Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In the Matter of: Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)	Docket No. 16–CRB–0003–PR (2018–2022)

APPLE INC.'S OPPOSITION TO GEORGE JOHNSON'S (GEO) MOTION TO (PROPOSED) PROTECTIVE ORDER

Apple Inc. ("Apple") submits this opposition to George Johnson's (GEO) Motion to (Proposed) Protective Order ("GEO Br."), dated June 14, 2016.

I. PRELIMINARY STATEMENT

Granting any participant access to the highly sensitive information produced during this proceeding threatens the competitive marketplace and full disclosure of information on which the Copyright Royalty Board ("CRB") relies to set appropriate rates. Indeed, the CRB has issued numerous protective orders restricting in-house counsel and other employees of participants from accessing such information. Moreover, in *Web IV*, the CRB specifically considered whether *pro se* participants should have access to restricted information and decided *against* granting access.

Despite this precedent, George Johnson ("GEO")—an individual music publisher and songwriter who directly competes with numerous participants in this proceeding, and likely engages in highly contentious negotiations opposite many others—has asked the CRB to allow him, and all other *pro se* participants, to view all information produced in this proceeding, including highly confidential financial data, business plans, trade secrets, licensing agreements, and other sensitive business data. Granting GEO's request would be highly prejudicial to the

other participants, as GEO inevitably would be in a position to use this information, inadvertently or otherwise, in connection with his music business, including in future negotiations with participants. Moreover, it likely would have a chilling effect on the production of confidential information and drive many participants to withdraw from this proceeding rather than reveal their protected information directly to a competitor.

That GEO is *pro se* does not change these concerns. Indeed, they are heightened, as there can be no doubt that GEO is directly involved in competitive decision-making with respect to the licensing of his music. Further, he is not at a disadvantage during these proceedings as he still can view and rely on all unrestricted materials submitted by the participants as well as his own data, and always has the option of retaining counsel should he wish to have access to restricted information. Accordingly, GEO's request must be denied.

II. PRECEDENT ESTABLISHES THAT GEO SHOULD NOT BE GIVEN AN EXCEPTION TO THE PROTECTIVE ORDER.

A. The CRB Previously Has Refused To Grant *Pro Se* Participants Access To Confidential Information.

While GEO claims that access to restricted information by *pro se* participants in a CRB proceeding is "a new and unique issue," (GEO Br. at 2), the CRB previously considered this very issue in *Web IV*, where it issued a Protective Order that denied *pro se* participants access to restricted information (Ex. A (*Web IV*, Protective Order)). In *Web IV*, the CRB issued an Interim Protective Order encouraging participants to submit papers addressing "whether and how any *pro se* participant may receive or review Restricted materials if participants are prohibited from receiving Restricted information." (Ex. B (*Web IV*, Interim Protective Order at 1).) Several participants, including GEO, submitted briefs addressing this issue. After receiving these arguments, the CRB issued a Protective Order granting access to restricted information only to outside counsel, personnel supplied by any independent contractor, and independent experts and

consultants. (Ex. A (*Web IV*, Protective Order ¶¶ IV(B)(1)–(3)).) *Pro se* participants were not permitted to view restricted information. (*Id.*) This was consistent with protective orders issued in numerous prior CRB proceedings. (*See, e.g.*, Exs. C–D (*Webcasting III*, Protective Order ¶ 3; *Satellite II*, Protective Order ¶ 3).)

B. Other Administrative Bodies And Courts Also Routinely Restrict Access To Confidential Information.

The CRB is not alone in restricting access to confidential business information. Many other administrative agencies frequently deny in-house personnel access to confidential information. *See, e.g.*, *Akzo N.V. v. U.S. Int'l Trade Comm'n*, 808 F.2d 1471, 1482–83 (Fed. Cir. 1986) (upholding protective order issued by ITC preventing "management personnel or in-house counsel" from viewing confidential information); Letter, William M. Wiltshire, Esquire, 25 F.C.C. Rcd. 12407, 12407 (2010) (explaining that the FCC granted a protective order limiting access to confidential information to outside counsel, its employees, and outside consultants and experts); *In the Matter of ECM Biofilms, Inc.*, Docket No. 9358, 2014 WL 1818841, at *3 (MSNET Apr. 24, 2014) (explaining that the FTC issued a protective order limiting access to confidential information to judges, outside counsel, independent consultants, and those who authored or received the information, as required by 16 C.F.R. § 3.31 (d) & Appendix). Similarly, courts routinely block those engaged in "competitive decision-making" from accessing confidential business information. *See, e.g.*, *FTC. v. Sysco Corp.*, 83 F. Supp. 3d 1, 3-4 (D.D.C. 2015) (denying in-house lawyer on executive committee access to confidential information as he was involved in his company's competitive decision-making because pricing, purchasing, and marketing were discussed at executive team meetings and he was chiefly responsible for mergers and acquisitions); *Nutech Ventures v. Syngenta Seeds, Inc.*, No. 8:12-CV-289, 2013 WL 2422876, at *1–2 (D. Neb. June 3, 2013) (in-house personnel denied access

to financial information because the information "could be of significant competitive value because Plaintiff could use this category of information in existing and future licensing activities"); *Intel Corp. v. VIA Techs., Inc.*, 198 F.R.D. 525, 530–32 (N.D. Cal. 2000) (in-house counsel denied access to confidential information because her "involvement in licensing agreements and interactions with Plaintiff's business unit managers . . . involves her in competitive decisionmaking and presents an unacceptable risk of inadvertent disclosure").

These limits apply equally to *pro se* parties. For example, in *In the Matter of ECM Biofilms, Inc.*, ECM Biofilms, Inc. ("ECM") wanted to appear *pro se* at nonparty depositions through its CEO. 2014 WL 1818841, at *1. FTC Complaint Counsel moved to prevent the CEO from viewing confidential information during these depositions. *Id.* ECM countered that this would violate its right to appear *pro se*. *Id.* at *5. The FTC disagreed, holding that the CEO could not view confidential information even where ECM was appearing *pro se*. *Id.* at *6; *see also Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1469–71 (9th Cir. 1992) (holding that, even after outside counsel withdrew from the case and in-house counsel entered his appearance, in-house counsel could not view confidential trade secrets because he was involved in competitive decision-making, including with respect to contracts and marketing). Consistent with this precedent, the CRB here should bar *pro se* participants from viewing restricted material.

III. ALLOWING GEO TO VIEW CONFIDENTIAL INFORMATION POSES A SIGNIFICANT RISK TO THE COMPETITIVE MARKETPLACE AND THE FULL DISCLOSURE OF INFORMATION DURING THIS PROCEEDING.

A. Granting GEO Access To Restricted Information Presents A Significant Risk That Such Information Will Be Inadvertently Used Or Disclosed.

The risk posed by the disclosure of confidential information "is not that [those] involved in such activities will intentionally misuse confidential information; rather, it is . . . that such

information will be used or disclosed inadvertently because of the [recipient's] role in . . . business decisions." *Sysco Corp.*, 83 F. Supp. 3d at 3–4; *see also FTC. v. Exxon Corp.*, 636 F.2d 1336, 1350 (D.C. Cir. 1980) ("[I]t is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so."). There is no doubt that disclosure of confidential information to GEO and other *pro se* participants poses a significant threat that such information will be used inadvertently in future business decisions and, thus, harm the disclosing party as well as the competitive marketplace in which all participants to this proceeding operate.

GEO is an individual songwriter and publisher. As such, he no doubt makes myriad competitive business decisions for himself and his company, GEO Music Group, including decisions regarding music licensing. If GEO is given access to the highly sensitive documents produced in this proceeding, such as licensing deals and financial data, there is a substantial risk that he will inadvertently use this confidential information in his own licensing negotiations and business operations. *See Nutech*, 2013 WL 2422876, at *1–2 (access to financial information denied because there was a risk the information could be used "in existing and future licensing activities"); *Intel*, 198 F.R.D. at 530 (risk of disclosure high where in-house counsel engaged in "negotiating the terms of licensing agreements" and confidential information could provide "a competitive advantage in negotiating related licenses in the future").

Moreover, such use is likely to harm the disclosing party as GEO will have an unfair business advantage in the marketplace and in future negotiations. This potential for harm is heightened as GEO directly competes with many of the participants in this litigation, and likely engages in negotiations opposite many others. *See Intel*, 198 F.R.D. at 531 ("Some courts have found an increased risk of harm when information is being disclosed to a direct competitor.").

Nor is it realistic to ask participants to simply trust that GEO will somehow be able to segregate his mind so as to "unknow" what he knows about restricted information from this proceeding when negotiating directly with them in a licensing context. Accordingly, granting GEO access to confidential information will create a market imbalance and harm all other participants in this proceeding as it would put GEO in a position to use their confidential information to make business decisions for his own music, inadvertently or otherwise.

B. Granting GEO Access to Restricted Information is Likely to Have a Chilling Effect on the Production of Such Information in this Proceeding.

As the Federal Circuit explained in *Akzo N.V. v. U.S. International Trade Commission*, requiring "[d]isclosure of sensitive materials to an adversary would undoubtedly have a chilling effect on the parties' willingness to provide the confidential information . . . ." 808 F.2d at 1483. This is particularly significant here as the CRB is "heavily dependent on the voluntary submission of information" to determine rates. *Id.* (finding chilling effect justified protective order because the ITC is dependent on the voluntary disclosure of information).

If the CRB requires participants to give GEO and other *pro se* participants access to restricted information, participants inevitably will be less willing to produce such information. This likely will cause numerous discovery disputes and drive some participants to withdraw from the proceeding rather than turn over their confidential information directly to another participant, without the buffer of outside counsel. Indeed, Congress was aware of this issue, which is why it explicitly granted CRB Judges the power to issue protective orders. 17 U.S.C. § 803(c)(5). As the Committee on the Judiciary explained,

> Since an overarching goal of the Committee is to create a complete and full record, the Committee has included this provision to ensure that parties will submit all necessary information providing the CRJs the opportunity to make well-informed decisions based on a full and complete record of the contested issues in proceedings.

H.R. REP. 108-408, 36 (2004). Allowing GEO access to restricted information would have the opposite effect.

IV. GEO SHOULD NOT BE TREATED DIFFERENTLY SIMPLY BECAUSE HE HAS CHOSEN TO APPEAR PRO SE.

GEO argues that the protective order creates an "information gap" because he is *pro se* and, therefore, cannot access confidential information. (GEO Br. at 2, 4.) As a preliminary matter, the CRB provides participants with the names of attorneys who have agreed to represent *pro se* participants pro bono. http://www.loc.gov/crb/docs/Pro_Se_Claimants.html. Thus, GEO likely could have representation if he so chose, or could use an independent expert or consultant to view confidential information. In addition, as GEO will have direct access to all unrestricted information produced in this proceeding, and can rely on all of his own data to support his position, he will not be placed at a significant disadvantage if he is precluded from viewing restricted information.

On the other hand, the potential harm to other participants if he can view protected information is especially high precisely because he is an individual participant. As an individual publisher and songwriter, GEO undoubtedly is involved in, and responsible for, every business decision involving his music. Accordingly, the risk that he will inadvertently use confidential information in business dealings is particularly high. Indeed, it likely is unavoidable unless he, like all personnel for participants, is shielded from such information.

Finally, allowing GEO to view restricted information would create perverse incentives for individual participants to forgo counsel intentionally in order to access the confidential information of the other participants.

V. CONCLUSION

For the foregoing reasons, GEO's motion should be denied.

Dated: June 21, 2016

Respectfully submitted,

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Determination of Rates and Terms for Making and Distributing Phonorecords	)	Docket No. 16-CRB-0003-PR (2018–2022) "Phonorecords III"

CERTIFICATE OF SERVICE

I, Erika E. Dillon, hereby certify that a true and correct copy of Apple Inc.'s Opposition to George Johnson's (GEO) Motion to (Proposed) Protective Order and Exhibits A-D thereto have been served this 21st day of June 2016 as follows:

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