UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BROADCAST MUSIC, INC.,

Petitioner,

v.

NORTH AMERICAN CONCERT PROMOTERS ASSOCIATION, as licensing representative of the promoters listed on Exhibit A to the Petition,

Respondent.

18 Civ. 8749 (LLS)

Related to *United States v. Broadcast Music, Inc.*, 64 Civ. 3787 (LLS)

NORTH AMERICAN CONCERT PROMOTERS ASSOCIATION'S MOTION FOR JUDGMENT AS A MATTER OF LAW

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Pursuant to Rules 52 and 58 of the Federal Rules of Civil Procedure, Respondent North American Concert Promoters Association ("NACPA") respectfully submits this memorandum in support of its motion for judgment as a matter of law that Petitioner Broadcast Music, Inc. ("BMI") has failed to show that its proposed fee for a license covering performances of the musical works in BMI's repertory at live concerts and music festivals promoted by NACPA members during the period from 2014 through 2022 is reasonable. NACPA also responds herein to BMI's Rule 44.1 brief on questions of foreign law (ECF No. 167) (BMI's "Rule 44.1 Brief").

INTRODUCTION

BMI bore the burden of proof at trial to establish the reasonableness of the fees and terms it seeks for the license at issue. *United States v. BMI*, 1996-1 Trade Cases ¶ 71,378 (S.D.N.Y. 1994 (as amended, the "BMI Consent Decree"), at § XIV(A). To meet that burden, BMI had to establish that live concert promoters in a hypothetical competitive U.S. market for public performance rights would agree to pay BMI a royalty rate nearly four times higher than the effective rate BMI voluntarily accepted for the prior 15 years and also agree to a substantially expanded revenue base on which those rates were paid. For the reasons set forth below, BMI failed to meet its burden in every respect. It is therefore incumbent on the Court to "determine a reasonable fee based upon all the evidence." *Id.*

At bottom, this is a straightforward case. While BMI presented days upon days of testimony at trial about promoters' financial statements and the relative prices of intangible music rights with zero marginal costs compared to physical products like walkie-talkies, both sides' economic experts agreed that there is no way to derive the answer to the question the Court must decide from a "first principles" ground-up approach.[1] The parties' experts agree that

[1] Trial Tr. 1163:18-1164:19 (Tucker); *id.* at 1455:23-1456:4 (Jaffe).

the Court should determine a reasonable fee for the license at issue here with reference to benchmark agreements, making adjustments if necessary to account for relevant differences between the benchmark transaction and the license at issue here.[2] Given that consensus, the relevant questions before the Court are (1) which benchmarks among those offered by the parties are most probative of a reasonable fee, as that standard has been interpreted by the Second Circuit, and (2) whether and how whichever benchmark the Court selects should be adjusted for fee-setting here.

NACPA brings this motion for judgment because none of the non-Consent Decree agreements or foreign tariffs on which BMI relies satisfy the relevant criteria for reliable benchmarks under the governing law; none of the Consent Decree benchmarks considered by Professor Tucker supports the royalty rate BMI has proposed; and no benchmarks at all support the adoption of the significantly expanded revenue base BMI has proposed. NACPA respectfully submits that the best available measures of a reasonable BMI royalty for the license at issue here are the rates that BMI itself has agreed to accept from NACPA in the past and what NACPA has agreed to pay to ASCAP—the licensor indisputably most similar to BMI—under final fee agreements during the period at issue. The undisputed record reflects that NACPA paid an effective rate of 0.21% of "Gross Ticket Revenues," *i.e.*, ticket sales revenues less deductions for ticket servicing fees, taxes, facility fees, and parking, under its most recent agreement with BMI. It also reflects that NACPA paid final fees to ASCAP at an effective rate of 0.19% for 2014-2017 and unitary rates of 0.23% for 2018-2019, and 0.275% for 2020-2021, all of which applied to the same revenue base used in prior BMI-NACPA agreements. NACPA's proposed benchmarks are consistent with the Second Circuit's long-established criteria for selecting a

[2] Trial Tr. 1163:18-1164:19 (Tucker); *id*. at 1470:8-19 (Jaffe).

reliable benchmark for purposes of rate-setting under the ASCAP and BMI Consent Decrees. And license agreements between the license applicant and each of ASCAP and BMI repeatedly have been embraced as the basis for rate-setting, particularly where, as here, there is no evidence of direct license transactions between individual copyright holders and individual music users under adequately competitive conditions in the industry under examination.

BMI has no legitimate answer to that standard, time-tested approach to rate-setting under the ASCAP and BMI Consent Decrees. Because those benchmarks compel a royalty rate far below BMI's proposed rate and the rejection of BMI's proposal to significantly expand the revenue base to which that rate is applied, BMI tells this Court it should disregard any ASCAP or BMI benchmarks, because Michael Steinberg, BMI's head of licensing, thinks that ASCAP was "afraid" of Judge Cote (whatever that means) and that Tom Annastas, his now-deceased former colleague who negotiated BMI's most recent agreement with NACPA, was asleep at the wheel. But the evidence does not support either contention. To this day, when Judge Cote is no longer its rate-setting Judge, ASCAP offers non-NACPA promoters a rate schedule that would yield an effective rate as applied to NACPA only slightly higher than the unitary rate NACPA agreed to pay and includes rate tiers as low as 0.1% of gross ticket revenues for the largest and most lucrative shows. *See* RX 582 (2022 ASCAP Blanket Concert and Recital Rate Schedule). And regarding Mr. Annastas, the only actual evidence in the case shows that he was a well-respected BMI executive throughout his tenure, who carefully studied the economics of the concert promotion industry in connection with his dealings with NACPA over time and kept BMI's most senior management informed throughout.[3]

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[3] *See, e.g.*, Trial Tr. 298:14-19 (Steinberg); *id.* at 276:14-20 (Steinberg); *id.* at 982:1-5 (C. Liss); *see also id.* at 275:16-276:2 (Steinberg).

BMI turns instead to rates set in circumstances that are entirely inapposite to the governing legal standard. In fact, its own expert disavowed any intention to study one of the primary criteria for a valid benchmark under Second Circuit law: whether the putative benchmark emerged from circumstances reflecting an adequate degree of competition to justify reliance on it. Ignoring that essential criterion, BMI invokes licenses from SESAC, from GMR, and from foreign PROs, all of which operate without one or more of the core competitive protections of the ASCAP and BMI Consent Decrees. None of these benchmarks was derived from economic circumstances similar to those present here, and none is reliable for the purposes of determining the rate that a willing buyer would pay to a willing seller in a hypothetical competitive market for the rights at issue. To the extent BMI's expert did consider other benchmarks such as the most recent ASCAP-NACPA agreement, or the rates BMI and ASCAP have charged to smaller, non-NACPA promoters, those benchmarks come nowhere close to supporting BMI's proposed fee.

BMI knows that granting its petition would require the Court to stray from the Second Circuit's governing standard. Throughout trial, it barely attempted to argue that its current proposal actually comports with the law. BMI's real claim is that the Consent Decrees and the Second Circuit's rate court jurisprudence have unjustly depressed ASCAP's and BMI's rates for the last three decades—that they somehow worked too well because of the judicial protections they afford. But that has it exactly backwards. The Consent Decrees exist to protect against exactly the kind of price gouging that BMI now attempts. If the goal were to determine what prices BMI could charge in the absence of constraint, there would be no need for judicial rate-setting at all. To argue, as BMI did, that the influence of the Consent Decrees contaminates an observed transaction and makes it less valid as a benchmark, one must believe that the rate courts have been systematically failing to implement the "reasonable fee" standard or misinforming market participants about what the standard is.

BMI's claim is also false. No rate court has ever set the live concert rates until now. And to the extent that BMI argues that flaws in the consent decree system and rate court oversight have trapped ASCAP and BMI into bad deals from 1990s that do not account for the current success of the live concert industry, the terms of ASCAP's 2018-2021 license with NACPA alone disprove that claim. ASCAP negotiated from NACPA a two-step increase of approximately 45% in total from its prior rates for the 2018-2021 terms. Even BMI's expert agreed that this increase was "substantial." The ASCAP rate is also not outdated: ASCAP and NACPA signed that deal in late 2018—long after the live concert industry had already experienced the massive growth and consolidation that BMI cites as a basis for its proposed rate hike today, and after ASCAP knew it would soon have recourse to a judge other than Judge Cote (if that were truly an issue). Yet BMI inexplicably now demands a rate that is nearly three times ASCAP's rate for the 2020-2021 period and even higher in relation to ASCAP's rate for prior years, despite no evidence that its license is worth even a penny more to NACPA than an ASCAP license. The unrefuted evidence at trial shows that, while promoters, performing artists, venues and ticketing companies have together invested close to a billion dollars to improve the live concert experience and drive revenue increases, BMI and its non-performing songwriters have not contributed anything new to the live concert experience over the past 30 years; BMI's expert admitted their relative contributions—the rights to publicly perform less than half of the songs performed at live events—were the same as they have always been. As the terms of ASCAP's 2018-2021 deal with NACPA reveal, the real problem here is not sticky or immutable PRO rates, or a stale license fee, or a flawed Second Circuit test. The problem is that BMI failed to show that its proposal for a dramatic and unprecedented rate hike is reasonable under the relevant standard.

Because BMI has failed to meet its burden of proof, NACPA is entitled to judgment as a matter of law that BMI's proposed fee is not reasonable.

ARGUMENT

I. BMI TRIED ITS CASE TO THE WRONG LEGAL STANDARD

BMI failed to prove that its proposed rate is "reasonable" because its entire case was premised on the wrong legal standard. BMI's case is nothing short of a frontal assault on the factual, legal, and economic underpinnings of the BMI Consent Decree governing this proceeding and the U.S. live concert public performance license marketplace that has developed in reliance on the guaranteed availability of ASCAP and BMI licenses at reasonable prices pursuant to their decrees.

The Consent Decrees were put in place, and have remained in place for nearly a century, to address *antitrust* concerns, *i.e.,* concerns that, absent government intervention, ASCAP and BMI would use the market power resulting from aggregating together many individual copyrights into a single license and eliminating potential competition among them to command rates that are too high. *See United States v. BMI*, 1940-43 Trade Cas. ¶ 56,096 (E.D. Wisc. 1941) ("1941 Consent Decree"); *Statement of the Dep't of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decree*, Dep't of Justice (Aug. 4, 2016) at 2, https://www.justice.gov/atr/file/882101/download.[4] The Consent Decrees mitigate ASCAP's and BMI's ability to exploit the market power that comes from aggregating copyrights through a

[4] The substantive terms of the 1941 Consent Decree were similar to the consent decree previously entered into by ASCAP that same year.

combination of critical protections for music users that includes: (1) the ability to obtain a license upon request, including an "interim" license, while the parties negotiate to prevent the PRO from leveraging the threat of copyright infringement liability to obtain a supracompetitive rate; (2) the ability to directly license rights from the copyright owners affiliated with the PRO to prevent the PRO from being the only source of access to performance rights for the individual works in its repertory; and (3) recourse to a rate court, if necessary, to obtain a reasonable fee instead of having to file costly and time-consuming antitrust litigation. *See* BMI Consent Decree §§ IV(A), XIV(A)-(B); *United States v. ASCAP*, 1940-43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941) (as amended, the "ASCAP Consent Decree") at §§ IV(B), VI, IX(A)-(G). Each of these aspects of the Consent Decrees is a critical bulwark against supracompetitive rates. Indeed, as the Supreme Court ruled in *BMI v. CBS*, 441 U.S. 1, 23-24 (1979), the protections afforded music users under the Consent Decrees, including specifically the ability to obtain direct licenses from affiliated publishers and songwriters, keep ASCAP and BMI from being *per se* unlawful violations of antitrust law.

When the parties invoke the protections of the rate court, the court's role is to ensure that BMI and ASCAP are not permitted to charge more than a "reasonable fee"—a term that has a specific meaning to address the competition concerns underlying the Consent Decrees. In interpreting the meaning of the "reasonable fee" standard, the Second Circuit repeatedly has made plain that the objective is to determine what a willing buyer would pay to a willing seller in a *hypothetical competitive* market. For example, in vacating and remanding the district court's fee determination in *United States v. ASCAP (RealNetworks)*, the Second Circuit held that "***[f]undamental to the concept of 'reasonableness' is a determination of what an applicant would pay in a competitive market***, taking into account the fact that [the PRO], as a monopolist, 'exercise[s] disproportionate power over the market for music rights.'" 627 F.3d 64, 76 (2d Cir. 2010) (emphasis added) (*quoting United States v. BMI (Application of Music Choice) ("Music Choice IV")*, 426 F.3d 91, 96 (2d Cir. 2005). The Second Circuit returned to this same observation in *Broadcast Music, Inc. v. DMX Inc.* in affirming decisions from this Court and the ASCAP Rate Court that had been consolidated for appeal. *See* 683 F.3d 32, 45 (2d Cir. 2012) (quoting *RealNetworks*, 627 F.3d at 76). The Second Circuit held that "[i]n assessing whether another agreement provides a valid benchmark, the district court must consider whether the other agreement dealt with a comparable right, whether it involved similar parties in similar economic circumstances, and ***whether it arose in a sufficiently competitive market***." *Id.* (emphasis added). In *Music Choice IV*, the Second Circuit squarely held that "[i]n choosing a benchmark and determining how it should be adjusted, a rate court must determine," *inter alia*, "'***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***.'" 426 F.3d at 95 (emphasis added) (*quoting ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 577 (2d Cir. 1990) ("*Showtime*").

BMI not only failed to meet this core objective of setting a reasonable fee, it disavowed the objective entirely. Ignoring decades of Second Circuit precedent, BMI's economic expert, Professor Catherine Tucker, *explicitly denied* that a "competitive market place" rate was relevant to her opinions. *See* Trial Tr. 1324:21-1325:12 (Tucker). In cross-examining NACPA's economic expert, Professor Adam Jaffe, BMI suggested he was wrong to consider whether the proffered benchmarks reflected an adequate degree of competition, as if Professor Jaffe had invented the standard himself out of thin air rather than applied the established analytical framework required by the governing law. *See* Trial Tr. 1547:19-1548:20 (Jaffe).

BMI instead premised its case on the license fees it could extract absent either competition or regulatory constraint—a hypothetical market suddenly stripped of the Consent Decrees' protections and at the mercy of the holdup power held by large copyright aggregators. If that were the goal, there would be no need for the Consent Decrees in the first place. Because Professor Tucker rejected the Second Circuit's firmly established—and binding—view that a sufficiently competitive rate is a necessary attribute of any legitimate benchmark, she never studied whether BMI's proposed benchmarks pass this test, and she offered no opinion that BMI's benchmarks arose under an adequate degree of competition. *See* Trial Tr. 1324:21-1325:12 (Tucker). Professor Tucker specifically looked for rates set by other large copyright aggregators whose market power over concert promoters was completely, as she acknowledged, "unconstrained."[5] Trial Tr. 1165:12-23, 1274:2-17 (Tucker). But her approach was exactly backwards because the BMI Consent Decree exists to protect music users from prices that reflect unconstrained market power. *See, e.g., Showtime*, 912 F.2d at 570 (emphasizing that the Consent Decrees' purpose is to "disinfect" the anticompetitive effects of ASCAP's and BMI's market power and urging the district courts not to rubber-stamp the outcomes of negotiations with even those constrained PROs); *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 357 (S.D.N.Y. 2014) (rejecting licenses between Pandora on the one hand and Sony and UMPG on the other because "Sony and UMPG each exercised their considerable market power to extract supra-competitive prices"), *aff'd sub nom*. *Pandora Media, Inc. v. ASCAP*, 785 F.3d 73 (2d Cir. 2015).

[5] Professor Tucker disregarded the most recent agreement between NACPA and BMI entirely and only begrudgingly considered the most recent agreement between NACPA and ASCAP as part of her benchmarking analysis. *See infra* Point III.A. Despite repeatedly claiming at trial that she did not give the most recent agreement between NACPA and ASCAP "less weight" as a benchmark because it arose under the competitive protections of the ASCAP consent decree, her affidavit confirmed that that is precisely what she had done. Trial Tr. 1349:12-1350:25 (Tucker).

Indeed, BMI all but asks the Court to endorse the price it would charge in a world where "there is no competitive market in music rights." *Showtime*, 912 F.2d at 577.

Only NACPA offered evidence about which benchmarks reflect an adequate degree of competition to justify reliance on them. Professor Jaffe explained that the Consent Decrees' protections for music users remain the only constraint on any "must-have" PRO's ability to act anti-competitively and demand licensing fees that exceed a competitive price. *See* Trial Tr. 1459:5-1460:21, 1463:21-1464:23 (Jaffe). This is particularly true given the unrefuted facts about the live concert industry established at trial. Among other things, under industry practices that have emerged out of decades of protections and rights consolidation under the ASCAP and BMI Consent Decrees, NACPA and its members have had no ability to "walk away" from any negotiation with any PRO that has aggregated a large-enough repertory to become "must have," no practical alternatives to taking licenses from each of the four U.S. PROs, and no true recourse apart from rate court (in the case of ASCAP and BMI) or costly antitrust litigation (in the case of SESAC and GMR) if a PRO seeks to exploit its market power to extract a supracompetitive rate. *See*, *e.g.*, Trial Tr. 461:13-17 (Schilder); 611:5-11 (Roux); 992:1-11, 1073:5-8 (C. Liss); 1456:18-1457:10 (Jaffe), 1749:10-23 (Ewing). Because there is no evidence in the live concert industry (unlike in some other industries) of direct transactions between copyright holders and music users at all, let alone in reasonably competitive circumstances, and because the Consent Decrees constrain, however imperfectly, the prices BMI and ASCAP would otherwise be able to charge, Professor Jaffe concluded that rates negotiated by NACPA with BMI and ASCAP under the Consent Decrees are the best evidence we have in this record of comparable transactions reflecting an adequate degree of competition to justify reliance on them. *Id*. at 1463:21-1464:23 (Jaffe).[6]

That opinion is consistent with a raft of rate court precedent approving the use of ASCAP and BMI licenses as benchmarks for rate setting when actual competitive-market transactions are unavailable. *See*, *e.g.*, *ASCAP v. MobiTV*, 681 F.3d 76, 83-88 (2d Cir. 2012) (affirming use of decade-old ASCAP licenses for cable television networks as benchmarks for mobile television programming); *Showtime*, 912 F.2d at 594 (affirming use of recent BMI benchmark to set ASCAP rates "in the absence of reliable direct indicia of a fair rate for ASCAP"); *United States v. ASCAP ("Capital Cities")*, 157 F.R.D. 173, 198 (S.D.N.Y. 1994) ("[P]rior negotiated arms-length agreements [between the licensee and ASCAP] are the best starting point for determining reasonable license fees for subsequent periods.").

Because BMI rejected the premise that the Court should set fees at the rate that would emerge in a hypothetical competitive market (*i.e.*, the proper legal standard), it offered no evidence to even try to meet that standard, and it has no rebuttal to Professor Jaffe's opinion on that core question. Accordingly, BMI has failed to meet its burden to establish reasonableness as a matter of law.

[6] This does not mean that correctly applying the Second Circuit's benchmarking test here would categorically preclude all future consideration of non-ASCAP or non-BMI licenses as benchmarks for ASCAP and BMI in future rate-setting cases with different factual records. BMI's expert was free to attempt a first-principles analysis of the value of a BMI license and to argue that that analysis justified the use of a different benchmark. BMI was also free to develop evidence that unregulated or foreign PRO rates arose in both a comparable and sufficiently competitive market to justify reliance on those rates. It failed to build such a record on either front.

II. BMI FAILED TO PROVE THAT ITS NON-CONSENT DECREE BENCHMARKS SATISFY SECOND CIRCUIT LAW

Given BMI's explicit disavowal of the relevant standard for benchmark selection, it is unsurprising that the benchmarks on which BMI primarily relies in support of its proposal for a massive royalty increase fail to meet the criteria the Second Circuit has established for selecting a reliable benchmark. As to each, BMI was required to prove: (1) "the degree of comparability of the negotiating parties to the parties contending in the rate proceeding" (2) "the comparability of the rights in question" (3) "the similarity of the economic circumstances affecting the earlier negotiators and the current litigants" and (4) "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." *See Music Choice IV*, 426 F.3d at 95 (internal citations omitted). It did not come close.

A. BMI Failed To Prove That SESAC And GMR Licenses Are Reliable Benchmarks

With respect to GMR and SESAC, BMI failed to prove that (1) BMI is reasonably comparable to SESAC or GMR, (2) the SESAC and GMR licenses were negotiated under similar economic circumstances as the BMI license, or (3) SESAC and GMR licenses reflect a market with an adequate degree of competition. We address each deficiency in turn below.

1. BMI Failed To Prove That It Is Reasonably Comparable To Either SESAC Or GMR.

BMI is not comparable to SESAC or GMR. BMI licenses an enormous repertory of music in an environment controlled by the terms of its Consent Decree and the rate court jurisprudence that has arisen out of it. *See generally* BMI Consent Decree; Point I *supra*. By contrast, SESAC and GMR sell blanket licenses to much smaller and mutually exclusive repertories without any consent decree protections for music users at all.[7] *See* Trial Tr. 1342:22-24, 1353:7-9 (Tucker).

SESAC's and GMR's shares of licensed performances are volatile and notoriously difficult to measure, which makes it "difficult to adjust [and] arrive with confidence at an implied [BMI] rate." *In re Pandora Media, Inc.*, 6 F. Supp. 3d at 362, *aff'd sub nom. Pandora Media, Inc.*, 785 F.3d 73.[8] In particular, SESAC's and GMR's rates cannot be extrapolated to BMI without introducing the risk of serious error due to their small size. *See id.* ("This problem [lack of knowledge] is exacerbated by the fact that SESAC's small size, when compared to ASCAP and BMI … amplifies any error in a projection."). At trial, Professor Tucker conceded this point. Trial Tr. 1378:3-10 (Tucker); *see also id.* at 1515:13-21 (Jaffe). It is not surprising, then, that neither SESAC licenses nor GMR licenses have ever been used as benchmarks to set final rates for either ASCAP or BMI. *See In re Application of MobiTV, Inc.*, 712 F. Supp. 2d

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[7] SESAC is contractually required to offer certain protections to local television and commercial radio broadcaster licensees that are similar to those contained in the ASCAP and BMI Consent Decrees as a result of agreements to settle antitrust lawsuits, but the protections are specific to those particular industries and not available to NACPA, its members, or the live concert industry more generally. *See* Point II.A.3 *infra*.

[8] BMI's contention that "it's just not that hard" to accurately and consistently measure GMR's market share, *see* Trial Tr. at 1861:8 (BMI Closing), was belied by its own factually deficient attempt to critique Professor Jaffe's music use study. While BMI sought to impugn the reliability of the Music Reports, Inc. ("MRI") data from 2018 that Professor Jaffe used in his music use study as a basis for calculating PRO shares by comparing it to information published by GMR about its repertory as of 2022, BMI was forced to concede the next day in a letter to the Court that the factual premise of its *voir dire* was incorrect since nearly 40% of BMI's own self-selected examples systematically undercounted GMR's share in comparison to the same 2022 GMR repertory information used in examining Professor Jaffe. *See* ECF No. 164 (BMI Nov. 17, 2022 Letter). As NACPA pointed out in response, BMI's admission and subsequent correction only underscored Professor Jaffe's testimony that share estimations for smaller PROs are likely to be imprecise and subject to meaningful fluctuations over time. *See* ECF No. 166 (NACPA Nov. 21, 2022 Letter).

206, 254 (S.D.N.Y. 2010) *aff'd*, 681 F.3d 76 (2d Cir. 2012) ("SESAC agreements have never been used as benchmarks in ASCAP rate court proceedings[.]").

2. BMI Failed To Prove That The SESAC And GMR Licenses Were Negotiated Under Similar Economic Circumstances To Those Required By The Decrees

SESAC and GMR are also inappropriate benchmarks for BMI because NACPA promoters negotiated licenses with them under markedly different economic circumstances than those dictated by the BMI Consent Decree. *First*, because SESAC and GMR license considerably smaller repertories, the total dollars at stake in concert promoters' negotiations with these smaller PROs are a small fraction of the dollars at stake in their negotiations with BMI or ASCAP. For this reason, there is significantly less incentive to resist unwarranted rate demands, even while insisting on reasonable rates from ASCAP and BMI. *See In re Pandora Media, Inc.*, 6 F. Supp. 3d at 362 ("SESAC's small size . . . reduces the incentive to resist SESAC's rate requests. While the cost associated with resistance may not be justified when a license fee is relatively small, the willingness to incur those costs will necessarily grow with the size of the anticipated payments."); *see also* Trial Tr. 1695:4-22 (Jaffe) (similar).

Second, as the trial made clear, promoters' negotiations with GMR were also influenced by a variety of idiosyncratic economic circumstances that would not apply in a negotiation with BMI. For some promoters (*e.g.*, Live Nation and Nederlander), the unique role of GMR's founder, Irving Azoff, influenced their willingness to pay GMR's rate. The price those promoters agreed to with GMR reflected the unique value they placed on their relationship with Mr. Azoff in his capacity as a prominent artist manager for live concert talent and the other business relationships they have with him. Trial Tr. 507:21-508:2 (Roux); *id*. at 1743:8-16, 1743:19-1744:5; 1749:10-25 (Ewing). For others, acquiescence to GMR's fee demands was motivated by explicit threats of copyright infringement litigation, the costs of which would have far surpassed the price of the license. Trial Tr. 841:5-14 (Marciano); *id.* at 1745:16-1749:25 (Ewing); *see also* RX 101, RX 102, RX 576 (repeated threats of copyright infringement from GMR to Nederlander). None of these economic considerations applies to NACPA's license with BMI (or its license with ASCAP). Yet BMI's expert admitted that she did not analyze how the unique economic circumstances of promoters' agreements with GMR (and SESAC) may have influenced their resulting rates. *See* Trial Tr. 1351:18-1352:1 (Tucker). Again, given GMR's relatively small size, even relatively small effects on the total GMR license fee could have profound effects on the implied rate it generates when extrapolated to a repertoire the size of BMI's. All of these demonstrable differences in economic circumstances foreclose an affirmative finding of comparability between GMR and SESAC licenses on the one hand and NACPA's licenses with BMI and ASCAP on the other.

3. BMI Failed To Prove GMR And SESAC Licenses Reflect A Market With An Adequate Degree Of Competition

Finally, and critically, SESAC and GMR are not appropriate benchmarks for BMI because they do not operate in markets with *any* competition, let alone a market with an adequate degree of competition. In the live concert industry as currently structured in the United States, with promoters securing blanket public performance licenses covering all required licenses for artists' live concert performances, developed under almost a century of protections under the ASCAP and BMI Consent Decrees, SESAC and GMR licenses are also "must haves," and promoters have no option to walk away from any negotiation with SESAC and GMR without taking a license. *See*, *e.g.*, Trial Tr. 461:13-17 (Schilder); 611:5-11 (Roux); 1073:5-8 (C. Liss); 1342:25-17, 1352:2-5 (Tucker); 1456:18-1457:10 (Jaffe); 1749:10-23 (Ewing). Despite this, live concert licensees must negotiate with these unregulated PROs without access to the most fundamental protections of BMI's Consent Decree: interim licensing, the guaranteed availability of direct licensing as an alternative, and rate court. *See, e.g.*, Trial Tr. 1342:22-24, 1345:17-1346:14, 1353:7-9, 1354:17-1355:9 (Tucker) ("A. … I know that for GMR, for example … direct licensing is not possible, which in itself slightly changes what the outside option would be if you were, for example, negotiating with GMR….Q. You testified yesterday that you understand direct licensing is not available for GMR affiliates, right? A. Yes, that's correct."); *id.* at 1117:19-1118:7 (C. Liss) (describing lack of interim licensing as a "sword over [licensee's] heads" in negotiations with SESAC). Music users thus have no choice but to agree to SESAC's and GMR's terms or commence costly and disruptive antitrust litigation.

In some industries where the total dollars at stake for licensees are much larger, music users have opted for the latter option and have brought antitrust lawsuits against SESAC and GMR that have survived dispositive motions and settled favorably. For example, to settle an antitrust class action brought by local television broadcasters following the denial of SESAC's motion for summary judgment, SESAC agreed to pay $58.5 million to the plaintiff class and agreed to restrictions on its conduct vis-à-vis those licensees patterned after the ASCAP and BMI Consent Decrees. *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 657 (S.D.N.Y. 2015); Trial Tr. 1512:10-1513:9 (Jaffe). SESAC also agreed to a mechanism for third-party rate-setting with the commercial broadcast radio industry to settle antitrust claims brought by the Radio Music License Committee, and its rates were far lower as a result. *See* RMLC Press Release, *Arbitrators Side With Radio and Reduce SESAC License Fees* (July 31, 2017), available at http://dehayf5mhw1h7.cloudfront.net/wp-content/uploads/sites/893/2017/09/22194403/RMLC -SESAC-press-release-07312017.pdf (explaining that arbitrators awarded RMLC stations "a more-than-60% discount off of the SESAC radio station license rate card," resulting in a credit to stations due to overpayment "worth tens of millions of dollars."); Trial Tr. 1512:10-1513:9

(Jaffe) ("after the first arbitration the resulting rates were quite a bit lower than they had been when SESAC was unconstrained").

In the live concert industry, though, the relatively small amount of dollars at stake do not justify the expense of antitrust litigation, and promoters have had little practical choice but to accept the terms demanded. *See* Trial Tr. 1513:14-20, 1598:25-1600:3 (Jaffe); *see also Showtime*, 912 F.2d at 585-86 (rejecting benchmarks proffered by ASCAP because "since the amounts of money payable even under the ASCAP formula do not constitute a large proportion of the companies' overall costs, it was certainly understandable for these companies to agree to payments they may have viewed as 'excessive'"). As J.R. Ewing, the Chief Financial Officer of Nederlander Concerts, testified, it is neither cost effective nor realistic to engage in expensive antitrust lawsuits when the total dollars at stake are comparatively small. Trial Tr. 1750:19-24 (Ewing) ("Q. Do you recall approximately how much you paid GMR for 2015? A. $875, something like that. Q. Were the dollars at stake with GMR enough to warrant Nederlander engaging in litigation with GMR about the rates that GMR wanted to be paid? A. Not even close."). Cynthia Liss provided similar testimony in relation to NACPA's dealings with SESAC. *See id.* at 992:1-11 ("Because of the relatively small nature of the [SESAC] payments, it would not in any way be cost effective to engage in an antitrust suit."). As the proponent of using SESAC and GMR licenses as benchmarks for rate-setting here, BMI bore the evidentiary burden of establishing that those licenses reflect an adequate degree of competition to warrant relying on them. *See Showtime*, 912 F.2d at 585-86 (holding that "ASCAP bears the burden of demonstrating that the rate it seeks is reasonable *and that such reasonableness can be measured by* [ASCAP's proffered benchmarks]") (emphasis added). The observation that, to date, concert promoters have not yet sued those PROs under the antitrust laws as some other music users have does not suffice.

4. BMI Failed To Prove Its Claim That SESAC And GMR Rates Are The Functional Equivalent Of Rates That An Individual Publisher Would Charge Absent The Consent Decrees

BMI's misguided attempt to circumvent the Second Circuit criteria for selecting a reliable benchmark for purposes of rate-setting under the Consent Decrees through an unsupported, wholly speculative comparison of SESAC and GMR to major music publishers does not cure BMI's failure of proof. Rather than grapple with the actual anticompetitive conditions under which GMR and SESAC operate, BMI sought to sidestep them with an inapt analogy. BMI urged the Court to consider the SESAC and GMR benchmarks as the functional equivalent of hypothetical rates that one of BMI's publisher affiliates might charge if BMI one day were to suddenly not exist. *See* Trial Tr. 1859:10-21 (Closing-BMI). According to BMI, in that hypothetical world, major publishers would be able to exercise their market power to hold up promoters for a rate that exceeds what GMR and SESAC actually charged in the real world, because while GMR and SESAC are—in BMI's view—at least somewhat constrained by the threat of antitrust litigation, large publishers supposedly would not be. *Id* at 1859:10-1860:5. No witness ever explained why any of this would be true, and BMI's expert admitted that she did not study the market power of music publishers as part of her assignment in this case.[9] Trial Tr. 1418:6-25 (Tucker).

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[9] The argument is wrong in any event. If a publisher amassed a repertory of musical works authored by numerous songwriters with enough copyrighted works in it to become "must have" for any live concert licensee, and then exploited that market power through exclusionary conduct to act anticompetitively towards music users, Section 2 of the Sherman Act would apply to that publisher's conduct the same as it would any other monopolist or attempted monopolist. *See generally*, *e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Tops Markets, Inc.*

BMI did not offer any evidence about what the hypothetical world for licensing the right to perform musical works at live concerts would look like if PROs did not exist, much less how that world compares to the actual world in which the SESAC and GMR rates came to be. BMI's expert never studied this question either. Instead, BMI asks the Court to assume that the entire licensing ecosystem for the live concert industry would have evolved in exactly the same way, and would continue to operate in the same way, in the absence of reasonably priced licenses from ASCAP and BMI covering nearly all of the rights needed. That makes no sense, particularly in the live concert industry where copyright law allows the performers to control the extent to which they need any performance rights licenses at all. It is undisputed that, in the real world, many artists perform songs that they themselves wrote or co-wrote and have the right to perform them unless they have alienated those rights. 17 U.S.C. § 201. That some songs may be co-written does not affect that analysis because it is black-letter copyright law that each owner of *any* fractional interest in a song has the right to perform that song without needing a performance rights license from the other fractional copyright owners or any PRO. *See*, *e.g.*, *Tolliver v. McCants*, 486 F. App'x 902, 904 (2d Cir. 2012) ("It is elementary that the lawful owner of a copyright is incapable of infringing a copyright interest that is owned by him; nor can a joint owner of a copyright sue his co-owner for infringement.") (quoting *Cortner v. Israel*, 732 F. 2d 267, 271 (2d Cir. 1984)). There is no need to address the question of which performances actually require a license if the Court relies on prior BMI-NACPA or ASCAP-NACPA agreements as benchmarks because that issue is baked into and reflected by the prices the parties negotiated. But answering that question would be essential to analyzing a world without PRO

v. Quality Markets, Inc., 142 F.3d 90, 99-101 (2d. Cir. 1998); *Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180, 221-24 (S.D.N.Y. 2014).

blanket licenses. There is no evidence in the record of how industry practices, including the selection by performing artists of which songs they choose to perform, would change if reasonably priced licenses were not readily available for most of the music performed.

Moreover, unlike the *Pandora* or *DMX* cases, in which the Court was presented with direct licenses and a robust evidentiary record concerning the circumstances and negotiations that led to those agreements, there have been no direct licenses between any concert promoter and any BMI affiliate. BMI cannot fill the evidentiary hole in its case with speculation from its counsel about the rates that any individual BMI affiliate (publisher or otherwise) *might* have charged for direct licenses covering performances at a live concert, the circumstances surrounding those hypothetical agreements, and the legality of those terms under U.S. antitrust law. In short, there is no evidence in the trial record that would allow the Court to even begin to analyze whether the SESAC and GMR licenses resemble direct licenses with BMI-affiliated publishers for performances at live concerts.

Indeed, there are countless unknowns about this hypothetical world that could dramatically impact the nature and price of music licensing.[10] For example, in this hypothetical world, would concert promoters still assume the responsibility for securing public performance licenses for the shows that they promote, or would that responsibility fall to the performers who are the ones that actually need the licenses to perform works they do not otherwise have the right to perform, or their record labels? Would songs be licensed on a blanket basis for a multi-year term or for each specific concert or tour? Would performer-songwriters who have or control the right to perform their own songs without the need for a license (whether from a PRO or any other

[10] Trial Tr. 1701:8-11 (Jaffe); *id.* at 1418:6-25 (Tucker); *see also id.* 1700:11-23 (Jaffe) ("If the blanket licenses and the PROs went away, as some big surprise no one knew it was coming, it just happened, the next day you would have chaos").

fractional copyright owner) decide to perform only their own songs rather than take on the burden of securing licenses? Would performer-songwriters preclude or limit publishers from aggregating any ability to hold up their public performances of their copyrights in the first place, thus depriving publishers of the supposed licensing power that BMI imagines? And how would any of these possibilities impact the price of performance rights licenses that an individual BMI affiliate would charge? BMI did not give the Court any tools or evidence even to begin to answer these questions. Nor could it, given BMI's concession that there is no evidence here that would allow for such a ground-up or first-principles approach in the absence of any competitive-market benchmarks reflecting this alternate reality.

5. The SESAC And GMR Licenses Do Not Support BMI's Rate Proposal In Any Event

Even if BMI had made the case for using either the SESAC or GMR licenses as benchmarks for rate-setting here, it offered no viable explanation for why the Court should ignore the rates that NACPA members pay for more than 90% of the rights they need (according to BMI's own market share calculations) and rely solely on an extrapolation of the rates charged for less than 10% of those rights. If the Court were inclined to consider the SESAC and GMR benchmarks at all, at a minimum, they would need to be appropriately weighted in the context of the aggregate total U.S. licensing picture that includes ASCAP and BMI. In other words, at most, the SESAC and GMR agreements are a small part of a much larger picture of NACPA members' willingness to pay for U.S. public performance rights—NACPA promoters at most can be deemed willing buyers of 100% of U.S. public performance rights for the total amount they pay to ASCAP, BMI, SESAC, *and* GMR. BMI's suggestion that a willingness to overpay for less than 10% of that whole reflects a willingness to triple concert promoters' total license expenditures is logically infirm. As Professor Jaffe explained, during the relevant period, the weighted average of U.S. PRO agreements with NACPA members is 0.24%. Trial Tr. 1530:22-1531:19 (Jaffe). Professor Tucker offered no opinion to dispute this calculation.

Even if considered *on their own*, the SESAC and GMR agreements proffered by BMI *still* point to rates lower than BMI has proposed, as Professor Tucker's testimony confirms. Even without an adjustment to account for SESAC's market power, the 2019-2024 SESAC-NACPA license implies a rate of 0.40% according to Professor Tucker, which is just half of BMI's proposed rate, and which is considerably closer to the previous NACPA-BMI benchmark effective rate of 0.21%. Trial Tr. 1840:10-13 (Closing-BMI); *see also id.* at 1354:6-11 (Tucker) (claiming that GMR licenses imply a rate of 0.63%—still well below BMI's proposed rate). Moreover, as discussed further in Point IV below, using either the SESAC or GMR licenses as benchmarks would compel the rejection of BMI's proposed revenue base or a significant downward adjustment in the rates because those agreements use the much narrower revenue base found in the prior BMI-NACPA agreements of gross ticket revenues. *See* JX 62, Section 4(A); PX 101, Schedule A; *see also* Point IV.

B. BMI Failed To Prove That Any Of Its Proffered Foreign PRO Rates Satisfies The Second Circuit's Benchmarking Test

No U.S. rate court applying the governing Second Circuit standard has ever used a foreign PRO tariff rate as a benchmark to set a rate for ASCAP or BMI, and BMI has not come close to building the robust record of comparability that would allow this Court to be the first. As with the SESAC and GMR agreements, BMI failed to prove that (1) any of the foreign PROs at issue is sufficiently comparable to BMI; (2) any of BMI's proffered foreign tariffs arose from similar economic circumstances; or (3) that any of those foreign tariffs arose in a market with an adequate degree of competition to justify reliance on those rates.

1. BMI Is Not Entitled To Any Presumption Of Comparability

The flaws in BMI's approach to the foreign benchmarks begin with BMI's improper attempt at burden-shifting. Tellingly, the first paragraph of BMI's Rule 44.1 Brief asserts that *NACPA* did not "advance any credible evidence" that the proposed foreign benchmarks are not sufficiently comparable for rate-setting purposes. Rule 44.1 Brief at 1. This is wrong, but more importantly, NACPA had no such obligation. BMI bears the burden of proving through competent evidence the comparability of the foreign rates upon which it relies. *See Showtime*, 912 F.2d at 585-86 (holding that ASCAP bears the burden of "demonstrating that . . . reasonableness can be measured" by its proffered benchmarks). It did not carry that burden. NACPA bears no burden to rebut evidence that BMI did not present.

BMI's Rule 44.1 Brief on foreign law cannot remedy its *evidentiary* failure of proof. As BMI itself admits, the Court does not need to decide, much less apply, foreign law at all in order to decide this case. Rule 44.1 Brief at 3, 13. BMI further conceded that it is the "evidence at trial" that must show "a basis to treat foreign rates as benchmarks in this proceeding." *Id.* at 1. But BMI utterly failed to establish whether the *facts* surrounding the foreign PROs and their tariff rates satisfy the four factors of the Second Circuit's test regarding comparability. *See Music Choice IV*, 426 F.3d at 95. BMI had the opportunity to present such evidence through credible fact and expert witnesses at trial; it chose not to do so, and its Rule 44.1 Brief cannot fill that evidentiary hole.[11]

[11] BMI admits that its expert never studied how key differences between BMI and the foreign PROs like PRS and SOCAN affected the disparities in rates. And it concedes that no affirmative analysis supporting the comparability of the foreign PROs to BMI exists. For example, Dr. Tucker admitted she didn't perform any independent analysis of whether SOCAN in Canada and

It is perhaps not surprising that BMI did not even attempt to justify its foreign benchmarks through factual evidence. Doing so would be an enormous undertaking. The National Music Publishing Association, an entity BMI elsewhere has declared to be "the leading voice of the music publishing industry in Congress and before the courts,"[12] has argued in an analogous rate-setting context that any such efforts to use foreign benchmarks to set royalty rates for music publishers would be a fact-intensive and fraught exercise:

> The introduction of foreign rates into the proceeding would drag the [tribunal] into an around-the-world review of rates and rate-setting that would distract from and overwhelm the only issue properly before them: setting an appropriate rate for the U.S. . . . license based on the statutory factors that Congress has established for the domestic marketplace.[13]

Following trial, noting the merit to the music publishers' and songwriters' objections, the Copyright Royalty Board rejected the proposed use of foreign benchmarks:

> [C]omparability is a much more complex undertaking in an international setting than in a domestic one. There are a myriad of potential structural and regulatory differences whose impact has to be addressed in order to produce a meaningful comparison. … [E]ven if the foreign benchmark were purely a product of a negotiated settlement between similar types of parties, it is hard to imagine that such parties would structure their settlement to encompass not only the U.K. copyright regime and U.K. industry considerations but to simultaneously encompass the U.S. copyright regime and U.S. industry considerations. … We find, that on the record before us, the full range of comparability issues has not been sufficiently analyzed and presented to permit us to use the

PRS in the UK are subject to oversight and appeals processes that are similar to rate court processes in the U.S. Trial Tr. at 1396:8-12 (Tucker).

[12] Trial Tr. 1403:2-16 (Tucker).

[13] *See* Nat. Music Publishers Ass'n Mot. *in Limine* To Exclude Evidence Relating to U.K. and Japanese Rates at 7, *Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords ("Phonorecords I")*, Dkt. No. 2006-3 CRB DPRA (Jan. 7, 2008), *available at* https://app.crb.gov/document/download/10902.

> foreign rates presented as a benchmark for the target U.S. markets in question in this proceeding.

Mechanical and Digital Phonorecord *Delivery Rate Determination Proceeding (Phonorecords I)*, 74 Fed. Reg. 4510, 4522 (January 26, 2009).[14]

This Court should likewise reject any reliance on foreign benchmarks, particularly where BMI has made no attempt at the in-depth comparative analysis that would be required to establish the reliability of any such foreign benchmark as a matter of Second Circuit law.

2. *BMI Failed To Prove That The Parties Here Are Reasonably Comparable To The Parties To Any Foreign PRO Rate*

BMI failed to establish that any of its proposed foreign PRO rates involved the same or substantially similar buyers and sellers as the parties here. Both PRS and SOCAN, for example, are government-sanctioned monopolists with control over virtually 100% of the public

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[14] Foreign rate tribunals have likewise rejected U.S. benchmarks in cases where, like here, there was not an adequate factual record supporting comparability that would have permitted the tribunal to rely on a US rate, among other things. *See, e.g.*, Declaration of David Yolkut ("Yolkut Decl.") Ex. A, *Performing Right Society Limited v. The British Entertainment and Dancing Association Limited* [1993] E.M.L.R. 325 at 330-331 (finding foreign benchmarks, including those from Canada and the U.S., "of little assistance" because "foreign conditions were too different to enable a reliable comparison to be made" based on the record before the Tribunal and noting that the foreign benchmarks were thus appropriately dismissed as irrelevant); *cf* Yolkut Decl. Ex. B, *SOCAN-Various Tariffs, 1990-1993*, Reasons of the Copyright Board of Canada dated 1993-12-06 at 9 (finding "there are important differences between the Canadian and American regimes for setting prices to be paid for the public performance of music that reduce considerably the relevance of American decisions for Canadians" including the fact that "the American regime rests on a consent decree" resulting from the DOJ's investigation under the "aegis of American antitrust legislation" and the fact that the U.S. rate courts interpret reasonableness in terms of a competitive market price whereas "[i]n Canada…a market price is not the only price that may be reasonable"). In its Rule 44.1 Brief, BMI cites *one* UK Copyright Tribunal case, *British Airways Plc v. Performing Right Society Ltd.*, that considered a U.S. rate as a comparable. *See* ECF No. 168, at 8 (Porter Decl. Ex. H), *British Airways Plc v Performing Right Society Ltd.* [1998] E.M.L.R. 556, at 573-577. But *British Airways* demonstrates why a U.K. rate is not an apposite benchmark here. That case was about music played on long-haul flights operated by British and American airlines and thus involved the same market for the same customers—something that is demonstrably not the case in this proceeding. *See id.*

performance rights in their respective countries. Trial Tr. 1170:8-15 (Tucker). The U.S. has four PROs, none of which controls even 50% of the music performed at live concerts. Tr. 1482:9-16 (Jaffe); 1266:18-23 (Tucker). Professor Tucker admits that she did not study how this structure may have impacted the rates that any foreign PRO can command. Trial Tr. 1396:8-21 (Tucker). The foreign 'buyers' are also different from NACPA members. Specifically, the foreign "benchmarks" Professor Tucker uses are general application tariffs for performances of popular live music; BMI never explained to the Court who all of those licensees are, much less how they compare to NACPA. In the United States, by contrast, BMI and ASCAP have long charged higher rates to small and individual promoters than to NACPA members. *See* RX128 (BMI email attaching North Highland Study), PX394 (BMI Non-NACPA rate card). Given the obvious differences between the buyers and sellers here compared to the parties to the foreign rates, at least ***some*** analysis of comparability was required to understand the potential impact on the PRO rates in each instance. Yet BMI's expert admits that she did not do even that. Trial Tr. 1396:8-17, 1406:4-9, 1411:8-19 (Tucker).

3. BMI Failed To Prove That Any Foreign PRO Rate Was Set Under Similar Economic Circumstances To Those Facing BMI and NACPA

BMI also failed to establish that any foreign PRO rates were negotiated under similar economic circumstances to those facing BMI and NACPA, particularly as envisioned by the BMI Consent Decree. Instead, the unrebutted trial record shows the opposite. As Jay Marciano and Bob Roux explained at length, the U.S. live concert industry involves vastly different economics than live concerts in the U.K., Canada or anywhere else in the world. For example, the U.S. live concert industry is the largest in the world, by far. It has higher revenues, higher ticket prices, and completely different cost structures than the live concert industries in the U.K. or Canada. Trial Tr. 667:18-668:5 (Roux); 766:21-767:6, 843:5-10, 845:15-846:2 (Marciano).

As a logistical matter, touring in the United States is much easier than in any other country. And on top of that, concertgoers' tastes vary "wildly" between the United States and U.K., and the appeal of certain songs can shift "enormously" from one country to another. Trial Tr. 844:6-22 (Marciano).

For this reason and others, international tours are the exception to the rule. Most NACPA members do not promote internationally at all,[15] and international tours account for only a tiny percentage of overall shows in the U.S. Trial Tr. 666:23-667:10 (Roux); Trial Tr. 843:25-844:2 (Marciano). There is accordingly very little overlap in terms of the performances licensed under foreign tariff rates, and BMI made no attempt to even undertake that analysis. Trial Tr. 1398:17-23 (Tucker). Nor has BMI conducted any analysis or presented any evidence that, for artist songwriters, third-party public performance licenses are required to the same extent in the U.S. as overseas. As the proponent of those benchmarks, it was BMI's burden to do so, *see Showtime*, 912 F.2d at 585-86, and the facile argument that (1) other countries have analogs to the public performance right and (2) that direct licensing is now available in the U.K., does not even begin to satisfy that burden.

Even in the context of international tours, concert promoters view the U.S. and foreign markets differently, and analyze the economics of those tours separately on a country-by-country basis, even if in some cases they then roll up those different budgets into a global tour agreement that is cross-collateralized for purposes of allocating the risks associated with guaranteed minimum fees. Trial Tr. 544:14-545:17 (Roux); Trial Tr. 846:9-19 (Marciano) (explaining that when AEG cross-collateralizes an international tour it produces "a separate budget for . . . every

[15] Because most NACPA members do not operate outside of the United States at all, they have no reason to take a license from any foreign PRO. As Mr. Ewing from Nederlander testified, he had never even heard of PRS or SOCAN. *See, e.g.*, Trial Tr. 1752:3-22 (Ewing).

single [] marketplace. . . and then we roll it up into one global guarantee" but "we don't just start with the United States and think that all the other countries should be paid the same way").

These differences have enormous implications for the negotiation of PRO rates in different countries. In terms of the actual dollars that songwriters receive, a rate of 0.21% can mean something completely different (and far more favorable to songwriters) in the United States than a higher rate somewhere else with a fundamentally different economic market for live concerts. That is why, among other reasons, different branches of Live Nation and AEG (the only NACPA members that also promote concerts outside of the U.S.), handle the PRO negotiations for each separate market separately. Trial Tr. 665:6-20 (Roux); Trial Tr. 844:3-5 (Marciano). And any assessment of the comparability of the economic circumstances surrounding foreign PRO rates vis-à-vis BMI must consider the market factors and relative input costs in each country. Yet Prof. Tucker admitted that she did not analyze any relevant economic circumstances affecting the foreign PRO rates, and accordingly could not opine on whether they are similar to those here, or how any differences would impact the comparability of rates. *See, e.g.*, Trial Tr. 1397:6-1398:23, 1400:13-19 (Tucker).

Avoiding all of this, in its Rule 44.1 Brief, BMI urges the Court to find that PRS and SOCAN are comparable to BMI because, according to BMI, both the Copyright Board of Canada and the UK Tribunal consider what a willing buyer would pay a willing seller as part of their review of the SOCAN and PRS rates, respectively. Rule 44.1 Brief at 5. But even if this were correct, the rate produced by a willing-buyer/willing-seller analysis may differ wildly from market to market based on differing economic circumstances in each place. Thus, merely invoking the words "willing buyer" and "willing seller" in the abstract says nothing about whether any foreign rate is an adequate benchmark for BMI under Second Circuit law particularly where, like here, the economic circumstances underlying the rates in each jurisdiction differ.[16]

Tellingly, the foreign rates to which Professor Tucker pointed all vary widely from each other, underscoring that however the rates are set, they, at bottom, reflect factors that are unique and localized to each jurisdiction, based on the particular economics of live concerts, history, and regulatory regimes in each territory. BMI has a fundamental failure of proof on establishing the comparability of the economic circumstances affecting the U.S. rates versus the foreign PRO rates and it cannot establish this prong of the Second Circuit's test.

4. *BMI Failed To Prove That Any Foreign PRO Rate Reflects An Adequate Degree Of Competition To Justify Reliance On It*

BMI also offered no evidence that any foreign tariff issued by a government-sanctioned monopolist reflects the workings of a sufficiently competitive market as envisioned by the Second Circuit. PRS and SOCAN are both monopolists, but neither operates pursuant to an antitrust consent decree. SOCAN, for example, has the exclusive right to license public performance rights in Canada; accordingly, direct licensing is a practical impossibility for Canadian music users. This is not in dispute. *See* Rule 44.1 Brief at 12. Nor is it disputed that SOCAN's ability to act as the exclusive source of required rights for concert promoters impacts the rates it can charge. 1409:23-1410:10 (Tucker). BMI's own expert admits that the practical availability of potential direct licensing is a critical tool for music users' ability to avoid supracompetitive rates, Trial Tr. 1198:4-22 (Tucker), but there is no such practical option in Canada. And BMI's executives admitted in internal emails that Canada's lack of direct licensing

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[16] In any event, the "willing-buyer/willing seller" paradigm is merely one factor that the Canadian Board has considered as part of a holistic, polycentric review into SOCAN's rates that also prioritizes the public interest and any other criterion that the Board considers appropriate. ECF No. 168, at 3 (Porter Decl. Ex. C), *Canadian Copyright Act*, RSC 1985, c C-42, s. 66.501.

explained why SOCAN could charge music users higher rates than BMI. *See, e.g.*, PX 203. Despite this, Professor Tucker never considered how the absence of alternatives to the SOCAN license in Canada impacts the competitiveness of SOCAN's tariffs or SOCAN's overall comparability to BMI, as appropriately constrained by its decree.[17]

As to PRS, BMI concedes in its Rule 44.1 Brief that although BMI licensees can avail themselves of interim licensing in the United States, prospective UK licensees do not have the same options. Rule 44.1 Brief at 2, 7. This is significant because under the BMI Consent Decree and the practices of the rate court, prospective BMI licensees are protected from the threat of copyright infringement once they request a BMI license. *See* BMI Consent Decree at §XIV(B). BMI argues that PRS's lack of a comparable interim licensing regime does not affect live concert licensees because there is a longstanding general application tariff for the live concert industry in the U.K. (Tariff LP), and established promoters have the option to take a license or remain licensed under the existing Tariff LP rate even while a legal challenge to the tariff is pending. But this misses the point. Tariff LP's current rates cannot be separated from their historical context, which Professor Tucker did not study. Trial Tr. 1406:4-9 (Tucker). PRS has charged live concert licensees a rate of at least 2% since 1963—a rate multiples higher than even BMI's *current* proposal—and every iteration of Tariff LP's fees since 1963 have derived from that

[17] In its Rule 44.1 Brief, BMI argues without support or explanation that SOCAN's ability to exclusively license its works and lack of direct licensing does not "merit significant consideration" in the Court's consideration of whether SOCAN's rates meet the Second Circuit's test for comparability. Rule 44.1 Brief at 12. But this statement is plainly at odds with the beliefs of BMI executives and the testimony of its expert, not to mention the teachings of the Supreme Court's decision in *CBS*. *See CBS,* 441 U.S. at 23-24 (ASCAP was not per se antitrust violator because affiliates had not agreed to license exclusively through ASCAP—a practice foreclosed by ASCAP's Consent Decree). In any event, the Court should reject BMI's repeated suggestion that NACPA's experts should have done BMI's job of building the evidentiary record to support BMI's proposed benchmarks for it.

initial starting point. *See* Yolkut Decl. Ex. C, *Cinematograph Exhibitors' Association of Great Britain and Ireland v PRS PRT* 13/63 (setting rates at 2% despite no evidence of what a willing buyer would pay a willing seller at that time); 1988 decision (setting at 3%); ECF No. 168, at 12 (Porter Decl. Ex. L), *PRS Ltd and PACE Rights Management LLP* [2018] CT 130/17 (approving the Modified Tariff in the form proposed by PRS (a rate of 4.2% of gross receipts excluding ticketing fees)). Because of this, U.K. live concert licensees have not been spared the effects of a lack of consent-decree-style interim licensing option by virtue of having a long-standing tariff—the lack of interim licensing likely has been baked into Tariff LP's rates for the better part of six decades.[18] Professor Tucker admits that she failed to analyze this disparity between PRS and BMI and its impact on the competitiveness of PRS rates. Trial Tr. 1410:19-1411:19 (Tucker).

Ignoring this issue, BMI instead argues that PRS reflects a competitive rate because modifications to Tariff LP in 2018 included (for the first time) a mechanism for reducing a promoter's fees to account for any direct licensing. BMI Rule 44.1 Brief at 9. But there is no evidence that direct licensing in the UK was feasible as a practical matter for licensees prior to 2018 (when the PRS rates were already set at 3%), or that sufficient time has passed for any direct licensing market to develop in the UK, much less to impact the PRS rates. Nor is there any evidence that, even now, PRS's brand-new direct licensing provision operates in the way

[18] This is not the only way in which this difference renders PRS an inapposite benchmark. The combination of interim licensing and Federal Rule of Evidence 408, as applied by the rate courts, also permit BMI's licensees to negotiate interim terms with BMI without prejudicing the licensees' ability to argue for a final rate that differs from the interim agreement. Without interim licensing, BMI argues that a prospective licensee in the UK who believes that Tariff LP reflects an anticompetitive rate must nonetheless pay that rate if it wishes to avoid the risk of infringement during negotiations with PRS. *See* Yolkut Decl. Ex. D, *UK Copyright Designs and Patent Act 1988*, §§ 125, 126. BMI did not consider or account for this distinction in its analysis of its benchmark, and it cannot demonstrate that PRS rates arose in a sufficiently competitive market to serve as benchmarks for BMI.

contemplated by the BMI Consent Decree, or that its existence supports that the PRS rate reflects sufficiently competitive conditions to justify reliance on it as a benchmark for BMI. 1655:3-14 (Jaffe). In short, BMI has not met its burden to show that the PRS rates reflect a sufficient degree of competition—the hypothetical competitive market required by the BMI decree as interpreted by the Second Circuit.

III. TO THE EXTENT BMI'S EXPERT CONSIDERED LICENSES OFFERED BY ASCAP AND BMI AS BENCHMARKS, NONE SUPPORTS BMI'S PROPOSAL

A. The Most Recent ASCAP-NACPA Agreement Does Not Support BMI's Proposal

The most recent final-fee agreement between NACPA and ASCAP is the only benchmark embraced by both Professor Tucker and Professor Jaffe for determining a reasonable fee here.

In sharp contrast to the non-Consent Decree licenses that BMI attempts to use to support its proposed fee, NACPA's agreement with ASCAP for the 2018-2021 period satisfies *all* of the Second Circuit's benchmark criteria and addresses every criticism BMI has lobbed at its own prior deals with NACPA. No PRO resembles BMI more closely than ASCAP, as the Second Circuit has found and as BMI's expert admits. *See*, *e.g.*, *Showtime,* 912 F.2d at 571 (affirming use of BMI license as benchmark for ASCAP rate); Trial Tr. 1266:10-23, 1268:1-11, 1270:18-21, 1272:15-22 (Tucker). No other rate in this case better reflects the economic circumstances affecting BMI and NACPA over the last eight years. The rates in the 2018-2021 ASCAP-NACPA agreement, which were negotiated in 2017 and 2018 and continued by mutual agreement at the end of 2020, accurately reflect the nature of the U.S. live concert industry today, including any changes that have occurred over the past three decades. Indeed, ASCAP negotiated a significant two-step rate increase from NACPA (from an effective rate of 0.19% to 0.23% and then to 0.275%, an increase of 45% overall), and the parties agreed to revamp the rate structure from five tiers to a unitary rate, disproving Professor Tucker's theory of unjustified persistence of rates under the ASCAP and BMI Consent Decrees. Finally, because it was negotiated within the protections of the ASCAP Consent Decree, the 2018-2021 ASCAP-NACPA Agreement is more likely to reflect an adequately competitive market to justify reliance on it here. Trial Tr. 1486:14-1489:25 (Jaffe); *see also Showtime*, 912 F.2d at 578-79 (holding that some licenses negotiated subject to consent decree protections may still be priced too high). BMI itself previously has admitted that licenses negotiated against the backstop of a rate court are more efficient and more closely tied to the hypothetical competitive "economic conditions" contemplated by the ASCAP and BMI Consent Decrees than licenses negotiated without a rate court option. *See* Yolkut Decl. Ex. E, Memo. of BMI in Support of Mot. to Modify Consent Decree at 31, *United States v. BMI*, No. 64 Civ. 3787 (S.D.N.Y. Jun. 27, 1994).

While Professor Tucker agrees that the 2018-2021 ASCAP-NACPA Agreement is a valid benchmark, *see* Trial Tr. 1270:7-21 (Tucker), that agreement shows how dramatically *unreasonable* BMI's proposal is. The rate ASCAP agreed to accept following extensive negotiations between well-informed, experienced executives for 2018-2019 is 0.23% of ticket sales revenues—less than 29% of the rate BMI seeks to charge NACPA for the same concerts during those years. *See* JX 57. The rate ASCAP agreed to accept for 2020-2021 is 0.275% of ticket sales revenues—less than 35% of the rate BMI seeks to charge NACPA for the same concerts during those years. *Id.* And ASCAP had the option to terminate the agreement at the end of 2020—long after BMI filed its petition seeking dramatically higher rates—but did not.[19]

[19] Professor Tucker excludes from her benchmarking analysis the final fee agreement between ASCAP and NACPA covering the years 2014-2017 even though the Court is also tasked with setting a reasonable BMI for those years. The effective rate ASCAP agreed to accept for those years is even lower—approximately 0.19% of ticket sales revenues. *See* RX 74; Trial Tr. 1100:19-1101:10 (C. Liss); 1473:10-18 (Jaffe).

B. The ASCAP and BMI Licenses With Non-NACPA Promoters Do Not Support BMI's Proposal

BMI also proffers as benchmarks the licenses that ASCAP and BMI have offered to concert promoters that do not belong to NACPA. Trial Tr. 1193:1-17 (Tucker). BMI never credibly explained why, when setting rates for NACPA, the Court should look to BMI and ASCAP licenses with non-NACPA promoters rather than to their agreements with NACPA itself, but those licenses do not support BMI's rate proposal in any event. Nor did BMI explain why the Court should rely on BMI rates that, by BMI's own admission, were not the product of any negotiations at all. Trial Tr. 263:18-25 (Steinberg). But even if the Court were to look to the rate schedules that BMI and ASCAP have used with non-NACPA promoters, the resulting fees would be well below BMI's proposal.

Professor Jaffe explained, and Professor Tucker did not contest, that applying those rate schedules to the concerts promoted by NACPA members during the period at issue here would yield an effective rate of approximately 0.28% of gross ticket revenues—just 35% of BMI's proposed rate even before the expansion of the revenue base BMI seeks. *See* Trial Tr. 1534:5-12 (Jaffe). Today, for the largest and most lucrative shows that account for most of the revenue generated by the license at issue here, ASCAP charges non-NACPA members just 0.1% of ticket sales revenue for stadium shows and just 0.2% for arena shows. *See* RX 582 (ASCAP 2022 Blanket Rate Schedule); *see also* RX 575 (BMI license for facilities with more than 10,000 seats with standalone rate of 0.15%).

C. BMI Failed To Prove That The Rates Charged To Music Users In Other Industries Confirm The Reasonableness Of Its Proposal

BMI has also failed to prove that the rates charged to music users in other sectors demonstrate the reasonableness of its proposed 0.80% of revenue rate. BMI has not offered these rates as benchmarks, but Professor Tucker testified that she conducted a so-called "sanity check" by comparing the reasonableness of the 0.80% rate to the rates music users pay BMI in different contexts, including TV sporting events, talk radio, music intensive TV programming, commercial radio stations, and digital music services. Trial Tr. 1229:19-1232:4 (Tucker). But instead of confirming the reasonableness of BMI's proposal, the rates music users pay BMI in other industries demonstrate that even the prior BMI-NACPA rate is, if anything, too high.

To start, the rates in other industries have always been higher than the rates paid in the live concert industry—and BMI admitted its senior licensing executives would have been well aware of that discrepancy when BMI and NACPA entered into their most recent final fee agreement. Trial Tr. 259:14-260:11 (Steinberg). Further, because different sectors have widely divergent business models, it is not appropriate to compare the rates paid in each sector based on a percent of revenue basis. *Id.* at 1539:9-1540:1 (Jaffe). BMI's corporate representative, Michael Steinberg, admitted even on direct examination that, notwithstanding BMI's attempt at a "sanity check" confirmation, the businesses of live concerts and other industries like broadcast radio are completely different and cannot be compared. *Id*. at 187:19-188:7 (Steinberg).

But the comparison would undermine, rather than support, BMI's proposal in any event. If one were to attempt a comparison across different sectors, the only appropriate way to do so would be to convert the various rates to "per-song-per-listener" rates to ensure an apples-to-apples comparison of the prices paid for music performance rights. Trial Tr. 1540:2-1542:2 (Jaffe). For broadcast radio and digital streaming services, the per-song-per-listener rate ranges from roughly 1/100th of a cent to 2/100th of a cent paid to BMI. *Id*. 1542:3-1543:5. This is well below the per-song-per-listener rate NACPA promoters have paid to BMI under prior final fee agreements. *Id.* at 1543:6-18. By contrast, the per-song-per-listener rate of BMI's proposal, not accounting for the expanded revenue base, ranges from 1.6 cents to 1.9 cents paid to BMI.

These numbers were so incomparable that they could barely fit on the same graph. *Id.* at 1542:3-25. Indeed, BMI's proposal results in a per-song-per-listener rate that is *160 times* greater than the rates charged in other music-intensive industries. *Id.* at 1543:6-18.

BMI has offered no evidence to explain why the per-song-per-listener rate for live concerts should be astronomically higher than the rates paid in other industries, nor can it. For example, Professor Tucker admitted that she did not do a per-song-per-listener analysis for any of the licenses that she considered. Tr. at 1232:5-15 (Tucker). At closing, BMI attempted to blunt the impact of Professor Jaffe's per-song-per-listener analysis by suggesting incorrectly that the per-song-per-listener metric was one of his own invention. Trial Tr. 1868:21-24 (Closing-BMI) ("Mr. Steinberg testified in the real world, people look at percent of revenue rates, but he didn't have experience with people talking about per-song-per-listener rates. That was something Dr. Jaffe came up with.") The record squarely contradicts this blatant misrepresentation. Mr. Steinberg was confronted with multiple BMI licenses that use a per-song-per-listener metric as part of the rate calculation and was forced to concede the dramatic disparity between the per-song-per-listener rates BMI has agreed to accept in other contexts and the effective per-song-per-listener rates of prior BMI licenses with the live concert industry. *Id.* at 350:17-359:14 (Steinberg). Outside of BMI, in other parts of the "real world," per-song-per-listener rates are also a commonly used metric. For example, webcasters such as Pandora pay SoundExchange royalties determined by a "per play" rate, *i.e.*, per-song-per-listener under the statutory royalty rate for the compulsory license under Sections 112 and 114 of the Copyright Act covering public performances of sound recordings. *See* https://www.soundexchange.com/service-provider/commercial-webcaster/. And publishers and songwriters argued (albeit unsuccessfully for royalties paid under the statutory license under

Section 115 of the Copyright for mechanical rights paid by on-demand streaming services like Spotify to be set at the greater of a per-song-per-listener fee or a per-subscriber fee. *See Johnson v. Copyright Royalty Board*, 969 F.3d 363, 371 (D.C. Cir. 2020). Instead of confirming the reasonableness of BMI's proposed rate, BMI's "sanity check" in fact confirms that BMI's historical NACPA rate is already 40 times (4,000 percent) higher than the rates paid in these other sectors concerts once compared on an apples-to-apples basis. *See* Trial Tr. 1539:9-1543:18.

IV. BMI FAILED TO PROVE THAT ITS PROPOSED REVENUE BASE IS REASONABLE

Finally, BMI failed to prove that the additional categories of revenue proposed for inclusion in the revenue base are either necessary or workable. While the Second Circuit observed in *Music Choice II* that the Court should consider the retail prices paid by consumers for the service at issue, *Music Choice II*, 316 F.3d at 195, BMI's proposed revenue base goes well beyond the amounts paid by consumers to attend concerts and includes both payments for goods and services other than access to the musical performances themselves as well as revenues from other sources entirely. Moreover, *Music Choice II* did not establish an immutable rule that the fee base always needs to capture any amount paid by a consumer. In *Music Choice II* itself, the court noted that "if it were demonstrated that retail purchasers were motivated to pay more because of advantages that resulted from a particular mode of delivery, such as better quality, better accessibility or whatever, this might justify a conclusion that the retail price of the service purchased by the customer exceeded the fair market value of the music." *Id.* at 196 n.3; *see also MobiTV, Inc.*, 681 F.3d at 87 ("[A]lthough not disagreeing with the holding of *Music Choice II*, we are not persuaded that its contention that retail revenues derived from the sale of the music fairly measure the value of the music is universally true"). Rather, in determining a revenue base, the Court can deviate from the retail price for "valid reasons." *Id.* at 87, n.12. Numerous valid reasons exist here to reject BMI's proposed expansion of the revenue base.

First, not a single one of the various licenses proffered as benchmarks by BMI uses the revenue base that BMI proposed. Indeed, every domestic benchmark available spanning a period of more than 25 years (but also including numerous agreements within the 2014-2022 period at issue here) uses the much simpler revenue base of gross ticket sales revenues subject to the customary deductions for ticket servicing fees, taxes, facility fees, and parking. *See* Trial Tr. 1365:2-1366:9 (Tucker); *see also*, *e.g.*, JX 24 (1998 BMI-NACPA Agreement), JX 29 (2006 BMI-NACPA Agreement), PX 24 (2002 ASCAP-NACPA Agreement), JX 57 (2018 ASCAP-NACPA Agreement), PX 33 (2011 SESAC-NACPA Agreement), RX 10 (2016 SESAC-NACPA Agreement), JX 62 (2020 SESAC-NACPA Agreement), PX 83 (GMR/Live Nation Agreement); PX 101 (GMR/AEG Agreement), PX 544 (GMR/Nederlander Agreement). That is a revealed preference for an appropriate revenue base across many different agreements. The Court is free to determine the revenue base "on any basis adequately supported by the record," *Music Choice IV*, 426 F.3d at 97, and the widespread use of ticket sales revenues as the revenue base for other music performance rights licenses in the live concert industry provides precisely such a basis for retaining the revenue base used in prior BMI-NACPA agreements. In contrast, there is no evidence at all that a willing buyer and a willing seller in a hypothetical competitive market would agree to use BMI's proposed revenue base in a voluntary transaction, and thus BMI failed to meet its burden of proving the reasonableness of its proposed revenue base.

Second, unrebutted fact testimony established that NACPA promoters do not have access—currently or retroactively—to comprehensive information that would be necessary to apply BMI's unprecedented expanded revenue categories accurately for the rate period at issue.

Trial Tr. 647:5-9, 814:2-11 (Ticketing Fees); 661:18-662:7; 86:20-87:10, 1738:12-19, 1741:6-1742:6 (VIP Lift); 392:2-13, 657:16-658:2, 830:7-15, 1729:6-16 (Sponsorship); 650:17-22; 654:1-3, 655:8-13, 825:17-826:20, 1740:10-14 (Boxes & Suites). Professor Tucker conceded that the Court should only order a revenue definition that is accessible to the concert promoters. Trial Tr. 1369:1-17 (Tucker).

Third, given that both experts opined that appropriate use of benchmarks would require the Court to adjust the rates in benchmark transactions downward if it adjusts the revenue base outward, expanding the revenue base is an unnecessary complication here. Trial Tr. 1227:9-1228:6; 1356:15-21 (Tucker testifying to the appropriateness of making adjustments); Trial Tr. 1367:7-20, 1368:8-1369:20 (Tucker admitting to the challenges of making appropriate adjustments); Trial Tr. 1500:2-14 (Jaffe explaining why adjustments are necessary). There is no reason for the Court to undertake the complex, error-prone exercise of trying to adjust the rates to wind up in the same place of overall dollars for a license that will be entirely retroactive when the Court issues its determination. *See* Trial Tr. 1497:15-1504:9 (Jaffe).

CONCLUSION

For the reasons above, NACPA respectfully moves the Court for judgment as a matter of law on BMI's petition because BMI has failed to carry its burden of demonstrating that the fees and terms it proposes for the license at issue are reasonable. The Court should instead set a reasonable rate for a BMI-NACPA license for the 2014-2022 period by using either the most recent final fee agreement between BMI and NACPA or the rates charged by ASCAP to NACPA under their final fee agreements in effect during the relevant period.

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[20] NACPA uses electronic signatures with consent in accordance with Rule 8.5(b) of the Court's ECF Rules and Instructions.

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