at p. 172. For the iHeart-Indie agreements (agreements between iHeart and twenty-seven independent record companies), Professor Fischel calculates an average royalty rate of [redacted]. Ex. IHM 3050; Ex. IHM 3034 p. 176, Exhibit D. For the Pandora-Merlin agreement, Prof. Shapiro calculates a blended rate of [redacted]. Written Direct Testimony of Carl Shapiro ("Shapiro WDT"), Ex. PAN 5022 at p. 31.

68. These guideposts create a range of bargains in the marketplace of [redacted].

IV. THERE SHOULD NOT BE ESCALATING RATES DURING THIS RATE PERIOD

69. SoundExchange's proposed annual rate increases are arbitrary and incompatible with the willing buyer-willing seller standard. As SoundExchange's expert, Daniel L. Rubinfeld, testified, its proposed escalating rates are not based on anticipated inflation, anticipated increases in music industry inputs, or the consumer price index. 5/6/15 Tr. 2226:10-21 (Rubinfeld).

70. In fact, of all of SoundExchange's benchmarks, [redacted]

[redacted]. *Id.* at 2227:11 – 2228:20. As for [redacted], Professor Rubinfeld himself criticized its use as an appropriate benchmark in the current proceeding. *Id.* at 2229:7-12.

71. There is no basis to assume, without supporting evidence, that fair market rates would necessarily increase during the Rate Period. Indeed, the record evidence indicates [redacted]. Corrected Written Direct Testimony of Daniel L. Rubinfeld ("Rubinfeld WDT"), Ex. SX 0017, ¶ 140; 5/8/15 Tr. 2736:18-2737:7 (Shapiro); 5/15/15 Tr. 4142:7-12 (Lichtman); 5/19/15 Tr. 4611:1-4 (Shapiro). There is simply nothing in the record that would support annual increases in the webcasting rate during the upcoming Rate Period.

72. If anything, the records supports a downward adjustment during the rate period. Professor Rubinfeld [redacted]. 5/6/15 Tr. 2231:7-12 (Rubinfeld). Even if the Judges were to accept as true (which they should not) the assumption underlying Professor Rubinfeld's proposal—that interactive and noninteractive services are converging (*id.* at 2225:22-2226:4)—this certainly does not support the conclusion that the Judges should impose on non-interactive webcasters what Professor Rubinfeld himself characterized as [redacted] during the Rate Period. *Id.* at 2223:20-21.

V. A PERCENTAGE OF REVENUE BASED RATE FORMULA WOULD BE UNFAIR AND UNWORKABLE

73. In all three prior webcasting proceedings the Copyright Royalty Board and its predecessor, the Copyright Arbitration Royalty Panel ("CARP"), have repeatedly rejected requests to implement percentage of revenue rate formulas, in favor of a per-performance rate.

The CARP summarized the multiple problems inherent in a percentage-of-revenue formula as, *inter alia*: (1) revenue merely serves as a proxy for what is truly being licensed, whereas a per-performance metric is directly tied to the nature and value of the right being licensed; and (2) percentage-of-revenue models are difficult to utilize because identifying relevant webcasting revenues are very complex, especially where a webcaster offers, as Sirius XM does, features and content unrelated to music. *Report of the Copyright Arbitration Royalty Panel, Docket Nos. 2002-1 CARP DTRA3 & 2001-2 CARP DTNSRA*, at 36 (Feb. 20, 2002).

74. Likewise, in *Webcasting II* the Judges gave the following reasons for rejecting a percentage-of-revenue approach: (1) that "percentage of revenue metrics ultimately demand a clear definition of revenue so as to properly relate the fee to the value of the rights being provided," which SoundExchange has not done, as webcasters presented evidence that "on-air talent, programming director contributions and marketing skills impact the revenues of simulcasting webcasters" (Sirius XM has also presented such evidence here); (2) "the use of a revenue-based metric gives rise to difficult questions for purposes of auditing and enforcement related to payment for the use of the license"; and (3) that a revenue-based metric eschews the basic notion that "payments should increase in direct proportion to usage," resulting in a situation where webcasters "would be forced to share revenues that are not attributable to music use, but rather to other creative or managerial inputs," or, conversely, in situations where a webcaster is generating little income, copyright owners may "receive little compensation for the extensive use of their property." *Webcasting II* at 24089-24090.

75. There is no evidence in the record of this proceeding that would justify departure from the Judges' (and their predecessors') consistent reasoning and precedent. To the contrary, the record evidence demonstrates that the application of a percentage of revenue rate across the

many different types of commercial webcasters, and particularly to Sirius XM's Internet radio service, would be unworkable and unfair. Both the importance of non-music content to Sirius XM's Internet radio service, and the fact that the non-music content is bundled together with the music content for one, undifferentiated license fee, renders a percentage-of-revenue rate inappropriate. *See* Frear WDT, Ex. SXM 6000, at ¶ 54.

76. Any attempt to adjust for this fact by calculating the amount of time a subscriber spends listening to music versus non-music programming could be riddled with imprecision and error: relative time spent listening to music vs. non-music content does not necessarily correspond to the relative contribution of music to consumers' willingness to pay Sirius XM's subscription fees. *Id.* at ¶ 57; 5/22/15 Tr. 5449:11-25 (Frear).

77. Indeed, the Judges' concern in *Webcasting II* that webcasters would be forced to share revenue that is not attributable to music, but to "other creative or managerial inputs," *Webcasting II* at 24090, is directly applicable here: Sirius XM has invested heavily in on-air personalities and hosts, as well as a broad array of exclusive non-music content—all of which distinguish Sirius XM from its competitors. *See* Frear WDT, Ex. SXM 6000, at ¶ 12-18. This also sets Sirius XM apart from the interactive services that SoundExchange relies upon for its benchmark agreements—those services are pure music delivery services, in which almost all of the revenue is related to the performance of sound recordings.

VI. CONCLUSION

78. For the reasons set forth herein, and in Sirius XM's Proposed Conclusions of Law, the Copyright Royalty Judges should adopt Sirius XM's rate proposal and set the rate for commercial webcasters at $0.0016 per-performance for the upcoming Rate Period.

Dated: June 19, 2015

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

In the Matter of	)	
DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)	)	**Docket No. 14-CRB-0001-WR**

CERTIFICATE OF SERVICE

I, Jackson Toof, hereby certify that a copy of the foregoing Sirius XM Radio Inc.'s Proposed Findings of Fact, Proposed Conclusions of Law, and Declaration and Rule 11 Certification of Jackson D. Toof has been served electronically by agreement of the parties on this 23rd day of June, 2015, with hard copy sent by first class mail upon the following parties:

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Jackson D. Toof

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

In the Matter of	)	
DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)	)	**Docket No. 14-CRB-0001-WR**

DECLARATION AND RULE 11 CERTIFICATION OF JACKSON D. TOOF
(On behalf of Sirius XM Radio Inc.)

1. I am counsel for Sirius XM Radio Inc. ("Sirius XM" or the "Company") in the above-captioned proceedings and I am authorized to submit this declaration and certification (the "Declaration") on behalf of Sirius XM.

2. I respectfully submit this Declaration pursuant to Rule 350.4(e)(1) of the Copyright Royalty Judges Rules and Procedures, 37 C.F.R. § 350.4(e)(1), and per the terms of the Copyright Royalty Judge's (i) Order dated October 10, 2014 (the "Protective Order") and (ii) Order Granting Joint Motion to Extend Deadline for Filing of Public Versions of Proposed and Reply Findings of Fact and Conclusions of Law dated June 15, 2015.

3. This Declaration is being submitted simultaneously with Sirius XM's Proposed Findings of Fact (Public Version) and Sirius XM's Proposed Conclusions of Law (Public Version).

4. I have reviewed Sirius XM's Proposed Findings of Fact and Sirius XM's Proposed Conclusions of Law. I have determined to the best of my knowledge, information, and belief that portions of those filings contain information that the Copyright Royalty Judges have agreed during the course of this proceeding to treat as "Protected Material" as defined by the

Protective Order. The Protected Material is identified in the Redaction Log and shaded in the printed copies of Sirius XM's filing.

5. All Protected Material identified in the Redaction Log, including written and hearing testimony and trial exhibits, was designated by the parties and accepted by the Copyright Royalty Judges as restricted during the course of the trial. Sirius XM's Redaction Log identifies each redaction contained in Sirius XM's Proposed Findings of Fact and Sirius XM's Proposed Conclusions of Law.

6. Pursuant to 28 U.S.C. §1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: June 23, 2015

Respectfully submitted,

By: _____

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Proposed Findings of Fact
Redaction Log

Location of restricted testimony	Basis for restriction
Page 8, ¶ 25	SXM Trial Ex. 6000 ordered Restricted at 5/22/15 Tr. 5406:3-9 (Frear)
Page 8, ¶ 26	SXM Trial Ex. 6000 ordered Restricted at 5/22/15 Tr. 5406:3-9 (Frear)
Page 9, ¶ 29	SXM Trial Ex. 6000 ordered Restricted at 5/22/15 Tr. 5406:3-9 (Frear)
Page 11, ¶ 34	PAN Trial Ex. 5046 ordered Restricted at 4/30/15 Tr. 1119:24-1120:25 (Harrison); PAN Trial Ex. 5048 ordered Restricted at 4/30/15 Tr. 1124:24-1125:5 (Harrison)
Page 11, ¶ 34	Testimony ordered restricted at 4/30/15 Tr. 1121:9-13 (Harrison); PAN Trial Ex. 5046 ordered Restricted at 4/30/15 Tr. 1119:24-1120:25 (Harrison)
Page 11, ¶ 34	Testimony ordered restricted at 4/30/15 Tr. 1121:20-22 (Harrison)
Page 11, ¶ 34	Testimony ordered restricted at 4/30/15 Tr. 1122:24-1123:3 (Harrison); PAN Trial Ex. 5046 ordered Restricted at 4/30/15 Tr. 1119:24-1120:25 (Harrison)
Page 11, ¶ 35	Testimony ordered restricted at 4/30/15 Tr. 1123:7-13 (Harrison); PAN Trial Ex. 5046 ordered Restricted at 4/30/15 Tr. 1119:24-1120:25 (Harrison)
Page 11, ¶ 35	Testimony ordered restricted at 4/30/15 Tr. 1123:19-20 (Harrison)
Page 11, ¶ 35	Testimony ordered restricted at 4/30/15 Tr. 1123:25-1124:7 (Harrison)
Page 11, ¶ 36	Testimony ordered restricted at 4/30/15 Tr. 1125:20-1126:7 (Harrison); PAN Trial Ex. 5048 ordered Restricted at 4/30/15 Tr. 1124:24-1125:5 (Harrison)
Page 19, ¶ 58	SXM Trial Ex. 6000 ordered Restricted at 5/22/15 Tr. 5406:3-9 (Frear)
Page 22, ¶ 65	PAN Trial Ex. 5365 ordered Restricted at 5/8/15 Tr. 2610:5-14 (Shapiro)
Page 23, ¶ 66	PAN Trial Ex. 5365 ordered Restricted at 5/8/15 Tr. 2610:5-14 (Shapiro)
Page 23, ¶ 67	IHM Trial Ex. 3034 ordered Restricted at 5/21/15 Tr. 5307:23-5308:16 (Fischel)
Page 23, ¶ 67	IHM Trial Ex. 3034 ordered Restricted at 5/21/15 Tr. 5307:23-5308:16 (Fischel)

Location of restricted testimony	Basis for restriction
Page 23, ¶ 67	PAN Trial Ex. 5022 ordered Restricted at 5/19/15 Tr. 4548:22-4549:22 (Shapiro)
Page 23, ¶ 68	Calculations derived from numbers that were ordered Restricted, as reflected in PFF ¶¶ 65-67
Page 23-24, ¶ 70	Testimony ordered restricted at 5/6/15 Tr. 2227:11-2228:20 (Rubinfeld)
Page 24, ¶ 70	Testimony ordered restricted at 5/6/15 Tr. 2229:7-12 (Rubinfeld)
Page 24, ¶ 71	SX Trial Ex. 0017; Testimony ordered restricted at 5/8/15 Tr. 2736:18-2737:7 (Shapiro); 5/15/15 Tr. 4142:7-12 (Lichtman); 5/19/15 Tr. 4611:1-4 (Shapiro)
Page 24, ¶ 72	Testimony ordered restricted at 5/6/15 Tr. 2231:7-12 (Rubinfeld)
Page 24, ¶ 72	Testimony ordered restricted at 5/6/15 Tr. 2223:20-21 (Rubinfeld)

Proposed Conclusions of Law
Redaction Log

Location of restricted testimony	Basis for restriction
Page 15, ¶ 35	PAN Trial Ex. 5046 ordered Restricted at 4/30/15 Tr. 1119:24-1120:25 (Harrison); PAN Trial Ex. 5048 ordered Restricted at 4/30/15 Tr. 1124:24-1125:5 (Harrison)
Page 21-22, ¶ 52	PAN Trial Ex. 5365 ordered Restricted at 5/8/15 Tr. 2610:5-14 (Shapiro)
Page 22, ¶ 53	PAN Trial Ex. 5365 ordered Restricted at 5/8/15 Tr. 2610:5-14 (Shapiro)
Page 22, ¶ 54	IHM Trial Ex. 3034 ordered Restricted at 5/21/15 Tr. 5307:23-5308:16 (Fischel)
Page 22, ¶ 54	IHM Trial Ex. 3034 ordered Restricted at 5/21/15 Tr. 5307:23-5308:16 (Fischel)
Page 22, ¶ 54	PAN Trial Ex. 5022 ordered Restricted at 5/19/15 Tr. 4548:22-4549:22 (Shapiro)
Page 22, ¶ 55	Calculations derived from numbers that were ordered Restricted, as reflected in PFF ¶¶ 65-67 and COL ¶¶ 52-54
Page 26, ¶ 64	Calculations derived from numbers that were ordered Restricted, as reflected in PFF ¶¶ 65-67 and COL ¶¶ 52-54
Page 26, ¶ 65	Testimony ordered restricted at 5/6/15 Tr. 2226:10-21 (Rubinfeld)
Page 27, ¶ 66	Testimony ordered restricted at 5/6/15 Tr. 2227:11-2228:20 (Rubinfeld)
Page 27, ¶ 66	Testimony ordered restricted at 5/6/15 Tr. 2229:7-12 (Rubinfeld)
Page 27, ¶ 67	SX Trial Ex. 0017; Testimony ordered restricted at 5/8/15 Tr. 2736:18-2737:7 (Shapiro); 5/15/15 Tr. 4142:7-12 (Lichtman); 5/19/15 Tr. 4611:1-4 (Shapiro)
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